

UNITED STATES
v.
RAY GUTHRIE ET AL.

IBLA 70-678

Decided April 14, 1972

Appeal in Contest Nos. R-1101, 1105 from a decision of hearing examiner Graydon E. Holt, Sacramento, California, declaring mining claims and mill site null and void.

Affirmed.

Mining Claims: Discovery: Generally

To constitute a valid discovery upon a mining claim there must be shown to exist, within the limits of the claim, a deposit of minerals in such quantity and quality as would warrant a prudent man to expend his labor and means with a reasonable prospect of success in developing a valuable mine; the fact that gold may have been found on property belonging to claimant's neighbor and the fact that the claim may have been mined successfully in the past are not sufficient to constitute discovery.

Mining Claims: Contests--Mining Claims: Discovery: Generally

It is the duty of a mining claimant whose claim is being contested to keep discovery points available for inspection by Government mineral examiners, and an examiner has no duty either to rehabilitate discovery points or to explore beyond the current workings of the mining claimant in an effort to verify a purported discovery.

Mining Claims: Contests--Rules of Practice: Appeals: Burden of Proof--Rules of Practice: Government Contests

In a mining contest when the Government has established a prima facie case that there has not been a discovery of a valuable mineral deposit within a mining claim, the claimant then has the burden of proof to show by a preponderance of the evidence that a discovery has been made.

Mining Claims: Contests--Rules of Practice: Evidence

An assay report which is not supported by evidence as to who took the sample assayed, where it was taken, and what procedures were followed cannot be given substantial evidential weight.

Mining Claims: Contest--Mining Claims: Hearings

Where the Government's witness has a university degree in mining engineering and experience in examining property and determining the mineral values, he may be found to be an expert witness who is qualified to state his opinion with respect to whether a prudent man would undertake development of a mine on mining claims he has examined.

APPEARANCES: Lester E. Barnwell, pro se.

OPINION BY MR. STUEBING

Lester E. Barnwell, individually and as trustee; Barbara H. Barnwell, and Robert T. Malmgren, trustee, 1/ have appealed to the Board of Land Appeals from the hearing examiner's decision issued June 24, 1970, declaring the M&M No. 1 lode mining claim and the White Mule placer mining claim null and void for lack of discovery of a valuable mineral deposit within the claims. The hearing examiner also declared appellants' Big Dick mill site null and void since the appellants have neither a valid mining claim nor quartz mill or reduction work as required by 30 U.S.C. § 42 (1970).

The M&M No. 1 lode mining claim is situated in sec. 26, T. 7 N., R. 19 W., S.B.M., Ventura County, California. The White Mule placer mining claim and the Big Dick mill site claim are in sec. 24, T. 7 N., R. 19 W., S.B.M., Ventura County, California. The three claims were located in 1937 and 1938. The mining claims, located for gold, are in the Los Padres National Forest, as is the mill site. The White Mule placer claim is situated on Piru Creek near the Big Dick mill site and the M&M lode claim is located approximately 1 mile to the southwest.

1/ Ray Guthrie, who formerly held an interest in the White Mule claim, sold it to Robert T. Malmgren by a deed executed April 16, 1969, subsequent to the initiation of the contest. B. B. Barnwell has not joined in this appeal.

On March 4, 1968, and March 28, 1969, the acting manager of the district land office, Riverside, California, at the instance of the United States Forest Service, Department of Agriculture, filed contest complaints charging respectively that: (1) there were no mineral materials of a variety subject to the mining laws, sufficient in quantity, quality and value to constitute a discovery within the boundaries of the mining claim; (2) the land embraced within the claim is nonmineral in character. Regarding the mill site, the complaint charged that: (1) the site was not used or occupied by the proprietor of a vein, lode or placer for mining, milling, processing, or beneficiation purposes or other operations in connection with such mines; (2) the mill site has no quartz reduction mill or reduction works thereon.

In their answers, appellants denied these charges.

At a hearing held in Los Angeles, California, the following facts were recorded:

Emmitt B. Ball, Jr., mining engineer for the United States Forest Service, examined the three sites.

In 1964, Ball took two samples from the M&M lode claim. These samples were taken across veins with maximum widths of five and eight inches. Ball did not sample a mining width but limited his samples to the vein material. The gold content in the samples was assayed at \$1.23 and \$1.05 per ton. The total values were \$1.49 and \$1.28. Mr. Ball returned to the claim in 1968 and took four additional samples: one from the stockpile of vein material near the shaft; one from a quartz outcrop near the discovery monument and two from the main adit. The assay report listed the following values per ton for these samples: \$19.92, \$2.38, \$1.02 and \$1.68. The subvalues per ton for gold were \$19.60, \$2.10, \$0.70 and \$1.40. He saw an adit and shaft on the site, but noticed that there were no current workings. Slough at the entrance to the adit indicated it had not been in operation for some time.

