

CABOT SEDGWICK, ET AL.

v.

O. M. PARKER

IBLA 76-626

Decided October 20, 1976

Appeal from decision of Administrative Law Judge Robert W. Mesch declaring three mining claims null and void. Private Contest No. 8871 (Arizona).

Affirmed and adopted.

1. Evidence: Admissibility -- Evidence: Weight -- Mining Claims: Contests -- Rules of Practice: Witnesses

Where the testimony and conclusions of an expert witness are based on careful examination of a mining claim by appropriate scientific methods, they will be accepted into evidence and given appropriate weight regardless of the fact that the witness may not be registered within that particular state as an expert in his field.

2. Mining Claims: Discovery: Generally

A discovery of a valuable mineral deposit has been made where 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 profitable mine.

3. 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.

4. Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally -- Stock-raising Homesteads

When, as a result of direct proceedings against mining claims, the Department determines that no discovery has been made, the claims must be declared null and void notwithstanding that they are located on land patented under the Stock-raising Homestead Act and the contest was privately initiated.

APPEARANCES: James F. Haythornwhite, Esq., Nogales, Arizona, for appellant; Louis W. Barassi, Esq., Tuscon, Arizona, for the appellee.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

O. M. Parker appeals from the April 8, 1976, decision of Administrative Law Judge Robert W. Mesch declaring 3 mining claims null and void for lack of discovery of a valuable mineral deposit. Appellant advances three reasons in support of his argument that Judge Mesch's decision should be reversed.

[1] Appellant first argues that the testimony of the contestants' expert witness should have been excluded, essentially because he was not professionally registered with the State of Arizona. We agree with Judge Mesch's disposition of both this issue and the case as reflected by his decision, a copy of which is attached hereto. We would only add that it is clear from the record that the testimony of the contestants-appellees' expert witness, Richard J. Lundin, was far more convincing than that of the contestee-appellant's expert witness, as Lundin's testimony was based on a thorough and methodical sampling of the claim in sharp contrast to that of contestee-appellant's expert testimony, which was insufficient to establish that a valuable deposit of mineral had been discovered.

[2, 3] Appellant also argues that Judge Mesch used an improper standard and weighed the testimony improperly in determining that there had been no discovery of a valuable mineral deposit. Because Judge Mesch's decision on both points is clearly correct no further discussion is necessary.

[4] Finally, appellant argues that it was error to declare the claims null and void, even if it is determined that no discovery has been made on the claims, because they are located on private land patented under the Stock-raising Homestead Act 1/ with a reservation of all minerals to the United States. However, it has been a consistent policy of this Department since 1960 to declare mining claims null and void where, after notice and an opportunity for a hearing, it is apparent that no discovery has been made. United States v. Carlile, 67 I.D. 417 (1960); United States v. Baranof Exploration & Development Co., 72 I.D. 212 (1965); United States v. Bartels, 6 IBLA 124 (1972). This Board has held in a case with legal issues identical to the case at bar, that where there has been no discovery of a valuable mineral deposit, the claim must be declared null and void. Sedgwick v. Callahan, 9 IBLA 216 (1973); see also Thomas v. DeVilbiss, 10 IBLA 56 (1973), aff'd. Thomas v. Morton, 408 F. Supp. 1361 (D. Ariz. 1976). We adhere to the holdings of the cases cited for the reasons stated therein.

Therefore, 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 and adopted as the decision of this Board.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Newton Frishberg
Chief Administrative Judge

1/ 39 Stat 862, 43 U.S.C. §§ 891 et seq. (1970).

April 8, 1976

CABOT SEDGWICK and PAULA	:	ARIZONA 8871
SEDGWICK, husband and wife,	:	
and LAWYERS TITLE OF ARIZONA,	:	Involving the Honky Tonk,
a corporation, as Trustee	:	Honky Tonk #1 and Argentite
under Trust No. 5850T,	:	unpatented lode mining claims
	:	situated in N 1/2 of Section 33
Contestants	:	and S 1/2 of Section 28, T. 23
	:	S., R. 14 E., G. and S.R.B.
v.	:	and M., Santa Cruz County,
	:	Arizona.
	:	
O. M. PARKER,	:	
	:	
Contestee	:	

DECISION

Appearances: Louis W. Barassi, Esq., May, Dees & Barassi,
Tucson, Arizona, for contestants;

James F. Haythornwhite, Esq., Nogales, Arizona,
for contestee.

