

UNITED STATES  
v.  
A. P. JONES

IBLA 70-69      Decided April 8, 1971

Mining Claims: Surface Uses – Surface Resources Act: Generally

In a proceeding under section 5 of the Surface Resources Act of July 23, 1955, to determine the rights of the Government and a mining claimant as to the surface resources of a mining claim prior to patent, the Government has no obligation to prove that the claim contains either surface resources and/or necessary access routes, but only to present a prima facie case that a discovery did not exist on the claim as of July 23, 1955, or that one does not exist at the present time. When the Government makes such a prima facie case it will prevail unless the claimant overcomes the Government's case by a preponderance of the evidence.

Mining Claims: Contests – Mining Claims: Hearings – Rules of Practice:  
Hearings

Evidence – Rules of Practice:

The technical exclusionary rules of evidence applied in court proceedings need not be followed in administrative hearings; therefore, the fact that hearsay evidence, consisting of an assay report, was received by the Hearing Examiner in a Government contest, together with other evidence, is no reason for changing a decision which is sustainable even without such evidence.

Mining Claims: Surface Uses – Surface Resources Act: Generally

In a proceeding under section 5 of the Surface Resources Act of July 23, 1955, to determine the rights of the Government and a mining claimant as to the surface resources of a mining claim prior to patent, the Government will prevail if it is shown that a discovery perhaps existed prior to the date of the act but it is determined there was not a discovery of a valuable mineral deposit as of the date of the act, and the Government will also prevail if it is shown that a discovery perhaps existed prior to, or as of, the date of the act but it is determined at the time of inquiry that no discovery exists because the evidence of mineralization will no longer justify the expenditure necessary to develop a mine.

Testimony by a Government mineral examiner that he examined a mining claim and the workings thereon but found no evidence of a valuable mineral deposit is sufficient to establish a prima facie case by the Government as to its right to use and manage the surface of the claim.

Mining Claims: Discovery: Generally

To constitute a valid discovery upon a lode mining claim there must be exposed within the limits of the claim a lode or vein bearing mineral in quantities which would warrant a prudent man to expend his labor and means, with a reasonable prospect of success, in developing a valuable mine; a showing which would only warrant further exploration in the hope of finding a valuable deposit is not sufficient.

IBLA 70-69	:	Sacramento Contest No. 44-66
	:	
UNITED STATES	:	Lode mining claims declared
v.	:	subject to the act of
A. P. JONES	:	July 23, 1955
	:	
	:	Affirmed

DECISION

A. P. Jones has appealed to the Secretary of the Interior from a decision dated June 9, 1969, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of a hearing examiner declaring the Five Mile Quartz Nos. 1 and 2 lode mining claims (hereinafter referred to as the Nos. 1 and 2 claims) in sec. 5, T. 2 N., R. 15 E., and sec. 32, T. 3 N., R. 15 E., M.D.M., Stanislaus National Forest, California, subject to the limitations and restrictions of section 4 of the act of July 23, 1955, 30 U.S.C. § 612 (1964).

Upon the recommendation of the Forest Service, United States Department of Agriculture, a proceeding was initiated pursuant to section 5 of the act of July 23, 1955, 30 U.S.C. § 613 (1964), to determine the right of appellant, asserted in verified statements filed on December 15, 1958, to use and control the vegetative and other surface resources of the land embraced in the claims. A hearing was held at Sonora, California, on May 1, 1968, on the charge, contained in the notice of hearing, that:

1. The lands within the claims, prior to patent, are subject to use and management by the United States in accordance with the provisions of section 4 of the act of July 23, 1955.
2. There is not disclosed within the boundaries of the mining claims mineral materials of a variety subject to the mining laws sufficient in quantity, quality, and value to constitute a discovery.

According to the verified statement filed on December 15, 1958, the claims were located on July 15, 1926. In June of 1927 the claims were acquired by Katherine G. Adams and/or Alfred A. Adams. On May 10, 1960, Katherine G. Adams applied for patent to the two claims. In May of 1963 or October 1965 the Adamases sold the claims to the appellant.

At the hearing the Government introduced in evidence four maps which showed the location, size and form of the two claims. The claims are rectangular, each being approximately 600 by 1500 feet. Claim No. 2 overlaps in general the northwestern quarter of the No. 1 claim.

