

UNITED STATES
v.
ALOYS A. DIETEMANN AND
DORIS E. L. DIETEMANN

IBLA 76-167

Decided September 8, 1976

Appeal from decision of Administrative Law Judge E. Kendall Clarke declaring the Ruby Lee quartz mining claim and the Ruby Lee millsite claim null and void. California Contest 1564.

Affirmed.

1. Mining Claims: Discovery: Generally

In order 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 as to justify a prudent man in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

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

When the Government contests a mining claim, by practice it has assumed 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. Likewise, a millsite claimant has the burden of establishing the validity of his claim by a preponderance of the evidence.

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

A prima facie case of lack of discovery within a mining claim is established when a Government mineral examiner testifies that he has examined the claim and found mineralization insufficient to support a finding of discovery.

4. Mining Claims: Discovery: Generally

A Government mineral examiner in evaluating a mining claim is under no duty to undertake discovery work or to explore beyond the current workings of a claim and it is incumbent upon the mining claimant to keep discovery points available for inspection by a Government mineral examiner.

5. Millsites: Generally -- Mining Claims: Millsites

Where a millsite is not being used for mining or milling purposes in connection with a mining claim owned by the owner of the millsite, and at the time of contest there is no quartz mill or reduction works on the site, the millsite must be declared null and void.

APPEARANCES: Milton Wichner, Esq., Los Angeles, California, for appellants. John McMunn, Esq., Office of the Solicitor, Department of the Interior, San Francisco, California, for the Government.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Aloys A. Dietemann and Doris E. L. Dietemann have appealed from the July 24, 1975, decision of Administrative Law Judge E. Kendall Clarke declaring the Ruby Lee quartz mining claim and the Ruby Lee millsite claim null and void. The proceeding was commenced at the request of the National Park Service by the issuance of a complaint by the Bureau of Land Management (BLM) on March 11, 1974. The complaint charged that: (1) there was no discovery of a valuable mineral deposit on the Ruby Lee mining claim; (2) the Ruby Lee millsite claim was not being used for mining and milling purposes, nor did it contain a quartz mill or reduction works; (3) neither claim was being held in

good faith; and (4) the claimants failed to substantially comply with the requirements of assessment work.

Both claims are located within the Joshua Tree National Monument in Riverside County, California. Location notices for the claims were recorded on March 10, 1936. The Joshua Tree National Monument was established by proclamation issued on August 10, 1936.

In his decision Judge Clarke concluded that there was no discovery of a valuable mineral deposit on the Ruby Lee mining claim and that the Ruby Lee millsite did not contain a quartz mill or reduction works, nor was it being used for mining or milling purposes. He, therefore, declared both claims null and void.

On appeal appellants assert that the Judge's decision failed to consider certain affirmative defenses which they set up in their answer to the complaint. In addition, appellants state that the Government failed to establish a prima facie case of lack of discovery on the Ruby Lee mining claim and that the Park Service mining engineer failed to sample an area of the mining claim which was highly mineralized.

Appellants contend that if the mining claim is valid, the millsite claim would be valid. Also they state that "the Millsite may be valid independently as having a 'quartz mill or reduction works' on the millsite."

Appellants submit that the contest should be dismissed or, in the alternative, remanded for further examination of the tunnel area.

We will deal first with appellants' assertion that the Judge ignored certain affirmative defenses set forth in their answer. While the Judge may not have dealt specifically with each defense, it is clear that none of the alleged defenses merit dismissal of the contest. There was no evidence of facts to support these alleged defenses and little or no legal reasoning offered by appellants to support their application to this case. The alleged affirmative defenses and our comments thereon follow.

1. Failure to state a claim upon which relief can be granted such as failure to perform assessment work.

Apparently, appellants' contention is that the charges made in the complaint would not justify a declaration that the claims were null and void, even if the Government could prove the charges. Such a contention is patently wrong. It is clear that the Department of the Interior may initiate a contest to determine the

validity of unpatented mining claims. United States v. Coleman, 390 U.S. 599 (1968); Cameron v. United States, 252 U.S. 450 (1920); United States v. Springer, 491 F.2d 239 (9th Cir. 1974), cert. denied, 419 U.S. 834 (1974); Davis v. Nelson, 329 F.2d 840 (9th Cir. 1964). ^{1/}

2. Estoppel.

Appellants have made no argument concerning estoppel. Neither the doctrines of equitable nor collateral estoppel are applicable to this case.

