

UNITED STATES
v.
WALLACE W. VAUX

IBLA 76-244

Decided April 1, 1976

Appeal from decision of Administrative Law Judge E. Kendall Clarke declaring 34 lode mining claims null and void (Contest No. OR 12648).

Affirmed.

1. Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally -- Mining Claims: Lands Subject to -- Withdrawals and Reservations: Effect of

Lands within national parks are not subject to mining location except where specifically authorized by law. 43 CFR 3811.2-2. However, lands within a national forest remain open to location and entry under the mining laws. 16 U.S.C. § 478 (1970). Where mining claims occupy land which has subsequently been withdrawn from the operation of the mining laws, the validity of the claim must be tested by the value of the mineral deposit as of the date of the withdrawal, as well as the date of determination. If the claim was not supported at the date of withdrawal for the national park by such a discovery, the land within the claims located in the park would not be excepted from the effect of the withdrawal.

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

Under federal law, a valid mining location cannot be made without a discovery of a valuable mineral deposit within the limits of the claim. The long standing test to determine whether there has been a discovery of a valuable mineral deposit is the "prudent man" test. To meet this test there must be sufficient mineralization within the claims to warrant a man of ordinary prudence to expend his time and means with a reasonable expectation of developing a valuable mine. For a lode claim, there must be tangible proof of the existence of a vein or veins bearing sufficient mineralization to meet the test.

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

Before a finding of discovery can be warranted, it must be shown as a present fact that the claim is valuable for minerals. Evidence of past profitable mining is not proof the claims are presently profitable. The claim may have been worked out or have lost its value because of change in economic conditions.

4. Mining Claims: Determination of Validity -- Mining Claims:
Discovery: Generally -- Mining Claims: Lode Claims

High assay samples alone are not evidence of a discovery. The nature of the samples yielding the high values must be considered. Where neither the date of the samples nor the nature of the samples submitted for assay is known, those assays cannot be considered as representative of a valuable mineral deposit within the limits of a mining claim.

5. Mining Claims: Discovery: Geologic Inference

Geological inference alone cannot support a determination under the mining laws that a discovery of a valuable mineral deposit has been made. The claimant must actually expose a valuable mineral deposit physically within the limits of the claim.

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

A mining claimant's belief in the existence of mineral on a claim is not sufficient to constitute discovery. The prudent man rule imposes an objective standard, and the fact that the claimant may be willing to expend his labor and means is not adequate.

APPEARANCES: Wallace W. Vaux, pro se; John McMunn, Esq., Office of the Solicitor, U.S. Department of the Interior, and Arno Reifenberg, Esq., U.S. Department of Agriculture, for appellee.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Wallace W. Vaux appeals from the September 15, 1975, decision of Administrative Law Judge E. Kendall Clarke, which declared null and void Shoestring Nos. 1 through 23, Julie A., Bradley A., Homestake and Star, High Tide, Low Tide, Franklin East, Franklin West, Isoletta, and Pussycat Nos. 1 through 3, lode mining claims, situated in unsurveyed secs. 25 and 36, T. 35 N., R. 13 E.; secs. 29, 30, 31, and 32, T. 35 N., R. 14 E.; sec. 1, T. 34 N., R. 13 E.; secs. 4, 5, 6, and 9, T. 34 N., R. 14 E., W.M., Chelan and Skagit Counties, Washington.

Contest proceedings in this case were initiated at the request of the National Park Service by a complaint filed by the Bureau of Land Management, charging: (a) minerals have not been found within the limits of the claims, or any one of them, of sufficient quality and/or in sufficient quantity to constitute a discovery under the mining laws; (b) the claims, and every one of them, were not located in good faith; (c) the claims, and every one of them, were not properly marked and located under the laws of the State of Washington, and of the United States, by the erection of monuments and the

staking of corners; (d) Pussycat Nos. 1 and 2, and Julie A., unpatented lode mining claims are located in whole or in part over existing patented mining claims; and (e) the claimant has failed to substantially comply with the requirements for annual assessment work on each of the claims provided by law. On April 24, 1975, a hearing was held in Seattle, Washington. Subsequently, Administrative Law Judge Clarke determined the above mining claims null and void for lack of discovery of a valuable mineral deposit, finding it unnecessary to make any findings on the other charges listed in the complaint.

[1] The record reveals that appellant's mining claims were located September 27, 28, 30 and October 1, 1968. On October 2, 1968, the area encompassing those claims was included in the North Cascades National Park, P.L. 90-544, 82 Stat. 926, 16 U.S.C. § 90 (1970). All the contested claims are within the national park except portions of the Shoestring No. 1 and Franklin West, which extend into the Mount Baker National Forest.

