

UNITED STATES  
v.  
RICHARD B. WALLS

IBLA 77-112

Decided June 7, 1977

Appeal from decision of Administrative Law Judge E. Kendall Clarke, dated December 27, 1976, declaring lode mining claims null and void. California 2625

Affirmed.

1. Mining Claims: Discovery: Generally

A valuable mineral deposit is an accumulation of a mineral in such quantity and such quality that a person would be justified in expending his time and means in a reasonable hope of developing a valuable mine.

2. Mining Claims: Discovery: Generally -- Mining Claims: Hearings -- Mining Claims: Withdrawn Land

Where land occupied by a mining claim has been withdrawn from operation of the mining laws, the validity of the claim must be tested by the value of the mineral deposit as of the date of the withdrawal, as well as of the date of the hearing.

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

When the Government contests a mining claim on a charge of no discovery, it

assumes the burden of going forward with sufficient evidence to establish a prima facie case; then the burden shifts to the claimant to show by a preponderance of the evidence that a discovery has been made and still exists within the limits of the claim.

4. Administrative Procedure: Hearings -- Mining Claims: Hearings

The Government has established a prima facie case when a mineral examiner testifies that he has examined a mining claim and has found the mineral values insufficient to support a finding of discovery.

5. Mining Claims: Hearings

Evidence tendered for the first time on appeal will be considered only for the limited purpose of determining whether a further hearing should be held.

6. Mining Claims: Discovery: Generally

In applying the prudent man test of discovery, the cost of extraction, processing and transportation to market of the recovered mineral must be considered because these costs bear on whether a person of ordinary prudence would be justified in the further expenditure of his time and means to develop a valuable mine.

7. Mining Claims: Discovery: Geologic Inference

Geologic inference alone cannot support a determination under the mining law 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.

## 8. Mining Claims: Discovery: Generally

Evidence of mineralization which may justify further exploration, but not the development of actual mining operations, is not sufficient to establish that a discovery of a valuable mineral deposit has been made.

Appearances: Richard B. Walls, Salt Lake City, Utah, pro se.

## OPINION BY ADMINISTRATIVE JUDGE RITVO

Richard B. Walls has appealed from a decision by Administrative Law Judge E. Kendall Clarke, dated December 27, 1976, which declared the Dreamland Mining Claim, Dreamland No. 1 and Gold Point Lode Mining Claims null and void for lack of discovery of a valuable mineral deposit. 1/

[1-5] The claims, which were located in 1939, are situated within Death Valley National Monument, California, in secs. 16, 17, 20, 21, T. 14 S., R. 41 E., M D M, Inyo County, California. The Judge's decision sets out in detail the evidence and applicable law and his findings and conclusion. We are in agreement with his decision, and, therefore, adopt it as the decision of this Board. A copy of it is attached hereto.

We address the particular points raised in the appeal. Appellant contends that a mineral report submitted by contestant contains a serious error as to the amount of rock that was mined in the mining operations carried out in the claims in 1940-1941. We need not evaluate his contention in detail because, as the Judge demonstrates in his decision, appellant's own evidence, at best, does not establish that a discovery has been made, and if the mineralized material is valued as the Administrative Law Judge found, and we find, the projected operation would be highly unprofitable.

[6] Next appellant refers to a discovery of placer gold he says he made on the claim sometime after the contestant's 1974 mineral report. Such a discovery, if it exists, cannot help him here. He does not state when this deposit was found. However, he did not refer to it at the hearing and it is no part of the record on which this case must be decided. United States v. Hunt, 29 IBLA 86 (1977). Furthermore, since it a placer deposit, it cannot sustain a lode claim. Finally, the Death Valley National Monument was withdrawn from mineral location by the Act

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1/ The contest was also brought against Paul Kayser, dba and president of Arizona Mining Properties, Inc., the lessee of the mining claims. Kayser did not appeal, thus the decision has become final as to him.

of September 28, 1976. P.L. 94-429, 90 Stat. 1342, 16 U.S.C. § 1901. Any discovery after that date would be of no avail for the issues at this time. At most evidence tendered on appeal of a mining contest may only be considered for the limited purpose of deciding whether there is justification for a new hearing. United States v. Hunt, *supra*.

