

UNITED STATES  
v.  
ARTHUR MAVROS ET AL.

IBLA 90-105

Decided March 9, 1992

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., declaring 30 lode mining claims invalid. Contest No. MTM 77302.

Affirmed.

1. Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

Expert testimony by a Government mineral examiner that he traversed all of the claims, sampled evident exposures, estimated the value of the contained mineral, and based his conclusion that there was no valuable mineral deposit on any of the claims on his finding that the values indicated by the highest assay would not cover his estimate of the mining cost establishes a prima facie case that the claims are invalid.

2. Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally--Mining Claims: Withdrawn Land

Drilling to obtain samples in support of a discovery will be allowed if the purpose of the drilling is to establish the quantity and continuous quality of exposed mineralization that would support a discovery if quantity and continuous quality of the exposed minerals continued for a reasonably project-able distance. In order to drill on withdrawn land to confirm a discovery, the claimant must show that he has disclosed valuable mineral on the claims and that a discovery would be confirmed by drilling.

APPEARANCES: Howard C. Greenwood, Esq., Hamilton, Montana, for appellants; Jody Miller, Esq., Office of the General Counsel, U.S. Department of Agriculture, Missoula, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Arthur Mavros and others <sup>1/</sup> (hereinafter claimants) have appealed from an October 30, 1989, decision by Administrative Law Judge John R. Rampton, Jr., declaring the MAVROS'S Nos. 1 through 9, Mavros Nos. 1X and 1 through 5, ART MAVROS Nos. 7 through 11, and MAVROS Nos. 1A through 10A lode mining claims (M MC 42937 through M MC 42956 and M MC 78950 through M MC 78959) invalid for lack of discovery of a valuable mineral deposit.

The claims were located between July 24, 1979, and June 12, 1981, in secs. 1, 2, and 11, T. 2 N., R. 16 W., Principal Meridian, Granite and Ravalli Counties, Montana, within the Deerlodge and Bitterroot National Forests. The claims are also in the Anaconda-Pintler Wilderness Area, which was created on September 3, 1964, pursuant to section 3(a) of the Wilderness Act, 16 U.S.C. § 1132(a) (1988). On January 1, 1984, the land in the Anaconda-Pintler Wilderness Area was withdrawn from mineral entry (subject to valid existing rights) by section 4(d)(3) of the Wilderness Act, 16 U.S.C. § 1133(d)(3) (1988).

The claims lie in a remote area accessible only by trail. Several old workings are found on the claims, including several pits, a caved shaft, some trenches, and an adit. Mineralization occurs in sulphide-bearing mesothermal quartz veins and lenses within fractures, usually less than 1-inch thick. In 1982, claimants submitted a plan of operations contemplating drilling a series of holes with a small core drill capable of being transported to the claims by horseback. In July 1982, Forest Service geologist, Edward K. Vukelich (Vukelich), and several Forest Service technicians, visited the claims to assess the environmental impact of claimants' proposed mining plan of operations. See Tr. 40-42; Exh. 4 (Mining Claim Report) at 1. During this initial visit Vukelich observed and examined evidence of old workings and the field geology at and near the claims (Tr. 42). An environmental assessment was prepared and a finding of no significant impact was made, but the open season had ended and drilling was postponed.

In September 1983, Arthur and Leroy Mavros and several others went to the claims to undertake the approved drilling program. Vukelich traveled to the claims at the same time to observe the operations. Claimants abandoned the drilling program when they found that they had insufficient water hose to do any drilling and it snowed on the first night they were on the site.

---

<sup>1/</sup> The original claimants were Arthur Mavros, Jamie Arthur Mavros, Robin Stacy Mavros, Rosalie Jean Mavros, David Tony Mavros, Timothy John Mavros, Daniel Jobe Mavros, Joseph Ian Mavros, Max M. Mavros, and Leroy Mavros. Various combinations of these 10 individuals are named as locators of the claims. After location, but prior to initiation of the mining claim contest, Max Mavros transferred all of his right, title, and interest in the claims. At his request, Judge Rampton dropped Max Mavros from the contest. Arthur Mavros, whose name appears on all of the location notices, is the primary claimant.

See Tr. 43-44, 47, 50-51; Exh. 4 at 1 and Figure 4. On July 27, 1984, Vukelich went to the claims with Arthur Mavros and Donald C. Lawson, then a staff field agent with the Montana Bureau of Mines and Geology. Lawson took grab samples at sites identified by Mavros and assayed the samples in an effort to assist the claimants in determining the value of their claims. See Tr. 53; Exh. 4 at 1.

Following withdrawal, claimants submitted a further mining plan of operations contemplating a drilling program similar to that approved but never carried out the prior year. The Forest Service has a policy that, prior to approving a mining plan of operations for operations in wilderness areas, the claims must be shown to be supported by a discovery (Tr. 61). By letter dated November 19, 1984, the Forest Service notified claimants that a validity examination was scheduled for the "week of July 22, 1985." The letter was received by all claimants. See Tr. 58, 342; Exh. 4 at 2.

From July 23 through 27, 1985, the mineral examination was conducted by three Forest Service geologists, Vukelich, Jim Shelden, and Ray TeSoro, with Vukelich acting as lead geologist. <sup>2/</sup> The examiners first determined the location of the claim group on the ground using the location notices, aerial photographs, contour maps, and a sketch map of the claims provided by Roy Snell, a close friend of Arthur Mavros, who had assisted the Mavroses in laying out the claims (Tr. 31, 35, 36, 38, 184-85, 310, 378, 383; Exh. 4 at 3 and Figure 7). Several claim corners were found in the field and identified on Exhibit 3. See Tr. 30-31, 36-37; Exh. 4 at 3. <sup>3/</sup> There has been no contention on appeal that the mineral examiners did not properly determine the location of the exterior boundaries of the claim group. <sup>4/</sup>

The mineral examiners traversed each claim and did a general reconnaissance of an area approximately 1,000 feet on all sides of the claim group. See Tr. 70, 71, 79-80, 185-86. According to Vukelich, the purpose of this reconnaissance was to search for "any kind of evidence of indications of mineralization" and "existing workings such as the prospect pits, the adits, [and] any kind of minerals-related activity" (Tr. 70).

