

Editor's note: Appealed -- aff'd, Civ. No. 74-192 (D. Oreg. May 1, 1975), aff'd, No. 75-2782 (9th Cir. Mar. 22, 1977)

UNITED STATES
v.
MARVIN C. RAMSEY ET AL.

IBLA 73-310

Decided January 11, 1974

Appeal from a decision of Administrative Law Judge D. F. Ratzman declaring the Kentta Nos. 1 and 2 mining claims subject to the surface management provisions of 30 U.S.C. §§ 611-615 (1970).

Affirmed.

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

When the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made.

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

Where a Government mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery, a prima facie case has been established.

Mining Claims: Contests--Mining Claims: Title

Though a state court may afford a presumption of discovery to the locators of a mining claim in determining possession between private claimants, such presumptions are in no respect applicable to

contests between the Government and the claimants to determine whether a valid discovery has been made.

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

A discovery of a valuable mineral deposit may be lost by exhaustion of the mineral deposit or by relatively permanent changes in other conditions which make it unlikely that the deposit could be extracted and marketed at a reasonable profit.

APPEARANCES: Gene L. Brown, Esq., Grants Pass, Oregon, for the appellants; Jim Kauble, Esq., Office of the General Counsel, United States Department of Agriculture, for the appellee.

OPINION BY MR. STUEBING

Marvin C. Ramsey, and his wife, Vesta Ruth, have appealed from the March 2, 1973, decision of Administrative Law Judge Dean F. Ratzman declaring that his Kentta Nos. 1 and 2 mining claims were subject to the surface management restrictions provided for in 30 U.S.C. §§ 611-615 (1970). This declaration was predicated on a finding that as of July 23, 1955, the date of the Surface Resources Act, and continuing until the present, no discovery of a valuable mineral deposit existed on the claims in question.

The proceedings against these claims, which are located in Siskiyou National Forest, Oregon, were initiated at the request of the Forest Service. The claims had been acquired by Marvin Ramsey's (appellant's) father and mined for gold between the years 1925 and 1942. The appellant has stated that the returns from those years were as high as \$1,900 in 1934 and as low as \$300 in other years. (Tr. 52, 75.) Since 1941 no money at all has been made from the claims. (Tr. 75.) However, the appellant has continued research and experimental work to develop a process for further mining operations.

The appellants have asserted that the Government did not establish a prima facie case of lack of discovery. In support of this argument the appellants assert that the evidence adduced by the Government did not definitively prove that the ground was non-mineral in character. Further, they contend that the Government's mineral

examiner conceded as much when he said that he would have made a more thorough examination of the claim if he had been hired by a private company.

We believe that neither of appellants' contentions precludes a finding that a prima facie case has been established. Rather, appellants have apparently failed to grasp the nature of the division of the burden of proof implied in establishing a prima facie case.

We have said many times that a prima facie case has been made where the Government's mineral examiner testifies that he has examined the claim and found the evidence of mineralization insufficient to support a finding of discovery. United States v. Keltz, 11 IBLA 38 (1973); United States v. Blomquist, 7 IBLA 351 (1972); United States v. Gould, A-30990 (May 7, 1969).

The burden of going forward then shifts to the claimant to prove by a preponderance of the evidence that a discovery has been made. Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969). It is clear that the claimant is the proponent of an order to declare his claim valid. Thus, pursuant to the Administrative Procedure Act, 5 U.S.C. § 556 (1970), it is the claimant who bears the risk of nonpersuasion. Foster v. Seaton, supra. Government mineral examiners determining the validity of a mining claim need only examine the claim to verify whether the claimant has made a discovery; they are not required to perform discovery work, to explore or sample beyond the claimant's workings, or to conduct drilling programs for the benefit of the claimants. United States v. Wells, 11 IBLA 253 (1973). For that reason, the contestant's mineral examiner was properly responsive in stating that he would have made a more thorough examination if employed by a private company, and the statement cannot be construed to evince either prejudice on the part of the examiner or an improper performance of his examination of the claims.

