

UNITED STATES
V.
VERNON J. ZERWEKH

IBLA 72-207

Decided January 29, 1973

Appeal from decision (OR-6816) of Administrative Law Judge Graydon E. Holt declaring mining claims null and void for lack of a discovery.

Affirmed.

Mining Claims: Contests—Mining Claims: Hearings—Rules of Practice: Evidence—Rules of Practice: Government Contests—Rules of Practice: Witnesses

A mineral examiner witness for the Forest Service in a Government contest against a mining claim is not disqualified as a witness nor is his credibility discredited merely because he is an employee of that agency and has recommended that the contest be brought, and the contestee merely asserts, without substantiation, that he is being discriminated against.

Mining Claims: Discovery: Generally—Mining Claims: Discovery: Geologic Inference

To establish a discovery of a valuable mineral deposit within a mining claim there must be an actual physical exposure of ore within the boundaries of the claim in existence at the time of the validity determination; mere geologic inference as to the possible existence of mineral within the claim is not sufficient.

Mining Claims: Discovery: Generally—Rules of Practice: Evidence

The mere belief by a claimant that valuable pockets of wire gold exist within a mining claim is not sufficient to establish their existence; nor does a showing of some isolated, low, mineral values suffice to constitute a valuable mineral deposit where there is no adequate evidence indicating any continuity between the areas showing values to support a reasonable inference as to the extent of the mineral deposit.

Administrative Procedure: Burden of Proof--Mining Claims: Contests

Part of the ultimate burden of proof borne by a claimant in a mining claim validity determination is the burden to establish the existence and extent of the mineral deposit.

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

In the absence of proof of a present valuable mineral deposit within a claim, evidence of past production of ore from a mining claim does not establish that there is presently a discovery of such a deposit within the claim; worked-out claims do not qualify as valid claims.

APPEARANCES: Vernon J. Zerwekh, pro se.

OPINION BY MRS. THOMPSON

Vernon J. Zerwekh has appealed from a decision dated November 24, 1971, of Administrative Law Judge Graydon E. Holt. ^{1/} The appellant's Nellie lode mining claim in the Wenatchee National Forest, Kittitas County, Washington, was declared null and void for lack of a discovery of a valuable mineral deposit.

Pursuant to the request of the Forest Service, the Bureau of Land Management filed a mining claim contest complaint on September 1, 1970, in the Bureau's Oregon State Office. The Government's contest complaint charged that:

- a. Minerals have not been found within the limits of the Nellie lode mining claim in sufficient quantities to constitute a valid discovery.
- b. The land within the above-named lode mining claim is nonmineral in character.

After a timely answer was filed by the appellant denying the charges, a hearing was held March 17, 1971, in Ellensburg, Washington. Judge Holt presided. The Government was represented by Arno R. Reifenberg, Esq., of the Office of General Counsel, United States Department of Agriculture, Portland, Oregon, ^{2/} and the appellant appeared in his own behalf.

^{1/} The change of Mr. Holt's title from "Hearing Examiner" to "Administrative Law Judge" has been made pursuant to the order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

^{2/} An appearance has not been made by Government counsel in connection with this appeal.

Judge Holt, after discussing the Government's case, the history of the Nellie lode claim, and the appellant's evidence and contentions regarding the mineral law, found that there had not been a discovery of a valuable mineral deposit. He stated that the Department of the Interior and the courts interpret the mining law of 1872 (30 U.S.C. § 21 et seq. (1970)) to require an exposure of a deposit with a sufficient concentration of minerals to give it " * * * a present or prospective value in an economic or commercial sense." The Judge found that the Government established a prima facie case through the testimony of two mining engineers, who had examined the claim, sampled improvements, but had found no minerals of commercial significance. He also found the contestee's case went no further than to suggest evidence sufficient to induce further exploration along a fractured dike, which he found did not satisfy a discovery within the requirements of the mining law.

In his appeal appellant has not pointed to any error in the legal principles stated in the Judge's decision for establishing a discovery within a lode mining claim. Instead, he makes a number of assertions concerning the Judge's fact findings. He asserts that the Judge made statements "that do not meet the true facts". None of these alleged inaccuracies throw any light on the pertinent issues. For example, appellant states that he never said that he had driven more tunnels in the district than any other person, as stated by the Judge, but that he did say "that in the last 30 years I had driven more tunnels in the Swauk district than any man alive." Also, appellant denied saying that "an indication of mineral was enough". The Judge stated in this regard: "At the hearing Mr. Zerwekh contended that the discovery requirement was satisfied by the finding of an 'indication' of mineral." In response to a question as to how much ore "you have to have" if a minable quantity of ore is not required, appellant answered:

A discovery, meaning an indication, in fact one place in the law says you don't even have to have a mineral, it just says a vein. (Tr. 56)

Appellant contends that the Forest Service's mineral examiner has a conflict of interest "as he is in recreation and also mineral examiner for the Forest Service", and is discriminating against him. The only facts to support these assertions are that the mineral examiner is employed by the Forest Service, that he recommended that the claim be contested and the claimant's own assertions regarding actions taken against other claims he had located which do not substantiate any charge of discrimination. The facts in no way disqualify the witness. They do not establish any conflict of interest or bias on the part of the mineral examiner, nor do they in any way

discredit the mineral examiner's testimony of facts which substantiate his opinion that a valuable mineral deposit has not been exposed within the claim. Cf. Udall v. Snyder, 405 F. 2d 1179 (10th Cir. 1969), cert. denied, 396 U.S. 819 (1970), holding that Government employees were qualified to testify as experts. Even had appellant succeeded in destroying the credibility of the Forest Service's witness he would not be entitled to a finding that the claim was valid in the absence of positive evidence that it was. United States v. Wayne Winters d/b/a Piedras Del Sol Mining Company, 2 IBLA 329, 78 I.D. 193 (1971).