Ball first visited the White Mule claim in 1962. Later he sampled the cut on the bank which is situated in front of the cabin and the river. The channel sample had a cross section of 3 by 6 inches. The assay results showed less than 1 cent per cubic yard of free gold, and 35 cents per ton after the free gold had been removed. Upon reinvestigation of the site, he took a sample from the backhoe hole. The sample covered about 1 square foot. The fire assay valued the free gold at a little over a cent per yard and \$3.15 per ton of concentrates after the removal of the free gold.

In 1962 Ball visited the Big Dick mill site. The structures on the site included a house or cabin with aluminum sheeting and several rooms and three small out buildings. There was no mill, mining machinery, or reduction work on the mill site. The only tools Ball noticed were an anvil and a small blacksmith forge. There was a trail leading from the mill site to the M&M claim but no road, which makes it impossible to move any substantial quantities of material from the lode claim down to the mill site a mile away. The trail is inadequate for pack animals. Material would have to be backpacked.

The hearing examiner declared the three claims null and void and appellants filed this appeal in which they contend that: (1) at the hearing appellants introduced evidence which established valuable mineral deposits; (2) contestant's sole witness did not possess the necessary qualifications to execute a proper examination of the mining claim nor to establish the cost of extracting and uncovering valuable minerals for them; and (3) the samples taken by the witness were insufficient.

We do not find that appellants have proved that a valuable mineral deposit exists on the claims within the meaning of the Mining Law (Act of May 10, 1872, R.S. § 2319; 30 U.S.C. 22, et seq.). Discovery of a valuable mineral deposit has been defined in the context of the prudent man test set forth in Castle v. Womble, 19 L.D. 455, 457 (1894):

[W]here 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, the requirements of the statute have been met. * * *

Appellants believe that gold exists on the claims and therefore a prudent man would be justified in expending labor and means to develop it. In support of this contention, they offered into evidence two assay reports from predecessors in interest which indicated the presence of gold on the property and which induced them to purchase the claims. (Contestees' Exhibits A and B ref. infra.)

Additional indicia of mineral values included an allegation that a neighbor had recovered nuggets of gold from the same stream which runs through the White Mule and unsubstantiated information that the M&M claim had been operated for gold successfully from 1937 to 1943.

Besides the information from other sources, Lester Barnwell has panned for gold on the Piru Creek which runs through the White Mule claim and has consistently recovered color. From 1946 to 1950 the gold was substantial enough to place in a vial. Barnwell's son, Bryan, has also panned for gold numerous times on both claims and has seen color or black sand that could indicate the presence of gold. Appellants rely on these personal experiences to bolster their contentions that valuable mineral deposits exist.

Appellants' burden, however, goes beyond the introduction of such evidence. Although the Government has the initial burden of establishing a prima facie case that the claim is invalid, the contestee must prove by a preponderance of evidence that the claim is valid. United States v. L. B. McGuire, 4 IBLA 307 (1972); United States v. A. P. Jones, 2 IBLA 140 (1971). The Government established a prima facie case when Ball testified that he examined the mining claims and found no workings or evidence of valuable mineral deposits. United States v. Herbert H. Mullin et al., 2 IBLA 133 (1971). Appellants, however, have failed to meet their burden of proving by a preponderance of the evidence that the claims are valid.

In presenting their case to prove that they have satisfied the prudent man criterion, appellants rely on their 1957 assay report of a sample from the M&M lode claim valuing the gold at \$35 per ton. (Exhibit A.) This sample was taken by a former owner, who was not present at the hearing. In determining whether the prudent man test has been met, the Secretary may consider whether there is a reasonable prospect that gold can be extracted, removed and marketed at a profit. United States v. Coleman, 390 U.S. 599 (1968); United States v. Silvertown Mining and Milling Company, 1 IBLA 15 (1970). Having examined the tunnel containing the vein from which appellants' sample was taken, Ball testified that the cost of operating the vein would exceed the \$35 per ton which that particular sample indicates could be recovered from it. Appellants offered no evidence to prove that Ball's calculations were erroneous, nor did they show that the existence of quantity and quality of gold in reference to the marketing conditions was such that a prudent man would expend substantial sums in expectation that a profitable mine might be developed. See Adams v. United States, 318 F.2d 861 (9th Cir. 1963); United States v. Howard S. McKenzie, 4 IBLA 97 (1971). In any event there is nothing that suggests that this sample is actually representative of recoverable values. Therefore, we must agree that a prudent man would not be justified in further expenditure of labor and means on the M&M lode and affirm the hearing examiner's conclusion that there has been no discovery of a valuable mineral within the limits of the claim.

