UNITED STATES
v.
NETTIE G. HARPER

IBLA 70-640 Decided December 12, 1972

Appeal from decision by L. K. Luoma, Administrative Law Judge, holding mining claims null and void and rejecting patent application (Arizona 035963).

Affirmed.

Mineral Lands: Generally -- Mineral Lands: Determination of Character of -- Mining Claims: Mineral Lands

Where in a proceeding under the section 5 of the Surface Resources Act, 30 U.S.C. § 613 (1970), the Government has accepted a verified statement by a mining claimant alleging surface rights to the land within his claims, such acceptance being conditioned upon a stipulation which expressly provides that "nothing herein shall be construed as precluding the United States from contesting the validity of these claims by subsequent proceedings," and where no mention is made of the mineral character of the claims, no determination has been made by the Government that the land is mineral in character.

Mineral Lands: Generally -- Mineral Lands: Determination of Character of -- Mining Claims: Generally -- Mining Claims: Mineral Lands

The issuance of a final certificate to a mining claim does not constitute a determination that land is mineral in character.

Mining Claims: Generally -- Mining Claims: Contests -- Mining Claims: Determination of Validity -- Rules of Practice: Government Contests -- Surface Resources Act: Generally -- Surface Resources Act: Applicability

The issuance of a final certificate to a mining claim, or a determination of the status of the claim under section 5 of the Surface Resources Act, 30 U.S.C. § 613 (1970), does

not preclude the Department from challenging the validity of the claim in a subsequent proceeding on any ground it may deem appropriate, since until the moment patent is issued the Department retains jurisdiction, after adequate notice and upon proper opportunity for hearing, to adjudicate the validity of mining claims on the public lands.

Mineral Lands: Generally -- Mineral Lands: Determination of Character of -- Mining Claims: Mineral Lands

In order that land be considered mineral in character, as contemplated by the mining laws, the known conditions must be such as reasonably to engender the belief that the land contains mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end. It is not necessary to show that the land contains a valid mining claim; the character of land as mineral may be determined through geologic inference, by the presence of minerals in substantial quantities on adjacent lands, or by other external conditions.

Administrative Procedure: Generally -- Administrative Procedure: Decisions -- Administrative Procedure: Hearing Examiners -- Mining Claims: Contests -- Rules of Practice: Generally -- Rules of Practice: Government Contests

The provisions of section 8(c) of the Administrative Procedure Act, 5 U.S.C. § 557(c) (1970), prescribing findings and conclusions on all "the material issues of fact, law, or discretion presented on the record," with "the appropriate rule, order, sanction, relief, or denial thereof," and the regulations governing contest proceedings involving mining claims, 43 CFR 4.425-8(b) (1972), do not require that an Administrative Law Judge make a ruling on a charge in a contest complaint that land is nonmineral in character, where he rules on another issue which is dispositive of the controversy.

Mining Claims: Discovery: Marketability

The test of marketability, i.e., whether the minerals for which discovery is claimed are present in such quantity and are of such quality that they can be extracted, removed, and marketed at a profit, applies also to minerals of intrinsic value. A locator need not produce proof positive that the deposit on his claim could support a profitable mining operation, but the nucleus of value which sustains a discovery must be such that with actual mining operations under proper management a profitable venture may reasonably be expected to result.

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, claimant then has the burden of showing with a preponderance of the evidence that a discovery has been made.

Mining Claims: Generally -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally -- Mining Claims: Discovery: Marketability

> The prudent man test is not satisfied when a mining claimant asserts that she is willing to accept a meager income from the claims which, though inadequate to support a commercial mining venture, would, in her opinion, satisfy the needs of a small miner on a "do it yourself" basis. The test is objective, not subjective.

APPEARANCES: Edward E. Williams, Esq., Phoenix, Arizona, for appellant; Richard L. Fowler, Regional Attorney in Charge, U.S. Department of Agriculture, Albuquerque, New Mexico, for appellee.

OPINION BY MR. FISHMAN

Mrs. Nettie G. Harper has appealed to the Director, Bureau of Land Management, 1/ from a decision dated May 21, 1970, by an Administrative Law Judge 2/ which held the Morning Starr Nos. 1, 2, and 3 lode mining claims, situated in the W 1/2, sec. 36, T. 13 N., R 2 W., G.S.R.M. (within the Prescott National Forest), Yavapai County, Arizona, to be invalid for lack of a valuable mineral.