Samples were taken at places that showed signs of mineralization, sites of old workings (Tr. 72), and in areas the examiners thought

---

<sup>2/</sup> Vukelich had sufficient background and experience to undertake the examination and testify as an expert witness. See Tr. 17-24; Exh. 1.

<sup>3/</sup> Claimants' witnesses did not agree with the names assigned to the claims but agreed that the location and configuration of the claim group was as depicted on Exhibit 3. See Tr. 367-73, 384-85, 397-98.

<sup>4/</sup> Claimants assert that Vukelich "could not state with precision from which claim any of the samples came (Transcript p. 63, 144, 189)" (Claimants' Posthearing Brief at 4). We find the issue to be of no consequence. None of the samples from the claims supported a discovery.

claimants may have worked (Tr. 56, 72-73, 157; Exh. 4 at 8). <sup>5/</sup> A total of 16 channel samples were taken. Fifteen of the samples were taken within the claim group and one was taken from outside the exterior boundary of the claim group. See Exh. 4 at 6. Most of the samples were taken from quartz veins exposed on the surface of the claims by old workings (Tr. 82, 83-84, 86-87, 90, 91-92, 93, 94; Exh. 4 at 6-8). The sample locations and strike of the veins is depicted on Exhibit 3.

Vukelich had all of the samples assayed (see Exh. 4 (Figure 20)) and calculated the total contained value of the copper, lead, zinc, and silver based on the best assay, using a 3-foot mining width (Exh. 4 at 9 and Exh. 5). See also Tr. 97. He then made a rough comparison of this value, assuming 100-percent recovery, against the estimated costs of mining the deposit, not taking into consideration either mineral losses associated with mining or milling or the costs of transporting or smelting. He concluded that the value of the mineral in place did not approach mining costs, there was no reasonable prospect that the deposit could be mined profitably, and, thus, there was no discovery of valuable mineral in place within the meaning of the mining law. See Tr. 97-100, 104-05; Exh. 4 at 9-10.

On November 18, 1988, the Bureau of Land Management (BLM) issued a contest complaint on behalf of the Forest Service, U.S. Department of Agriculture, challenging the validity of the subject mining claims on the grounds that "[m]inerals have not been found within the limits of the \* \* \* claims in sufficient quantities and/or qualities to constitute the discovery of a valuable mineral deposit," as of either the date of withdrawal (Jan. 1, 1984) or the present time. The complaint was duly served on claimants. On December 15, 1988, claimants filed an answer.

A hearing was held before Judge Rampton in Missoula, Montana, on June 15 and 16, 1989. Following the hearing, the parties submitted briefs and Judge Rampton issued his October 30, 1989, decision. After finding that the Government established a prima facie case that none of the claims contained a discovery of valuable mineral in place on the date of withdrawal or at the time of the hearing and that the prima facie case had not been overcome by claimants by a preponderance of the evidence, Judge Rampton declared all of the claims invalid. Claimants appealed from his decision.

---

<sup>5/</sup> Judge Rampton held that Vukelich's mineral examination had been conducted "in accordance with established guidelines used in the mining industry and as set forth in the instructions issued to mineral examiners by the Forest Service and [BLM]." Claimants contend that this finding is not supported by the record. Claimants' observation that there is no specific documentary evidence or testimony setting forth the "guidelines" and "instructions" is correct. However, Vukelich testified that the procedure he used when conducting his mineral examination was that adopted by BLM, and that he had been trained by BLM regarding the conduct of a mineral examination (Tr. 24-25, 58). Claimants have submitted no evidence to the contrary.

The appeal focuses upon various requirements for making and maintaining a discovery capable of supporting a mining claim located under 30 U.S.C. § 22 (1988). We will first set out a general statement of the law applicable to a discovery of valuable mineral. A mining claimant acquires no vested rights against the United States by merely staking a mining claim. Unless and until a claim is supported by a discovery of valuable locatable mineral within its boundaries, the claimant acquires no rights against the United States. United States v. Coleman, 390 U.S. 599 (1968).

The "prudent man test," the standard for determining whether there has been a discovery, was set out in Castle v. Womble, 19 L.D. 455 (1894). This test remains the accepted standard for this determination. A discovery has been made if "minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." Id. at 457.

A claimant need not be engaging in a profitable mining operation and commercial success need not be assured in order to have a valuable mineral deposit on his claim. See Barton v. Morton, 498 F.2d 288, 289 (9th Cir.), cert. denied, 419 U.S. 1021 (1974); Barrows v. Hickel, 447 F.2d 80, 82 (9th Cir. 1971); United States v. Gunsight Mining Co., 5 IBLA 62, 69 (1972), aff'd, Gunsight Mining Corp. v. Morton, No. 72-92 Tuc. (JAW) (D. Ariz. Sept. 11, 1973). However, a showing of a reasonable prospect that the commercial value of the deposit exceeds the cost of extracting, processing, transporting, and marketing the contained mineral is a crucial element of the proof that there is a reasonable prospect of success in developing a valuable mine. See, e.g., United States v. Crawford, 109 IBLA 264 (1989); United States v. Holder, 100 IBLA 146 (1987).

It is therefore evident that, to have a reasonable prospect of success in developing a valuable mine, the mine owner must be able to demonstrate, as a present fact, that there is a reasonable probability that the mineral can be extracted and marketed at a profit. A discussion of present marketability can be found in Ideal Basic Industries, Inc. v. Morton, 542 F.2d 1364, 1369-70 (9th Cir. 1976). See also United States v. Holder, supra at 149-50.

