

UNITED STATES  
v.  
GEORGE J. HUNT AND A. M. GOODWIN

IBLA 77-5

Decided February 23, 1977

Appeal from a decision of Administrative Law Judge Dean F. Ratzman declaring the Tyros and Tyros No. 1 (aka Tyros #2) placer mining claims null and void. N-8173, N-8174.

Affirmed.

1. Administrative Procedure: Burden of Proof--Mining Claims:  
Contests--Mining Claims: Discovery: Generally

When the Government has presented a prima facie case of lack of discovery of a valuable mineral deposit on a mining claim, the mining claimant then has the burden of establishing by a preponderance of the evidence that the discovery test has been met. Consequently, the ultimate burden of proving discovery is always upon the mining claimant.

2. Mining Claims: Hearings--Rules of Practice: Evidence

Evidence tendered on appeal from a mining contest may only be considered for the limited purpose of determining whether a further hearing is warranted.

APPEARANCES: George J. Hunt, pro se; F. Thomas Eck III, Esq., Eck & Harkins, Ltd., Carson City, Nevada for appellant, A. M. Goodwin; Otto Aho, Esq., Field Solicitor, Department of the Interior, Reno, Nevada, for the Government.

## OPINION BY ADMINISTRATIVE JUDGE FISHMAN

George J. Hunt and A. M. Goodwin have appealed from a decision of Administrative Law Judge Dean F. Ratzman dated September 27, 1976, declaring the Tyros and Tyros No. 1 (aka Tyros #2) placer mining claims null and void. The claims are situated in Sec. 18, T. 14 N., R. 20 E., M.D.M., Douglas County, Nevada.

On April 8, 1975, the Bureau of Land Management (BLM) filed complaints (N-8173 and N-8174) contesting the validity of the two above-mentioned placer mining claims. The complaints charged that (1) the land encompassed by the claims was nonmineral in character and (2) that minerals had not been found within the limits of the claims in sufficient quantities or qualities to constitute a valid discovery. Judge Ratzman concluded that the mining claimants had failed to establish by a preponderance of the evidence that a discovery of valuable minerals existed on either of the claims.

We have reviewed Judge Ratzman's decision containing his summary of the evidence, the applicable law, and his findings and conclusions. We are in agreement with his decision, and, therefore, we adopt it as the decision of this Board and attach a copy hereto.

[1] Appellants claim on appeal that there was insufficient evidence upon which to make the determination of lack of discovery of valuable minerals on the contested claims. This contention is clearly erroneous. The Government presented a prima facie case of lack of discovery of valuable minerals on the claims. This is all that contestant was required to do. The ultimate burden of proving a discovery is on the mining claimant. Such burden requires the claimant to show by a preponderance of the evidence that the discovery test has been met. Consequently, the ultimate burden of proving discovery is always upon the mining claimant. United States v. Zweifel, 508 F.2d 1150, 1157 (10th Cir. 1975), cert. denied, 423 U.S. 829 (1976); United States v. Springer, 491 F.2d 239 (9th Cir. 1974), cert. denied, 419 U.S. 834 (1974). As stated by Judge Ratzman, appellants' "presentation at the hearing consisted entirely of allegations and speculation."

Appellants state that the Judge failed to give "sufficient consideration to factors other than mineralization." Appellants cite such factors as the use of zirconium in the nuclear energy field; the increasing use of nuclear energy and the concomitant demand for essential minerals such as zirconium. For such reasons, appellants believe a prudent man would be justified in expending his labor and means with a reasonable prospect of success in developing a valuable mine on the claims.

Such an argument presupposes the existence of sufficient mineralization on the two contested claims. The mere expectation of finding a valuable mineral deposit on a mining claim is insufficient to establish a discovery. 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. United States v. Fichtner, 24 IBLA 128 (1976).

