

UNITED STATES
v.
H. A. TAYLOR ET AL.

IBLA 73-116

Decided June 7, 1973

Appeal from a decision of Administrative Law Judge Graydon E. Holt (Contest 0-8497) declaring appellants' Skyline Nos. 1-6 lode mining claims null and void.

Affirmed.

Mining Claims: Discovery: Generally--Mining Claims: Lode Claims

To constitute discovery upon a lode mining claim, there must be exposed within the limits of the claim a vein or lode of quartz or other rock in place, bearing gold or some other mineral deposit in such quality and quantity which would warrant a prudent man in the expenditure of his time and money with a reasonable prospect of success in developing a valuable mine.

Mining Claims: Discovery: Generally

To constitute discovery it is not enough that the mineral values exposed might justify further prospecting or exploration to determine whether actual mining operation would be warranted, or that a prudent person might be justified in holding onto the claims with a reasonable hope or expectation that someday there may be uncovered sufficient quantities of minerals to make their development as a mine economically feasible.

Mining Claims: Determination of Validity--Administrative Procedure: Burden of Proof

In a contest against a mining claim, the Government need only present a prima facie case that there has been no discovery. After such a presentation the burden devolves upon the mineral claimant to prove by a preponderance of the evidence that there has been such a discovery.

Mining Claims: Discovery: Generally

To verify whether a discovery of a valuable mineral deposit has been made, Government mineral examiners need not explore a sample beyond those areas which have been exposed by the claimant; they do not do the discovery work for claimant.

APPEARANCES: I. F. Taylor, pro se, for appellants; Albert Wall, Office of General Counsel, U.S. Dept. of Agriculture, Portland, Oregon, for the Government.

OPINION BY MR. RITVO

From a decision of Administrative Law Judge 1/ Graydon E. Holt, dated August 21, 1972, declaring all six lode mining claims null and void, appellants appeal to this Board as to claims Skyline Nos. 1, 2, and 5. 2/

The matter was initiated by the filing of a complaint dated October 1, 1971, by the Bureau of Land Management, U.S. Department of the Interior, at the request of the U.S. Forest Service. The complaint charged that minerals had not been found within the limits of the claims in sufficient quantities to constitute a valid discovery. A timely answer was made by appellants.

Notice was given of the hearing to Mrs. H. A. Taylor, widow of H. A. Taylor, who died intestate September 9, 1964, and to H. L. Taylor, I. F. Taylor, E. G. Taylor, M. A. Taylor and Raymond Taylor, children of H. A. Taylor. Exhibit 1 - p. 4.

The hearing was held on May 10, 1972, in Medford, Oregon. There was no appearance by or on behalf of the contestees. The only witness was Colver F. Anderson, a mining engineer employed by the Forest Service.

The evidence indicates that the Skyline No. 1 was located in 1932; the Nos. 2 and 5 in 1949. Anderson testified that the principal and only practical mineral on the claims is gold. Tr. 6. The No. 1 claim has the major part of the workings. It contains one very old and two newer shafts, along with open pits and general quartz exposures. Tr. 4.

1/ 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. 16787.

2/ In its appeal, contestees state, "We do not intend to hold claims No. 3, 4, and 6."

The best sample Anderson obtained was from the No. 1 claim. It showed a \$13 per ton total value of gold and silver based on a \$35 ³/₄ per ounce price of gold and \$2 for silver. Tr. 6. It was taken from a small pile of quartz material near the new shaft. Tr. 6. Anderson said that Irv Taylor told him that there was no ore exposed in the shaft at the time of the examinations. Tr. 5, 6. The next highest sample, \$17.90, was taken from tailings left from an earlier operation. Ex. 1, 5, 7. Other samples ranged in value from \$0.40 - \$4.25. Ex. 1-7. He stated that the claimant told him that during the entire time the Taylor family owned the claims only about \$1,100 of minerals had been removed even though thousands and thousands of dollars worth of work had been done on the claims. Tr. 7.

