

UNITED STATES  
v.  
HERBERT CLARK

IBLA 75-53

Decided January 30, 1975

Appeal from the June 21, 1974, decision of Administrative Law Judge Dent D. Dalby declaring the Sleeping Beauty and Sleeping Beauty No. 2 lode mining claims invalid (NM 260).

Affirmed.

1. Mining Claims: Discovery

To constitute a discovery upon a mining claim there must be physically exposed within the limits of the claim minerals in such quality and quantity to warrant a prudent man in expending his labor and means, with a reasonable prospect of success, in developing a valuable mine.

2. Administrative Procedure: Burden of Proof -- Mining Claims: Contests -- Mining Claims: Determination of Validity

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 of going forward then shifts to the claimant to show by a preponderance of the evidence that his claim is valid.

3. Administrative Procedure: Burden of Proof -- Mining Claims: Contests -- Mining Claims: Determination of Validity

When a government mineral examiner testifies that he has examined the exposed workings on a claim without finding sufficient mineral values to support the discovery of a valuable mineral deposit, a prima facie case of lack of discovery has been made; the Government's mineral

examiner is not obliged to explore beyond the current workings of a mining claimant in attempting to verify a discovery.

4. Mining Claims: Discovery: Generally

Evidence of mineralization which may justify further exploration, but not development of actual mining operations, is not sufficient to establish that a discovery of a valuable mineral deposit has been made.

APPEARANCES: Herbert Clark, Silver City, New Mexico, pro se.; Richard L. Fowler, Esq., Office of the General Counsel, United States Department of Agriculture, Albuquerque, New Mexico, for appellee.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Herbert Clark appeals from the June 21, 1974, decision of Administrative Law Judge Dent D. Dalby which declared the Sleeping Beauty and Sleeping Beauty No. 2 lode mining claims null and void due to lack of discovery of a valuable mineral deposit. Both claims are located in T. 17 S., R. 17 W., NMPM, Gila National Forest, Grant County, New Mexico.

In an earlier decision of this Board, United States v. Wells, 11 IBLA 253 (1973), we dealt with an earlier contest proceeding involving these same claims. <sup>1/</sup> We found that the evidence submitted at the contest proceeding was inadequate to establish whether these two claims are valid. Accordingly, we remanded the case for further hearing. After rehearing the case, Administrative Law Judge Dent D. Dalby again concluded that the claims were invalid due to lack of discovery of a valuable mineral deposit.

[1] These mining claims were located pursuant to the general mining law, the Act of May 10, 1872, 30 U.S.C. § 22 et seq. (1970), which requires that for a mining claim to be valid, it must, among other things, contain a valuable mineral deposit. The Department of the Interior's seminal decision defining the terms "valuable mineral deposit" is Castle v. Womble, 19 L.D. 455 (1894), where the Department stated:

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<sup>1/</sup> The earlier proceedings were styled United States v. Mrs. H. R. Wells, et al., because Mrs. Wells was one of the parties named in contest proceedings against several claims. The proceedings on remand, however, involve only two of those claims, both of which are held by Mr. Herbert Clark, the sole locator of record.

[w]here minerals have been found and the 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, the requirements of the statute have been met.

19 L.D. at 457.

That definition of the phrase, valuable mineral deposit, commonly referred to as "the prudent man test," has been adopted by the Supreme Court. Chrisman v. Miller, 197 U.S. 313 (1905); Cameron v. United States, 252 U.S. 450 (1920); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963).

[2] When the Government contests the validity of 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. United States v. Springer, 491 F.2d 239, 242 (9th Cir. 1974), cert. denied, 95 S. Ct. 60 (1974); Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959).

[3] A prima facie case has been made when a Government 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. Shield, 17 IBLA 91 (1974); United States v. Ramsher Mining and Engineering Co., Inc., 13 IBLA 268 (1973); United States v. Woolsey, 13 IBLA 120 (1973); United States v. Gould, A-30990 (May 7, 1969).