The only witness for the Government at the hearing was William Johnson, a Forest Service mining engineer. He first examined the claims in June of 1961 in response to the patent application filed in 1960. As a result of the examination he suggested to the Assistant Regional Forester that the Adamases be allowed to withdraw the pending patent application as being premature without prejudice to their refileing. On October 3, 1961, the Adamases filed a withdrawal of their application for patent. This was accepted and the application closed on October 24, 1961. Johnson also suggested that the Adamases withdraw their verified statement as to the two claims in question, but this was never done. Because of these outstanding verified statements Johnson examined the claims a second time on November 28, 29 and 30, 1966. He was accompanied by the appellant and by Wesley Moulton, a Forest Service mining engineer.

The two engineers made a general reconnaissance of the surface area of the claims and a detailed examination of the workings found thereon. Johnson made a sketch map of the major workings. It showed several hundred feet of tunnels. An outline of the workings was also shown on mineral survey maps. After asking the appellant where he would like the Government to take samples, Johnson took five samples from the No. 1 claim and three samples from the No. 2 claim. There was never any objection made by the appellant as to the way the Government engineers examined the claims. Johnson recorded the site where each sample was taken and his record was introduced in evidence. Johnson also indicated on his sketch map and on a mineral survey map the sources of each of the five samples taken from the No. 1 claim. The samples were bagged, tagged and delivered to Abbot A. Hanks, an assay company in San Francisco. The company was requested to assay the material for gold and silver and Johnson subsequently received back a signed report of assay which was introduced in evidence.

According to the assay report the five samples taken from the No. 1 claim showed combined gold and silver values respectively of \$1.80, \$1.45, \$1.45, \$0.40 and \$0.24 per ton for an average of \$1.07 per ton per sample and the three samples taken from the No. 2 claim showed combined gold and silver values respectively of \$0.40, \$0.40 and \$0.235 per ton for an average of \$0.35 per ton. Nearly all of the values were for gold.

Johnson testified that the minimum value of ore that one could expect to mine profitably from the underground lode claims in question would be in the realm of \$20.00 a ton. He also said that ore with this minimum value would have to be of sufficient quantity and at least 30 inches in width (a minable width) in order for one to expect to mine it profitably.

Johnson stated that based on his examination of the claims, it was his opinion that there is not presently exposed within the limits of these claims a discovery of a valuable mineral deposit.

In a case of this nature the Government has only the burden of establishing a prima facie case that the claim is invalid. 1/ The contestee then has to prove by a preponderance of evidence that his claim is valid, 2/ the validity sufficient to sustain a patent. 3/ He must prove that there was a discovery of a valuable deposit of minerals on July 23, 1955, 4/ which continues to exist. 5/ The term "valuable minerals" refers to specific valuable minerals

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1/ Converse v. Udall, 262 F. Supp. 583, 593 (D. Ore. 1966), aff'd Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Toole, 224 F. Supp. 440 (D. Mont. 1963).

2/ Cases cited, supra note 1.

3/ Converse v. Udall, supra note 1.

4/ Converse v. Udall, supra note 1; United States v. Ruby LaRose Green, A-31031 (March 25, 1970); United States v. Calhoun and Howell of Oregon, Ltd., A-31004 (August 29, 1969), aff'd Calhoun and Howell of Oregon, Ltd. v. Hickel, Civil No. 70-155 (D. Ore., September 24, 1970); United States v. A. Speckert, 75 I.D. 367 (1968).

5/ United States v. Ruby LaRose Green, supra note 4; United States v. Calhoun and Howell of Oregon, Ltd., supra note 4; United States v. Speckert, supra note 4; United States v. Independent Quick Silver Co., 72 I.D. 367 (1965), aff'd Converse v. Udall, supra note 1.

discovered 6/ within the limits of each of the claims. 7/ A discovery exists where minerals have been found and the evidence is of such 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. 8/

Appellant's first argument is that the hearing examiner erroneously overruled appellant's objections to the Government's introduction of various evidence. An analysis of these objections reveals that they were all basically predicated upon an objection to the admission in evidence of Exhibit 11, the assay report. He contends that the assay report constitutes hearsay and should not have been admitted unless he was given an opportunity to cross-examine the persons who prepared it.

The rule has been long settled that the technical rules for the exclusion of evidence are not applicable to Federal administrative proceedings in the absence of a statutory requirement that such rules are to be observed. Opp Cotton Mills v. Administrator of Wage and Hour Division, Dept. of Labor, 312 U.S. 126 (1941). This principle has not been changed by the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (Supp. V, 1969). Thus, the mere receipt of hearsay evidence is no cause for a reversal of an administrative decision. Willapoint Oysters v. Ewing, 174 F.2d 676 (9th Cir. 1949), cert. denied, 338 U.S. 860 (1949); E. L. Cord, dba El Jiggs Ranch, 64 I.D. 232 (1957). Instead, whether such evidence is considered and what weight is given to it may depend upon whether there is other corroborative evidence and whether it is in the interest of fair play and justice to allow the evidence. See United States v. Arch Little and Ethelyn Little, A-30842 (February 21, 1968).