3. Denial of due process and violation of Contestees' civil rights.

Judge Clarke correctly stated the law concerning the due process requirements. See ALJ Decision at pp. 5-6. The requirements were met in the present case. See United States v. Coleman, *supra*, 5 U.S.C. § 556 *et seq.* (1970); United States v. Gunn, 7 IBLA 237, 79 I.D. 588 (1972). Appellants were given notice and an opportunity to be heard. They appeared at an administrative hearing and were represented by counsel. Following the conclusion of the hearing, they were afforded the opportunity to submit a post-hearing brief. Appellants have not shown that any rights have been violated in this proceeding.

4. Waiver of right to contest validity of the claims.

Appellants did not specify how the Government had waived the right to contest the claims herein; however, it is clear that the Department has the right to determine the validity of an unpatented mining claim at any time until patent issues. Cameron v. United States, *supra*; Davis v. Nelson, *supra*.

5. Contestees, having held and worked the claims for a continuous period of more than 5 years, established vested rights under 30 U.S.C. § 38.

Appellants have not established any vested rights because 30 U.S.C. § 38 (1970) does not relieve appellants of the burden of establishing the existence of a valid discovery on their mining claim. See Cole v. Ralph, 252 U.S. 286 (1920); Meritt N. Barton,

^{1/} The specific charge of the complaint that appellants had failed to perform assessment work was withdrawn by the attorney for the Government subsequent to the conclusion of the hearing but prior to Judge Clarke's decision. See Government's Answering Brief dated March 14, 1975, at p. 12. The other charges, if proven, would be sufficient to warrant a declaration that the claims are invalid.

6 IBLA 293, 79 I.D. 431A (1972); cf. United States v. Guzman, 18 IBLA 109, 81 I.D. 685 (1974).

6. In Contest No. 7802 before the Land Office at Los Angeles, California, the Ruby Lee Millsite was adjudicated to be valid in U.S. v. Ruby Lee Rule filed in January 1943.

The earlier contest of the millsite was discussed at the hearing and it was indicated that there was no record of final adjudication in such contest. In any event, attorney for appellants admitted that the contest would bear little relevance to the present contest because the Government may contest an unpatented claim at any time up to issuance of patent (Tr. 15-16). That the millsite was properly found invalid is demonstrated by the discussion, infra.

In short, these alleged affirmative defenses are without any merit and appear to be frivolous. We turn now to the issue of the validity of the claims.

At the hearing Paul H. Knowles, a professional mining engineer employed by the Park Service, testified concerning his field investigation of the claims. He briefly visited the millsite claim in February 1972 or 1973 with a park ranger (Tr. 22). On March 13, of the same year, he met appellants at the millsite and in their company he investigated the mining claim. 2/ Mr. Knowles made one other visit to the millsite on November 24, 1974, with John McMunn, attorney for the Government (Tr. 43).

Mr. Knowles took seven samples from the Ruby Lee mining claim which is located about 8 1/2 miles from the millsite (Tr. 21, 29). He sampled all the areas pointed out to him by Mr. Dietemann (Tr. 30; Ex. 5 at p. 2). Mr. Knowles testified that the method used in taking the samples was channel sampling which is a generally accepted professional method (Tr. 35).

The samples were assayed by an independent professional assaying firm (Tr. 36). The samples were all assayed for gold and silver.

2/ There is some discrepancy over the year of the March 13 visit. The Administrative Law Judge's decision states that the March 13 visit occurred in 1972. See ALJ Decision at p. 2. Mr. Knowles stated at the hearing he visited the millsite in February 1972 and in the company of appellants visited "at the millsite again in, I believe it was March 13th, same year" (Tr. 22). However, Ex. 2 and Ex. 4 state that the examination date was March 13, 1973. Other evidence appears to reflect 1973 as the correct year, with the reference in the transcript to 1972 being an error. In any event, Mr. Knowles did make an investigation of the claims while accompanied by appellants.

One sample was assayed for platinum. Four samples were assayed for lead. No platinum was found and only traces of lead (Ex. 5). Mr. Knowles stated that, based on the current gold and silver prices at the date of the hearing, the value of the samples averaged less than \$ 2.00 per ton (Tr. 47). His estimation of the cost of mining, transporting, and milling ore from the Ruby Lee mining claim was about \$ 50.00 per ton, plus 15 percent add on for inflation to 1974, plus 10 percent for smelter costs, for a total of about \$ 60 per ton, minimum (Tr. 48, 147, 148). In his opinion, a reasonably prudent man would not be justified in expending his labor and means with a reasonable prospect of success in developing a valuable mine on the mining claim (Tr. 49).

