



UNITED STATES v. BEVERLY WIGGLESWORTH, *ET AL.*

178 IBLA 61

Decided July 28, 2009



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

UNITED STATES v. BEVERLY WIGGLESWORTH, *ET AL.*

IBLA 2008-169

Decided July 28, 2009

Appeal from decision of Administrative Law Judge James H. Heffernan finding three lode mining claims valid.

Set aside and remanded.

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

The validity of a mining claim depends on the discovery of a valuable mineral deposit, which must be 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, and that the mineral deposit can be extracted, removed, and marketed at a profit. Where a claim is located on land withdrawn from mineral entry, a claim must be supported by a discovery of a valuable mineral deposit at the time of withdrawal as well as at the time of the contest hearing.

2. Mining Claims: Determination of Validity--Mining Claims:
Discovery: Generally

In order for there to be a valuable mineral deposit on each of the claims in a group, the recovery expected from each claim must not only exceed the costs of mining, transporting, milling, and marketing the particular deposit on that claim but each claim must also bear a proportionate share of the development and capital costs attributable to the combined operation.

APPEARANCES: Karen D. Glasgow, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Oakland, California, for the National Park Service, (appellant); R. Timothy McCrum, Esq., and Daniel W. Wolff, Esq., Washington, D. C., for contestees-appellees Beverly Wigglesworth, James Wayne Cole, Mildred L. Wilson, and Benson Minerals, Inc.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

The National Park Service (NPS) has appealed from an April 23, 2008, decision of Administrative Law Judge James H. Heffernan to the extent that he found the Golden Quail (GQ), Golden Quail 2 (GQ 2), and Golden Quail 6 (GQ 6) lode mining claims valid.¹ For reasons explained in greater detail below, we find that Judge Heffernan failed to base his findings on a proper application of our precedent regarding a group of mining claims. We remand this case for him to do so.

BACKGROUND

The three claims involved in this appeal are located in San Bernardino County, California, where they were once part of a group that included 143 claims. *See* Ex. G-1 at 15, 43. On October 31, 1994, Congress enacted the California Desert Protection Act (CDPA), Pub. L. No. 103-433, 108 Stat. 4471, Title V of which created the Mojave National Preserve within which these claims were located. 16 U.S.C. §§ 410aaa-41 through 410aaa-59 (2006). The CDPA required the Secretary to transfer land in that area administered by the Bureau of Land Management (BLM) to the NPS to be preserved in accordance with the CDPA and with the provisions of law generally applicable to units of the National Park System. 16 U.S.C. §§ 410aaa-43, -46 (2006). The CDPA withdrew the land from mining and made existing claims subject to the Mining in the Parks Act (16 U.S.C. § 1901). 16 U.S.C. §§ 410aaa-47, -48 (2006). The CDPA prohibits approval of any plan of operation prior to determining the validity of the unpatented mining claims, mill sites, and tunnel sites affected by such plan within the preserve. 16 U.S.C. § 410aaa-49(a) (2006); *see also* 36 C.F.R. Part 9. After the passage of the CDPA, the claimants dropped all but 42 of the 143 claims. Ex. G-1 at 10.

¹ Judge Heffernan also found 13 claims invalid because the “[c]ontestees presented only evidence of geologic inference and exploration potential” and consequently failed to meet their burden of proof. Decision at 29. The claims are named the Golden Quail 3, 5, 7, 8, 9, 15, 16, 24, 25, 26 and the Quail 37, 67, and 158. Although the claimants filed a notice of appeal from this decision, they stated in their Answer to BLM’s appeal that they were not appealing the invalidation of the 13 claims. Answer at 3. The Board thereupon dismissed the appeal. *Beverly Wigglesworth*, IBLA 2008-170 (Oct. 2, 2008).

The three adjacent claims form an L-shaped group. The GQ claim is at the north and the GQ 2 claim is at the south, so that the southern end line of the GQ claim is the northern end line of the GQ 2. The GQ 6 claim is east of the GQ 2, with the eastern side line of the GQ 2 the same as the western side line of the GQ 6. There is an existing pit near the boundary between the GQ and GQ 2 claims from which 30,000 tons of ore had been extracted prior to the withdrawal. Answer at 2, Ex. G-6 attach. 6.1, pp. 27, 29; ex. 43, pp. 1-5. A drill sample on the GQ 6 claim suggests the presence of an ore body in the southern portion of that claim that lies 420 feet beneath the surface.