Before: Administrative Law Judge Mesch.

Pursuant to 43 CFR 4.450, the contestants, as the owners of patented stock-raising homestead entries, filed a complaint alleging, among other things, that the subject mining claims are invalid because ". . . A valid mineral discovery as required by the mining laws of the United States does not exist within the limits of each of the mining claims . . ." The contestee, as the owner of the mining claims, which cover lands within the stock-raising homestead entries, filed a timely answer and denied that the mining claims are invalid. A hearing was held on February 11, 1976, at Nogales, Arizona.

In Cabot Sedgwick, et al. v. B. H. Callahan, 9 IBLA 216 (1973), the Interior Board of Land Appeals ruled that: (1) a surface patentee under the Stock-Raising Homestead Act, 43 U.S.C. §§ 291-301, has standing to bring a contest challenging the validity of a mining claim located upon the same land; (2) the contestant has only the burden of establishing a prima facie case that the mining claim is invalid and the burden then shifts to the mineral claimant to show by a preponderance of the evidence that the mining claim is valid; and (3) if it is found that a discovery of a valuable mineral deposit has not been made, the mining claim must be declared null and void.

In determining whether a mining claim has been perfected by the discovery of a valuable mineral deposit, the Department of the Interior and the courts have consistently applied the criteria that: (1) a valuable mineral deposit is an occurrence of mineralization of such quality and quantity as to warrant a person of ordinary prudence in the expenditure of time and money in the development of a mine and the extraction of the mineral, i.e., the mineral deposit that has been found must have a present value for mining purposes; and (2) mineralization that only warrants further prospecting or exploration in an effort to ascertain whether sufficient mineralization might be found to justify mining or development does not constitute a valuable mineral deposit. See, for example, Chrisman v. Miller, 197 U.S. 313 (1905); United States v. Coleman, 390 U.S. 599 (1968); Henault Mining Company v. Tysk, 419 F.2d 766 (9th Cir. 1969); Barton v. Morton, 498 F.2d 288 (9th Cir. 1974); United States v. Frank W. Winegar et al., 16 IBLA 112, 81 I.D. 370 (1974); United States v. James P. Rigg, Jr. et al., 16 IBLA 385 (1974).

In Chrisman v. Miller, supra, some oil had been found seeping at the surface within the limits of an oil placer mining claim. The court stated with respect to this finding of mineralization:

. . . It does not establish a discovery. It only suggests a possibility of mineral of sufficient amount and value to justify further exploration. (p. 320)

The court then accepted the following declaration of what is necessary to constitute a discovery of a valuable mineral deposit:

. . . "The mere indication or presence of gold or silver is not sufficient The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral." . . . (p. 322)

In Barton v. Morton, supra, veins had been exposed containing some gold and silver. The mineralization was spotty and uneven. The mineralization was not of sufficient quantity to be mined economically. Expert witnesses testified that a prudent man would be justified in tunneling into or along the veins in search of chutes or pockets containing sufficient ore to be profitably mined. The court quoted with approval:

[i]t is nowhere suggested that any quantity of material of the quality of the vein matter thus far disclosed would constitute a mineable body of ore. The evidence does not, in fact, establish any mineral quality of any consistent extent. Although appellants have found ore samples with indicated values exceeding \$ 70 per ton, the record does not support a finding that they have found a deposit yielding ore of that quality, or of any other quality, the exploitation of which may be contemplated. . . .

. . . That which is called for . . . is further exploration to find the deposit supposed to exist. (p. 291)

At the hearing, I denied a motion by the contestee to strike the testimony of the contestants' only witness. The motion was based on the grounds that the witness, a geologist, was not registered as provided by the Arizona laws and, therefore, his evaluation of the mining claims and his testimony was "unlawful." 1/ I have reconsidered my ruling and have concluded that the motion was properly denied. The fact that

1/ A.R.S. § 32-145 provides, in part:

Any person who commits any of the following acts is guilty of a misdemeanor:

[Footnote 1 continued on page 4.]

the witness was not a registered geologist and might have performed work in violation of the Arizona statutes did not make him an incompetent witness or require that his testimony be stricken. In Paradise Prairie Land Co. v. United States, 212 F.2d 170 (5th Cir. 1954), the court stated:

The trial judge is vested with a broad judicial discretion in admitting or rejecting expert testimony, but lack of a statutory license to practice surveying is not of itself sufficient to justify the rejection of the testimony of one who is otherwise qualified as an expert.