The allegation, based on hearsay, that the M&M lode was operated successfully from 1937 to 1943 does not validate the claim, even if it were proven. 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); United States v. A. P. Jones, *supra*; United States v. R. W. Wingfield, A-30642 (February 17, 1967); United States v. Margherita Logomarcini, 60 I.D. 371, 373 (1949). Appellants have failed to make a showing that the claim is still valuable.

A similar situation existed in regard to the White Mule claim. Appellants offered a 1938 assay report which showed 3.14 ounces of gold per ton valued at \$109.90. (Exhibit B.) Lester Barnwell had no information as to who panned the material submitted to the laboratory or how the sample was taken. Therefore, we cannot determine whether the sample was representative. We cannot allow substantial weight to be given to the assay report, when evidence as to who took the sample assayed, where it was taken, and what procedures were followed is insufficient. See United States v. L. B. McGuire, *supra*; United States v. Wayne Winters, 2 IBLA 329, 342 (1971).

Lester Barnwell stated that there is gold on the property, yet offered no information as to the quantity and quality of gold which may exist and what the cost of exploiting the gold would be. He admitted that it may be difficult to extract. On the basis of the assay reports and his personal investigation, Ball, on redirect examination, again expressed the opinion that a prudent man would not be justified in expending further means and labor to develop the mine.

Nor does the report that a neighbor recovered nuggets of gold from the same stream which runs through appellants' claim prove that there is a valuable mineral deposit within appellants' claim. Even if this neighbor had proven the existence of a valuable deposit on her property, the inference of valuable minerals outside the limits of appellants' claim would not be sufficient to establish discovery within appellants' claim. Under the mining laws such an inference cannot be substituted for the actual exposure of the mineral deposit within the limits of the claim. United States v. Hines Gilbert Gold Mines Company, 1 IBLA 296 (1971); State of California v. E. O. Rodeffer, 75 I.D. 176 (1968). Appellant must actually expose a valuable mineral deposit physically within the claim. Henault Mining Company v. Tysk, 419 F.2d 766 (9th Cir. 1969), *cert. denied* 398 U.S. 950 (1970).

On the basis of the evidence presented, we conclude that appellants have failed to prove discovery of a valuable mineral within the limits of the White Mule claim.

Appellants' second contention, that the Government's expert witness was not qualified, is not supported by the record. Ball earned his Bachelor of Science Degree from the University of Nevada in mining engineering. In the course of his eight years' employment with the Forest Service he has examined and evaluated several hundred mining claims, a number of which have been located for gold. Prior to the Forest Service Ball was employed by Victorville Limerock Company and Kaiser Steel Company, among others. His work with these companies also involved examining property and determining what mineral values the properties offered. Thus, he necessarily considered all mineral exposures which might be present on them. We find that Ball's education and experience qualifies him as an expert witness and that such a witness is qualified to testify as to his opinion with respect to the prudent man rule. Udall v. Snyder, 405 F.2d 1179 (10th Cir. 1968).

Appellants' third contention, that the samples taken by Ball were insufficient, is without merit. Ball investigated the M&M lode claim on two occasions and took a total of six samples. He examined the White Mule claim twice and took two samples. One of these, the backhoe hole sample, was taken at the request of Lester Barnwell. This was the only place which Barnwell had advised Ball to sample.

The mining claimant is charged with the duty of keeping discovery points available for the inspection by the Government's mineral examiner, and the examiner has no duty to rehabilitate discovery points or explore beyond the current workings of the mineral claimant. United States v. Herbert H. Mullin, *supra*; United States v. Bryan Gould, A-30990 (May 7, 1969). Since Barnwell had not pointed out any other possibilities, Ball used his own judgment in taking samples. From the number of samples and their location there is no indication that Ball's samplings were not fair and representative. The claimant made no persuasive positive showing which would refute the Government's case.

As for the Big Dick mill site, the only equipment Barnwell mentioned was a damaged homemade rolling mill that has not been used for four years, and which, when operative, was only used to crush about 100 pounds of material. Barnwell admitted that he has not recovered anything beyond gold colors through the milling operation. Barnwell does not have any other claims in the area from which this mill site

can be used. The mill site law, 30 U.S.C. § 42 (1970), authorizes a proprietor of a valid mining claim to locate a mill site for mining or milling purposes in connection with his claim. An additional provision authorizes the location of a mill site for a quartz mill or reduction works not connected with a particular mining claim. Since the appellants have neither a valid mining claim nor a quartz mill nor reduction works, we conclude that the Big Dick mill site claim is null and void.

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 hearing examiner is affirmed.

Edward W. Stuebing, Member

We concur:

Joseph W. Goss, Member

Joan B. Thompson, Member