Appellants charge that they were not allowed to present probative evidence, such as test drillings or samplings or expert opinion, to establish valuable mineralization on the claims. This argument is without merit. There is no indication in the case record that appellants were prevented from presenting evidence to establish the validity of their claims. In fact, appellants were allowed great latitude in the presentation of their case at the hearing (Tr. 64-5). In addition, Judge Ratzman specifically asked appellants if they desired to make any other statements at the hearing (Tr. 91) and when asked by Judge Ratzman whether they wished to submit a post-hearing brief, appellant Hunt replied, "Well, I don't think it's necessary. I think we have said all that is relevant" (Tr. 93).

Appellants also request a rehearing and have submitted certain evidence on appeal consisting of an "unsigned statement in the handwriting of George Hunt," assay reports from the U.S. Department of the Interior, Bureau of Mines, maps prepared by George Hunt depicting the sites of sampling by Mr. Mallery and Mr. Hunt, and Bureau of Mines Bulletins on titanium and zirconium. Appellants claim that because they were without legal counsel at the hearing they did not understand or appreciate their burden of proof.

[2] Evidence tendered on appeal from a mining contest may only be considered for the limited purpose of deciding whether there is any justification for the ordering of a further hearing, since the record made at the hearing must be the sole basis for decision. United States v. Fichtner, *supra* at 130; United States v. MacIver, 20 IBLA 352 (1975). Despite the fact that appellants were not represented by counsel at the hearing, the evidence submitted does not appear to be of such a nature that it could not have been produced at the hearing. Granting that assay report from the Bureau of Mines was dated November 24, 1976, appellants could have acted more precipitously in securing an assay report since the contest complaint was issued in April 1975. The unsigned statement, apparently written by George Hunt, is unacceptable in that Mr. Hunt was present at the hearing, yet he declined to take the witness stand. The values in the assay report do not appear to differ greatly from those in the analyses submitted by contestant at the hearing.

The fact that appellants were not represented by legal counsel at the hearing is not persuasive that a rehearing is necessary, in light of the fact that the Judge and government counsel were very cooperative with appellants' attempts to present their evidence. Presentation may serve to elucidate a meritorious claim; however, presentation cannot substitute for a lack of substance.

The evidence, as offered, is of limited probative value, and it is unlikely that a further hearing would develop evidence to support appellants' claim of discovery.

Appellants had ample opportunity to present their evidence at the hearing. Due process requires notice and an opportunity to be heard. United States v. O'Leary, 63 I.D. 341 (1956). Appellants received notice and were afforded an opportunity to be heard. In the absence of compelling reasons to the contrary, due process does not require a second hearing. See United States v. MacIver, *supra* at 359.

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.

Frederick Fishman

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Administrative Judge

We concur:

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Edward W. Stuebing  
Administrative Judge

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Anne Poindexter Lewis  
Administrative Judge

August 11, 1976

DECISION

United States of America,	:	<u>Contest Nos. N-8173, N-8174</u>
	:	
Contestant	:	Involving the Tyros and Tyros
	:	No. 1 (aka Tyros #2) Placer
v.	:	Mining Claims , situated in
	:	Sec. 18, T. 14 N., R. 20 E.,
A. M. Goodwin and George J. Hunt,	:	M.D.M., Douglas County, Nevada
	:	
Contestees	:	

MINING CLAIMS DECLARED NULL AND VOID

On April 8, 1975, the Bureau of Land Management filed complaints contesting the validity of two placer mining claims in Douglas County, Nevada. The complaints charge that the land within the claims is nonmineral in character, and that minerals have not been found within the limits of the claims in sufficient quantities or qualities to constitute a valid discovery. A timely answer to the complaints was filed by the contestees, Miss A. M. Goodwin and Mr. George J. Hunt. The answer refers to concentrate samples from the claims which assertedly contain titanium and zircon, and suggests that the claims can make a "contribution to the remedy" of a domestic shortage of zircon.

A hearing in this contest was held in Carson City, Nevada on June 23, 1976. The contestant's counsel presented location certificates which recite that the Tyros placer claim was located on March 31, 1964, and that the Tyros #2 placer claim was located on July 20, 1966. The initial work performed on the claims was trenching and hillside benching that resulted in "the removal of earth and gravel . . . in excess of 400 cubic feet" from each claim. Exhibits No. 1 and No. 2.