An expert is one who qualifies as such by reason of special knowledge and experience, whether or not he is authorized to practice in his special field under a licencing [sic] requirement imposed by statute. The inquiry by the trial judge as to the qualifications of such a witness should be whether or not the witness possesses the special knowledge and experience to qualify him as an expert, not whether or not he has complied with the state's licencing [sic] requirements to practice that profession.

1/ [Continued from page 3.]

1. Practices, offers to practice or by any implication holds himself out as qualified to practice as an architect, assayer, engineer, geologist, landscape architect, or land surveyor, who is not registered as provided by this chapter.

A.R.S. § 32-101 defines "geological practice" as:

. . . [A]ny professional service or work requiring geological education, training, and experience, and the application of special knowledge of the earth sciences to such professional services as consultation, [and] evaluation of mining properties
. . . .

[Citations omitted.] The witness should have been permitted to testify, if the only objection was lack of a statutory license to practice surveying. (p. 173)

See also Hayes v. United States, 367 F.2d 216 (10th Cir. 1966); Bowser v. Publicker Industries, 101 F. Supp. 386 (E.D. Pa. 1951); United States v. 60.14 Acres of Land, 235 F. Supp. 401 (W.D. Pa. 1964); Howlett v. Mayo's, Inc., 100 P.2d 263 (Okla. 1940).

The contestants' witness testified that he has a bachelor of arts degree in anthropology and geology (Tr. 6); that he has pursued graduate studies in geology (Tr. 6); that he is 28 years old and has spent about two and one-half years out of the last five years as an exploration, evaluation and mining geologist (Tr. 7-10, 58, 132); and that he has not, as yet, completed the training requirement for registration as a geologist in Arizona (Tr. 9).

He testified that he and an assistant, who is also a graduate geologist, spent three days in February of 1976 examining the area of the contested claims (Tr. 10, 44); that they took 23 samples from the claims and from adjoining land (Tr. 10; Ex. 3); that the samples were assayed for gold, silver, lead and copper (Tr. 14); and that the assay results showed insignificant values (Tr. 14). With gold valued at \$ 100.00 an ounce, silver at \$ 3.50 an ounce, copper at \$.50 a pound, and lead at \$.20 a pound, the sample containing the highest total values showed that the material had a gross value of \$ 9.17 per ton. (Ex. 6) The witness stated that mining costs alone would run from \$ 15.00 to \$ 25.00 per ton. (Tr. 15)

The witness expressed the opinion that a person of ordinary prudence would not be justified in investing time or money in the development of the mining claims. (Tr. 21) He also stated that he did not believe the claims were even worthy of further exploration activities. (Tr. 22)

The testimony of this witness is sufficient to establish a prima facie case that a valuable mineral deposit has not been found within the contested mining claims.

The contestee presented the testimony of a consulting mining engineer who has been registered with the State of Arizona for almost 30 years. (Tr. 82) This witness has an extensive experience background in mining and has been familiar with the mining district in which the claims are located since 1948. (Tr. 82-84)

He testified that he took four samples from the claims in 1973 (Tr. 86); that two of the samples did not have any values (Tr. 86); that one sample from the Honky Tonk Claim ran 0.36 of an ounce of gold per ton (Tr. 87); that a sample of about 10 tons of ore in place on the Argentite Claim ran 0.85 of a ounce of gold (Tr. 87); and that he took three samples from the Honky Tonk No. 2 Claim the previous Saturday but he did not, as yet, have the assay results (Tr. 88).

He expressed the opinions that the claims ". . . can be mined with careful management and adequate preparation . . ." and that a person of ordinary prudence would be justified in spending time and money on the property in a mining activity. (Tr. 98) However, he also testified that he did not know the tonnage of the ore that might be available for mining (Tr. 96); and if he owned the property, the first thing he would do would be to sample it carefully "[t]o be sure that I had ore and it wasn't too spotty, . . ." (Tr. 99) He further testified:

THE COURT: . . . Other than this ten tons of ore, is the property, each one of the three mining claims, ready for development or do they simply justify some exploration?