On September 20, 1996, the claimants submitted to NPS a proposed mining plan that initially covered 14 claims to which 2 others were later added. Ex. cb-45, g-1 p. 10. At this point, NPS was required to first determine whether the claims were valid. 16 U.S.C. § 410aaa-49(a) (2006); *see also* 36 C.F.R. Part 9.

[1] The validity of a mining claim depends on the discovery of a valuable mineral deposit. 30 U.S.C. § 22 (2006). “[I]n order to qualify as ‘valuable mineral deposits,’ the discovered deposits must be 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’” *United States v. Coleman*, 390 U.S. 599, 602 (1968) (quoting *Castle v. Womble*, 19 L.D. 455, 457 (1894)). In *Coleman*, the Supreme Court refined the prudent person test and held that “profitability is an important consideration in applying the prudent-man test,” and that the supplemental marketability test requires a showing that the mineral deposit can be extracted, removed, and marketed at a profit. *Id.* Where a claim is located on land withdrawn from mineral entry, a claim must be supported by a discovery of a valuable mineral deposit at the time of withdrawal as well as at the time of the contest hearing. *Hjelvik v. Babbitt*, 198 F.3d 1072, 1074 (9th Cir. 1999).

The NPS evaluated the claims, finding them not valid. Ex. G-1. This contest ensued.

JUDGE HEFFERNAN’S DECISION

Judge Heffernan held two rounds of hearings extending over a total of eight days. On April 23, 2008, he issued the decision holding that 13 claims were invalid and that the 3 claims involved in this appeal, termed the “core claims,” were valid. Regarding the 13 invalid claims, Judge Heffernan found that there had been no physical exposure of a valuable mineral deposit and that a valuable discovery may not be premised exclusively upon geological inference. Decision at 25 (citing *United States v. White*, 118 IBLA 266, 314-15 (1991), and *United States v. Larson*, 9 IBLA 247, 261-62 (1973)).

As for the three remaining claims, Judge Heffernan characterized the dispute between the parties as follows:

The resource deriving from the three core claims comes to some 166,000 tons of mineralized rock with an average grade of 0.084 ounces per ton, which would produce some 13,947 ounces of gold. Tr. 49. The parties are both in quite close agreement with respect to these relative numbers emanating from the projected open pit operation on the three core claims; however, their ensuing dispute results from the computation of the economics deriving therefrom. In particular, the parties dispute whether the referenced 13,947 ounces of gold could be produced at a profit in October 1994, the withdrawal date. The government doesn't really dispute that gold in that amount could be derived from the three core claims. Tr. 49. Thus, the dispute between the parties really distills into calculating the economics of the three core claims, especially the open pit portion thereof, including the costs of start up and operation and, in particular, the imputed equipment costs.

Decision at 5. He also reported that the parties disagreed as to the projected amount of the underground resource and whether the underground resource should even be modeled. *Id.*

At the conclusion of his opinion, Judge Heffernan summarized the Government's argument for invalidity by citing the 2007 Mineral Report which found that, in 1994, costs for the three core claims would exceed revenue yielding net loss of \$17,064,000.00, based on a gold price of \$379.00 per ounce. Ex. G-6, p. 14. Decision at 28. He found that the Government's determination that the claims could not be mined at a profit resulted from inflating the costs of mining in three ways: (1) by basing costs on underground mining despite the fact that the contestees planned to mine with surface methods; (2) by basing costs on new equipment rather than used equipment; and (3) by basing processing costs on milling rather than heap leaching which is less expensive. On the basis of the testimony of the claimants' principal witness, James D. Golden,² and Exhibit S-1, prepared by Golden, Judge Heffernan found that the three core claims could be profitably mined by exclusively using an open pit operation coupled with utilization of used, rather than new, equipment, and a heap leach, both at the time of withdrawal and at the time of the two hearings, because the claimants had proven profitability in October 1994 of some \$11.5 million (Tr., 1068, 1075; Ex. S-1) and profitability at the time of the hearings of some \$25.8 million (Tr., 725). Decision at 29.

² Chief Operating Officer of Gold Spring Mining Company, Virginia City, Nevada. Tr. 200.

ARGUMENTS ON APPEAL AND ANALYSIS

NPS challenges Judge Heffernan's findings with numerous arguments. NPS attacks his reliance on the evidence offered by one of the claimants' principal witnesses concerning the economics of the claims, contending that the program he utilized is a pit optimization program based on economic assumptions and is not designed to provide an economic evaluation of the property. NPS asserts that a discounted cash flow analysis is lacking, and that the claimants' model reflects only operating costs, not capital costs such as road construction, building construction, and the present value of borrowed money. The claimants counter that another witnesses' supplemental report factored in appropriate capital costs and projected cash flow. Ex. G-6, attach. 6.1, pp. 45-48.