In his "Report of Examination" entered as Exhibit #1, Anderson stated:

The only rock in the claim area is diorite of the Mt. Ashland batholith which covers many square miles. The veins found are the roots of veins which probably once extended into the overlying rocks. The remaining gold and silver values are too limited in volume to be classed as ore.

* * * * *

A valid discovery is not demonstrated on any of the six Skyline lode claims. Exhibit 1 - 3.

Concerning the samples taken, Anderson stated (Ex. 1-7):

The highest values of these samples are far below those necessary for commercial operation from narrow veins. The two highest samples are not from rock in place and were taken only to obtain an indication of the values that may have been present or mined in the past.

The Administrative Law Judge held that the contestant had presented a prima facie case that there was not a discovery of a valuable mineral deposit on any of the claims, and that in absence of any evidence to the contrary, the claims must be held null and void. We agree.

³/₄ The price of gold now hovers around \$100 an ounce. However, in view of the testimony that the vein from which the high sample was taken is not exposed in the shaft, the limited extent of what veins there were on the claim, and the costs of mining narrow veins, the increase in value of gold does not warrant a change in result.

In his appeal, I. F. Taylor, apparently representing all contestees, ^{4/} gave as reasons for his appeal that "Claims Nos. 1, 2, and 5 have good mining potential" and that "(w)e feel the work that has been done at this time is merely development work and should be pursued further." (Emphasis added.) Contestees, also, contend that " * * * we only showed him (Anderson) the corners and told him our plans then left him alone. We do not feel his assay report was a fair one as it certainly [did not] agree with some we have made ourselves." (Bracketed words added.) No evidence was given, however, to support this allegation by contestees.

Under the mining laws of the United States (30 U.S.C. §§ 21 et seq. (1970)), the discovery of a valuable mineral deposit is essential to a valid claim. United States v. Carlile, 67 I.D. 417, 427 (1960). It is well established that a discovery sufficient to validate a mining claim has been made:

* * * [W]here minerals have been found and 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, * * * Castle v. Womble, 19 L.D. 455, 457 (1894).

This test has been accepted by the courts and the Department. United States v. Coleman, 390 U.S. 599 (1968); Chrisman v. Miller, 197 U.S. 313 (1905), Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); United States v. Bartels, 6 IBLA 124 (1972). Where a claim is based on a lode location, there must be exposed within the limits of the claim a lode or vein bearing mineral which would warrant the expenditure of labor and means with the same prospect of success. United States v. Avgeris, 8 IBLA 316, 322 (1972); United States v. Smith, A-30888 (March 2, 1968). See also, Jefferson-Montana Copper Mines Company, 41 L.D. 320 (1912); Frank W. Whitenack, 1 IBLA 156 (1970); United States v. Mellos, 10 IBLA 261 (1973).

The appellant emphasizes that minerals have been found on claims 1, 2 and 5 and that they have good mining potentials. However, it is not enough that the mineral values exposed might justify further

^{4/} A perfunctory answer to the original complaint was filed on behalf of all claimants by Mr. Briggs, of the law firm of Briggs and Munsell, Ashland, Oregon. No further evidence of any representation of claimants by counsel appears. I. F. Taylor, in his appeal repeatedly refers to "we" apparently meaning all claimants. However, he alone signed the appeal.

prospecting or exploration to determine whether actual mining operations would be warranted. Sedgwick v. Callahan, 9 IBLA 216 (1973), United States v. Henault Mining Company, 73 I.D. 184 (1966), aff'd, Henault Mining Company v. Tysk, 419 F.2d 766 (9th Cir. 1969), cert. denied 390 U.S. 950 (1970).

When the Government institutes a mining contest it must make a prima facie case of lack of discovery. United States v. Mellos, supra. The testimony and report introduced as an exhibit by Mr. Anderson, adequately demonstrated, at the very least, a prima facie case of no discovery.

