

UNITED STATES
v.
SIGNA LAUCH ET AL.

IBLA 71-201

Decided January 15, 1973

Appeal from decision by Administrative Law Judge Rudolph M. Steiner declaring certain mining claims null and void and holding other claims to be subject to Section 4 of the Act of July 23, 1955.

Affirmed in part; set aside in part and remanded.

Mining Claims: Discovery—Mining Claims: Surface Uses—Surface Resources Act: Generally

Where proceedings are brought by the Government under the Act of July 23, 1955, § 5, 30 U.S.C. 613 (1970), to determine the rights to surface resources on lands embraced within mining claims, it is incumbent upon the holder of a claim to demonstrate a discovery of a valuable mineral deposit within the claim as of the time of the Act, and also at the time of the hearing. Where a contest is initiated by the Government against a mining claim on the ground of lack of discovery, it is likewise incumbent upon the mining claimant to show a discovery of a valuable mineral deposit within the claim at the time of hearing.

APPEARANCES: Jack McSherry, Esq., of Cle Elum, Washington, for appellants;
Jim Kauble, Esq., and Arno Reifenberg, Esq., Office of the General Counsel, U.S. Department of Agriculture, Portland, Oregon, for appellee.

OPINION BY MR. FISHMAN

Signa Lauch has appealed from an adverse decision of an Administrative Law Judge, dated February 2, 1971. 1/

1/ A notice of appeal was timely filed on behalf of Signa Lauch. The other mining claimants, Archie L. Craig and W. W. Daffron did not file a notice of appeal, however, the statement of reasons filed by counsel for Signa Lauch indicates that the statement was filed on behalf of all contestees and mining claimants.

Six mining claims are involved in this proceeding. The validity of two of the claims, the Standby placer mining claim and the Little York lode mining claim, were contested. Proceedings were initiated against the remaining four claims, the Phoenix, Settler, and High Time lode mining claims and the Nugget placer mining claim pursuant to section 5 of the Act of July 23, 1955, 30 U.S.C. § 613 (1970), to determine the rights of the mining claimants to use and control the vegetative and other surface resources of the land embraced within the claims. All of the claims are situated in the Swauk area of the Wenatchee National Forest in Kittitas County, Washington. The cases were consolidated for hearing by stipulation of counsel.

The sole issue at the hearing was whether minerals had been found within the limits of any of the claims in sufficient quantity to constitute a valid discovery.

Based upon the evidence presented, the Judge reached the conclusion that no discovery of a valuable mineral deposit within the limits of any of the claims in issue had been demonstrated. He declared the Standby and Little York mining claims null and void; and determined the Phoenix, Settler, High Time, and Nugget mining claims to be subject to the limitations and restrictions of sec. 4 of the Surface Resources Act, 30 U.S.C. § 612 (1970).

Appellants' principal argument is that evidence adduced at the hearing established that a discovery had been made at one time by their predecessors in interest and that it was error to conclude that no valid discovery existed on any of the claims. We disagree.

Where proceedings are brought by the government under sec. 5 of the Act of July 23, 1955, to determine the rights to surface resources on lands embraced within mining claims, it is incumbent upon the holder of a claim to demonstrate a discovery of a valuable mineral deposit within the claim as of the time of the Act, and also at the time of the hearing. See United States v. A. Speckert, 75 I.D. 367 (1968); United States v. Independent Quick Silver Company, 72 I.D. 367 (1965); United States v. Ford M. Converse, 72 I.D. 141 (1965), aff'd, Converse v. Udall, 262 F. Supp. 583 (D. Ore. 1966), aff'd Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. den. 393 U.S. 1025 (1969). Where a contest is initiated by the Government against a mining claim, it is likewise incumbent upon the mining claimant to show a discovery of a valuable mineral deposit within the claim at the time of hearing. Mulkern v. Hammitt, 326 F.2d 896 (9th Cir. 1964).

Even if it were true, as appellants contend, that their predecessors in interest had made a valid discovery on the claims in issue, it was still incumbent upon them to demonstrate that a valid discovery existed on the claims at the time those claims were challenged by the Government in contest proceedings or in proceedings under the Surface Resources Act.

Appellants next argue that the evidence presented at the hearing established a valid discovery on each of the claims.