The appellants argue that Oregon law provides for a presumption of discovery in favor of the locators of a claim, Steele v. Preble, 158 Ore. 641, 77 P.2d 418, 428-29 (1938). This may be true when the dispute is in a state court and the issue is determination of possession or title between private parties. Here, however, the issue is whether a discovery has been made and presumptions afforded claimants by state courts simply do not obtain, especially since the Government was not a party to the proceedings, Perego v. Dodge, 163 U.S. 160, 168 (1896). It is the Interior Department, and not state courts, which has been given plenary power over disposition of the public lands, Cameron v. United States, 252 U.S. 450, 460 (1920).

The appellants also argue that they have proved by a preponderance of the evidence that there is a discovery on the claims. However, we find that the Administrative Law Judge correctly weighed the conflicting evidence in concluding that no discovery had been shown.

The Department of the Interior's seminal decision in determining whether there has been a discovery of a valuable mineral deposit is Castle v. Womble, 19 L.D. 455 (1894). In that case, it was held that:

[W]here minerals have been found and the evidence is of such a character that a man 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, the requirements of the statute have been met.

Id. at 457.

This formulation, often referred to as the prudent man test, has received the continuing approval of the courts. Chrisman v. Miller, 197 U.S. 313, 322 (1905); Cameron v. United States, 252 U.S. 450 459-460 (1920).

In the years since the promulgation of the prudent man test, the Department has found it necessary to state explicitly that for a mineral deposit to be considered valuable it must be susceptible to development, extraction and marketing at a profit. This test of marketability has been approved by the Supreme Court as a logical complement to the prudent man test:

Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent man test, and the marketability test which the Secretary has used merely recognizes this fact. United States v. Coleman, 390 U.S. 599, 602 (1968).

The appellants have effectively conceded that if a discovery had ever been made on the claims, it has been lost due to subsequent intervening events. During the era prior to World War II when the claims were actually exploited, the gold was mined by a hydraulic method. However, in 1964 the area in which the mining claims are located was devastated by a flood and the mining works were largely destroyed. Marvin C. Ramsey testified that he has since abandoned any thought of returning to the hydraulic method of mining because the cost of doing so would be prohibitive due not only to the flood damage but also to the additional cost of environmental controls

imposed by the state. (Tr. 55, 56, 74.) Therefore, any evidence as to possible past discovery based on a method of recovery which it is now conceded is prohibitively expensive, is irrelevant to a determination of present discovery since the possible past discovery has been lost. Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336 (1963), citing with approval United States v. Logomarcini, 60 I.D. 371, 373 (1949), and United States v. Houston, 66 I.D. 161, 165 (1959). See also Mulkern v. Hammitt, 326 F.2d 896 (1964); Adams v. United States, 318 F.2d 861, 871 (1963); Multiple Use Inc. v. Morton, 353 F. Supp. 184 (D. Ariz. 1972), aff'g United States v. Silverton Mining and Milling Co., 1 IBLA 15, 18 (1970); United States v. Estate of Alvis F. Denison, 76 I.D. 233 (1969); United States v. Humboldt Placer Mining Co., 8 IBLA 407, 416, 79 I.D. 709, 716 (1972).

In addition, appellants have conceded for all practical purposes that they are contemplating further research and not the present development of actual mining operations. Though Ramsey has been aware of the presence of platinum on the claims since 1925, he has made no attempt to extract it; and, at present, his plans call only for further research. (Tr. 79, 80.) Appellants' expert witness testified that a contemplated pilot plant was really in the nature of an experiment.

Money expended on further exploration or further research, but not on initiation of actual mining operations, is evidence only that further exploration or research may be justified; it is not evidence that a discovery has been made or that prudent men would be justified in initiating actual operations, United States v. Gunsight Mining Co., 5 IBLA 62, 69 (1972); United States v. New Mexico Mines, Inc., 3 IBLA 101, 106 (1971).

Finally, we agree with Judge Ratzman's determination that the appellants' expert witness "utilizes unreliable processes, and provides inaccurate information," (Dec. at 9). Appellants' own samples, when tested by the fire assay method failed to show the presence of gold in significant quantities. (Tr. 87.) In apparent explanation of the disparity of results between their fire assays and their non-standard assays, appellants' expert witness stated that the gold was "clear down in the atoms" of the associated material. (Tr. 87.) While we do not categorically assert that such pre-Agricolian notions of metallurgy are totally invalid, neither do we believe that such evidence is entitled to probative weight without a showing of its scientific basis.

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

Edward W. Stuebing, Member

We concur:

Frederick Fishman, Member

Martin Ritvo, Member