The NPS focuses in particular on the judge's findings with respect to the GQ 6 claim, especially his conclusion that the deposit on that claim can be mined by surface methods, claiming that the top of the GQ 6 ore body is covered by 420 feet of overburden which makes surface mining as a single claim pit operation "physically impossible." SOR at 9. The NPS further asserts that since the GQ 6 claim is only 600 feet wide, assuming a pit slope of no more than 50 degrees, the deepest pit would be only 358 feet deep, or 62 feet above the top of the deposit. *Id.* The claimants dismiss this argument, explaining that they would develop the claims as a group and are not required to confine the pit within the boundaries of the GQ 6.³

NPS also contends that development operations cannot fit on the three claims, asserting that even without the loss of significant surface area from surface mining the GQ 6, the three claims cannot support the necessary physical operations. Golden testified that nearby private land could be purchased to support these activities for an additional cost of \$1 million. The Government disputes the basis for this figure, arguing that, even with offsite processing, the claims cannot bear sufficient storage for waste, fuel, supplies, equipment, and explosives, or accommodate the necessary ground water monitoring wells, security fences, ring road, pit buffer area, buildings, parking and other facilities necessary for the claimants to commence mining operations on park land. SOR at 9-10. Furthermore, they aver, the claimants have presented no evidence showing how they plan to surface mine the mineralization on GQ 6: "in all of the pit models presented by [the claimants], the utility of GQ 6 is to expand the pit in order to access mineralization on GQ 2 and/or as a repository for waste rock and tailings." *Id.* at 10. Acknowledging that "a majority of the cost of the project in the government analysis is apportioned to underground mining," NPS asserts, "the fact is that underground mining is the sole method available for

³ The ore body is near the west boundary of the claim, which it shares with the GQ 2 claim and, therefore, any pit reaching that deposit would likely involve both claims.

accessing the mineralization on GQ 6” (*Id.* at 11) “[b]ecause the mineralization on GQ 6 begins at approximately 429 feet below the ground’s surface.” *Id.* at 12. “Therefore,” NPS states, “the government retained its underground mining operation analysis because without it Contestee is further limited to only two claims.” *Id.* at 11.

Finally, the Government asserts, even though Judge Heffernan found that the GQ 6 revealed an “impressive 185-foot long string of mineralization,” he erred in relying on a single drill hole (93-15D) to support his conclusion that a discovery had been made on the GQ 6. SOR at 13. NPS maintains that there is no evidence that claimants can surface mine the mineralization on GQ 6 or that underground mining of the claim is profitable, and asserts that drill data does not prove a discovery of economic mineralization on GQ 6, which is “[a]t best,” “an inferred resource” “for which quantitative estimates are based largely on broad knowledge of the geologic character of the deposit” and on “an assumed continuity or repetition.” *Id.* at 14.

The claimants point to this Board’s reluctance to disturb the findings of an administrative law judge, when based on credibility determinations supported by substantial evidence (Answer at 12, citing *United States v. Miller*, 46 IBLA 1, 7 (1982)), and emphasize Golden’s expertise, claiming he had “demonstrated his credibility through his experience” of conducting “over 100 thorough mine evaluations.” *Id.* at 15. Yet, despite this expertise and credibility, Golden testified that a discovery had been made on other claims that were found invalid (Tr. 319-20), demonstrating the importance of the trier of fact’s responsibility to also look beyond a witnesses’ credentials and experience and focus on the foundations of the evidence upon which that witness bases an opinion.

The claimants discuss burdens of proof, referring to our decision in *United States v. Miller*, 165 IBLA 342, 356 (2005), where we held that when the Government contests a mining claim based on a charge of lack of discovery of a valuable mineral deposit, it bears the initial burden of going forward to establish a *prima facie* case in support of that charge, whereupon the ultimate burden of persuasion falls to the claimant to overcome that case by a preponderance of the evidence. Answer at 11. Emphasizing that this contest does not arise from a patent application, they assert that their only requirement is to rebut the particulars of the points raised by the Government in its *prima facie* case, and claim that they have met that burden. *Id.*