Our discussion has thus far addressed the "quality and quantity" of mineralization necessary to support a discovery. In this case an additional factor must also be considered. This factor is time. When land is withdrawn from the operation of the mining laws the existence of a discovery on the date of withdrawal is critical to a validity determination. See Cameron v. United States, 252 U.S. 450, 456 (1920); United States v. Converse, 72 I.D. 141, 146 (1965), aff'd, 262 F. Supp. 583 (D. Or. 1966), aff'd, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969). Simply stated, if the mining claim is perfected on the date of withdrawal, certain rights have vested in the claimant, and those rights cannot be cancelled by the withdrawal. On the other hand, if there is no discovery when the land is withdrawn, the claim is not perfected on that date, no

rights have been acquired, and nothing is lost by reason of the withdrawal. See United States v. Wichner, 35 IBLA 240 (1978). No further exploration to physically expose valuable mineral of sufficient quality and quantity to constitute a discovery may be permitted after that date. See Lara v. Secretary of Interior, 820 F.2d 1535, 1542 (9th Cir. 1987); United States v. Gunsight Mining Co., *supra* at 64; United States v. Converse, *supra* at 146.

Once made, a discovery must be maintained. Even though a claimant may have made a discovery and actually mined ore from a claim, until a patent application has been perfected and the equitable title has vested, a claimant runs the risk of losing his discovery if the deposit is exhausted or if a material change in market conditions renders it unreasonable to expect that the mineral can be mined at a profit. See, e.g., Best v. Humbolt Placer Mining Co., 371 U.S. 334, 336 (1963); Multiple Use, Inc. v. Morton, 353 F. Supp. 184, 193 (D. Ariz. 1972), *aff'd*, 504 F.2d 448 (9th Cir. 1974). Thus, there is a need to show the existence of a discovery both on the date of withdrawal and the date of the hearing. See United States v. Lee Western, Inc., 50 IBLA 95, 98 (1980).

When the contest involves a group of claims each claim must be supported by an exposure of valuable mineral within its borders (see United States v. Foresyth, 15 IBLA 43, 58 (1974)). Valuable mineral must be exposed on each claim. See United States v. Multiple Use, Inc., 120 IBLA 63, 109 (1991); United States v. New York Mines, 105 IBLA 171, 95 I.D. 223 (1988); Cactus Mines Limited, 79 IBLA 20, 26 (1984). This does not mean that a claim must stand alone when considering whether there is sufficient valuable mineral of sufficient quality that there is a reasonable expectation that the deposit could be extracted, removed, and marketed at a profit. See United States v. Foresyth, 100 IBLA 185, 248-50, 94 I.D. 453, 488-89 (1987). Rather, the minerals from all the claims may be aggregated for purposes of determining whether they may be profitably mined and marketed. See Schlosser v. Pierce, 92 IBLA 109, 128-29, 93 I.D. 211, 222 (1986).

In a mining contest involving a question of the existence of a discovery, the Government has the initial burden of establishing a prima facie case. When a prima facie case has been presented the burden devolves to the claimant, who must overcome the Government's case by a preponderance of the evidence. See Hallenbeck v. Kleppe, 590 F.2d 852, 856 (10th Cir. 1979); United States v. Bechthold, 25 IBLA 77, 82 (1976).

[1] Claimants' appeal contains two basic contentions. The first is that Judge Rampton erroneously concluded that the Government established a prima facie case that no valuable mineral deposit existed on the mining claims because the Government failed to sample the discovery points, limited its sampling to 6 of the 30 claims, did not sample visible signs of mineralization, based its valuation on one diluted sample, and overestimated the costs of mining.

We will deal with claimants' assertions beginning with the general allegation that the mineral examiners conducted the examination unaccompanied by claimants and thus arbitrarily selected sampling points in areas where they had not worked, without the benefit of any input from claimants, and failed to sample their discovery points. The record belies claimants' assertions for a number of reasons.

Claimants contend that the Government failed to make a "reasonable effort" to have claimants participate in the July 1985 mineral examination (Claimants' Posthearing Brief at 2). As a basis for this allegation of error, claimants generally take issue with Judge Rampton's statement that "the claimants were given every opportunity to point out to both Mr. Lawson and the Forest Service examiners their discovery points but chose not to do so" (Decision at 7 (emphasis added)). They assert that they did not deliberately fail to point out discovery points to Vukelich, in the context of his September 1983 visit to the claims, or to Lawson, in the context of his July 1984 visit. They argue that Arthur Mavros "did not understand that he was to show either the [mineral examiner] or Mr. Lawson his points of discovery" (Statement of Reasons (SOR) at 10). They state, "[a] person can make a 'choice' only when he is fully aware of what is expected of him and of the consequences of his actions." Id.

Claimants are correct in their assertion that Arthur Mavros was not advised that he should point out his discovery points during the course of the September 1983 visit. See Tr. 310-11. However, that was not the purpose of the visit. Vukelich was there to monitor claimants' drilling. See Tr. 50; Exh. 4 at 1 and Figure 4. The purpose of the Lawson inspection was similar, and again, this inspection was never intended to be a validity examination.

During Lawson's July 1984 inspection of the claims, Lawson was accompanied by Arthur Mavros and Vukelich. See Exh. 4 at 1. Vukelich testified that, at his suggestion, Mavros invited Lawson (who worked for the Montana Bureau of Mines providing assistance to small miners (see Tr. 53, 206)), to inspect the claims for the following purpose: "[Mavros] would show Mr. Lawson the--we called these discoveries, and that they would take samples and have them assayed and then Mr. Lawson would make some sort of valuation and instruct him, or at least give him some advice, as to how to proceed" (Tr. 53). Lawson testified that Vukelich was not with them when Mavros took him to various locations on the claims: "I assumed that most of the spots [Mavros] took me to, which were adult workings, were his discoveries on those particular claims" (Tr. 214). See Tr. 242-43.

For his part, Mavros testified that he was aware that Lawson's purpose was to "take some samples and have them assayed" (Tr. 315). Mavros stated that he showed Lawson "the area where we were working," i.e., areas which they had opened up and sampled (Tr. 315). See Tr. 316-17. According to Mavros, these workings constituted some of his discovery points but not all, because he was only able to identify those points with which he was familiar. See Tr. 316, 319-20, 326. At the time of Lawson's inspection Mavros knew that he had to "prove \* \* \* up" his claims (Tr. 338). He had

been alerted to the need to establish the validity of his claims when Snell explained the contents of the February 1984 Forest Service letter to the claimants. See Tr. 337-39, 398.