Mr. H. W. Mallery, a Bureau of Land Management geologist, testified on behalf of the contestant. He has a bachelor of science degree (geology, mineralogy and engineering) plus three years of graduate study in geology and mineral pedrology. Tr. 7. He was employed by large private concerns as a geologist and engineer for seven years. Since 1955 he has been a Federal agency geologist, and in that capacity has examined more than 1000 mining claims "in detail." Approximately 800 of those claims were in Nevada. Tr. 10.

The contested claims are about 6 1/2 miles south of Carson City, at a point where there are springs, a short distance from Highway 395, and less than a mile from the Carson River. Exhibit No. 3. Mr. Mallery's mineral examination was conducted on eight days in 1970 and 1976. Before proceeding to the claim on the initial visit (July 22, 1970) he conferred with one of the contestees, Mr. Hunt. Miss Goodwin was on the contested properties on that date. On May 17, 1976, the contestees were present when Mr. Mallery inspected the claims. Tr. 14.

The rock on the claims is Mesozoic volcanic material with interbedded sedimentary rocks and limestones. Mr. Mallery observed granitic rocks that are mostly quartz and monzonite in composition. The area has been cut by a number of faults. Tr. 17. In 1970 Mr. Hunt informed the Bureau's mining engineer that the claimants were interested primarily in rare earth minerals, and that the values occur chiefly in residual clays. He referred to the existence of samarium and platinum. He did not have a hole or shaft on the claims. Tr. 18.

On May 17, 1976, Mr. Warren Swanson, an associate of the mining claimants, provided additional information to Mr. Mallery. The former indicated that he had taken numerous samples from a tract of land approximately 10,000 acres in size, roughly adjacent to and surrounding the subject mining claims. At that time, zirconium and titanium were mentioned. Mr. Swanson or Mr. Hunt displayed vials of concentrates and presented certificates of analysis which were said to represent assays of samples from the claims or the surrounding area. Mr. Hunt asserted that ore existed "anywhere I scoop up the sand." Tr. 19. The claimants said that the sands at a point on the Tyros claim, several hundred feet north of the trailer in which Miss Goodwin resides, are representative of the mineral values occurring on the claims. Tr. 19.

In addition to verifying the location of the claim boundaries, and preparing a map, Mr. Mallery took samples at three locations where the claimants contend that values exist. They are "1970 Discovery," Tyros claim, "1970 Discovery," Tyros #1 claim (also referred to in the record as Tyros #2) and "1976 Sample point" on the latter claim.

The 1970 sample from Tyros #1 consisted of four pounds of sands -- "the heaviest and darkest colored material from the surface down to the bottom of the sandy soil." It was material designated by Mr. Hunt "as containing the values alleged for his discovery." Tr. 29. Mr. Mallery ordered an analysis of the sample for combined rare earth elements, platinum group elements, gold and silver. The results are listed on reports received from Denver assayer Herbert M. Ochs. Exhibit No. 24. A sample from the Tyros #1 claim (23077-HWM-1) contained only a trace of gold, a trace of silver, no platinum group minerals, and less than one-tenth of 1% of combined rare earths. Those results would not provide quantities of significant economic interest. Tr. 33.

The report reflecting percentage estimates from a complete qualitative spectrographic analysis shows a number of elements present "in more or less anticipated quantities." Tr. 33. In his preparation of the concentrates to be transmitted to the assayer, Mr. Mallery found no gold in the samples. They consisted principally of black sands and heavy silicate minerals.

A 16 1/2 pound sample was taken by the Bureau's mineral examiner from the Tyros claim, at a point said by Mr. Hunt to be representative of the best mineral values. Tr. 34. That sample was labeled 23077-HWM-2, and was tested for combined rare earth minerals, gold, silver and the platinum group. The results were the same as those for Tyros No. 1, except for gold. There was .01 ounce of gold per ton in the Tyros #1 sample, and .02 ounce of gold per ton in the Tyros sample.