The burden of proof then rested on claimants to show, by a preponderance of evidence that the claim was valid by reason of discovery. United States v. Avgeris, supra. By failing to introduce any evidence at the hearing, claimants obviously failed to rebut the Government's case. United States v. ALARCO, 9 IBLA 1 (1973).

The most that we can find, and all we believe contestees have actually claimed in their appeal, is that a prudent person might be justified in holding onto these claims with a reasonable hope or expectation that someday there may be uncovered sufficient quantities of minerals to make their development as a mine economically feasible. This "holding and prospecting" doctrine as a basis for a right to a claim was rejected in Cole v. Ralph, 252 U.S. 286, 307 (1920); United States v. Larsen, 9 IBLA 247 (1973).

Similarly claimants' unsubstantiated contention that the government mineral examiner did not examine where the minerals were most valuable is without merit. To verify whether a discovery of a valuable mineral deposit has been made, Government mineral examiners need not explore or sample beyond those areas which have been exposed by the claimant; they do not do the discovery work for claimant. United States v. Grigg, 8 IBLA 331, 79 I.D. 682 (1972).

Finally, appellants argue that they have done assessment work and more each year and that they cannot afford an attorney to properly prosecute their claims. These assertions do not relieve them of the necessity of establishing the validity of their claims. Lack of capital investment to establish the fact of discovery is no excuse for failure to prove the existence of a valuable mineral deposit. United States v. Grigg, supra.

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 Administrative Law Judge is affirmed. 5/

Martin Ritvo, Member

I concur:

Douglas E. Henriques, Member

5/ Although we agree that the Administrative Law Judge should protect the rights of all parties equally, we wish to disassociate ourselves from any inference that may lurk in the concurring opinion that Judge Holt did not conduct the hearing properly.

Frederick Fishman, Specially Concurring.

The main opinion in part rests upon the value of the gold samples taken from the claims, "based on a \$35 per ounce price of gold * * *," although it later recognizes that gold "now hovers around \$100 an ounce." This recognition deserves emphasis. The current world price of gold is fluctuating around three times \$35 per ounce. ^{1/} We can take official notice of that fact. Courts and administrative agencies may take judicial (or official, as the case may be) notice of matters of common knowledge. See Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U.S. 292 (1937). Cf. Cook v. Celebrezze, 217 F. Supp. 366, 368 (W.D. Mo. 1962). Glendenning v. Ribicoff, 213 F. Supp. 301 (W.D. Mo. 1962).

In United States v. Ideal Cement Company, Inc., 5 IBLA 235, 79 I.D. 117, 119 (1972), we stated:

First, there is no question that prior to the issuance of a patent the lands in mining claims remain subject to the jurisdiction of the Secretary of the Interior, and he may at any time reexamine the correctness of a determination as to the validity of the mining claims, and, if he deems it necessary, remand the case for the taking of additional evidence, after proper notice and opportunity for an adequate hearing. Cameron v. United States, 252 U.S. 450, 459 (1920); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); United States v. Clare Williamson, 75 I.D. 338, 342-343 (1968).

^{1/} The Washington Post of May 16, 1973, buttresses this fact:

"LONDON, May 15 -- Gold hit record highs in Europe for the second straight day today and the U.S. dollar touched new lows. But experts said another international monetary crisis appeared unlikely.

"Dealers here and on the Continent reported that by late in the day some of the steam had gone out of the feverish trading in dollars and gold since the weekend.

"Gold nevertheless closed in London and Zurich, the world's two largest bullion markets, at a record \$110.50 an ounce, up \$8 for the day. But \$5 of that climb came in the first hour alone and the markets appeared relatively steady later on.

* * * * *

"In Paris, gold soared to an all-time high of \$124.13 an ounce, up a phenomenal \$17.93 on the day. Bankers there said buyers were in the market for gold `at any price.'"

Since the Government may, prior to the issuance of patent, question the validity of any mining claim, it accords with common fairness that a tripling of the value of the commodity in issue, a matter of common knowledge, is recognized.