Claimants present this argument in the face of the fact that the Forest Service sent written notice in November 1984 that an examination had been scheduled for the week of July 22, 1985, some 8 months in the future. The notice was sent to all claimants and received by them. See Tr. 58, 342; Exh. 4 at 2. In its notice the Forest Service stated that

[a]lthough you are not required to be on the claims for the examination[], your presence, or that of a knowledgeable representative, is desired. Your presence and assistance would be of great value to us by being able to identify claim corners, discoveries, mine workings, and preferred sampling locations where the highest mineral values would most likely be found.

(Exh. 4 (Figure 6) at 1). The author of the notice concluded with the statement: "I will keep you informed of any changes that may arise and if you have any questions or wish to discuss any aspect of this issue, please feel free to call the [Forest Service]." Id.

Claimants do not dispute having received the November 1984 Forest Service letter and Arthur and Leroy Mavros indicate that they had prior knowledge of the planned July 1985 examination. See Tr. 339-40, 378. Nonetheless, they did not accompany the mineral examiner during the course of the examination or attempt to have the examination rescheduled to a date mutually acceptable. As a result, the examination took place without the benefit of claimants' knowledge of the location of claims or the mineral contained in the claims. Claimants were afforded an opportunity to accompany the mineral examiners and point out what they considered to be the proper discovery points. They did not. In addition, they could have approached the mineral examiners at any time prior to the June 1989 hearing with an offer to point out their discovery points, but did not. See United States v. Timm, 36 IBLA 316, 317-18 (1978). Finally, they could have submitted written evidence regarding the location of their discovery points and the nature of the mineralized material at those discovery points, but did not. See Tr. 183-85. They cannot be heard to complain that they were precluded from presenting an adequate defense because the mineral examiners selected sample points other than those they might have chosen. See United States v. Chappell, 72 IBLA 88, 93 (1983).

After locating the claims on the ground, the mineral examiners searched for "any kind of evidence of indications of mineralization" and "existing workings such as the prospect pits, the adits, [and] any kind of minerals-related activity" (Tr. 70). Samples were taken at "any place" that either showed signs of mineralization or was the site of previous workings (Tr. 72). Contrary to claimants' assertion, Vukelich testified that he took samples when it appeared that the Mavroses had worked the area. See id. at 56, 72, 157; Exh. 4 at 8. Vukelich stated that the points sampled were the only ones the mineral examiners found that looked

as though they might be mineralized (Tr. 72-73; Exh. 4 at 6). Considering these facts, the mere assertion that the wrong sites were sampled is insufficient to defeat the Government's case or show error in Judge Rampton's decision. 6/

Claimants challenge Judge Rampton's conclusion that "there was no place on the claim area having any [visible] signs of mineralization where Mr. Vukelich and his assistants did not sample" (Decision at 8). In support of this argument they point to one site they claim Vukelich failed to sample, i.e., "the small pile from which Lawson took his sample DCL 84-4" (SOR at 12). Noting that the sample assay indicated 0.005 ounces of gold and 13.8 ounces of silver per ton (see Exh. 4 (Figure 5) at 1), claimants argue that the Government mineral examiners either "do not know how to recognize mineralized formations, or \* \* \* used flawed sampling methods" (SOR at 12).

We find no error in Vukelich's and Judge Rampton's failure to attribute any weight to Lawson's sample DCL 84-4. Lawson described his sample as a grab sample taken from a pile of sorted ore that had been hand-picked from vein material placed at the entrance to an old mine (Tr. 222). The sample was not and was never intended to represent mineral in place. Lawson did not observe the vein from which the sample came and concluded that the mineralization evident in the sample was the "only mineralization that I saw in all the sites that I was on that had any potential to be of commercial value or to even encourage a person to do more work" 7/ (Tr. 223). Lawson recognized this fact when he told Arthur Mavros that he was sorry he had not sampled the ore pile a few years earlier (Exh. 4 (Figure 5) at 1). He testified:

[T]hat assay result really didn't do Mr. Mavros any good, because we had no way of knowing positively where it came from. It wasn't in place and a pile [of] ore is not considered a legitimate discovery. That's why in my remark \* \* \* I was very sorry Mr. Mavros and I hadn't gotten together, because I think he very likely might have--if he'd spent all this money at that 84-4 site on development or drilling, he would have had a better chance of coming up with an ore deposit.

(Tr. 227). He then stated that when he said "development" in this context he meant "exploration" (Tr. 228). When asked whether the sample was evidence of a valuable mineral deposit, he stated:

---

6/ Claimants intentionally covered over many of their sample sites prior to the mineral examination. See Tr. 357-58, 360, 375. Thus, some of the mineralized outcroppings purportedly sampled by claimants may not have been physically exposed at the time of the examination.

7/ Lawson took a total of six samples (Tr. 216-17; Exh. 8). He testified: "I took samples everywhere where I thought there was a chance of there being mineralization that would validate a discovery" (Tr. 216). With the exception of sample DCL 84-4, the assay results disclosed less than 0.005 troy ounces of gold and from 0.05 to 0.9 troy ounces of silver per ton. See Exh. 4 (Figure 5) at 1.

[I]t doesn't indicate that there was a valuable mineral deposit, it indicates that there was an interesting prospect. There's no way, looking at the hand-sorted sample, of knowing whether that was a little stringer, whether it was an inch wide or whether it was a vein that was a foot or three-feet wide or whether it was a little pocket, and once they got through that, there wasn't anything left.

Id.

A showing of high mineral values in a sample taken from a pile of loose material on a mine dump, with no evidence of the origin of that material, is not probative of the existence of a valuable mineral deposit. See United States v. Parker, 82 IBLA 344, 356-57, 368-69, 91 I.D. 271, 278-79, 285-86 (1984). It is simply impossible to know where the sample came from, the dimensions or continuity of the vein from which the material was taken, or the manner in which the sample was taken. The rock Lawson picked from the dump may have come from a small pod or even from outside the claims. Lawson correctly concluded that sample DCL 84-4 is probative only of the possible existence of valuable mineral which might warrant further exploration. DCL 84-4 does not constitute evidence of the discovery of a valuable lode deposit. See Barton v. Morton, *supra* at 291-92; Thomas v. Morton, 408 F. Supp. 1361, 1375 (D. Ariz. 1976), *aff'd*, 552 F.2d 871 (9th Cir. 1977); United States v. Parker, *supra* at 358, 91 I.D. at 279.