The record shows that the claims were originally located on July 1, 1950, by appellant's brother, J. M. Gallagher, and by Charles L. Felippi, with each owning a one-half interest. After Mr. Gallagher's death in 1955 appellant acquired her interest, and

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1/ The Secretary of the Interior, in the exercise of his supervisory authority, transferred jurisdiction over all appeals pending before the Director, Bureau of Land Management, to the Board of Land Appeals, effective July 1, 1970. Cir. 2273, 35 F. R. 10009, 10012.

2/ The title "Hearing Examiner" has been superseded by "Administrative Law Judge." 37 F. R. 16787 (August 19, 1972).

in 1966 purchased the remaining interest from Mr. Felippi. On June 7, 1966, Mrs. Harper filed an application for mineral patent, stating that the claims were chiefly valuable for gold and silver. The mineral survey of the claims was approved on March 13, 1968. A final certificate was issued by the Arizona Land Office of the Bureau of Land Management on August 5, 1968, at which time appellant was advised that "[a]pproval for patenting will be withheld pending mineral examination and a favorable recommendation by the U.S. Forest Service."

On February 14, 1969, at the request of the Forest Service, the Arizona Land Office filed a contest complaint against the claims, charging that:

> a. A valid mineral discovery as required by the mining laws of the United States does not exist within the limits of the Morning Starr #'s 1, 2, and 3 lode claims.
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> b. The land embraced within the Morning Starr #'s 1, 2, and 3 lode mining claims is nonmineral in character within the meaning of the mining laws.
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> c. The claims are not properly marked on the ground.

A hearing was held on these charges on September 26, 1969, in Phoenix, Arizona. At the hearing, Judge Luoma dismissed charge (c) on the ground that approval of the mineral survey constituted a determination by the Government that the claims were properly marked. After consideration of the evidence offered with respect to the remaining charges, the Judge in his decision of May 21, 1970, sustained charge (a), concluding that a valid discovery had not been shown to exist within any of the claims. In view of the finding of a lack of discovery on the claims, the Judge held that it was unnecessary to determine whether the land involved was nonmineral in character.

In her appeal, filed July 20, 1970, Mrs. Harper contends that the failure to rule on the question of the mineral character of the land within the claims was error, since it was, in her view, incumbent on the Judge to render a finding on each of the charges raised in the complaint. She asserts that the value of the land for minerals is attested to by the evidence of past mineral production on the claims in question and on adjacent claims, as set forth in the mineral report prepared by the Government's mineral

examiner and introduced in evidence at the hearing. Appellant further alleges that the Government, having on two separate occasions determined that the land was mineral in character, is, in effect, estopped from further trial of this issue. In support of this contention she relies on an Arizona Land Office decision dated March 16, 1959 (Contestee's Exh. F), terminating proceedings brought under the Act of July 23, 1955 (Surface Resources Act), § 5, 30 U.S.C. § 613 (1970), 3/ and accepting a verified statement filed by her predecessor in interest, Charles L. Felippi, which claimed surface rights in the land in conflict with the limitations and restrictions specified by the Act and waived a hearing. She also relies on the final certificate issued August 5, 1968.

Appellant's argument that the Government is precluded by past decisions from questioning the mineral character of the land is without merit. The decision accepting Mr. Felippi's verified statement in accordance with a stipulation filed by the Forest Service expressly provides that "nothing herein contained shall be construed as precluding the United States from contesting the validity of the claims by subsequent proceedings." No mention is made of the mineral character of the land, and no limitation is placed on the charges which the Government may allege in contesting the claims in the future. A charge made in a subsequent proceeding that the land included within the claims is nonmineral in character would

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3/ Section 4 of the Act (30 U.S.C. § 612 (1970)) provides that any mining claim located on public land after July 23, 1955, "shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto," and reserves the right to 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)," as well as to use the land for access to adjacent land.