After Mr. Hunt advised Bureau representatives in 1975 that a zirconium discovery existed on the claims, Mr. Mallery ordered a second analysis of the materials which had been transmitted originally. The certificate of analysis (Exhibit No. 25) lists percentages which "indicate a relatively minor quantity of Zirconium Oxide in each sample." The results would not encourage Mr. Mallery to continue working a claim for zirconium. Tr. 42.

The sampling work in 1976, performed near the south boundary line of the Tyros #1 claim, involved the use of an auger to obtain material at depth. The site selected had been designated by the claimants as the best place to sample for titanium and zirconium. The material was obtained from nine holes at locations which, in the opinion of the Bureau's examiner, were selected in an objective manner. Tr. 48.

The results of the analysis made by the Ochs assaying firm in Denver are incorporated in the case record. (Exhibit No. 26). The values reported for zirconium oxide, titanium oxide and iron oxide are essentially negligible, according to Mr. Mallery. Tr. 55. In his opinion valuable minerals or significant deposits have not been found on either of the two contested claims. Tr. 57, 59. Mr. Swanson (Mr. Hunt's nephew and partner), in questioning Mr. Mallery about the latter's conclusion that it is not feasible to profitably mine the material under consideration, referred to a prospective operation of 10,000 tons per day, with a net recovery from titanium of \$ 26,000 per day. He also suggested that there are millions of tons of titanium oxide on a 10,000 acre land area which surrounds (and includes) the contested claims. Mr. Mallery responded:

" . . . We are not talking about a 10,000 acre tract of land. We're talking about two specific mining claims . . . . We're talking about the discovery of a valuable mineral, only on Tyros and Tyros No. 1. \* \* \*" Tr. 60.

His estimate of the volume of sands on the two claims is that they probably do not total more than ten cubic yards. Tr. 62. The only shafts, workings or holes on the claims are the ones augered by Bureau employees. Tr. 67. Mr. Mallery, who has worked in operating titanium mines, reiterated his view that the quantities of zirconium oxide and titanium oxide on the contested claims (analyses show them to be less than 1%) are negligible. The cut off point in operating titanium mines is "around three to six per cent Tr. 02." Tr. 64. There is an extensive quantity of colluvium on the claims, both laterally and at depth, but Mr. Mallery would not categorize it as ore in any sense of the word. Tr. 67.

The claims are not situated in an area where there has been substantial prospecting or mining activity in more than 100 years. They are not in proximity even to an old mining operation. The nearest titanium production (from ilmenite and rutile) is in Florida, New York and Virginia. Tr. 69. Mr. Mallery does not agree with the mining claimants' assertion that zirconium is in short supply. Tr. 72.

After describing the steps that would be required for the production of zirconium and titanium, including excavation, milling, screening, washing, separating and metallurgical processing, Mr. Mallery stated that the two contested claims could not support "an economically valuable operation." The loss would be significant. Tr. 79. Titanium comprises approximately 0.62% of the earth's crust, approximately the same percentage or "normal abundance" found to exist in the samples taken from the contested claims. Tr. 81.

Mr. Warren L. Swanson testified in support of the position taken by the mining claimants. He has worked in mines and with an electrostatic separating mill. In addition, he has experience with different processes of milling and recovery of minerals. He has been employed as an Assistant City Engineer in Carson City, Nevada, and by engineering and construction firms. At the present time he is part owner and the Vice President of the Ormsby House Hotel and Casino in Carson City. Tr. 87.

Mr. Swanson testified that the United States is in short supply of rutile and zirconium. He said that at the time of the hearing two major companies were investigating the deposit, and that he and his partners had been trying to keep information about what they had found from being disseminated. Tr. 87. They have located claims on another 360 acres because they are convinced that titanium and zirconium are in short supply and will "become more and more valuable every day." Tr. 88.

Mr. Swanson's reference to a valuable deposit is to a 10,000 acre area, not merely to the contested claims, because "its all the same." Tr. 89. Upon cross-examination he agreed that the companies which have shown an interest in the 10,000 acres have been prospecting or exploring. Material has been removed only for testing purposes.