The North Cascades National Park was established "subject to valid existing rights," and the land within the park was withdrawn from location, entry and patent under the United States mining laws as of October 2, 1968. "Lands in national parks and national monuments are not subject to mining location, except where specifically authorized by law." 43 CFR 3811.2-2. This Act contains no such authorization. ^{1/} Concerning the portions of the contested claims within the national forest, the Act of June 4, 1897, 16 U.S.C. § 478 (1970), provides that mineral lands within forest reserves remain open to location and entry under the mining laws. 43 CFR 3811.1.

Where mining claims occupy land which has been subsequently withdrawn, the validity of the claims must be tested by the value of the mineral deposit as of the date of the withdrawal, as well

^{1/} The Act establishing the North Cascades National Park creates two recreation areas 16 U.S.C. § 90a, 90a-1 (1970), and expressly withdraws those areas from location, entry, and patent under the mining laws. 16 U.S.C. § 90-1(b) (1970). Concerning the park lands not within the recreation areas, the Act is silent. However, regardless of this silence, lands included within a national park are deemed withdrawn from disposal unless continued application of the mining laws is expressly provided for by the legislation. R. C. Jim Townsend, 18 IBLA 100, 101 (1974), fn. 2. See Solicitor's Opinion, 78 I.D. 352 (1971); Solicitor's Opinion, 74 I.D. 97, 101-102 (1967).

as of the date of the contest hearing. United States v. Fleming, 20 IBLA 83, 99 (1975). Therefore, contestee's claims located within the park area must be supported by a qualifying discovery of a valuable mineral deposit as of October 2, 1968. If not, the lands within the claims have not been excepted from the effect of the park withdrawal, and the claims cannot thereafter become valid, even if a subsequent qualifying discovery occurred. Id. Because the lands within the national forest are open to location, contestee had until the date of the contest hearing to establish a qualifying discovery sufficient for a finding of validity concerning those portions of his claims outside the national park. Mulkern v. Hammitt, 326 F.2d 896 (9th Cir. 1964).

In reaching his finding of lack of discovery, Judge Clarke summarized some of the relevant evidence as follows:

The contestant, the National Park Service, called Charles T. Weiler to testify concerning his examination of the claims here in question. Mr. Weiler received his degree in mining engineering from Penn State University in 1942, and in 1950 and 1951 took graduate work in mining economics at Columbia University. He has been employed in the mining industry in one capacity or another since January, 1943, except for the two years which he served in the United States Naval Reserves. (Tr. 8).

In connection with his employment, Mr. Weiler testified that he visited the claims on August 8 accompanied by Wallace Vaux, the claimant here, who also is a mining engineer. These claims were located on September 27, 28, 29, and 30 and October 1, 1968 just prior to the establishment of the North Cascades National Park in October of that same year. The claims were located in rugged mountain country. The Shoestring group crosses the valley and the Stehekin River and go on to the mountain side on the opposite side of the river. The other claims are mostly discontinuous at different places through the general area, but in steep rugged country. Mr. Weiler found no discovery sites, no claim corners, and no discovery monuments. He saw no recent evidence of prospecting, mining or drilling on any other claims. (Tr. 14). He stated that in his opinion the locations appear to be paper claims without any reality on the ground. Based on his professional background and his examination of these claims, he was

of the opinion that a reasonable prudent man would not be justified in expending his time and means with a reasonable prospect of developing a valuable mine. (Tr. 18).

Mr. Vaux, who is a mining engineer, received his degree in 1958 from the University of Washington. He stated that there were no claim corners (Tr. 49) and that he had done no discovery work on the claims, but rather relied on Bulletin 37 (Tr. 53) which was literature describing the general area and providing assays of samples which were taken apparently in 1893. He stated that had the national park not been formed causing a withdrawal of the land from mining entry, he would have properly staked the claims and then done a quick geological "recon" and tried to show some findings. "I also would have taken geochemical samples, which are soil samples or stream sediment samples, and at the same time tried to fit these onto a map, which is what we do all the time. Then I wouldn't be just stuck on looking for silver or lead" "I would do preliminary work, these various stages that you go through before you ever have any serious decisions and spend large amounts of money." (Tr. 57).

Much of Mr. Vaux's own testimony supports Mr. Weiler's testimony. For example, the following colloquy with the Government's attorney, Mr. McMunn, on cross-examination demonstrates Mr. Vaux had not been on many of the claims until he accompanied Mr. Weiler in his examination:

BY MR. MC MUNN:

Q. Mr. Vaux, prior to your visit to the claims with Mr. Weiler, had you been on the ground of any of the Shoestring claims?