Mr. Knowles testified that on the Ruby Lee millsite claim there was a small cabin about 18 feet by 12 feet with a small add-on shed behind it (Tr. 140). He found no quartz mill or reduction works on the claim (Tr. 53). The well on the millsite was dry. He stated that water is necessary in the milling process (Tr. 55).

There was a small stockpile of ore on the millsite claim. Mr. Knowles estimated that the pile contained about 70 tons of hand-selected material (Tr. 57). Mr. Dietemann told Mr. Knowles that some of the material in the pile was from the Ruby Lee mining claim and some was from other claims. He did not identify what other claims (Tr. 53). Mr. Knowles took grab samples from 12 different points on the stockpile (Tr. 55). The assay of this sampling showed a value for gold and silver of \$ 52.56 per ton (Tr. 56). In Mr. Knowles' opinion the stockpile was too small to interest a buyer (Tr. 57). He did not feel that the millsite claim was being used or occupied for mining and milling purposes in connection with a mining claim, nor did it contain a quartz mill or reduction works (Tr. 58).

In rebuttal, Mr. Dietemann, a sanitary engineer, testified that he worked the mining claim in the late 1920's and early 1930's and that about 250 ounces of gold were removed from the Ruby Lee mining claim during that period (Tr. 270-271). Operations were halted around 1936 (Tr. 268). He stated that following his World War II service, 10 tons of lead were removed from the claim which he personally used in his plumbing business during 1948, 1949 and 1950 (Tr. 271, 275). Mr. Dietemann testified that from 1948 to 1961 or 1962, 125 ounces of gold were removed from the claim. He sold the gold to a dentist (Tr. 272).

Mr. Dietemann feels that there are "perhaps one million tons of ore on that [Ruby Lee mining] claim" (Tr. 279). He stated that in 1973 he dynamited one of the tunnels on the claim to cover up the main vein "to keep it from the public" (Tr. 280).

He used portable milling facilities on his millsite until about 1962. Some of the machinery he used for milling is stored in his garage at home in Los Angeles (Tr. 276).

Mrs. Dietemann testified that she married Mr. Dietemann in 1964 and that Mr. Dietemann had been to the Ruby Lee mining claim at least once a year since then (Tr. 297-98). She felt there was a discovery on the mining claim, but the first time she was on the mining claim was when she accompanied Mr. Dietemann and Mr. Knowles in 1973 (Tr. 302, 304). She had been to the millsite at least once a year since 1963 or 1964 (Tr. 304).

Bob Sanders testified on behalf of appellants concerning certain visits he made to the mining claim during 1974 (Tr. 155-157). Mr. Sanders has no formal education in geology or mining engineering (Tr. 197). He has never worked in the field as a miner, geologist or mining engineer. His background is in the construction industry (Tr. 198). Mr. Sanders took various samples on the mining claim, but his sampling techniques were unusual and he apparently mixed samples from various locations on the claim (Tr. 195-206).

Mr. Sanders described himself as a potential lessee of the property (Tr. 238). He said his interest in the mining claim was to determine if there was enough material on the claim to justify further exploration (Tr. 205). He considered the claim a "good prospect" (Tr. 249).

Appellants also presented a written report by a mining engineer, Robert R. Dunfield (Ex. A). Mr. Dunfield made a brief examination of the Ruby Lee mining claim on December 14 and 15, 1975. Mr. Dunfield did not attend the hearing and was, therefore, unavailable for cross-examination. In his report, Mr. Dunfield stated that a tunnel was started on the vein crossing the claim, but that he was unable to remove the 3' to 4' of caved in material to sample the zone beyond the portal area. He took five samples, four of which assayed from none to only a trace of gold, while the fifth, which was taken in the portal area, assayed .225 oz. of gold per ton or about \$ 40.95 per ton. He suggested that the portal might be positioned at the top of a potential ore zone, but that there was "no assurance that such ore will continue with depth."

[1] In order to establish the validity of a mining claim, the claimant must prove a discovery of a valuable mineral deposit. In order to constitute a discovery there must be physically exposed within the limits of the claim minerals in such a quality and quantity as to justify a prudent man 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. 457 (1894).

[2] When the Government contests the validity of a mining claim, by practice it has assumed 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, *supra*; Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959); United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975). Likewise, a millsite claimant has the burden of establishing the validity of his claim by a preponderance of the evidence. United States v. Swanson, 14 IBLA 158, 81 I.D. 14 (1974).