It is clear that the sample points were not arbitrarily selected by the mineral examiners, but were selected to determine to the fullest extent possible the nature and concentration of the mineralization they observed, whether exposed by old workings or by claimants. <sup>8/</sup> The mineral examiners were not required to go beyond that, *i.e.*, they were not required to sample areas with no apparent mineral content to prove their observations accurate. If their observations were incorrect it would be easy for claimants to prove them wrong by presenting contrary evidence. They did not. The assertion and evidence advanced by claimants does not persuade us that the samples taken by the Government mineral examiners are not representative of the mineralization on the claims. They contend that the examiners deliberately took samples which were not representative of mineral values because their samples contained "surface debris," rather than mineralized quartz veins. <sup>9/</sup>

---

<sup>8/</sup> Claimants also suggest that the mineral examiners chose sample points to justify the recommendation that the claims be declared invalid. See Claimants' Posthearing Brief at 2. This suggests that the examiners were biased and unfairly skewed the mineral examination. We find no evidence in the record supporting this charge.

<sup>9/</sup> Claimants also assert that Vukelich admitted that his samples were not representative. See Claimants' Posthearing Brief at 4. The testimony cited by claimants only indicates that Vukelich recognized that his samples may not be indicative of potential mineralization found at depth. See Tr. 191. We do not construe this to be an admission that the sampling did

See Claimants' Posthearing Brief at 3-4. We find nothing in evidence to support this contention and a great deal of evidence to refute it. See, e.g., Tr. 72; Exh. 4 at 6. The mineral examiners took their samples from vein material in place. See Tr. 188.

Claimants argue that the Government's prima facie case is undermined because the mineral examiners took samples from 6 of the 30 claims and did not sample every claim. It is true that only six (and possibly seven) of the claims were sampled (see Exh. 3), but this hardly undermines the Government's prima facie case. Samples were taken at various points across the entire claim group. See Exh. 4 (Figure 9). The selection of sample sites reflects an effort to sample any exposed signs of mineralization. On the other hand, claimants have failed to identify any exposed mineralization not sampled by the mineral examiners or any area which should have been sampled because of the likelihood that minerals might be disclosed by the sampling. <sup>10/</sup>

When a mineral examiner, who is not accompanied by the claimant, undertakes a systematic reconnaissance of a group of claims, and makes a conscientious effort to sample those sites deemed most likely to contain mineralization, the combination of observation and sample results is sufficient to form a proper basis for a professional opinion. The mineral examiner is not required to engage in a comprehensive sampling program of a group of claims to establish definitively that there is no mineralization within any of them. See United States v. Bechthold, *supra* at 85. When all of the assays of the samples taken from the sites deemed most likely to contain mineralization indicate mineral values far too low to justify further investigation, the evidence will establish a prima facie case that no discovery exists within all of the claims examined even though no samples were taken from some of those claims. See Hallenbeck v. Kleppe, *supra* at 859;

---

fn. 9 (continued)

not represent the exposed mineral. In any case, claimants need not have relied on the mineral examiner's samples and assays. They could have submitted evidence of mineral values supporting a discovery. <sup>10/</sup> Arthur Mavros' samples were taken, for the most part, from quartz outcroppings, presumably his discovery points. See Tr. 328-30, 352-53. However, he was unable to identify the sample points. See Tr. 330-34. Leroy Mavros confined his efforts to sampling quartz outcroppings in 1980. See Tr. 282-83, 356-64, 373-74. These sample points were covered by him and not exposed at the time of the mineral examination in July 1985. Lawson's samples are discussed elsewhere. In any event, the existence of a Government prima facie case is based solely on the Government's case-in-chief. If not elicited by the Government in its case-in-chief, the claimants' testimony is not considered when determining whether a prima facie case exists, even though that testimony may have great relevance when considering the ultimate question of discovery. See, e.g., United States v. Aikens Builders Products (On Reconsideration), 102 IBLA 70, 79-80 (1988) (Burski, A.J., concurring).

United States v. Weekley, 86 IBLA 1, 3-5 (1985); United States v. Niece, 77 IBLA 205, 211 (1983); United States v. Ubehebe Lead Mines Co., 49 IBLA 1, 5, 6-7, 10 (1980); United States v. Bechthold, *supra* at 83-86.

Claimants erroneously suggest that the Government's prima facie case improperly rests on "geologic inference" because the Government was seeking to extrapolate the actual nature of mineralization throughout the claim group based on "a single sample, on a single claim" (SOR at 3 (emphasis in original)). Accordingly, claimants assert that Judge Rampton should have granted their motion to dismiss the contest complaint at the conclusion of the Government's presentation of its case. See Tr. 269-70, 274-75. Vukelich did not consider the samples taken by him to represent the mineralization found throughout the claim group. See Tr. 167. The samples used for his evaluation represented the highest assay values found during the mineral examination.

The highest grade sample was sample 7-1. The assay of this sample ran 193 parts per million (ppm) copper (0.02 percent), 14,700 ppm zinc (1.47 percent), 1.68 percent lead, and 1.06 ounces silver per ton. Sample 7-1 was a channel sample 6 inches wide and 1 to 2 inches in depth taken across a 1.4-foot wide quartz vein. Samples 7-1 and 7-2 were used when calculating the value of mineral in place. Sample 7-2 was a channel sample 2 inches wide, 1 inch deep and 3 feet long, taken across the hanging wall. See Exh. 4 at 6-7. When calculating a weighted average grade to estimate the value of mineral in place across a 3-foot mining width Vukelich used a 1.6-foot length for sample 7-2 and the full length of sample 7-1. See Tr. 82; Exh 5. He explained that the 3-foot width represented the "minimal mining width if the deposit was to be mined" by underground methods (Tr. 83). See also Tr. 89-90.