Under section 5 a procedure is established to determine whether an unpatented mining claim is subject to the limitations and restrictions imposed by the Act. In order to preserve his rights to the management and disposition of the surface resources of an unpatented mining claim alleged to have been located prior to July 23, 1955, a claimant must file within a prescribed time a verified statement setting forth the date of location and other pertinent information with respect to the claim. A hearing is then held or the issues may be resolved by acceptance of the verified statement to the extent stipulated by the parties.

be in itself sufficient to contest the claims, since a valid mining claim cannot be located on nonmineral land. See United States v. Iron Silver Mining Co., 128 U.S. 673, 683 (1888). In any event, it is clear that the Department may inquire into all matters vital to the validity of a mining claim at any time prior to the passage of title, i.e., the issuance of patent. United States v. Ideal Cement Co., Inc., 5 IBLA 235, 79 I.D. 117 (1972).

The same reasoning applies to the effect of the final certificate. Issuance of a final certificate, which consists of a statement that the claimant has deposited the purchase money for his claim and has ostensibly complied with the procedural requirements of the mining laws, in no way bars the Government from further inquiry into the validity of a claim. Adams v. United States, 318 F.2d 861, 872 (9th Cir. 1963). The certificate contains no determination, express or implied, of the mineral character of the land, and conditions the issuance of patent upon a finding that "all is found regular and upon demonstration and verification of a valid discovery of a valuable mineral deposit and subject to the reservations, exceptions, and restrictions noted herein." In the instant case the document is headed by the words: "Subject to a field examination by the U.S. Government."

The issuance of a final certificate on a mineral entry does not impart that discovery of a valuable mineral has been made, a sine qua non for the issuance of patent, but rather only that the proper papers and fees have been submitted. See 43 CFR 3862.5-1. In contradistinction, a final certificate in a lands case imports that all requirements of the governing law have been satisfied. See 43 U.S.C. § 1165 (1970).

Even if the prior actions of the Department could be construed as having decided the issue of the character of the land, the Government would not be estopped from reopening the question and challenging the validity of the claims at any time prior to patent and on any ground which it might deem appropriate. The Department of the Interior is charged with the administration of the mining laws of the United States, and, until the moment patent is issued, retains jurisdiction, after adequate notice and opportunity for hearing, to adjudicate the validity of mining claims on the public lands. Cameron v. United States, 252 U.S. 450, 460 (1920); United States v. Ideal Cement Co., Inc., supra. See C. Henry Bunte, 41 L.D. 520, 521 (1913).

In order that land be considered mineral in character as contemplated by the mining laws the known conditions must be such as reasonably to engender the belief that the land contains mineral

deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end. Diamond Coal and Coke Co. v. United States, 233 U.S. 236, 239, 240 (1914); United States v. Southern Pacific Co., 251 U.S. 1, 13, 14 (1919). Although a finding that land is nonmineral in character is sufficient to invalidate a mining claim, the reverse is not true. To establish the mineral character of land it is not necessary to show that the land contains a valid claim, whereas to prove the validity of a claim it must be shown that a discovery has been made of a valuable mineral deposit physically exposed within the limits of the claim. The character of a tract of land as mineral may be inferred through geological inference, by the presence of minerals in substantial quantities on adjacent lands, or by other external conditions. See United States v. Diamond Coal and Coke Co., supra at 249; Southern Pacific Co., 71 I.D. 224, 233 (1964); United States v. U.S. Borax Co., 58 I.D. 426, 433 (1943).

The Administrative Procedure Act does not require a finding on all charges preferred by the Government in a contest complaint. It is sufficient to invalidate a claim if any charge, going to the vitality of the claim, is established. Section 8(c) of the Act, 5 U.S.C. § 557(c) (1970), provides:

> The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of --
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> (A) findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and
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> (B) the appropriate rule, order sanction, relief, or denial thereof.
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> [Emphasis supplied]

The provisions of this section are specifically made applicable to decisions of Administrative Law Judges adjudicating mining contests by 43 CFR 4.452-8(b) (1972). In Re United Corp., 249 F.2d 168, 179 (3d Cir. 1957), the court said;

> The final order of an administrative agency must include findings and conclusions upon all material issues presented on the record. The reasons or basis for the decision must also be clearly enunciated. This

> principle is well established in the law and was expressly codified in Section 8(b) [now 8(c)] of the Administrative Procedure Act. [Footnote omitted.] Judicial interpretation of this requirement is legion.
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> [Emphasis supplied]

The Department, although not adverting to the Administrative Procedure Act, put the term "material issues" into focus in State of California v. E. O. Rodeffer, 75 I.D. 176, 178, 179 (1968) as follows:

