

UNITED STATES
v.
SIGNA LAUCH, ET AL.

IBLA 71-201

Decided April 26, 1976

Action on recommended decision of Administrative Law Judge E. Kendall Clarke, declaring the Little York lode mining claim null and void, and the Phoenix lode mining claim subject to the provisions of the Surface Resources Act.

Adopted and affirmed.

1. Mining Claims: Discovery: Generally -- Mining Claims: Hearings

A mining claim contested under section 5 of the Surface Resources Act, as amended, 30 U.S.C. § 613 (1970), and a discrete claim contested under the general mining law, will be held subject to the provisions of the Surface Resources Act, and null and void respectively, where the contestees fail to submit evidence which preponderates over the Government's case that a discovery of a valuable mineral deposit has not been made on either claim.

APPEARANCES: Darrell Ellis, Esq., and Jack McSherry, Esq., of McSherry and Ellis, Cle Elum, Washington, for contestees; Jim Kauble, Esq., Office of General Counsel, Department of Agriculture, Portland, Oregon, for contestant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

In United States v. Lauch, 9 IBLA 60 (1973), this Board set aside a 1971 Administrative Law Judge's decision in part, and remanded the case for re-examination of two mining claims. The Board ordered a recommended decision on the validity of the Little York lode claim, and on whether the Phoenix lode claim was subject

to the limitations of the Surface Resources Act of July 23, 1955, as amended, 30 U.S.C. § 611 et seq. (1970). Pursuant to the decision, Administrative Law Judge E. Kendall Clarke issued an order directing the parties to make a joint sampling on the claims, and to submit the assay certificates. Hearing on the sampling was held April 28, 1975, in Ellensburg, Washington.

[1] The Little York lode mining claim was contested under the regulations governing mineral contests under the general mining laws, 30 U.S.C. § 22 et seq. (1970). 43 CFR 4.451 et seq. A claim so contested is void if minerals have not been found in such quantity and quality "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). Accord, Chrisman v. Miller, 197 U.S. 313, 321-23 (1905).

In such a proceeding, the mineral claimant bears the risk of nonpersuasion. When the Government has adduced a prima facie case of lack of discovery, the burden devolves upon the claimant to show by a preponderance of the evidence that a discovery of a valuable mineral deposit has been made. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

The Phoenix lode mining claim was challenged under the provisions of section 5 of the Surface Resources Act of July 23, 1955, as amended, 30 U.S.C. § 613 (1970). In addition to the requirements outlined above, the respondent (claimant) in such a proceeding must demonstrate a discovery of a valuable mineral deposit on the claim as of July 23, 1955, as well as of the date of hearing. Otherwise, the claim becomes subject to the limitations in section 4 of the Act, 30 U.S.C. § 612 (1970). United States v. Speckert, 75 I.D. 367 (1968); United States v. Independent Quick Silver Co., 72 I.D. 367 (1965), aff'd sub nom. Converse v. Udall, 262 F. Supp. 583 (D. Ore. 1966); see United States v. Converse, 72 I.D. 141 (1965), aff'd, 262 F. Supp. 583 (D. Ore. 1966), aff'd, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).

We herewith adopt the discussion and findings of the Administrative Law Judge with the modifications that follow. The Judge held (at pp. 3-5):

Since it was found [in this Board's remand opinion] that a prima facie case had been made by the Government and nothing at the remanded hearing negated in any way that prima facie case, the issues to now be decided are whether in the case of the Little York Lode Claim there was a

showing of discovery at the time of hearing sufficient to preponderate against the Government's prima facie case and in the case of the Phoenix Claim, a showing of discovery as of July 23, 1955 as well as a showing at the time of the hearing sufficient to overcome that prima facie case.

A careful analysis of the testimony and assay certificates introduced at the rehearing indicate that no samples were taken on the Little York Lode Claim from any rock in place. No request was made of the Forest Service engineer to take any sample, jointly from Little York and the only samples taken independently were either from the stream sediments or the dump. (Ex. R-A, R-4, also see Tr. 45). Even though some of these samples show rather high values, they cannot be relied upon to establish the validity of a lode claim (see Ex. R-4 and R-A) because they are not probative evidence concerning the value of the material in place in the lode claim.

The samples which were jointly taken from agreed areas came from a winze in the lower tunnel on the Phoenix claim. (Tr. 8, also see sketch map, page 12 of Ex. R-1). This winze was filled with water at the time of the original examination and therefore was not sampled, however, the Appellants' representative had dewatered it prior to the joint examination.

The assay reports prepared by Union Assay Office from seven samples taken jointly (Ex. R-1) showed gold values ranging from none to 0.060 ozs. per ton and silver values ranged from none to 0.1 ozs. per ton. Mr. Meschter, the Forest Service mining engineer, analyzed the results of the sampling in his report R-1, page 11 as follows:

"The sampling performed in the winze shows that the gold values are limited to relatively thin quartz-calcite veins which are variable in thickness and discontinuous. The wall rock is essentially barren of gold values."