Mr. Hunt did not present formal testimony as a witness, but interjected statements during the course of the hearing. He said that the claimants have taken hundreds of samples, which prove that the 10,000 acre area "is mineralized all over." Tr. 68. He contends that the cost of mining, concentrating and recovery would be "very very inexpensive," and that a simple operation would be involved. Tr. 70, 80.

#### Summary of Applicable Law

Once the Government has established a prima facie case that a discovery is lacking, the burden of producing preponderating evidence of the existence of a valuable mineral deposit sufficient to support a discovery falls upon the claimants. Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959); United States v. Independent Quick Silver Company, 72 I.D. 367 (1965).

The mining statutes do not expressly define a discovery. However, it has been held that one exists 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 . . ." Castle v. Womble, 19 L.D. 457 (1894).

The above-quoted definition is approved in United States v. Coleman, 390 U.S. 599 (1968), which holds that in determining whether a mineral deposit is valuable, the Secretary of the Interior may require a showing that there is a reasonable expectation based upon the circumstances known at the time that the mineral can be extracted, removed and marketed at a profit. It is stated in Coleman:

". . . Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction

and transportation are hardly economically valuable. Thus profitability is an important consideration in applying the prudent man test . . . ."

A finding of mineralization may suggest the possibility of mineral of sufficient value and amount to justify further exploration, but it does not establish a discovery. Chrisman v. Miller, 197 U.S. 313 (1905). A discovery is not shown when further exploration is necessary before the feasibility of development can be demonstrated. United States v. Theresa B. Robinson, 21 IBLA 363 (1975).

The average value of samples taken is an accepted factor in evaluating a claim, and has a direct bearing on the question of discovery. See U.S. v. Richard and Nellie Effenback, A-29113, (Jan. 15, 1963).

A prima facie case that a discovery of a valuable mineral deposit is lacking is established when a Government mineral examiner gives his expert opinion that he examined a claim and found insufficient values to support a finding of discovery. United States v. Alex Bechthold, 25 IBLA 77 (1976).

#### Conclusions and Determination

The testimony of Mr. Mallery and the Bureau's exhibits present a strong prima facie case that the mining claimants have never made a discovery of valuable minerals on the contested claims. He has spent a great deal of time on the lands in question, inspecting the visible rocks, sands and formations, and taking samples. The claimants assert that they have samples and assays, and refer to concentrates that are said to have come from the area. However, their presentation at the hearing consisted entirely of allegations and speculation.

The ultimate burden of prevailing in this contest is on the mining claimants. Findings favorable to their position cannot be based upon generalizations about a short supply of titanium and zirconium, or upon Mr. Hunt's assurances that mining, processing and recovery operations would be simple and inexpensive. The most that can be said about the claims is that they contain small quantities of rutile and ilmenite, and that various parties have prospected for minerals in the general area.

The mining claimants have not established by the preponderance of the evidence that a discovery of valuable minerals exists on either of the contested Tyros placer mining claims. The Bureau has sustained the second charge in Paragraph 5 of the complaint. Accordingly, the Tyros Placer Mining Claim and the Tyros #1 (also known as Tyros #2) Placer Mining Claim are hereby declared null and void.

I conclude that no purpose will be served in these contests by review of the question raised by the first charge in the complaint, which asserts that the land within the claims is non-mineral in character.

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Dean F. Ratzman  
Administrative Law judge

Appeal Information

An appeal from this decision may be taken to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations in 43 CFR Part 4 (revised as of October, 1975). Special rules applicable to public land hearings and appeals are contained in Subpart E. If an appeal is taken, the notice of appeal must be filed in this office (not with the Board) in order to facilitate transmittal of the case file to the Board. If the procedures set forth in the regulations are not followed, an appeal is subject to dismissal. The adverse party to be served with the notice of appeal and other documents is the attorney for the Bureau of Land Management whose name and address appear below:

Mr. Otto Aho  
Field Solicitor  
U.S. Department of the Interior  
Federal Building and U.S. Courthouse  
300 Booth Street, Room 4127  
Reno, Nevada 89502

Enclosure: Additional information pertaining to appeals.

Distribution:  
A. M. Goodwin, 218 Harbin Street, Carson City, Nevada 89701 (Cert.)  
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