Assay reports have long been accepted as competent evidence by mining claimants as well as the Government in mining contests without the testimony of the assayer. United States v. Lawrence W. Stevens, 76 I.D. 56 (1969). Since they redound to the advantage or disadvantage of each party equally, objections to their acceptance have been rare. In the immediate case, the hearing examiner

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6/ Converse v. Udall, *supra* note 1; United States v. Ruby LaRose Green, *supra* note 4.

7/ Converse v. Udall, *supra* note 1, at 593.

8/ Castle v. Womble, 19 L.D. 455 (1894); United States v. Coleman, 390 U.S. 599 (1968).

indicated to the appellant that he had been accepting signed assay reports as evidence, without the assayers being present, for 27 years, and he allowed the appellant 30 days following the hearing to make an offer of assay reports and/or other evidence, saying that he would then consider the offering and, if necessary, reopen the hearing so that the evidence could be presented. Clearly, the appellant was given full opportunity to present the same type of evidence as the Government with which to rebut or overcome the Government's case. Also the appellant had the advantage of having an opportunity to review the Government's case prior to presenting such evidence. However, the appellant never offered any additional evidence or assay reports even though his attorney, in connection with his request for a continuance of the hearing, stated that samples had already been taken and sent for assay.

It does not appear that the assay reports complained of formed the basis for the hearing examiner's decision but were regarded as merely corroborative of other testimony by the Government's witness. We cannot see that there has been any undue weight given to hearsay evidence, or that the exclusion of the hearsay evidence presented would alter the result.

Appellant's second argument is that the hearing examiner erroneously denied a motion for a summary judgment which the appellant made at the close of the Government's case. Appellant's basis for the motion, stated at the hearing, was restated on this appeal. It is argued that although section 4 of the Act of July 23, 1955, makes rights under a mining claim subject to the right of the United States to manage and dispose of the vegetative resources or to use the surface for access to adjacent land, there was no evidence offered by the United States as to the existence of any vegetative resources or of the existence of any adjacent land requiring access. Appellant points to evidence adduced by him to show that there are no vegetative resources on the land and that it is a steep, rocky hillside, and he invites further attention to the failure of the Government to show the existence of any adjacent land requiring access. He contends that the absence of any demonstrated surface resources or access needs constitutes a failure on the part of the United States to sustain Charge No. 1 of the Notice of Hearing.

The pertinent part of section 4 of the Act of July 23, 1955, 30 U.S.C. § 612 (1964) provides:

Rights under any mining claim hereafter located . . . shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of

the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land . . . .

The statute plainly reserves to the United States the rights stated on "any mining claim" on which a discovery is not made prior to July 23, 1955. The statute does not purport to say that the rights mentioned are reserved only on mining claims on which certain surface resources or certain access routes exist. Thus, proof of surface resources and access routes <sup>9/</sup> is not a precondition to the United States having the rights stated and is therefore in no way an issue in a proceeding under section 5 of the act to determine who has these rights on the claims in question.

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<sup>9/</sup> If surface resources and access requirements are totally absent from a claim then the rights reserved to the United States may be more theoretical than practical. But obviously they are still rights. However, it is difficult to conceive of a total absence of surface resources. In fact, it would seem that the mere surfaces of these claims would be considered within the category "surface resources" as would the water in the Five Mile Creek which creek crosses the claims, the water that accumulates on the claims, the young and old trees on the claims, the soil that of necessity supports the trees, wildlife habitat, forage, etc. That Congress did intend the words "surface resources" to include such as the surface, water, trees and soil is clear from the legislative history of the act. See H.R. Rep. No. 730, 84th Cong., 1st Sess. (1955). 2 U.S. Code Cong. & Ad. News, 2474-98 (1955). At pages 2475-76 of this report it is noted that a problem had arisen of developing statutory authority and regulations to encourage mining activity on public lands compatible with utilization, management, and conservation of surface resources such as water, soil, grass, timber, parks, monuments, recreation areas, fish, wildlife and waterfowl. The report states that the act is to deal with these problems of surface versus subsurface competing uses. So even if evidence of the existence of "surface resources" were necessary, it would appear that the record abounds with it. In any event, there was no positive proof by the appellant that the claims were completely void of surface resources and necessary access routes.