Nevertheless, on the basis of the record before us, I am constrained reluctantly to agree with the result reached in the main opinion. However, I am concerned about the bland, if not cavalier, acceptance by the Judge of the testimony by the Department of Agriculture's witness. The record shows that the lands contained "roots of veins which probably once extended into the overlying rocks." (Ex. 1 - p. 3.)

He also testified (Tr. 6):

The principal and only practical mineral is gold. The best sample that I got was from this one or two tons of ore that they had piled out from the shaft. This is shown in one of the pictures and talked about in the report. I got \$11.00 with gold at \$35.00 an ounce and silver at \$2.00 an ounce. Well, the total value of the gold and silver is \$13.00. This is not really enough, of course, for a commercial operation. It takes 35 to 40 dollars, in the narrow veins especially, these days to even break even. [Emphasis supplied.]

The main opinion recites that "the vein from which the high sample was taken is not exposed in the shaft * * *." Exhibit 1, page 7 shows that such sample was taken from a "pile." As noted earlier, the Government witness had testified that "[t]he best sample that I got was from this one or two tons of one that they had piled out from the shaft." [Emphasis supplied.] This deposit on the surface, by reason of insufficient quantum, is plainly insufficient to constitute a discovery. However, if there were an amount justifying economic beneficiation, it could constitute a discovery. See Lindley on Mines, § 426 (1897); American Mining Law, Calif. State Division of Mines, § 221 (1943); cf. United States v. Grosso, 53 I.D. 115, 126 (1930).

The contestee was not present or represented at the hearing. The determination of invalidity by the Judge is largely based upon the underscored language above relating to "35 to 40 dollars * * *." It seems to me it was incumbent upon the Judge to probe the basis for the witness's conclusion.

In Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2d Cir. 1965), the Court stated:

In this case as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act like an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.

In Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 F.2d 1109, 1119 (D.C. Cir. 1971), the court stated that an administrative body must not "sit back like an umpire."

The purpose of a hearing under the Administrative Procedure Act, 5 U.S.C. §§ 551, et seq. (1970), is a search for the truth. Where, as in the case at bar, one of the parties did not appear, it would appear to be even more incumbent upon the Judge to meet his obligation to assist in that endeavor. Expert testimony is not infallible. As was pointed out in McCarthy v. Sawyer-Goodman Co., 194 Wis. 198, 215 N.W. 824, 826 (1927):

The convincing power of expert testimony depends somewhat upon the knowledge and experience of the one who is called upon to weigh such testimony. The untutored are likely to accept the opinion of an expert at its face value, while those possessing knowledge upon the subject concerning which he testifies may discount it or entirely disregard it as unsound.

In State of Washington v. United States, 214 F.2d 33, 43 (9th Cir. 1954), cert. den., 348 U.S. 826 (1954), it is stated: "Opinion evidence is only as good as the facts on which it is based." The record is barren of any facts which would afford any basis for the "35 to 40 dollars" opinion.

The search for truth should impel trial judges to be as zealous and diligent in ascertaining facts from witnesses in support of validity of claims as well as seeking data that would invalidate claims. Even-handedness is required. Concededly, there are at least two concepts involved which may be, at times, dissonant. Contest proceedings are unquestionably adversary in nature; the Secretary of the Interior, and his delegates, have the responsibility of seeing that claims against the public lands are valid, if they are to be permitted to stand when challenged. There is also an obligation upon Departmental employees not to permit a party in the private sector to be deprived of a claim where the facts do not so warrant. There is a belief in the private sector that this last obligation of trial judges is seemingly more often honored in the breach than in its observance. I do not mean to suggest that a trial judge

should undertake to try a case, in toto, on behalf of a contestee, but where, as here, a crucial element in the case, may rest only upon sheer conjecture, it is incumbent upon the trial judge to play a proper role in the search for truth.

Frederick Fishman, Member