At the hearing below the Government's mineral examiner, a registered mining engineer with extensive experience in the private copper industry, testified that there was no possible way that the copper on appellant's mining claims could be mined at a profit (Tr. 59), since there is neither sufficient quantity of copper ore nor sufficient quality to permit establishment of a paying operation. The assay of the samples taken showed an average copper content of 1.98 percent (Dec. at 3). Based on calculations of what a smelter would pay for such copper ore (Ex. G-16, 17), the mineral examiner testified that appellants could not even recover labor costs on a mining operation (Tr. 24-32). Utilizing a different method of mining would involve recovery of copper from a leaching process on the claims. With respect to that method of mining and recovery, the mineral examiner testified that there was not a sufficient quantity of ore on the claims to make such a process profitable (Tr. 49). The mineral examiner concluded that there is only 9,900 cubic feet of inferred ore on the claims. That figure, 9,900 cubic feet, is based on an estimate by the mineral examiner that the vein of ore is 300 feet long, 1.5 feet wide, and 22 feet deep (Tr. 25,

50). The figure for depth, 22 feet, was arrived at by the mineral examiner's observation that in a shaft located on the vein of mineralized material, the ore body narrowed to 6 to 8 inches. Consequently, the cost of mining that material would be "astronomical" (Tr. 50). Furthermore, the mineral examiner testified that in his experience with such veins, they tend to become even smaller (Tr. 51, 52). While it is true that the mineral examiner did not prove beyond any doubt that there is a limited amount of ore on the claim, his opinion was based on expert knowledge applied to his actual observation of the prevailing geologic conditions. Moreover, the appellant did not introduce any evidence that would tend to rebut the mineral examiner's rough estimate. In determining the validity of a mining claim Government mineral examiners need only examine the claim to verify whether the claimant has made a discovery. They are not obliged to perform discovery work or to explore beyond the claimant's workings. In particular, they are not required to drill or block out the existence and extent of the ore body. Henault Mining Co. v. Tysk, 419 F.2d 766 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970). See also United States v. Goodpaster, 13 IBLA 281 (1973); United States v. Woolsey, supra. 2/

The testimony of the Government's mineral examiners established a prima facie case that the claims are invalid, since it demonstrates that the ore on these claims cannot be mined at a profit.

It is clear from appellant's own testimony that he believes that there is both sufficient quantity and quality of ore on both claims to justify the initiation of actual mining operations. Indeed, appellant's actions indicate that he has always intended to develop the claim. It is equally clear, however, that appellant's beliefs are predicated on faith, hope and a misunderstanding of the mining law and not on any concrete facts.

For example, even though appellant believes there is sufficient quantity and quality of material for mining operations, he conceded that he doesn't really know how much ore is on the claims:

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2/ In the appeal from the decision rendered in the first hearing of this contest the Board found that the contestant's estimate of ore volume was not formed on any reliable basis, and was, consequently, incompetent. 11 IBLA at 259. The figures on which the calculation of volume were based in the second hearing are the result of measurements of the part of the ore body which is exposed.

And who knows what's underneath there? I'm ready to take the gamble to see what's underneath \* \* \*.  
(Tr. 44)

\* \* \* \* \*

JUDGE DALBY: Just direct your attention to discovery and tell me the facts you want me to know. How much ore is -- do you know how much ore there is there?

THE WITNESS: I don't know and he don't know and nobody else knows.  
(Tr. 71).

[4] On the basis of insufficient quantity of ore alone, appellant has failed to establish the discovery of a valuable mineral deposit. At best, he has demonstrated only that he might be justified in continuing exploration, though the mineral examiner testified that there weren't even sufficient indications for that (Tr. 51). Mineral indications which might justify further exploration, but not development of actual mining operations are not sufficient to establish discovery of a valuable mineral deposit. Henault v. Tysk, *supra*; United States v. Gunsight Mining Co., 5 IBLA 62 (1972); United States v. New Mexico Mines, 3 IBLA 101 (1971).