[7] Further appellant contends that the Administrative Law Judge mistakenly applied a marketability factor to the prudent man test to determine whether a discovery of a valuable mineral deposit exists on any of the claims. He says the marketability test is not pertinent to an intrinsically valuable mineral such as gold. As the Board held in a recent case in which it affirmed a holding that a gold placer claim was invalid: "This test, the prudent man test has been refined to require a showing that the mineral in question can be extracted, removed, and marketed at a profit. \* \* \*" United States v. Maley, 29 IBLA 201, 206 (1977). The concept of discovery and marketability was restated by the 10th Circuit even more recently. Roberts v. Morton, 549 F.2d 158 (10th Cir. 1977). The court held (at 162, 163):

Third, plaintiffs challenge the findings that they did not discover a valuable mineral in compliance with the mining laws. They argue that their claims in Piceance Creek Basin consist of valuable minerals -- dawsonite, nachcolite, dolomite, ferroan; that the claims contain other alumina bearing compounds such a gibbsite, analcite and nordstrandite; that marketability is not required to be shown as to intrinsically valuable minerals such as gold, silver, alumina, uranium, etc., and that it is sufficient as to them to show a general market, which was done for alumina (Reply Brief for Appellants, 12-16, 23).

The statute making mineral deposits in Government lands open to exploration and purchase refers only to "all valuable mineral deposits. 30 U.S.C.A. § 22. In interpreting the mining laws the Secretary has used a 'prudent-man test' formulated in Castle v. Womble, 19 L.D. 455, 457 (1894):

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 valuable mine, the requirements of the statute are met.

The Supreme Court has approved the test for some time. See United States v. Coleman, 390 U.S. 599, 602, 88 S.Ct. 1327, 20 L.ED.2d 170, and cases there cited.

In the Coleman case the Court sustained a determination by the Secretary that quartzite deposits did not qualify under the statute because the stone could not be marketed at a profit. This refinement, the marketability test, was commended. And the Court said that " \* \* \* profitability is an important consideration in applying the prudent-man test \* \* \*" Ibid.

Plaintiffs argue that they have shown the presence of alumina, an intrinsically valuable mineral, and that Coleman recognizes that this showing satisfied the statute. Reliance is placed on this statement in Coleman, supra at 603, 88 S.Ct. at 1331:

While it is true that the marketability test is usually the critical factor in cases involving non-metallic minerals of widespread occurrence, this is accounted for by the perfectly natural reason that precious metals which are in small supply and for which there is a great demand, sell at a price so high as to leave little room for doubt that they can be extracted and marketed at a profit.

[6] We agree, however, with the district court's view that marketability at a profit remains an essential consideration in this case. We are persuaded that the Court's statement in Coleman, cited above, does not mean that marketability has no relevance where a discovery even of a precious metal is involved. See Converse v. Udall, 399 F.2d 616, 621 (9th Cir.). It is still proper here that the Secretary "take into account the economics of the situation. Id. at 622. [2/]

Thus, the Administrative Law Judge correctly considered the economics of appellant's operation in determining whether a prudent man would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.

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2/ For a full discussion of this issue see United States v. Larsen, 9 IBLA 247 (1972), aff'd, Larsen v. Morton, D. Ariz., Civil No. 73-119-TUC-JAW, September 24, 1974; United States v. Arizona Mining and Refining Company, 27 IBLA 99 (1976); United States v. Heard, 30 IBLA 42, 67 (1977).

Appellant also argues that if geologic inference cannot be used to establish a discovery it cannot be used to disprove one by evaluating samples and concluding that there is no discovery. Here appellant confuses the application of expert opinion to the physical showings that have been made, *i.e.*, the size of the vein, the quality and quantity of minerals that have been exposed, geological conditions, the experience with similar veins and other pertinent facts, with the attempt to rely on geologic inference in the absence of the actual exposure of a vein or lode within the claim which would in itself justify development if it were to extend beyond the portion exposed. To establish the existence of a valuable mineral deposit on a lode claim, there must be proof of a continuous mineralization along the course of the vein or lode; the mere showing of disconnected pods of mineral concentration, even of high values does not satisfy the test. United States v. Arizona Mining and Refinery Company, Inc., *supra* at 105.

[8] Finally, appellant urges that the fact that Kayser, a man experienced in mining would not have been willing to spend large sums in building a road and driving a 500-foot exploration tunnel if he had not thought that a profitable mine would result.

Again, that there are exposures of mineral sufficient to warrant further exploration of a claim does not establish a "discovery" which requires development of actual mining operations. United States v. Fichtner, 24 IBLA 128 (1976).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is affirmed.