Claimants challenge Vukelich's aggregation of the material taken from samples 7-1 and 7-2 when calculating the value of the mineral in place, asserting that sample 7-2 "dilute[d] any mineralization contained in 7-1" (SOR at 2). The record supports the propriety of taking channel samples and the subsequent use of a minable width when estimating the value of mineral in place. See Tr. 73, 89-90; United States v. Page, *supra* at 18, 20; United States v. Franklin, 99 IBLA 120, 122, 125 (1987); United States v. Kiggins, 39 IBLA 88, 89, 104-06, 125 (1979); United States v. Webb, 1 IBLA 67, 77 (1970), *aff'd*, Webb v. United States (D. Ariz. Nov. 9, 1982), *aff'd*, 723 F.2d 917 (9th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984); United States v. Hicks, A-30780 (Oct. 24, 1967) at 3-4, 11, *aff'd*, Hicks v. United States, No. 1202 Pct. (D. Ariz. Mar. 26, 1970). In this case, the assay values are so low that the result would be the same if the vein material were segregated from the wall rock when making the cost estimates. The total contained value of the vein material does not approach the cost of removing and processing it. There was no error in the manner in which the samples were taken or in the use of the resulting assays. Both support the Government's prima facie case.

Vukelich estimated the gross value of the mineral contained at the site of the sample having the highest assay to be from \$16.18 to \$20.83 per

ton, using the value of copper, zinc, lead, and silver on the date of withdrawal (\$16.18 per ton) and at the time of the hearing (\$20.83 per ton) 11/ (Tr. 57, 394; Exh. 5). He then began his analysis of the cost of rendering the copper, lead, zinc, and silver marketable by examining the cost of mining a vein 3 feet wide. He estimated that the mining costs would be between \$28 and \$55 per ton. At that point Vukelich deemed it unnecessary to estimate any of the other costs, such as milling, transportation, smelting, the effect of being unable to recover 100 percent of the contained mineral, or smelter deductions. 12/ He concluded that a prudent man would not expend his time and means to develop the mineral he observed because the total value of the contained mineral was less than the cost of removing it from the ground, and that many additional costs could reasonably be anticipated. 13/ See Tr. 97-100, 104-05; Exh. 4 at 9-10.

We find no fault with Vukelich's approach to the valuation of the mineral he observed on the mining claims. There was a valid and logical basis for the "dilution" of the values contained in sample 7-1. Vukelich recognized that it would be impractical to mine in an opening 1.4 feet wide, and thus used a minimum practical width for an underground opening when making his mining cost-per-ton estimations. It was proper for him to take a weighted average of the values contained in samples 7-2 and 7-1, and in fact, it was to claimant's advantage for him to do so. 14/ See Exh. 4 at 9 and Exh. 5.

Claimants argue that Vukelich based his conclusion that all of their claims were invalid on the results of sampling at one site, i.e., the site from which samples 7-1 and 7-2 were taken. Their argument is not correct. Vukelich's opinion that there was a lack of a discovery on any of the claims was based on his visual examination of all of the claims, sampling the sites which appeared to contain the greatest concentration of mineral, and choosing the best assay from those samples for his cost and return

---

11/ On June 15, 1989, Vukelich prepared a Supplement to his Mineral Report (Exh. 5), comparing the values represented by samples 7-1 and 7-2 (either \$16.18 per ton, based on long-term projections of original prices, or \$20.83 per ton, using June 1, 1989, prices). See also Tr. 101, 102-03, 105-06. We use the latter estimates because they represent the highest values of mineral in place presented by any witness.

12/ Claimants incorrectly contend that Vukelich improperly included costs of shipping and smelting "all material including overburden and any debris removed in the mining operation" (SOR at 3). Vukelich did not consider the costs of shipping and smelting. See Exh. 4 at 9-10. Actual losses would be substantially greater than indicated by the estimated mining costs because these additional costs would be incurred.

13/ Vukelich's comparison was based on the value of the material and the costs of mining as of Jan. 1, 1984, the date of withdrawal, and at the time of the hearing. There is no dispute regarding the metal prices or the basis for the estimated mining costs.

14/ Sample 7-2, taken from the hanging wall, represented mineral values in the wallrock. The foot wall was not exposed and could not be sampled.

analysis. His conclusion was that the best he saw did not constitute a discovery; thus, the rest, which was not as good, could not. We have no basis for finding fault with this analysis. See United States v. Koenig, 99 IBLA 397, 400 (1987).

In the end, we hold that Judge Rampton properly concluded that the Government had established a prima facie case that the claims were not supported by the discovery of a valuable mineral deposit, both as of the date of withdrawal and the time of the hearing. Thus, he properly denied claimants' motion to dismiss the contest. <sup>15/</sup> Thereupon, the burden of rebutting the Government's prima facie case of lack of a discovery shifted to claimants.

[2] Claimants contend that Judge Rampton is estopped from finding that they failed to overcome the Government's prima facie case because the Forest Service prevented them from engaging in the core drilling necessary to prove a discovery on the claims. They specifically assert that Judge Rampton erred when holding that the Forest Service had not unduly prevented them from doing work on the claims "which would have provided incontrovertible evidence of their discovery or the lack of a discovery of a valuable [mineral] deposit" (SOR at 13).

An Administrative Law Judge is precluded from declaring a mining claim void for lack of a discovery when it is shown that the Government prevented the claimant from entering their claim to gather the information necessary to prove the existence of a discovery. See United States v. Parker, supra at 383, 91 I.D. at 294; United States v. Pool, 78 IBLA 215, 225 (1984). The critical question here is whether claimants were kept from doing the work necessary to prepare and present their case.