> The issues of discovery and of the mineral or nonmineral character of lands have been before the Department for consideration in a wide variety of situations but rarely, if at all, in the posture which they assume in this instance. Although it has been customary in contests of mining claims for the contestants to make the dual charges that no discovery has been made and that the lands embraced in mining claims are nonmineral in character, a finding on one of the issues is normally dispositive of a controversy and makes it unnecessary to make a finding on the other issue. The reason for this is fairly obvious. Proof of the discovery of a valuable mineral deposit is concurrent proof of the mineral character of the land on which the discovery is made, and, where a discovery is shown, there is no occasion to make a separate finding with respect to the mineral character of the land on which the discovery has been made. On the other hand, a finding that there has not been a discovery normally renders moot the question of mineral character, since the discovery of a valuable mineral deposit is indispensable to the validity of any mining claim and a finding that land in a mining claim is mineral in character can not validate the claim in the absence of a showing of discovery. A finding that land is not mineral in character, of course, is necessarily a finding that a discovery has not been made upon that land.
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> For these reasons, the Bureau having determined that the mining claims in question are invalid for lack of discovery, it is not essential to determine whether the lands in the claims are mineral in character so far as the validity of the claims is concerned.

In view of the foregoing, we deem it unnecessary to rule on the issue of the mineral character of the land. We proceed to the issue of discovery.

Mrs. Harper challenges the findings of lack of discovery on the ground that the Judge misinterpreted the prudent man test by requiring a demonstration of commercial value to perfect a discovery of a gold or silver lode mining claim, and thus erroneously imposed a standard more rigid than had been sanctioned by past decisions of the courts and of the Department. Disputing testimony of the Government mineral examiner to the effect that the cost of mining and marketing the minerals from the claims would exceed the assayed value of the ore, and would amount to $30 to $35 per ton, appellant insists that an individual small mine operator could reduce this figure by two-thirds or more, on a 'do it yourself' basis. She argues that a profit of as low as $5 to $10 a day would constitute a substantial increment to the income of a person living on retirement benefits, and would be sufficient to satisfy the amount required under a test of profitability as applied to such person.

In order that patent may issue to public land based on a lode mining claim, a discovery and location of a vein or lode containing a valuable mineral deposit must have been made within the limits of the claim. 30 U.S.C. §§ 22, 23, 29 (1970). The essential elements necessary to the discovery of a valuable mineral deposit were defined by the Department in Castle v. Womble, 19 L.D. 455 (1894), in these words:

> * * * [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 * * *. Id. at 457.

Application of this test was specifically approved by the Supreme Court in Chrisman v. Miller, 197 U.S. 313 (1905); Cameron v. United States, supra; Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); and United States v. Coleman, 390 U.S. 599 (1968).

In his decision the Judge, paraphrasing the prudent man test, stated at page 6:

> Whether a discovery has been perfected depends upon a finding of a mineral deposit of such quality and quantity 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 paying mine. * * *

[Emphasis supplied]

It is to the substitution of the word "paying" for "valuable" in the phrase "in developing a valuable mine" that appellant objects. She construes "paying", as used by the Judge, to mean "commercially valuable", and insists that the Department has never demanded a showing of commercial value as a prerequisite to a discovery of intrinsically valuable minerals, such as gold and silver, in a lode mining claim.

The courts have traditionally interpreted the word "valuable" as applied to a mine in the prudent man test to mean "valuable in economic sense." In Converse v. Udall, 399 F.2d 616, 622 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969), the court pointed out:

> * * * It [the prudent man test], too, concerns itself with whether minerals are "valuable in an economic sense." And that is the way the courts have long interpreted it. That is what Mr. Justice Field was writing about. So was Mr. Justice Brewer in Chrisman v. Miller, supra, (197 U.S. at 322-323, 25 S. Ct. 468). So was Mr. Justice Van Devanter in Cole v. Ralph, supra, (252 U.S. at 457, 40 S. Ct. 410). So were Judge Gilbert in Charlton v. Kelly, supra, (156 F.2d at 436-437), Judge Hamley in Adams v. United States, supra, (318 F.2d at 870), and Judge Madden in Mulhern v. Hammitt, (9 Cir. 1964, 326 F.2d 896), all speaking for this court.