Martin Ritvo  
Administrative Judge

We concur:

Douglas E. Henriques  
Administrative Judge

Edward W. Stuebing  
Administrative Judge

December 27, 1976

UNITED STATES OF AMERICA,	:	CALIFORNIA 2625
	:	
Contestant	:	Involving the Dreamland
	:	Mining Claim, Dreamland No.
v.	:	1 and Gold Point Lode Mining
	:	Claims, situated in Secs. 16,
RICHARD B. WALLS; PAUL KAYSER,	:	17, 20, and 21, T. 14 S., R. 41
d.b.a. and PRESIDENT OF ARIZONA	:	E., M.D.M., Inyo County,
MINING PROPERTIES, INC.,	:	California
	:	
Contestees	:	

DECISION

Appearances: John McMunn, Attorney, Office of the Field Solicitor,  
U.S. Department of the Interior, San Francisco, California,  
for Contestant;

Lawrence M. Hecker, Attorney at Law, Tucson, Arizona,  
for Contestees.

Before: Administrative Law Judge Clarke

STATEMENT OF THE CASE

This is a Contest of the Dreamland Mining Claim, Dreamland No. 1 and Gold Point, lode mining claims initiated on behalf of the National Park Service by the State Director, Bureau of Land Management, United States Department of the Interior. The subject mining claims are located in Death Valley National Monument, California. These proceedings are maintained under authority of and in accordance with 43 U.S.C. Section 1201 and the regulations found in Title 43, Code of Federal Regulations, Part IV and arose by the filing of a Complaint on January 23, 1975.

The Complaint alleges, inter alia, that "minerals have not been found within the limits of the claims or any one of them, in sufficient quantity and/or sufficient quality to constitute a discovery under the mining laws." The Complaint requests that the subject mining claims be declared null and void.

The Contestees are the owners of or have an interest in the subject claims. An answer was filed on behalf of the Contestees admitting the foundational allegations of the Complaint and denying the remaining principal allegations thereof.

A hearing on the Complaint was held in Phoenix, Arizona on January 27, 28 and 29, 1976. The undersigned Administrative Law Judge presided.

#### SUMMARY OF APPLICABLE LAW

In this proceeding, the Contestant is required to produce sufficient evidence to establish a prima facie case in support of its contention that a discovery does not exist on the contested claim. Thereafter, the Claimant must show by a preponderance of the evidence that the claim is valid. Foster v. Seaton, 271 F.2d 836 (D.C., C.A., 1959); United States v. Springer, 491 F.2d 239, 242, (9th Cir. 1974), cert. denied, 95 S.Ct. 60 (1974).

The Act under which these mining claims were located (30 U.S.C., 22 et seq., May 10, 1872) requires for a valid claim the discovery of a valuable mineral deposit.

It has been held in a long list of cases beginning in 1894 that a discovery of a valuable mineral 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. 455, 457 (1894).

In the United States Supreme Court case of Chrisman v. Miller, 197 U.S. 313 (1905), the Court approved the earlier definition by the Department, Castle v. Womble, supra, that a mineral found on a claim

such as gold or silver must exist in quantities sufficient to justify the expenditure of money for the development of the claim and extraction of the mineral. (See also Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963)).

The Supreme Court has further held that it is the intent of the mining laws to reward the discovery of minerals which are valuable in an economic sense and that the minerals which would not be extracted by a prudent man because there is no demand for them for a price higher than the extraction and transportation costs are not economically valuable. United States v. Coleman, 390 U.S. 599 (1968).

A prima facie case has been made when a Government mineral examiner testifies that he has examined the claim and found the evidence of mineralization insufficient to support a finding of a discovery. United States v. Shield, 17 IBLA 91 (1974); United States v. Ramsher Mining and Engineering Co., Inc., 13 IBLA 268 (1973); United States v. Woolsey, 13 IBLA 120 (1973); United States v. Gould, A-30990 (May 7, 1969).

### DISCUSSION

The evaluation of all the evidence in this case reveals without any doubt whatsoever that the Contestant has presented a prima facie case of lack of discovery on all three of the claims here involved.

Three qualified individual testified for the National Park Service, the contestant herein. All three were well qualified in either mining engineering, geology or both. All three had extensive years of experience in the field of mining engineering. Large numbers of samples were taken by the mining engineers for the Contestant in places which were indicated to represent the best showings by the Contestees. All three mining engineers for the Contestant concluded that a prudent man would not be justified in spending his time or money with a reasonable prospect of developing a paying mine. The prime witness for the Contestant stated that he would not recommend to any one that they spend any more money even exploring the claims in question. Such testimony established a prima facie case.