[3] There is no merit in appellants' contention that the Government failed to make a prima facie case of the validity of the claims. The Government is not required to provide positive proof that there has been no discovery of a valuable mineral deposit on a mining claim. A prima facie case is established when a Government mineral examiner testifies that he has examined the claim and found mineralization insufficient to support a finding of discovery. United States v. Clark, 18 IBLA 368 (1975).

Appellants contend that Mr. Knowles failed to sample a highly mineralized area of the mining claim, *i.e.*, the tunnel area. Such tunnel is the one that was dynamited by Mr. Dietemann. Mr. Dietemann accompanied Mr. Knowles on his examination of the claim, yet Mr. Dietemann did not direct Mr. Knowles' attention to the area which appellants now claim was highly mineralized.

[4] The Government mining engineer is under no duty to undertake discovery work or to explore beyond the current workings of a claim and it is incumbent upon the mining claimant to keep discovery points available for inspection by mineral examiners. United States v. Blomquist, 7 IBLA 351 (1972); United States v. Houston, 66 I.D. 161 (1959). Further, there is no persuasive proof that there is sufficient mineralization in the tunnel or other areas on the claim to meet the discovery test. Mr. Dietemann has explored the claim since the late 1920's, but has not demonstrated the presence of more than a little, erratic mineralization.

The evidence presented by the Government established a prima facie case that both the Ruby Lee mining claim and Ruby Lee millsite claim are invalid.

The Government mining engineer did not find sufficient mineralization to justify a further expenditure of labor and means to develop the Ruby Lee mining claim. Appellants' attempt to produce evidence to rebut the prima facie case of invalidity of the mining claim falls far short of the necessary standard.

Appellants' evidence in support of a discovery on the mining claim consisted of the self-serving testimony by Mr. and Mrs. Dietemann,

the submission of a mineral report by a mining engineer who was unavailable for cross-examination at the hearing, and the testimony of a person with no formal training in mining who was interested in leasing the claim because he thought it was a "good prospect." Analysis of this evidence indicates that it does not establish that a prudent man would be warranted in expending further time and money with a reasonable expectation of developing a valuable mine. The report of the mining engineer would not warrant such an expenditure, but demonstrates that further exploration would be needed to establish if there is mineralization below the surface. Mr. Sanders' testimony demonstrates only his own willingness to explore the claim.

Viewing the evidence in the light most favorable to appellants, they have established only that the Ruby Lee mining claim might possibly justify further exploration. Mineral indications which might justify further exploration, but not development of mining operations, are not sufficient to establish discovery of a valuable mineral deposit. Henault Mining Co. v. Tysk, 419 F.2d 766 (9th Cir. 1969) cert. denied, 398 U.S. 950 (1970); United States v. Clark, supra.

[5] With regard to the millsite claim, where a millsite is not being used or occupied for mining or milling purposes in connection with a mining claim owned by the owner of the millsite, and at the time of contest there is no quartz mill or reduction works on the site, the millsite must be declared null and void. United States v. Almgren, 17 IBLA 295 (1974).

Section 15 of the Act of May 10, 1872, 17 Stat. 96, 30 U.S.C. § 42 (1970), which authorizes the issuance of millsite patents, states in pertinent part:

Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith * * *. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section.

Appellants presented evidence that the millsite had been used in the past for milling purposes when they had had a portable mill on the claim. At the time of the hearing some of the milling equipment was being stored in their garage in Los Angeles. However, there was no mill on the claim, although there was a small stockpile of material on the claim, the origin of which was not evidenced.

Appellants may not be considered the owners of a quartz mill or reduction works within the meaning of the statute merely because Mr. Dietemann may have used a mill on the site at an earlier time. United States v. Cuneo, 15 IBLA 304, 81 I.D. 262 (1974). There is not a quartz mill or reduction works on the claim which could be used to mill ore, nor has there been for more than a decade. Therefore, the millsite does not meet the requirements for being an independent site for a quartz mill or reduction works. Further, it cannot be said that the Ruby Lee millsite claim is being used or occupied for mining or milling purposes in connection with the Ruby Lee or any other mining claim. There is no persuasive evidence that the millsite is legitimately being used in connection with any recent mining activity within the purview of the law. The mere existence of the small stockpile of material on the claim is not sufficient to establish such use.

For the above-stated reasons, the Ruby Lee mining claim and Ruby Lee millsite claim are null and void.

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

Joan B. Thompson
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Edward W. Stuebing
Administrative Judge