In deciding what constitutes value in an economic sense the Department has developed the criterion of marketability, i.e., the test of whether the minerals for which discovery is claimed are present in such quantity and are of such quality that they can be extracted, removed, and marketed at a profit. Layman, et al., v. Ellis, 52 I.D. 714 (1929); Solicitor's Opinion, 54 I.D. 294, 296 (1933). When discovery is claimed for nonmetallic minerals of widespread occurrence, this test is applied strictly, and claimant is required to make a positive showing of present marketability by demonstrating accessibility of the deposit, bona fides in development, proximity to market, and existence of present demand for the minerals. Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959); Solicitor's Opinion, supra at 296. Where, on the other hand, minerals of intrinsic value, such as gold and silver, are involved, the test is applied with considerably less rigor in the sense that

the saleability of the mineral may be assumed. A locator of a claim containing a precious mineral need not produce proof positive that the deposit could support a profitable mining operation, but "the nucleus of value which sustains a discovery must be such that with actual mining operations under proper management a profitable venture may reasonably be expected to result." United States v. Santiam Copper Mines, Inc., A-28072 (June 27, 1960), quoted with approval in Converse v. Udall, supra at 623.

The term "paying mine" employed by the Judge, imposes no greater requirement than a showing of a reasonable prospect of developing a "valuable" mine.

Moreover, Mrs. Harper's suggestion that in her particular circumstances the mining claim would be a paying proposition ignores the concept that a determination of validity cannot rest upon subjective considerations, but only upon objective criteria. See United States v. Neil Stewart, 5 IBLA 39, 79 I.D. 27, 34 (1972).

We find that the Judge correctly stated the test of discovery as applied to a deposit of intrinsically valuable minerals. When used, as in this instance, in conjunction with the phrase "with a reasonable prospect of success," the words "paying mine" can in no sense be construed as imposing a requirement that a claimant demonstrate with certainty that a profitable mining venture will result. Indeed, even as applied to minerals of widespread occurrence, the prudent man test does not require actual successful exploitation of a mine. Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971).

Where contest proceedings have been instituted challenging the validity of a claim, the Government need only establish a prima facie case that no discovery of a valuable mineral deposit has been made within the limits of the claim; the burden of proof then falls upon claimant to overcome the Government's prima facie case by showing through a preponderance of the evidence that the requisite discovery has been made and the claims are therefore valid. Foster v. Seaton, supra at 838; United States v. Wayne Winters d/b/a/ Piedras del Sol Mining Co., 78 I.D. 193, 197 (1971). The basic issue in the case before us, accordingly, is whether the Government has established a prima facie case that a mineral deposit does not exist within the limits of the Morning Starr Nos. 1, 2, and 3 claims which would justify a person of ordinary prudence in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine; and, if so, whether appellant, through a preponderance of the evidence, has overcome the Government's prima facie case and substantiated a discovery. From our review of the record we conclude that the testimony and other

evidence introduced by the Government have established a prima facie case of lack of discovery which appellant has failed to rebut with respect to all the claims in the case at bar.

Mr. Alexander sampled the claims for the Government on September 25 and 26, and October 16, 1968. Thirteen samples were taken under his direction; eight from Morning Starr No. 1, three from Morning Starr No. 2, and two from Morning Starr No. 3. Seven of the samples from Morning Starr No. 1 were extracted from a 510-foot adit which runs along the center of the claim; the eighth came from a 60-foot caved cut. On September 11, 1969, Mr. Alexander revisited the claims but took no further samples after he found that the adit had been locked and no new excavations had been made (Contestant's Ex. 2 at 2, 4-8; Tr. 42-45).

The total mineral values of the Government samples ranged from $.66 (No. 2693 from Morning Starr No. 2 and No. 2695 from Morning Starr No. 3) to $19.47 per ton (No. 2685 from Morning Starr No. 1).

Appellant submitted four assay reports, dated June 16, 1958, May 18, 1960, November 9, 1960, and September 13, 1963, on seven samples, all of them extracted by Mr. Felippi in the adit on Morning Starr No. 1 (Contestee's Exs. A, B, C, D; Tr. 69-72). The values ranged from $3.88 to $150.96 per ton.

In a contest proceeding involving more than one claim the test of discovery is applied to each claim individually, since "[a] discovery without the limits of the claim, no matter what its proximity, does not suffice." Waskey v. Hammer, 223 U.S. 85, 91 (1912). Accordingly, we shall evaluate the evidence as it applies separately to each claim.