A. Prior to the visit with Mr. Weiler?

Q. Yes.

A. No.

Q. Prior to that visit, were you physically on the ground of the Julia A. claim?

A. Now just a moment. Can I take that back?

JUDGE CLARKE: Yes. Do you recall something else?

A. (Continuing) I was on the ground, but I can't recall the date. I didn't record it in my field notes.

BY MR. MC MUNN:

Q. Were you on each of those 23 claims?

A. Not each of them, no.

Q. Which ones were you on?

A. On the Shoestring and on the Pelton Basin area.

Q. Which number is that?

A. That would be like Shoestring 3, 4, 5, 14, 9, in that area there.

Q. And what year was that?

A. I've got that information at home. I don't recall. It was on a Labor Day.

Q. Was that after you located the claim?

JUDGE CLARKE: After or before?

A. I would say that was before.

BY MR. MC MUNN:

Q. But you're not sure?

A. No.

Q. Prior to your visit to the claim with Mr. Weiler, were you physically present on the ground on the Julia A. claim?

A. No.

Q. Were you physically present on the Bradley A. claim?

A. No.

Q. On the Homestake and Star claim?

A. No.

Q. On the High Tide claim?

A. No.

Q. On the Low Tide claim?

A. No.

Q. On the Franklin East claim?

A. No.

Q. On the Franklin West claim?

A. No.

Q. On the Isoletta claim?

A. No.

Q. On the Pussy Cat 1 through 3 claims?

A. No.

Q. What date did you visit the claims, again, with Mr. Weiler?

A. 1973.

Q. What year did you locate these claims again?

A. 1968.

(Tr. 62-64).

There is no evidence that Mr. Vaux did anything on the claims he may have been upon prior to accompanying the Government's mineral examiner. Indeed, he admits that there were no corners located on the ground other than the two relocated claims (Tr. 49). He did nothing after the Park was created, he explained, because Park officials discouraged any kind of activity (Tr. 49, 55).

Nevertheless, appellant attacks the determination of no discovery. He asserts that the "prudent man" test of discovery has been replaced by Washington State law, particularly RCW 78.08.06 and 78.08.72. He contends, among other matters, that Judge Clarke's interpretation of discovery is not supported by "real modern situations." Appellant argues that surface exposure of mineral was required to establish discovery. He testified at the hearing that not all valuable mines have surface outcroppings, giving four examples of valuable mines found without such exposure (Tr. 65-67). In his brief submitted to Judge Clarke for assistance in consideration of the contest, appellant explained the "modern situations":

In the economic occupation of trying to discover mineral deposits and, therefore, mineral wealth, it has long been recognized by everyone in this business that the so-called "Prudent Man" theory of law has become outmoded and does not apply to modern-day methods or technology, so forward-thinking states such as Washington passed laws which allow a sensible approach to this business. Mines are by economics, larger and lower grade. They don't generally lie on one claim. Washington no longer requires a discovery pit. * * * So you see, in 1975 this outmoded law [the prudent man test] has no practical application. * * *

(p. 4).

It is appellant's position, as set forth in his statement of reasons for appeal, that:

* * * [d]iscovery, as interpreted by exploration people is acquiring potential ground and systematically exploring it until either a mining situation is located or it is dropped due to lack of incentive to continue. * * *

Even if this were the test, appellant has not even met his suggested meaning of "discovery," as he has not even explored the claims. Cf. Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).

[2] Under federal law, a valid mining location cannot be made without a discovery of a valuable mineral deposit within the limits of the claim. 30 U.S.C. § 22, § 23 (1970); United States v. Zweifel, 508 F.2d 1150 (10th Cir. 1975), cert. denied, U.S. (1976).

To prove such a discovery, the prudent man test requires satisfactory evidence of sufficient mineralization in both quality and quantity to warrant a person of ordinary prudence to expend his time and means with a reasonable expectation of developing a valuable mine. United States v. Coleman, 390 U.S. 599 (1968); Chrisman v. Miller, 197 U.S. 313 (1905), approving Castle v. Womble, 19 L.D. 455 (1894). For lode mining claims, there must be tangible proof of the existence of the vein or veins bearing sufficient mineralization to meet this test. Henault Mining Co. v. Tysk, 419 F.2d 766 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970); Jefferson-Montana Copper Mines Co., 41 L.D. 320 (1912). Regulation 43 CFR 3841.3-1 provides:

No lode claim shall be located until after the discovery of a vein or lode within the limits of the claim, the object of which provision is evidently to prevent the appropriation of presumed mineral ground for speculative purposes, to the exclusion of bona fide prospectors, before sufficient work has been done to determine whether a vein or lode really exists.