In *Miller*, we recognized that a contestee bears a different burden when a contest is filed as the result of a patent application where a claimant must not only overcome the government’s *prima facie* case, but “must establish that the claim is valid, even apart from the issues raised in the *prima facie* case.” 165 IBLA at 356. What the claimants fail to recognize, however, is that when a contest does not involve an application for patent, a finding that the mining claimant has preponderated ordinarily results only in dismissal of the contest, not in a finding that

the claim is valid. *E.g. id.*; *United States v. Willsie*, 152 IBLA 241 (2000); *United States v. Lewis*, 58 IBLA 282 (1981); *United States v. Hooker*, 48 IBLA 22, 26-27 (1980); *see Cactus Mines Limited*, 79 IBLA 20, 22-27 (1984); *see also United States v. Swanson*, 93 IBLA 1, 18 n.9; 93 I.D. 288, 298 n.9 (1986), *aff'd Swanson v. Babbitt*, 3 F.3d 1348 (9th Cir. 1993). As we explained in *Miller*,

“Dismissal of a contest complaint does not determine the validity of the claim, but merely establishes that, as to the issues raised in the hearing, the mineral claimant has preponderated. Thus, in a hearing on a Government contest complaint, there is no requirement that a mining claimant show that the claim is valid; rather, the mineral claimant’s burden is to preponderate on the issues raised by the evidence.” *United States v. Hooker*, 48 IBLA 22, 26-27 (1980). Therefore, to the extent the Millers seek a ruling that dismissal of the contest by the Judge equated to a determination that the claim is valid, we decline to so rule.

165 IBLA at 353 n.15. Thus, even if Judge Heffernan were correct in concluding that the claimants preponderated and, accordingly, in dismissing the contest, he erred in finding all three claims valid.

In 1975, the Board provided a detailed analysis of the burden of proof requirements in which we distinguished contests that involved patent applications from those that did not.

If a patent application has been filed, it is essential for this Department to determine whether all the requisites of the law have been met before patent may issue. If there has not been evidence presented on an essential issue, or issues, dismissal of the contest will not fulfill this Department’s obligation to act “to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved.” *Cameron v. United States*, 252 U.S. 450, 460 (1920). Therefore, in a patent proceeding, it would be essential to order a further hearing to make a proper determination on the essential issues.

United States v. Taylor, 19 IBLA 9, 25-26, 82 I.D. 68, 74 (1975). Later decisions such as those upon which the claimants rely are properly regarded as iterations of this analysis.

Hence, in the absence of a patent application, the claimants’ argument concerning their burden of proof would have merit, were it not for the fact that the contest in this case arose from the filing of an application for approval of plan of operation which triggered the following statutory requirement that did not exist when *Taylor* was issued:

The Secretary shall not approve any plan of operation prior to determining the validity of the unpatented mining claims, mill sites, and tunnel sites affected by such plan within the preserve and shall submit to Congress recommendations as to whether any valid or patented claims should be acquired by the United States, including the estimated acquisition costs of such claims, and a discussion of the environmental consequences of the extraction of minerals from these lands.

16 U.S.C. § 410aaa-49(a) (2006). With passage of the CDPA, Congress made a determination of validity as “essential” a precondition for the Secretary to approve a plan of operation as it is for the Secretary to issue a patent under the mining law. In light of this explicit statutory language,⁴ we cannot infer that Congress intended for the Secretary to approve plans of operation or consider the purchase of claims under procedures less rigorous than would pertain to the issuance of a patent for the land.

We undertake our consideration of the parties’ arguments in this case on a foundation of controlling principles established in earlier appeals involving the validity of mining claims considered as a group.

Although the mining law requires the discovery of a valuable mineral deposit on each claim, this Board has long recognized that a group of mining claims may be considered together for purposes of determining whether a valuable mineral deposit exists on each claim. *United States v. New York Mines, Inc.*, 105 IBLA 171, 191, 95 I.D. 223, 234 (1988); *United States v. Foresyth*, 100 IBLA 185, 250, 94 I.D. 453, 489 (1987); *Schlosser v. Pierce*, 92 IBLA 109, 130, 93 I.D. 211, 223 (1986). Even though the nature of the deposit of minerals on each claim is such that extracting, removing, and marketing the deposit would not result in a profitable operation if each claim were operated as an independent mine, development of the claims may be found to result in a profitable operation if locatable minerals are exposed on each of the claims and deposits are considered in combination.

[2] However the validity of one or more claims does not necessarily make every claim in the group valid, even if there is a physical exposure on all claims. More than twelve years before the first of the hearings was held in this contest, the Board considered *en banc* a case involving two mining claims considered as a group on land withdrawn from mineral location within the Payette National Forest, Idaho.

⁴ See generally, *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004), where the Court stated: “The preeminent canon of statutory interpretation requires us to ‘presume that [the] legislature says in a statute what it means and means in a statute what it says there.’ *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.”