Milvoy Suchy, a qualified mining engineer employed by the Government, testified that he examined each of the claims (Tr. 7-8). On the Standby claim, Suchy panned areas where assessment work was being done but was "unable to find anything" (Tr. 18). He took samples of a material which was found on the Standby claim and sold by Albert Lauch ^{2/} as a plant food (Tr. 15). He analyzed the material and determined that it was a surface pumicite or volcanic ash (Tr. 15, 17). He testified that there was nothing unusual about the material and that its commercial value was not any more than surface soil (Tr. 17).

On the Nugget claim, Suchy cut samples at bedrock and near bedrock. He panned the samples but found nothing of value (Tr. 20). He testified that the Nugget claim had been placered extensively, and that it had a rock quarry or pit on it (Tr. 19) which he first observed in 1958, but never saw any evidence of removal of any stone (Tr. 20). He examined the stone and determined that it was a Swauk sandstone which is common in the area and of widespread occurrence (Tr. 21).

Based upon his examination of the Standby and Nugget placer claims, Suchy concluded that there had not been a discovery of a valuable mineral deposit demonstrated on either of the claims that would justify a prudent man in the further expenditure of his time and means to develop a paying mine.

Suchy examined the surface of the High Time, Settler, Little York, and Phoenix lode claims (Tr. 22, 53, 54).

^{2/} Albert E. Lauch owned the claims at the time proceedings under the Surface Resources Act were initiated, and at the time Suchy examined the claims. Upon his death his interests in the claims passed to Signa Lauch.

On the High Time claim he found mostly overburden and outcrops of sandstone and shale. He found nothing to sample on the surface and took no samples (Tr. 22). Suchy sampled within the High Time claim taking cuts of mostly calcite material in the Swauk and near the caved end of an adit; however, the assay result showed nothing of mineralogical significance (Tr. 22, Government Exhibits Nos. 2 and 11).

He sampled a selected piece of white quartz which was found in a building on the Little York claim and represented by Albert Lauch to be typical of the materials of a vein near a winze situated inside a tunnel on the Phoenix claim (Government Exhibit No. 3). The assay results of this sample indicated a value of \$21.18 of combined gold and silver. Suchy cut 15 other samples from the workings on the Little York and Phoenix claims. Twelve of the samples contained no gold or silver, and three samples contained insignificant values (Government Exhibits No. 12, 13, 3; Tr. 25-27). Suchy testified further that on the occasions he was in the mine to cut samples from the place where the white quartz was represented to have been taken, the winze was flooded and not accessible. He further testified that the winze was pumped out at one time, but that he was not notified, and so never made a mineral examination or determination of whether any quantity of the material remained in place on the claim (Tr. 26). Suchy also testified that there was evidence all along the Swauk of old workings and mined areas which indicated that at one time the area contained valuable deposits (Tr. 29). He further stated that a rich pocket on the Phoenix claim apparently had been mined out before Albert Lauch purchased the claims (Tr. 28).

Based upon his examination of the four lode claims, Suchy was of the opinion that there was no discovery of a valuable mineral deposit on any of the claims which would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine.

Once the Government established its prima facie case of no discovery, the burden of producing preponderating evidence of the existence of a valuable mineral deposit sufficient to support a discovery fell upon the claimant. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Independent Quick Silver Company, *supra*.

Appellants called several witnesses in an attempt to establish a valid discovery on each of the claims. S. D. Swensen, testified that he was familiar with the Phoenix and York claims. He identified an assay report (Appellant's Exhibit C-53) which indicated as follows:

Gold 119.80 oz per ton
Silver 518.00 oz per ton

Swensen testified that he was present at the time the samples were taken, and that "The ore was taken from the inside of the large, upper tunnel * * * and on the dump." (Tr. 113)

Swensen identified another assay report (Appellant's Exhibit C-54) which indicated as follows:

Sample No. 1 Gold 134.32 oz per ton
Silver 524.30 oz per ton

Sample No. 2 Gold 116.40 oz per ton
Silver ... 492.60 oz per ton

He testified that he was present when the samples were taken "inside the tunnel" (Tr. 114) and when asked on cross-examination what kind of samples they were, he stated that "They were rock samples taken from the tunnel which was largely rock except when you talk about the tailings." (Tr. 115).