The fact that there may be no outcroppings of minerals is taken into consideration in 43 CFR 3841.3-2 which provides:

The claimant should, therefore, prior to locating his claim, unless the vein can be traced upon the surface, sink a shaft or run a tunnel or drift to a sufficient depth therein to discover and develop a mineral-bearing vein, lode, or crevice * * *.

The Henault case, supra, emphasizes that the mere belief minerals exist at depth is not sufficient to meet the prudent man test; instead the claimant must show the existence of the minerals by drilling.

Appellant's only proof of discovery rests on a report of mineralization referred to in Bulletin No. 37, 2/ two relocated mining claims, his testimony, and a letter from a mining company that might have been interested in his claims until it learned they were located within a national park (Ex. B, Tr. 46-48). Appellant avers, specifically in regard to his two relocations,

2/ Inventory of Washington Minerals, Parts I and II, by Marshall T. Hunting, 1956 (Tr. 29).

that Bulletin 37 shows production on one relocation, the Isoletta claim, and high assay samples from both relocations (Ex. A). From Bulletin No. 37, contestee drew up a silver distribution map showing numerous claims with recorded values, including his claims and others located in the vicinity (Ex. E).

[3] Appellant's reliance upon Bulletin 37 as evidence of discovery of a valuable mineral deposit is not adequate to meet the prudent man standard. The evidence showing production on the Isoletta claim does not reveal when that production was had or if it was a profitable venture. The Bulletin apparently was published in 1956 (Tr. 29), but the Isoletta had been located since 1897 (Ex. A).

The value which sustains a discovery must be such that with actual mining operations under proper management a profitable venture can be reasonably expected to result. Converse v. Udall, supra, 399 F.2d at 623; United States v. White, 72 I.D. 522, 525 (1965). There is no evidence in the record which reveals that the production on the Isoletta was profitable. Even if it was, however, evidence of past profitable mining is not proof that the claims could presently be profitably mined. Before a discovery can be established under the mining laws, it must be shown as a present fact that the claims are valuable for minerals. Adams v. United States, 318 F.2d 861, 870 (9th Cir. 1963). Exhaustion of the deposit or a change in the economic conditions making mining unprofitable may cause the loss of a previous discovery on the claim. Adams v. United States, supra; Mulkern v. Hammitt, supra; United States v. Denison, 76 I.D. 233 (1969).

[4] Bulletin 37 also showed apparently high assay samples taken on appellant's two relocations, the Isoletta claim and the Homestake and Star claim. These samples alone are not evidence of a valid discovery. The nature of the samples yielding the high values must be considered. United States v. Pruess, A-28641 (Aug. 22, 1961), aff'd, Pruess v. Udall, 410 F.2d 750 (9th Cir.), cert. denied, 396 U.S. 967 (1969). The Bulletin neither reveals when the samples were taken nor the nature of the samples submitted. Therefore, they cannot be considered as representative of a present valuable mineral deposit within the limits of those two relocations.

[5] Appellant's silver distribution map based upon Bulletin 37 (Ex. E) showing mineralization in the vicinity of his claims is not persuasive. Even if it could be considered as supporting a geological inference of mineralization on his claims, an assumption with which we do not agree, it could not be sufficient. Proof of the presence of a valuable mineral deposit within the limits of the

contested claims is required, and inferences of the existence of mineral deposits outside the limits of the contested claims do not meet the discovery test. United States v. Hines Gilbert Gold Mines Company, 1 IBLA 296 (1971).

[6] Appellant's stated willingness to further expend his labor and means is not a basis for discovery. Claimant's hopes and beliefs concerning the quantity and quality of mineral on his claims are not equivalent to the knowledge of the existence of valuable minerals. Castle v. Womble, *supra* at 457. The facts of known mineralization must be such as would justify a prudent man to develop the property. Chrisman v. Miller, *supra*.

It is evident that these claims were, as the Government's mineral examiner testified, mere "paper locations". There was sufficient evidence by Mr. Vaux's own admissions that the claims had not been staked to support charge (c) of the complaint. See United States v. Zweifel, *supra*; Vevelstad v. Flynn, 230 F.2d 695 (9th Cir.), *cert. denied*, 352 U.S. 827 (1956). ^{3/} However, the most significant matter in this case is that there is no basis whatsoever to support appellant's contention that there has been a discovery in this case. None of the other points raised by appellant have relevance to this vital issue of discovery or show error in the Judge's decision.

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 Administrative Law Judge Clarke declaring the lode mining claims null and void is affirmed.

Joan B. Thompson
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Douglas E. Henriques
Administrative Judge

^{3/} The proof may also support other charges, but for the purpose of this decision, it is unnecessary to discuss them. We only note that as to lands which have been patented, there is no basis for bringing a contest if the United States does not have title to reserved minerals. The record does not reflect the ownership of the minerals.