Other aspects of appellant's beliefs are equally unsupported by any probative evidence -- particularly appellant's estimates of the costs of the leaching and mining process. Appellant has given two different hypotheticals involving the projected costs, one at the hearing and one in his brief on appeal:

We were going on the leaching process: that's why we built the two dams Ashby's report shows -- the boxes or vats this report shows, the pumps and the pipelines, and the set-up actually tested to be sure it would operate. This process uses all the ores from .01% on up to 100%. This method costs approximately 14 cents to produce a pound of copper. I got this figure from Kennecott Copper Corporation at Santa Rita, New Mexico. They do a lot of leaching and will tell anyone that is where they make the most of their profits. They produce around five million pounds of copper per month in their plant at Santa Rita off of what they put on their waste dumps, which assays from 85% to 90%, so a ton of this copper is worth (copper prices not at \$1.00 to \$1.05) approx. \$1,700.00 a ton, at a cost of 14 cents a pound to produce - \$280.00. There is quite a margin of gain -- about \$1,420.00. Then, say it takes half of this (which

is extremely high) to mine, to transport, and to process at the smelter. This leaves \$ 710.00 profit. We first planned on making a ton of copper every two days, which comes to \$ 355.00 per day.

(Appellant's Brief at 1).

First, there is nothing in the record to indicate that the costs asserted by appellant to be Kennecott's costs for leaching on its large-scale operation would in any way be comparable to the small-scale operation contemplated by appellant. Second, even if the costs of the leaching process are similar, the estimate of the feasibility and costs of the actual mining method contemplated by appellant seem to be based on no facts at all. Appellant simply assumes that he can mine for a certain amount without ever showing how he intends to do so. He makes no reference to kind and cost of equipment or to the proposed method of mining or to probable labor costs. <sup>3/</sup>

Finally, it is clear that appellant's belief that he has a valid mining claim is predicated on a misunderstanding of the mining law. Appellant states in his brief that "It seems that the Forest Service lawyer (Fowler) has replaced the word 'valid' with 'valuable,' which isn't the law at all. \* \* \* I can't agree that the word 'valid' should be changed to 'valuable'; it gives the law a whole new meaning." As we have previously noted, the general mining law, the Act of May 10, 1872, 30 U.S.C. § 22 (1970), explicitly requires that valid mining claims contain valuable mineral deposits. Since the enactment of that law, both the courts and this Department have adhered to the view that a valuable deposit has been discovered when a prudent man would be justified in the belief that he has a reasonable prospect of success in developing a valuable or paying mine. Castle v. Womble, *supra*; United States v. Coleman, 390 U.S. 599, 602 (1968). To comply with the prudent man test, the Department requires that a claimant show the probable costs and revenues of his proposed mining operation. While the Department has never required "a sure thing," it does at least require that the method of mining seem plausible and that the anticipated costs and revenues appear reasonable. Where the method of mining seems implausible, or

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<sup>3/</sup> We noted in our first opinion that appellant and his relatives planned to supply the labor for the mining operation themselves. Appellant repeated that assertion at the second hearing. (Tr. 88). However, he also stated that he has leased the claims since the first hearing and has no intention of working the claims himself (Tr. 67). Though the lease was not introduced into evidence, appellant apparently received no bonus or rental payments -- only a promise to pay royalties for any copper actually mined (Tr. 67). The lessee company was advised of the hearing but did not appear (Tr. 69).

where the anticipated costs and revenues are not based on reliable, probative evidence, a mining claim cannot be found valid. This is true whether a mining claimant is the prospector with a burro or whether it is a huge multi-national corporation, for no prudent man will undertake investment in a mining claim unless he has reasonable prospect of success based on reliable estimates.

In this case, however, appellant has not shown how he intends to mine the copper on these claims, nor has he shown that there is sufficient volume of ore to justify his belief that he could develop a paying mine.

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 Administrative Law Judge Dent D. Dalby declaring the Sleeping Beauty and Sleeping Beauty No. 2 lode mining claims null and void is affirmed.

Edward W. Stuebing  
Administrative Judge

We concur:

Martin Ritvo  
Administrative Judge

Douglas E. Henriques  
Administrative Judge

