

UNITED STATES  
v.  
ALARCO (formerly MENA MINING and EXPLORATION CO., INC.)

IBLA 71-215

Decided January 10, 1973

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., declaring invalid the Mary Alice No. 3 lode mining claim for lack of discovery and finding the lands embraced by the claim to be nonmineral in character.

Affirmed.

1. Mining Claims: Contests—Mining Claims: Determination of Validity

To establish a prima facie case and to meet its burden of proof in a mining contest, the Government is required only to show by competent evidence that there has been no discovery of a valuable mineral deposit.

2. Administrative Procedure: Burden of Proof—Mining Claims: Contests—Mining Claims: Discovery: Generally—Rules of Practice: Government Contests

In a Government mining contest where the contestant has made a prima facie showing of a lack of discovery the burden of producing evidence of the existence of a valuable mineral deposit sufficient to support discovery is upon the claimants and where no evidence is introduced it is proper to declare the claim null and void.

APPEARANCES: Ernest E. Tabor, a co-owner of ALARCO, for contestee; Richard L. Fowler, Esq., Office of the General Counsel, United States Department of Agriculture, Albuquerque, New Mexico, for the Government.

OPINION BY MR. HENRIQUES

A contest was initiated at the request of the Forest Service, United States Department of Agriculture, seeking to determine the validity of the Mary Alice No. 3 lode mining claim situated in sec. 7, T. 19 N., R. 1 E., N.M.P.M. A hearing was held on October 14, 1970, at which time the contestee did not appear. Prior to the commence-

ment of the hearing, the attorneys for the contestant delivered to the Administrative Law Judge <sup>1/</sup> a document from Ernest E. Tabor, on behalf of the contestee, which he had received the day before entitled "Motion Entered for Record." In said document various allegations were made, including the statement that:

Also as the date is not convenient for contestee to attend, it should be obvious that this case will be docketed in Federal Court, regardless of the ruling on this motion. If I may re-iterate, the date stated is not convenient or possible for contestee's to attend, living 1,000-2,000 miles distant.

The Judge, treating this portion as a motion for continuance, and the entire motion as a motion to dismiss, denied both. As regards to the motion for continuance, the Judge cited 43 CFR 1851.2-1(a) (now see 43 CFR 4.432) which requires that a motion for continuance be filed at least ten days prior to the hearing except in the case of "an extreme emergency \* \* \* which cannot have been anticipated and which justifies beyond question the granting of a postponement." The Judge noted that the postmark on the envelope was October 12, just two days prior to the hearing, and the distance from the hearing which was given as the ostensive reason for the continuance was scarcely a matter which was not immediately apparent from the notice of the hearing, receipt of which appellant had acknowledged on August 8, 1970, more than two months earlier. Thus, the distance could not be the predicate for a finding of "an extreme emergency." We agree. As regards to the motion to dismiss, the Judge found that the allegations were merely self-serving assertions unsupported by any evidence. Once again, we concur with denial of the motion.

At the hearing Harve I. Ashby, a government mineral examiner, testified that he had inspected the mining claim on two different occasions. His report, written subsequent to his examinations, was admitted into evidence. In this report he declared that "\* \* \* it is the writer's opinion that a valid discovery of mineral, as defined by the mining law, does not exist within the boundaries of said claim."

The requirements for a discovery under the U.S. Mining Laws, 30 U.S.C. § 23 (1970), are now settled beyond peradventure. A discovery exists "[W]here minerals have been found and the evidence is

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<sup>1/</sup> The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 5787 (August 19, 1972).

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 \* \* \*." Castle v. Womble, 19 L.D. 455, 457 (1894); United States v. Coleman, 390 U.S. 599 (1968).

In the contest of an unpatented mining claim the Government has the burden of presenting a prima facie case that no discovery has been made; after such a presentation has been made the burden of proof devolves to the mineral claimant to prove, by a preponderance of evidence, the existence of a valuable mineral deposit sufficient to support a discovery. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Wayne Winters (d/b/a Piedras Del Sol Mining Company), 78 I.D. 193 (1970).

The Government's burden is met where there is "testimony \* \* \* by a government mineral examiner that he has examined the mining claims and the workings thereon and found no evidence of a valuable mineral deposit." United States v. Harold H. Benson, A-31061 (September 4, 1969); United States v. H. B. McGuire, 4 IBLA 307 (1972). Thus, the evidence presented in the instant case met the Government's burden. It thereupon became the duty of the contestee to prove that a discovery had been made and that the lands embraced within the claim were mineral in character. The nonappearance of the contestee at the hearing effectively precluded such a showing. Thus, the Judge had no option but to declare the mining claim null and void, and the Judge so held by decision dated February 10, 1972.

On March 5, 1972, contestee filed a notice of appeal. On March 22, 1972, appellant, through Ernest E. Tabor, submitted his reasons for this appeal. In this statement he alleged, inter alia, that:

"I, Ernest E. Tabor, along with three other dis-interested (non-owners) stood in the hall-way outside the hearing room in Albuquerque, from 9:45 a.m. to 10:45 a.m. If, however, there was a hearing in progress, the doors were locked and no one would let us gain admission. After waiting about half the stated time, I obtained one other witness, who was and is a Federal employee in the same building and asked them to witness my putting under the door a handwritten note to the effect that I was present at the appointed time. This is a total of five (5) witnesses. Testimony to these facts will be given under the supervision of a qualified operator of an eletropoloygraph (sic) machine, by all five persons present."

We note in passing that this claim totally contradicted the contention appellant pressed in his "Motion Entered for Record" that he would be unable to attend the meeting and therefore would need a continuance. In response to this new allegation, the attorney in charge of the case for the Government categorically denied that the entry to the hearing room had been in any way inhibited and declared that the door was not even closed, much less locked. Despite some misgivings, this Board, by order dated August 31, 1972, afforded the contestee 60 days during which time he could obtain the affidavits of those involved and submit them to this Board. This unusual step was taken in recognition of the fact that opportunity for participation in a hearing goes to the very heart of due process and the rationale involved in the Administrative Procedure Act. Contestee acknowledged receipt of the order on September 7, 1972. No supportive affidavits, indeed, no word of any kind has been forthcoming. Accordingly, we expressly find that appellant was not excluded from the hearing.

As regards the existence or nonexistence of a millsite, a point which loomed large in the contestee's brief, we merely reiterate what the Judge expressly noted: "If such a millsite exists, its validity is not in issue since no reference is made to it in the complaint. Therefore, no ruling is made."

The other contentions and allegations advanced by appellant we find to be wholly without merit. Furthermore, we note that in his statement of reasons on appeal, Tabor admitted that there has been no discovery. Thus, he declared:

If, however that it pleases the office of hearings and appeals, after we have had an opportunity to drill the remaining 15 acres of Mary Alice #3, then our geologist determines the remaining 15 acres of this claim shows no merit, then be assured no other monies will be spent thereon and we shall invalidate the claim, (15 acres) ourselves.

A discovery is not created by a hope or expectation that minerals occur in sufficient quantity so as to justify a person of ordinary prudence in the further expenditure of his labor and means but only by evidence of the fact that the minerals do exist in such quantities. The above quoted statement clearly indicates that no discovery within the meaning of the mining laws has been made.

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

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Douglas E. Henriques, Member

We concur.

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Edward W. Stuebing, Member

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Frederick Fishman, Member

