

**Editor's note: Appealed -- remanded, Civ. No. 1-73-93 (D. Idaho Sept. 28, 1976)**

UNITED STATES  
V.  
PAUL C. PONCIA, ET AL.

IBLA 72-225

Decided June 28, 1973

Appeal from a decision by Administrative Law Judge Dent D. Dalby<sup>1/</sup> declaring three placer mining claims invalid and rejecting patent applications. (Contest I-2358).

Affirmed.

Mining Claims: Discovery: Generally

To constitute a discovery there must be shown to exist within the limits of a mining claim a valuable mineral deposit which is subject to location under the mining laws and which would warrant a prudent man in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.

Mining Claims: Contests--Mining Claims: Determination of Validity--Rules of Practice: Government Contests

A mining claim is properly declared invalid where the Government has made a prima facie showing that there has not been a discovery and the contestee does not meet his burden of proof by showing the existence of a discovery by a preponderance of the evidence.

Administrative Procedure: Administrative Law Judges--Rules of Practice: Hearings--Mining Claims: Hearings

The findings of an Administrative Law Judge will not be set aside in a mining contest upon a charge of bias in the absence of a substantial showing of prejudice or bias.

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<sup>1/</sup> The title "Administrative Law Judge" replaced that of "Hearing Examiner" pursuant to an order of the Civil Service Commission 37 FR 16787 (August 19, 1972).

Administrative Practice--Administrative Procedure: Adjudication

The procedures followed by the Department of the Interior in the initiation, prosecution, hearing and administrative decision of mining contests are in full compliance with the Administrative Procedure Act and its requirements of separation of function in decision making, and do not deny due process.

APPEARANCES: Claude Marcus, Esq., Boise, Idaho, for appellants;

Robert S. Burr, Esq., Office of the Field Solicitor, Department of the Interior, Boise, Idaho, for the United States.

OPINION BY MR. RITVO

Contestees have appealed to the Secretary of the Interior from Judge Dalby's decision dated December 2, 1971, invalidating three placer mining claims on the grounds that the claims are nonmineral in character and that valuable mineral deposits do not exist within the limits of the claims. Appellants have asserted the following arguments on appeal:

- (1) The Administrative Law Judge, as a member of the Department of the Interior, is directly responsible to and under the supervision of the Department, which is the real party in interest in this case, and for that reason is biased and incapable of rendering an impartial decision.
- (2) The decision of the Administrative Law Judge exceeded statutory limitations in that Judge Dalby consulted a party on facts and issues without providing notice to the contestees.
- (3) Contestant failed to establish a prima facie case of no discovery.
- (4) There is no substantial evidence to support Judge Dalby's decision that the contestees have failed to make a discovery on each claim.
- (5) The Judge erroneously relied upon profitability as the sole criterion in determining if contestees had made a discovery.

The appellants' contentions relating to a prima facie case, substantial evidence, and the proper criteria for determining a discovery are similar to those asserted in their brief to the Judge following the hearing below. After reviewing the evidence presented at the hearing, this Board determines that the issues were properly decided below. Examinations and samples taken by Quin A. Blackburn,

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a Bureau of Land Management geologist, and E. D. Barnes, a Bureau of Land Management mining engineer, on September 17 and 18, 1968, and July 1 and 27, 1971, adequately established the Government's prima facie case of lack of a discovery. A total of 16 samples were taken, some from places designated by the appellant, Paul C. Poncia, and all were assayed and the reports admitted into evidence. The results of these assays clearly indicate a failure to make a discovery. Evidence adduced by the contestee and his expert witness did not show dissimilar mineral values, and so did not overcome the Government's prima facie case of no discovery.

Appellants charge that Judge Dalby relied upon profitability as the sole criterion in determining the existence of a discovery. The test for determining if a discovery has been made is that of the "prudent man" developed in Castle v. Womble, 19 L.D. 455, 457 (1894), and affirmed by the Courts, United States v. Coleman, 390 U.S. 599 (1968); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied 393 U.S. 1025 (1969). It allows the Department to take into consideration the costs of extraction, transportation, and marketing in determining whether a person of ordinary prudence would be justified in further expenditure of his labor and means with the reasonable prospect of success in developing a valuable mine. While Judge Dalby did refer to the lack of evidence showing that gold could have been profitably extracted, his opinion was not based solely on the issue of profitability. The prudent man test was adequately discussed and obviously employed by the Judge in reaching his decision.

The appellants' allegations that Judge Dalby, as a member of the Department of the Interior, is biased and incapable of rendering an impartial decision are unsupported by any evidence. Contestees merely make bald assertions of prejudice in their statement of reasons without citing any specific instances of bias. The findings of an administrative law judge will not be set aside in a mining contest upon a charge of bias in the absence of a substantial showing of prejudice or bias. Converse v. Udall, 262 F. Supp. 583, 590 (D. Ore. 1968), aff'd, Converse v. Udall, supra; United States v. Haas, A-30654 (February 16, 1967).

Similarly appellant's request, by way of discovery, to obtain information relevant to whether that the Judge or some other Departmental employee violated the provision of the Administrative Procedure Act, 5 U.S.C. § 554(d), is without merit and is denied. Section 554(d) provide:

The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he

becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not -

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as a witness or counsel in public proceedings.

Specifically, the appellants allege and seek discovery procedures to obtain information relevant to whether,

(1) the Judge consulted a person or party on a fact in issue without providing notice and an opportunity to participate to each party,

(2) the Judge was responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of a prosecuting or investigative function, and

(3) an employee or agent of the agency engaged in the performance of a prosecuting or investigative function participated in or advised in the decision of the Judge or in the decisions rendered in review of his decision.

Contestees' allegations are unsupported by any evidence. Without such evidence, there is no reason to authorize the appellant to interrogate the Judge or any other employee, even if such a procedure were otherwise permissible.<sup>2/</sup> Procedures followed by the Department in the initiation, prosecution, hearing and administrative decision of mining contests are in full compliance with the Administrative Procedure Act, its requirements of

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<sup>2/</sup> 5 U.S.C. § 556(b) provides:

"\* \* \* On the filing of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as part of the record and decision in the case."

separation of functions in decision making, and do not deny due process. United States v. Melluzzo, 76 I.D. 160 (1969); United States v. Johnson, A-30405 (October 28, 1965).

Therefore, pursuant to the authority vested in the Board of Land Appeals, 43 CFR 4.1, the decision of the Administrative Law Judge is affirmed.

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Martin Ritvo, Member

We concur:

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Douglas E. Henriques, Member

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Newton Frishberg, Chairman

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