Mr. Meschter testified that the sampling was comprehensive of everything shown in the winze. (Tr. 13).

Duplicate pulps were returned by the assayer to Appellants' Attorney, Mr. McSherry. (Tr. 15). The greatest value in the samples taken jointly was \$9.96 per ton and this was taken at a place where the vein was one to three inches in width. (Tr. 17). Mr. Meschter was of the opinion that a prudent man would not be justified in expending his time and means with a reasonable prospect of developing a valuable mine.

Although Mr. Rutherford [contestees' lessee] talked of high silver values, his testimony was not supported by any assays from material in place. (Tr. 45).

A careful analysis of all of the evidence reveals that there is no substantial material evidence showing any mineralization on the Little York Claim. With respect to the Phoenix Claim all of the evidence upon which any reliance can be placed simply buttresses the prima facie case presented by the Government. The failure to preponderate against the Government's case applies to both the time of the enactment of P.L. 167, July 23, 1955 and the time of the hearing.

Because the Appellants have failed to establish by a preponderance of the evidence that a discovery, within the meaning of the mining laws of the United States, exists on the Little York Claim, it is hereby declared null and void. Inasmuch as no discovery of a valuable mineral has been demonstrated by a preponderance of the evidence on the Phoenix Claim, it is hereby declared to be subject to the limitations and provision of the Act of July 23, 1955, Sec. 5, 30 U.S.C. 613 (1970).

First, contestees' 1/ attempt to rebut Mr. Meschter's conclusion that a discovery had not been made in the winze area was based on their assertion that the rock wall bore the same values as the quartz-calcite veins it contains (Tr. 33, 37). Contestees introduced no samples directed specifically at the mineral values of the "wallrock" or "bulk," as the parties called it. On recross-examination Mr. Meschter pointed out that

1/ The term "contestees" as used here and hereinafter also encompasses the respondents with respect to the Phoenix lode mining claim. They are the same parties.

the assay value of sample Phoenix (Ph)-5, taken from a 9-inch wide vein in the winze, was roughly five times that of Ph-4, a 44-inch cut he took including the same vein and roughly 35 inches of surrounding wallrock (Tr. 29-30). Mr. Meschter concluded from the 1 to 5 ratio of values, and the 1 to 5 ratio of the length of the cuts, that the wallrock was essentially barren of mineral values (Tr. 30). This evidence, the best of record on the question, was not rebutted by contestees.

Second, some of the higher values shown at the first hear-hearing were samples taken from the upper tunnel and dump on the Phoenix claim and assayed in 1963 (Ex. C-53). Mining engineer Meschter's report shows this tunnel in August 1974 as "caved" (Ex. R-1, at 12), and contestees' lessee, Mr. Rutherford, did not request that any sampling be done in this upper tunnel area. Similarly, Mr. Meschter was not asked to take any sample from the "Johnson pocket" or "Johnson cut" on the Phoenix claim.

Mr. Rutherford admitted on cross-examination that Mr. Meschter sampled every location he requested (Tr. 49). Contestees were also free, as Mr. Meschter informed them, to submit whatever other samples they might take. Contestees took this opportunity and submitted assays of samples from the upper dump (Ex. R-A), the creek bed and lower dump on the Little York claim (Exs. R-2, R-3), and from the lower tunnel (Ex. R-4). It is thus apparent that contestees did not consider the upper tunnel or the "Johnson pocket" to be discovery points or workable deposits at the time of rehearing. Their attempt to rebut contestant's case was limited to the winze in the lower tunnel, the lower tunnel itself, and the lower dump (on the Little York claim).

Third, we emphasize and approve the Administrative Law Judge's finding that the lower dump sample submitted by contestees was not probative evidence of the value of the lode deposits in place. The quantity and uniformity of value in the dump material that would support a mining operation is not demonstrated by a single sample, so taken, the value of which is not corroborated by the samples from the tunnel from which the dump material is derived.

Further, the significance of the high values in the creek bed was compromised by Mr. Rutherford's own admission that the sample was not representative (Tr. 46). These samples did not rebut the prima facie case established by the joint samples, and the mining engineer's testimony, that contestees did not have a discovery of a valuable mineral deposit within the meaning of the mining laws on either the Little York or the Phoenix claim.

As supplemented by this discussion, we approve and adopt the Administrative Law Judge's findings and conclusions set out above. Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Little York lode mining claim is declared void, and the Phoenix lode mining claim is declared subject to the limitations of section 4 of the Surface Resources Act, 30 U.S.C. § 612 (1970).

Frederick Fishman
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Douglas E. Henriques
Administrative Judge