Seven judges found that only one of those claims was valid. Two judges dissented in part and would have found both claims valid. A third judge would have made no finding on the issue of validity and would have remanded the matter for further hearing on the basis of new evidence.

Even though the 7-judge majority emerged from two separate opinions, all seven recognized the following two-pronged principle:

In order for there to be a valuable mineral deposit on each of the claims in a group, the recovery expected from each claim must not only exceed the costs of mining, transporting, milling, and marketing the particular deposit on that claim but each claim must also bear a proportionate share of the development and capital costs attributable to the combined operation. See *Schlosser v. Pierce*, supra at 131-32, 93 I.D. at 224 (referring to *In re Pacific Coast Molybdenum Co.*, [75 IBLA 16,] 24, 24 n.7, 25-26, 32, 90 I.D. at 357, 357 n.7, 357-58, 361). * * * Accordingly, we must conclude that the deposit on each claim must be sufficient to bear at least a proportionate share of the development and capital costs. We find no sanction for another approach in the mining laws.

United States v. Collord, 128 IBLA 266, 287-88 (1994) (lead opinion by Arness, A.J.) (emphasis added), *aff'd in relevant part, rev'd in part*, No. 94-0432-S-EJL (D. Idaho Sept. 28, 1994), *aff'd*, 154 F.3d 933 (9th Cir. 1998) (as to attorney's fees); see 128 IBLA at 311 (Burski, A.J., concurring in the result).⁵ In reaching this

⁵ Judge Burski considered whether development costs already incurred must be recovered when the claims are not on withdrawn land, and would refine the principle articulated in the lead opinion to state that each claim must bear its share of capital and infrastructure costs *that had not already been expended*.

[I]n those situations in which a mining claimant has already constructed the infrastructure necessary to mine multiple claims and can show that these costs will be recovered from either a single claim or a subgroup of those claims, the claimant need not establish that the pro rata costs of these workings can be borne by the production from other claims.

128 IBLA at 305. He reached this conclusion with respect to *unwithdrawn* land, citing *United States v. Mannix*, 50 IBLA 110 (1980) in which the Board “[i]n effect bow[ed] to practicality,” in recognizing that, “so long as the land remained presently open to mineral location, where expenditures which might properly be seen as imprudent had already been incurred, a mining claimant could show the existence of a valuable mineral deposit without establishing that those already-made expenditures
(continued...)

conclusion, the majority rejected the argument that the validity of those claims could be established simply by adding up the revenues that could be mined from the two claims and subtracting the total costs of mining the two claims.⁶

The approach taken by Judge Heffernan in this case appears to follow that of the two dissenting judges in *Collord*, not that of the majority. In order to support his finding of validity for the GQ claims in a manner consistent with *Collord*, Judge Heffernan was obligated to separately identify the value of the deposits on each claim as well as the proportionate costs to be assigned to each claim of extracting those deposits. Although this Board has occasionally exercised its *de novo* review authority to reconsider the evidence presented in a case when the Administrative Law Judge has not applied the appropriate criteria and make a final decision as we did in *Collord*, we are not required to do so and must make that determination on a case by case basis, considering the record and circumstances of each appeal. In the case at hand, the necessary findings under *Collord* do not so readily emerge from the evidence presented in this case. Because the determination of validity required by 16 U.S.C. § 410aaa-49(a) (2006) must be based on a finding that reserves on each claim are sufficient to bear both the direct operating costs of each claim and a proportionate share of the development and capital costs, no final action on the claimants' application for approval of a plan of operation can be taken until this issue is resolved. Accordingly, we must remand this case to Judge Heffernan to make findings on this necessary issue. See *United States v. Taylor*, 19 IBLA at 25-26, 82 I.D. at 74.

⁵ (...continued)

would be recovered.” 128 IBLA at 304. Neither *Collord* nor this appeal involves these circumstances.

⁶ In *Collord*, one claim had higher value deposits that would be mined first while the deposits on the second claim were of lower value and would be more expensive to mine so that total profits realized from mining the first claim would diminish by mining the second claim, even though the two claims together would show a profit. The majority concluded that the second claim was not valid because the marginal cost of mining, milling and transporting ore from that claim exceeded its anticipated marginal revenue. 128 IBLA at 287, 305-06.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is set aside and the case remanded for further action consistent with this opinion.

/s/
Christina S. Kalavritinos
Administrative Judge

I concur:

/s/
James K. Jackson
Administrative Judge