The only area on the claims which showed any promise for mineralization, particularly for gold and silver, was the so called pillar area on the Dreamland Mining Claim shown on Exhibit 3 and Exhibit 8 as exposure #4. There is at this exposure #4 a remanent lens of ore, part of which was removed in the 1940s. The evidence shows that this lens represents a

quantity of ore totalling not more than 15.47 tons. (The witnesses for the Contestant and Contestees all seem to agree with this estimate of the quantity.) To the southeast of exposure #4 as shown on Exhibit 3 is an exposure #5 which also showed some higher values for gold and silver. However, the evidence is clear that this enriched area is so minor, it does not deserve further exploration. The Contestees through the testimony of the President of Arizona Mining Properties (the lessee of these claims), Paul Kayser, asserted that 15.47 tons of material could be removed in a hand operation which would result in a profit. Mr. Kayser's figures for cost of operation given during his testimony proved to be inaccurate and rather than reflect a profit reflected a loss for the proposed mining enterprise.

By motion made on behalf of Mr. Kayser subsequent to the hearing based upon certain physical problems experienced by Mr. Kayser during the hearing, additional testimony by way of affidavit was received making some corrections to his testimony concerning costs.

Counsel for Mr. Kayser in his opening brief at page 24 attempts to restate the costs of operation to show that the 15.47 tons of material could be removed at a profit from the Dreamland claim. However, counsel on page 25 of his brief in recapping the costs and dollar recovery from the ore has neglected to include the smelting charges and the transportation in concluding that a profit of \$3407 could be realized from mining the 15 plus tons of ore in 15 days. Had he taken the complete costs, including the transportation and smelting costs as shown on page 24 of his brief coming to \$6812 and subtracted that from the assumed recovery of \$8056, he would have arrived at \$1244 profit on the 15.47 tons of materials rather than \$3407. Even this small profit is based on cost figures which at best are very rough estimates.

I find that the evidence does not support the cost and recovery assumptions which have been made, particularly in regard to the recovery of 4.2 ounces of gold per ton. The sampling which was performed by the Contestant would indicate that the gold value in the pillar area is closer to 1.1 ounces of gold per ton rather than the 4.2 ounces used by the Contestees. The Contestees used the 4.2 ounces per ton based on some 1942 smelter returns from selected ore taken from the area adjacent to the pillar. It is of course quite possible that the ore taken was of higher quality than that remaining in the pillar and may account for the reason that the pillar was not taken at the same time.

The figures recomputed with a value of 1.1 ounces of gold per ton shows that the total operation consisting of approximately 15 1/2 tons comes to an extensive loss rather than any profit. The figures for costs of mining used by Mr. Kayser were not well substantiated or documented,

but seemed to have come from his memory concerning similar costs which he had incurred in other businesses. Even assuming that one could believe that a slight profit could be made from the operation which was estimated to be completed in 15 days, the question arises as to whether that would make a mining operation which a prudent man would invest his time and means with a reasonable prospect of developing a paying mine. Upon its face one cannot conclude that such an operation does in fact establish discovery. With all the possible contingencies, it is unreasonable to believe that any one would carry out the kind of mining operation suggested by Mr. Kayser for such a possible modest profit which he estimates and certainly not for the unquestionable loss that would occur from the 15 day operation.

The only other evidence which needs even the slightest mention was the result of certain statistical projections made by Mr. Cross who has an education as a geologist but basically works as a statistician providing mathematical models. Mr. Cross using all the samples which had been taken, many of which were clearly not taken in a professional manner and some of which were taken by persons not present at the hearing and at a time more than 35 years prior to the hearing, projected the probability of finding other enriched zones such as that in the pillar area. This evidence, of course, is nothing more than geological inference which has clearly been held to be unacceptable in establishing discovery under the mining law.

### CONCLUSION

A careful evaluation of all the evidence presented in this hearing shows that the only mineralization of any significance is limited to the Dreamland claim, particularly to exposure #4 or the pillar area, and that the quantity of mineral which is exposed and which can be rather accurately determined in regard to quantity is insufficient to form the basis for a satisfaction of the requirements of discovery under the United States mining laws. I, therefore, find that the Dreamland Mining Claim, Dreamland No. 1 and Gold Point lode mining claims are null and void for lack of a discovery within the meaning of the mining laws of the United States.

E. Kendall Clarke  
Administrative Law Judge