Following the withdrawal of land from mineral entry, a claimant may enter the claims to gather evidence that a discovery existed on the date of withdrawal and, if necessary, the date of an impending hearing. For example, if the claimant had driven an adit which exposed valuable mineral prior to withdrawal, the claimant should be allowed to reopen a caved portion of the adit to take samples of the mineral he had previously exposed (see United States v. Parker, supra at 384, 91 I.D. at 294- 95). He could also drill in order to sample a previously disclosed valuable mineral deposit (cf. Hiko Bell Mining & Oil Co., 55 IBLA 324, 328-31 (1981) (drilling permitted to prove existence of commercial quantities of coal already discovered during term of prospecting permit, consistent with

---

<sup>15/</sup> Claimants also challenge the relevancy of Judge Rampton's reference to a prima facie case for lack of discovery based on the "lack of production or sale[s] over a number of years" (Decision at 5). Judge Rampton, made this reference as an example of what is sufficient to establish a prima facie case. Id. There is no suggestion that it formed the basis for Judge Rampton's conclusion. He held that his conclusions rested on the "expert opinions of Mr. Vukelich and Mr. Lawson" (Decision at 6). We find it totally unnecessary to rely on this presumption.

Foresyth). On the other hand, the claimant may not drive an adit on what appears to be a promising structure in hopes of finding valuable mineral, as that activity would be considered further exploration to disclose a deposit not exposed prior to withdrawal. See United States v. Parker, *supra* at 384, 91 I.D. at 294; United States v. Niece, *supra* at 207, 207-08 n.3; United States v. Chappell, *supra* at 94 (precluded from engaging in exploratory drilling after withdrawal).

Claimants submitted their first plan of proposed operations on July 20, 1982. They contemplated drilling 20 holes, 10 to 20 feet deep during the period between August and October 1982 using a 1-1/2-inch gas drill which could be carried to the drillsite on pack horses (Exh. 4 (July 1982 Plan of Operations) at 2). The plan was approved on September 13, 1982, but claimants made no attempt to drill that year. Claimants did not submit their next proposed plan of operations until August 26, 1983, when they submitted a plan which was almost identical to the one submitted the previous year. This second plan was approved 11 days after it was submitted. The following day, September 7, 1983, the Mavroses, Vukelich, and others, went to the claims with drill equipment, but no holes were drilled because claimants had failed to bring enough water hose and became concerned about the weather. See Exh. 4 (Figure 4).

Claimants allege that in a 1983 meeting between Arthur Mavros, Snell, Vukelich, and a Sula District ranger the Forest Service forced them to use the smaller drill (SOR at 5). To support this contention, claimants elicited testimony from two of the participants. Mavros testified that in the 1983 meeting he was told that he could not transport the 2-inch core drill into the area by helicopter or drag it in by tractor. See Tr. 306-07, 342-43. Snell recalled the meeting, but thought that it took place "in '84 or the first part of '85." *Id.* at 416. He also stated that when Mavros was told that "we were not allowed to take heavy equipment in" he switched to the smaller drill. *Id.* at 417. There is no dispute that a meeting took place. Vukelich acknowledged the meeting (Tr. 60), but could not recall that a larger drill had been discussed (Tr. 136). He did recall that they had discussed the withdrawal and that the Forest Service would conduct a validity examination if a plan of operations was submitted after withdrawal (Tr. 61). No written proposal for use of a larger core drill was ever submitted.

Judge Rampton made no specific findings regarding the meeting but concluded generally that the evidence did not support claimants' allegation and that the Forest Service inhibited their activity. See Decision at 7. Claimants take issue with this conclusion alleging that they were prevented from using the larger core drill, and asserting that the larger core drill would have provided better evidence of mineral at depth than the smaller drill. We find little merit in their contentions. According to claimants' witnesses, it was only after they were told they could not use the larger drill that claimants opted to use the smaller drill that could be transported on horseback. The witnesses testified that the meeting took place in 1983, 1984, or 1985. The first plan of operations, calling for use of the smaller drill, was submitted in 1982, 1 year before the alleged Forest Service refusal.

Claimants argue that they wanted to use a large drill to obtain better proof of a pre-existing discovery. The evidence does not support this argument. Arthur Mavros indicated that he intended to drill along the entire length of the claim group in an effort to trace quartz veins running in a northerly direction. See Tr. 282, 309-10, 321-22, 352-54. However, he displayed little, if any, specific knowledge of the location of veins, exposed outcroppings, or the mineral content of the veins at the outcroppings. See Tr. 288, 296-97, 299, 302, 327-29, 335. His proposed drilling plan was little more than a plan to drill a random series of holes. No specific target was described and no specific result was anticipated. What he was proposing was grassroots exploration drilling. See Tr. 334-36, 397. If the drilling was to confirm or demonstrate the existence of a discovery, claimants would have been able to describe what they intended to confirm and how the drill results would support the conclusion. The description of the events that took place when the parties attempted to use the smaller drill also demonstrates that their intent was to find mineralization rather than to confirm the existence and extent of valuable mineral previously found. For example, if they had known a specific target they would have known how much hose they needed.

Although the claimants proposed a number of drilling programs, both before and after withdrawal, they never presented a drilling program that could be construed as being for the purpose of gathering information necessary to prove the existence of a discovery rather than for exploration. No attempt was made to garner the information about an existing discovery by any other means and nothing was presented to indicate what claimants might be attempting to confirm. With absolutely no evidence that the very minor quantities of inferred mineral material found on the claims was of sufficient character to warrant drilling with a drill that must be taken to the site with a helicopter or moved to the site with a caterpillar tractor, it was well within the authority of the Forest Service to discourage an exploration program that would require the environmental impact resulting from the use of that equipment. 16/

We fail to find any nexus between the alleged refusal to allow drilling with heavy equipment and claimants' failure to prove the existence of a single discovery. Had a case been presented that the next logical step in a development program would be to confirm continuity at depth with a large core drill, we might look upon the arguments more favorably. Claimants did not exhibit sufficient knowledge of the geology of the claims to identify a proposed drill site or explain what they hoped to prove by drilling at a particular site. Although they may have wished to use a 2-inch drill there is no evidence that it was necessary to use that equipment.

---

16/ We find claimants' allegation that they were considering use of a helicopter incredible. When explaining why they did not have enough hose to do the drilling with the smaller drill Mavros explained that he could not afford more horses to carry hose to the site.