In a proceeding to determine the validity of a mining claim, at most, the Government need only establish a prima facie case of a lack of discovery of a valuable mineral deposit within the claim. After such a presentation, the burden of presenting a preponderance of evidence to establish a discovery is upon the mining claimant. Id.; Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959).

In our review of the evidence in the record, we concur with the Judge's finding that the Government adequately established a prima facie case of lack of discovery. Appellant contends that assays have not been made of all minerals, such as for platinum. The Forest Service mineral examiner did submit assays (Exhibits 4 and 5) for gold, silver, lead, copper, zinc, and platinum, but there was no showing of mineralization for any of these minerals except a trace of gold, 0.6 ounces per ton of silver and 0.006 percent copper at a value then of \$1.10 per ton. The mineral examiner indicated that material appellant said was platinum had been tested and was shown to be elemental iron (Tr. 45-6). Appellant submitted no assay reports showing platinum within the claim. Other than a report of 0.02 percent copper (Ex. E), and spectographic analysis giving estimated percentages of elements found (Exs. C-1 and D-1), his assay reports showed only a value for silver of \$0.262 (Ex. C-1) and \$0.2022 (Ex. D-2), and of gold of \$0.20525 (Ex. D-2). There is nothing in the record to substantiate any finding that these insubstantial mineral values show the existence of a valuable mineral deposit.

Nevertheless, appellant contends that the Judge did not give weight to the following facts: that the surface ore in the district had been leached, that wire gold is found mostly in very rich pockets, that his claim is in the formation where most of the very rich pockets had been extracted, and that gold was found in the past and produced from the claim. The Judge's ultimate finding was based upon all of the evidence presented to him. Although he did not mention certain facts this does not establish that he failed to consider them.

Appellant's assertions as to the geological character of the area and the evidence relating thereto do not demonstrate a discovery. An actual physical exposure of ore within the boundaries of a claim in existence at the time of the validity determination must be established to prove discovery of a valuable mineral deposit. United States v. Bess May Lutey, et al., 76 I.D. 37 (1969), aff'd, Bess May Lutey v. Dept of Agriculture, Civil No. 1817 (D. Mont., filed Dec. 10, 1970); United States v. Calla Mortenson, et al., 7 IBLA 123, 124 (1972). Even if the facts relied on by appellant were sufficient to support a geologic inference as to the possible existence of mineral within the claim, this would be insufficient to establish a discovery as geological inference alone does not prove a discovery of a valuable mineral deposit under the mining laws. United States v. Hines Gilbert Gold Mines Company, 1 IBLA 296, 298 (1971). The surface leaching of the minerals has no significance without proof of the existence of minerals at depth. United States v. Gunsight Mining Company, 5 IBLA 62, 67 (1972). Likewise, the mere belief by the claimant that valuable pockets of wire gold exist within the claim is not sufficient to establish their existence. United States v. Lem A. and Elizabeth D. Houston, 66 I.D. 161, 166 (1959). Even a showing of some isolated values is not sufficient to establish the existence of a quantity of ore sufficient to constitute a valuable mineral deposit where there is not adequate evidence indicating any continuity between the areas to support a reasonable inference as to the extent of the mineral deposit. Cf. United States v. Raymond H. Taylor, A-30776 (October 6, 1967); United States v. Consolidated Mines and Smelting Co., Ltd., et al., A-30760 (September 19, 1967).

The burden to establish the existence and extent of the mineral deposit is not upon the Government, as appellant seems to suggest, but is part of the ultimate burden of proof borne by the mining claimant under Foster v. Seaton, supra. See Henault Mining Co. v. Tysk, 419 F. 2d 766 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970).

As to appellant's statements concerning past production of minerals from the claim, the evidence in the record on this point is vague and general. It is evident that appellant has not produced ore from the claim and that if ore was produced it was many years ago. Even if actual mining operations were profitably conducted on the claim in the past, such evidence by itself would not prove the existence of a present discovery, which is essential. It is well established that a locator who does not carry his mining claim to patent takes the risk that his claim will no longer support the issuance of a patent and will lose its validity because of changes in economic circumstances. United States v. Estate of Alvis F. Denison, 76 I.D. 233 (1969). Worked-out claims do not qualify

as valid claims as there is no longer a valuable mineral deposit within them. Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336 (1963); Adams v. United States, 318 F. 2d 861, 871 (9th cir. 1963). Therefore, appellant's contention that a discovery has been proven because of past production from the claim is without merit in the absence of proof of the existence of a present valuable mineral deposit within the claim.

To conclude, our review of the record confirms the Judge's findings in this case. There is simply no basis for any finding of a discovery of a valuable mineral deposit within the claim as required under the mining law.

Accordingly, 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.

Joan B. Thompson, Member

We concur:

Joseph W. Goss, Member

Anne Poindexter Lewis, Member