Of the three claims, Morning Starr No. 1, where a total of fifteen samples were taken by both the Government and Mr. Felippi from the adit, was the most extensively sampled. The assays of these samples show wide variations in the degree of mineralization of the claim. One sample assayed as low as $.98 per ton (Government sample No. 2691). Contrasted with this were the three highest value samples from any of the claims, two of Mr. Felippi's, at $150.96 and $30.19, per ton, respectively, and the Government's at $19.47. Mr. Alexander testified that the cost of extraction and marketing of the minerals from the claims would be about $30 to $35 per ton, including mining, hauling, loading, and processing, with the cost of labor alone at $8 (Tr. 57). Although his statement was lacking in specificity and was largely the result of conjecture,

(Tr. 58), it was nonetheless the judgment of a mining engineer, assertedly based upon his knowledge of the character and accessibility of the claims and his familiarity with the general conditions in the area. As such, when coupled with reports of assays of Government samples none of which showed a value as high as $30, this evidence was sufficient to establish a prima facie case of no discovery, and to shift the burden of proof to appellant. United States v. Wayne Winters d/b/a Piedras del Sol Mining Co., supra at 195.

Appellant attempts to counter the Government's case with the unfounded surmise, first advanced in her brief in the current appeal, that the costs of mining and marketing can be reduced to $5 to $15 per ton. She maintains that there is a considerable profit to be made, even on a $30 to $35 per ton mining and marketing cost, where the ore assays out to a value of $126 per ton. She insists that in any event the mineralization within the claims is sufficient to enable her to derive an income which, although perhaps inadequate to support a commercial mining venture, would nonetheless satisfy the needs of a small miner operating on a "do it yourself" basis.

Appellant attempts to transform the prudent man test into a standard flexible enough to fit the circumstances of an individual mining claimant. As the Judge pointed out, the prudent man test is objective, not subjective. Assuming, arguendo, that by reducing the costs of extraction and marketing to a minimum appellant should be able to realize an income of a few dollars a day from the claims, her willingness to expend her time and money for a meager return does not warrant the conclusion that a person of ordinary prudence would be justified in so doing. As the Supreme Court pointed out in Chrisman v. Miller, supra:

> Some cases have held that a mere willingness on the part of the locator to further expend his labor and means was a fair criterion. In respect to this Lindley on Mines (1st ed.) sec. 336, says:
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> > But it would seem that the question should not be left to the arbitrary will of the locator. Willingness, unless evidenced by actual exploitation, would be a mere mental state which could not be satisfactorily proved. The facts which are within the observation of the discoverer, and which induce him to locate, should be such as would justify a

> man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property. [Emphasis in original]. Id. at 322, 323.

The estimate of $30 to $35 per ton made by the Government mineral examiner was the only evidence offered with respect to the extraction and marketing costs of the minerals in the claims.

While it is true that some of the samples taken from Morning Starr No. 1 showed substantial values, no evidence was adduced to indicate the extent of the ore bodies. As was said in Northern Pacific Ry. Co. v. United States, 1 F.2d 53, 57 (D.C. Mont., 1924):

> Samples and assays without data of extent in at least two, if not three, dimensions of ore bodies, mean little or less than nothing of value, and are well calculated to deceive.

Of the fifteen samples taken from Morning Starr No. 1, only three samples showed substantial values, and only two met the presumed cost of beneficiation. Since there was no evidence at all as to the extent of the ore body, or the circumstances, a finding by the Judge of no discovery of a valuable mineral deposit was proper. United States v. Utah Uranium Coalition Mines Co., Contest 7815 (August 21, 1957). The locations in the tunnel, from which the high value samples were taken, are such as not to warrant a geological inference of a continuous ore body. See United States v. Jesse W. Crawford, A-30820 (January 29, 1968).

Three samples were obtained from Morning Starr No. 2 and two from Morning Starr No. 3, all by the Government. The mineral values of all of these samples were extremely low. The highest values found were $1.24 per ton (Sample No. 2690) in Morning Starr No. 2, and $1.08 (Sample No. 2694) in Morning Starr No. 3. We find these claims to be invalid.

Therefore, 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.

Frederick Fishman, Member

We concur:

Martin Ritvo, Member

Newton Frishberg, Chairman.