Without some showing that heavy equipment was required, claimants' impression that permission would be denied did not preclude their garnering the information necessary to confirm the existence of a discovery. There is no evidence that Mavros wanted to obtain core samples to establish "the quantity and continuous quality of an exposed outcropping," which was permitted after segregation of the land in United States v. Foresyth, 100 IBLA at 194, 94 I.D. at 458. The existence of an exposure of valuable minerals that would support a discovery if quantity and continuous quality of these minerals continues for a reasonably projectable distance is critical to the right to enter withdrawn land for the purpose of drilling to confirm a discovery. Claimants have failed to present any evidence that they have disclosed valuable mineral on the claims which could be confirmed by drilling.

Finally, claimants assert on appeal that they have demonstrated a discovery of a valuable mineral deposit on the claims. See SOR at 4. In support of this contention they point to testimony regarding numerous samples taken from the claims and either shown or sent to others, who may or may not have assayed them. See Tr. 283-85, 287, 288-91, 292, 294, 295, 298-99, 300-01, 360, 364. With one exception, no assay reports were ever made a part of the record. 17/ In fact, claimants apparently received no assay reports other than the one submitted. See Tr. 303. At best, they received verbal reports that some of the samples were "good" based upon visual examination. For example, claimants refer to testimony by Snell, Roy Shook, and Marvin Weisbeck, friends of Arthur Mavros with some experience in mining, regarding their visual estimates of the presence of minerals in samples taken from unidentified places on the claims. 18/ See Tr. 384, 388, 394-95, 404, 410, 429-30, 432; Claimants' Posthearing Brief at 8-9. Both Snell and Weisbeck qualified their observations by indicating that the mineral they saw justified further exploration. See Tr. 397, 400, 430, 431-32. At most we will agree with their conclusion. This evidence does no more than support a decision to conduct further exploration. See Tr. 288, 296-97, 299, 302, 352. It does not support a prudent decision to undertake development of a mine.

Other than the three samples assayed for Mavros, claimants presented no evidence of either the location or physical nature of any sample taken

---

17/ Claimants submitted gold and silver assays of three grab samples taken from the Mavros No. 1 claim, north of Ripple Lake. See Tr. 283-85; Claimants' Exh. A. The assays indicated a trace of gold and from 0.15 to 0.30 ounces of silver per ton. Leroy Mavros testified that these samples were the "only ones" reported to have high mineral values (Tr. 376). The values indicated by these assays were less than those used by Vukelich.

18/ Max Mogus, Arthur and Leroy Mavroses' uncle, was supposed to have assayed a number of samples. Rather than sending the assay results to the Mavroses, he would report to them by telephone. The weight of the testimony regarding these oral reports was severely undermined by the statement that Mogus regarded the three samples described in footnote 17 as "good" (Tr. 364). Those assays indicated a trace of gold and from 0.15 to 0.30 ounces of silver per ton.

from the claims. With the exception of some of Lawson's samples (which contained very nominal values) all of the samples taken by or on behalf of claimants were grab samples. With the exception of the two assays, there was no attempt to make a bona fide quantitative assessment of the mineral content of the samples or to consider anticipated costs of mining. See Tr. 335. Thus, claimants have advanced absolutely no basis for concluding, either as of the time of withdrawal of the land or the date of the hearing, that the minerals found on any of the claims are of such a quality and in such a quantity as would justify a person to expend further labor and means with a reasonable prospect of success in developing a valuable mine. They clearly failed to rebut the Government's prima facie case by a preponderance of the evidence. See, e.g., United States v. Page, 119 IBLA 12, 21-22 (1991); United States v. Burt, 43 IBLA 363, 367 (1979); United States v. Guthrie, 5 IBLA 303, 307 (1972). Judge Rampton properly held that claimants had failed to rebut the Government's prima facie case of the lack of a discovery of a valuable mineral deposit on any of the mining claims and correctly declared them invalid. See Cameron v. United States, supra at 460. If we were to ignore the evidence presented by the Government, the evidence introduced by claimants would support a finding that there was no exposure of valuable mineral prior to the January 1, 1984, withdrawal. See United States v. Jones, 72 IBLA 52, 56-57 (1983); United States v. Kuretich, 54 IBLA 124, 130-31 (1981).

During the hearing and at its conclusion, claimants sought an order directing the Government and claimants to conduct joint sampling of the claims. See Tr. 5, 269, 435. Judge Rampton took the motion under advisement and denied the motion in his October 1989 decision. The basis for his denial was that the sampling would have to be confined to areas of mineralization exposed prior to the date the land was withdrawn from mineral entry (Jan. 1, 1984) and the mineral examiners had already examined "[a]ll of the \* \* \* exposures" (Decision at 8). Claimants contend that Judge Rampton improperly denied their motion. They take particular exception to his additional conclusion in support of denial of the motion that further sampling would be fruitless because it would be "impossible to pinpoint the areas previously blasted [by claimants] some 10 years ago and then covered to hide the scars," which areas purportedly represented some of their discovery points but which were not sampled by the Government. Id.

We generally find no problem with his holding. There was no evidence that any additional sampling would be from areas where mineralization was previously disclosed but not sampled or even, as so derived, might be productive of another result. See United States v. Hanson, 26 IBLA 300, 302 (1976); United States v. Cook, supra at 274, 293. In United States v. Lauch, 9 IBLA 60, 65-66 (1973), we ordered further sampling in part because the claimants had offered evidence of high gold values but it was uncertain which of two claims the values had been taken from. Thus, there was evidence that the Administrative Law Judge had incorrectly declared one of these claims void for lack of discovery. In any case, claimants were given notice of the impending examination on November 19, 1984. The examination took place in the week of July 22, 1985, and the hearing convened

on June 15, 1989, almost 4 years later. There is nothing in the record that would give the slightest hint that during the period between November 1984 and June 1989 claimants were precluded from taking surface samples to support their case. They took none, and we can find no justification for imposing an obligation to take further samples on the Forest Service. There being no evidence to support claimants' bare assertions that joint sampling would disclose the existence of prior existing discoveries, as that phrase is used in the mining laws, an order directing joint sampling is entirely unwarranted. Judge Rampton properly denied claimants' motion.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

---

R. W. Mullen  
Administrative Judge

I concur:

---

James L. Burski  
Administrative Judge

122 IBLA 315