The application of the statute to claims "hereafter located" has consistently been construed by the Department and the courts as requiring that claims located prior to the date of the act must have been valid; i.e. that a discovery must exist on the claims as of July 23, 1955, and at the time of the hearing. 10/

Since the allegation stated in paragraph "1" of the charge would necessarily flow from a finding that the allegation stated in paragraph "2" was sustained, it was not necessary for the Government to prove a prima facie case as to more than the allegation contained in paragraph "2".

Testimony by a Government mineral examiner that he has examined mining claims and the workings thereon but found no evidence of a valuable mineral deposit is sufficient to establish a prima facie case by the Government as to the invalidity of the claims. United States v. Ruby LaRose Green, supra note 4. The Government having presented such evidence, the burden shifted to the appellant to show by a preponderance of evidence that his claims were not subject to section 4 of the act.

Appellant's only witness was the appellant's predecessor in interest, Alfred A. Adams. It is apparent from his testimony that Adams's opinion was merely that further exploration of the two claims might disclose a discovery.

Adams indicated that the only gold he took out of the No. 1 and No. 2 claims during the 36 to 38 years he had the claims was in samples which he took for assay. However, neither the samples nor assay reports thereof, nor information as to the values they disclosed were offered in evidence. In fact, the only statement Adams made about the value of the minerals on the Nos. 1 and 2 claims was that the minerals were much less valuable than those found on a nearby claim. 11/

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10/ Cases cited, supra note 5.

11/ Adams was referring to the Five Mile Quartz No. 3 claim (referred to as the No. 3 claim). This claim overlaps the southern one-half of the No. 1 claim; it and five other nearby claims were sold by Adams to the appellant at the same time he sold appellant the claims in question. These six claims are not in issue in the instant case.

Although perhaps it is possible to interpret Adams's testimony (which is confusing at times) as indicating that gold was found and removed from the Nos. 1 and 2 claims prior to the Adamases' acquisition of them in 1927 and as indicating that Adams removed some small amount of gold from the claims prior to 1936 his testimony did not indicate and there was no probative evidence to show that any valuable gold deposit remained on the two claims as of July 23, 1955, or as of the time of the hearing. This void in appellant's evidence is accentuated by the fact that in this case there is not even a guess offered as to the quantity of ore of any given quality that may be presently found on the claims. It is well established that the fact that a claim may have been successfully worked in the past or the fact that there may have once been a discovery of a valuable mineral deposit on it is insufficient to validate the claim, for it must be shown as a present fact that the claim is still valuable for minerals, worked out claims not qualifying. Best v. Humboldt Placer Mining Company, 371 U.S. 334, 336 (1963); Adams v. United States, 318 F.2d 861, 871 (9th Cir. 1963); United States v. Ruby LaRose Green, *supra* note 4; United States v. Taylor T. Hicks, et al., A-30780 (October 24, 1967), *aff'd* Hicks v. United States, Civil No. 1202 (D. Ariz., April 1, 1970); United States v. R. W. Wingfield, A-30642 (February 17, 1967); United States v. Pacific Smelting and Refining Company, et al., A-30439 (November 30, 1965); United States v. Margherita Logomarcini, 60 I.D. 371, 373 (1949).

Thus, all that the appellant's evidence amounts to is an unsubstantiated hope that pursuit of the exposed veins on the claims will disclose richer ore, and, viewed most optimistically, the evidence shows no more than a possibility that further exploration may disclose the existence of valuable mineral deposits somewhere on the claims. Such a showing does not constitute a discovery. United States v. Ford M. Converse, 72 I.D. 141 (1965), *aff'd* in Converse v. Udall, *supra* note 1; United States v. Lester E. Martin, A-31050 (April 3, 1970).

It is obvious that the appellant failed to produce sufficient evidence to sustain his burden of proving the existence of a present discovery within the limits of either claim. Appellant's arguments, in large measure, reflect recognition of the fact that he has not exposed minerals on the two claims in question which are valuable in an economic sense. In the absence of evidence of the exposure of a deposit of such minerals, appellant was properly limited in his use of the claims to mineral exploration and development and to such use of the surface of the claims as may be incidental to mining.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision of the Bureau of Land Management is affirmed.

Edward W. Stuebing, Member

We concur.

Martin Ritvo, Member

Joan B. Thompson, Member.