Wallace G. Rutherford was called as a witness by appellants. He testified that he had been leasing the lode claims from Signa Lauch since 1961 (Tr. 93, 94); that considerable research and exploratory work were performed in the lower tunnel and on the upper portal of the lower tunnel (Tr. 93-94). He identified an assay report (Appellant's Exhibit C-52) which represented material taken from tailings or a pile of ore located on a dump (Tr. 108, 111). The tailings or loose ore was represented to be from the "upper tunnel." (Tr. 99). The report indicated the following values:

Gold 7.96 oz per ton
Silver 2.22 oz per ton

Rutherford also identified another assay report (Appellant's Exhibit C-56). He testified that the assay results were from ore samples in the area of the Johnson pocket (which was apparently on the Phoenix claim), the upper tunnel, the lower tunnel, and a drift above the lower tunnel (Tr. 101). The report itself identified two samples to be from the Little York claim, but did not specify from which claim the remaining eight samples were taken.

Rutherford also identified assay reports (Appellant's Exhibits C-59, C-60, C-61) which he stated represented values of samples

taken from the lower tunnel, the Johnson pocket, and the upper tunnel. However, it was not clear from the record which assay result was from which claim. He also identified an assay report (Appellant's Exhibit C-58), but again, it is not clear in the record from which claim the ore assayed had been taken.

Walter L. Gonnason was called on behalf of the appellants to testify as a consulting geologist (Tr. 117). He stated that he had been consulted by the appellants in 1966 (Tr. 119). He testified that he took samples in the Johnson cut area (Tr. 124) and stated that he took the samples numbered 1 and 2 on Appellant's Exhibit C-56 from the Johnson cut which was located on the Phoenix claim. (The exhibit, C-56, indicates samples No. 1 and 2 were taken from Little York.) Gonnason also stated that Exhibit C-58, Exhibit C-60, and Exhibit C-61, also admitted by the appellants, were from the Johnson cut (Tr. 124, 125).

Gonnason expressed an opinion that a reasonably prudent man would be justified in continuing to expend his time, efforts and means to develop the Little York, Phoenix, Settler, and High Time claims, with a reasonable expectation of being able to operate the claims at a profit (Tr. 128).

The evidence presented by the appellants was insufficient to refute the prima facie case established by the Government in connection with the Standby, Settler, High Time, and Nugget claims.

The Government's evidence with respect to these claims was not refuted by the appellants. Although Gonnason testified that a prudent man would be justified in developing the High Time and Settler claims, the assay results of the samples he took were limited to the Phoenix claim and perhaps the Little York claim. He admitted that he made no personal observation or examination of the Standby claim, and testified that his examination of the High Time claim only indicated that further exploration was warranted. The testimony of both Swensen and Rutherford, which was for the most part limited to the Little York and Phoenix claims, was insufficient to overcome the prima facie case established by the government with respect to the Standby, Settler, High Time, and Nugget claims.

The assay reports submitted by the appellants for the claims show unquestionably high values, but we cannot determine with any degree of certainty which values are associated with the Little York claim and which values are associated with the Phoenix claim. The difficulty arises from the fact that one of the tunnels referred to by the witnesses runs through both claims, and also because

a dump, situated on the Little York claim, contains unworked ore which came out of the tunnel.

The consulting geologist who testified on behalf of the appellants was of the opinion that the Little York and Phoenix claims could be operated at a profit. Mr. Rutherford, who was leasing the claims from Signa Lauch at the time of the hearing, testified that there was enough ore available on the claims at that time to operate a mine.

In view of this testimony, and the seemingly high values of the samples taken from these two claims, we feel that it would better serve the ends of justice to afford appellants a further opportunity to demonstrate the validity of these claims. A joint sampling is to be conducted upon order of the Judge and thereafter, based upon the data thereupon obtained, and such further evidence as he may deem appropriate, he shall forward to this office a recommended decision.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Judge is affirmed in connection with the Standby, Settler, High Time, and Nugget mining claims, set aside as to the Little York and Phoenix claims, and remanded for appropriate action in accordance with this opinion.

Frederick Fishman, Member

We concur.

Edward W. Stuebing, Member

Douglas E. Henriques, Member