THE WITNESS: Further exploration in the favorable spots to develop ore.

THE COURT: To see what you might find there; is this correct?

THE WITNESS: Yes, yes. There are good assays on each of the three claims that would lead me to believe, to go ahead and do a little work on each one of the three.

THE COURT: But is it correct or not that you would have to have some sound idea as to the number of tons of ore that might be available before you would want to start a mining operation?

THE WITNESS: Yes. . . . (Tr. 125, 126)

I construe the testimony of this witness as indicating only that the claims merit further prospecting or exploration in

an effort to establish whether there are (other than possibly 10 tons of mineralization exposed on the Argentite Claim) valuable mineral deposits within the claims. I do not construe the testimony as showing that a valuable mineral deposit, i.e., one that justifies exploitation in an effort to develop a valuable mine, has been found within the limits of each of the mining claims. 2/

I cannot conclude and I do not believe a witness can conclude, irrespective of his expertise and experience, that a valuable mineral deposit has been found within the limits of a mining claim without having some information as to the amount of the ore that might be available for extraction, the facility for reaching and working it, and the value or product per ton. The record in this case does not contain any information as to the amount of ore that might be available for extraction. There is some information with respect to mining and other costs, but it is not tied to any specific deposit. The two samples that had some value which the contestee's expert witness took and the samples the contestee took are virtually meaningless without some information as to the size or extent of the mineralization represented by the samples.

The evidence does establish that there are an estimated 10 tons of mineralization exposed on a wall in one of the excavations on the Argentite Claim that contains, at least by one sample, values per ton of 0.85 of an ounce of gold, 1.90 ounces of silver, 0.05 per cent copper, and 2.00 per cent lead. (Ex. B) With respect to this deposit, the contestee's expert witness estimated the costs of mining, transportation, smelting and overhead at \$ 73.00 to \$ 83.00 per ton. (Tr. 108-111) On the basis of metal prices in the February 1976 issue of the Engineering and Mining Journal, the gross return would be in the neighborhood of \$ 127.00 per ton. If the one sample is representative of the deposit, then the mineralization might yield a net return of from \$ 44.00 to \$ 54.00 per ton, or a total return of \$ 440.00 to \$ 540.00.

2/ A valuable mineral deposit must be found within the limits of each mining claim. A discovery on one claim will not support rights to another claim or group of claims even though the claims are contiguous. United States v. Frank and Wanita Melluzzo, 76 I.D. 181 (1969); United States v. J. L. Block, 12 IBLA 393, 80 I.D. 571 (1973).

The question is whether this occurrence of mineralization constitutes a valuable mineral deposit sufficient to validate the Argentite Claim. A person of ordinary prudence would probably be justified in taking steps to extract this mineralization. However, I do not believe that this mineralization, standing alone, is adequate to validate the mining claim. If it is, then an individual could obtain a patent to 20 acres of public domain upon a showing that there was some mineralization, no matter how insignificant, that could be extracted at a profit. I doubt that this was the intent of the mining laws. In Barton v. Morton, supra, the court stated:

. . . A patent passes ownership of public lands into private hands. So irrevocable a diminution of the public domain should be attended by substantial assurance that there will be a compensating public gain in the form of an increased supply of available mineral resources. . . . (p. 292)

The test to be applied is not whether some mineralization, no matter how inconsequential, might be extracted at a profit but whether the mineralization that has been found is such that a person of ordinary prudence would be justified in working the mining claim in an attempt to develop a valuable mining operation. Cf. United States v. Frank and Wanita Melluzzo, supra; United States v. E. A. Barrows and Esther Barrows, 76 I.D. 299 (1969), aff'd; Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971).

The contestee, who is a retired Naval officer, also testified. His testimony was general and inconclusive and does not merit summarization. He did not present any information which would support the conclusion that a deposit of mineralization has been found within the limits of any one of the claims of such quality and quantity as to justify a person of ordinary prudence in commencing a mining endeavor with a reasonable expectation of developing a valuable mine.

Each of the contested mining claims is declared null and void because the claim has not been perfected by the discovery of a valuable mineral deposit.

Robert W. Mesch
Administrative Law Judge

