

UNITED STATES
v.
A. O. BARTELL

IBLA 77-239

Decided June 23, 1977

Appeal from decision of Administrative Law Judge E. Kendall Clarke in proceeding Oregon 012727-B (P.L. 167) holding appellant's mining claims subject to section 4 of the Surfaces Resources Act of July 23, 1955.

Affirmed.

1. Mining Claims: Surface Uses--Surface Resources Act:
Generally

In a proceeding under section 5 of the Surface Resources Act of July 23, 1955, to determine the rights of the Government and a mining claimant as to the use and management of the surface and its resources on certain mining claims, it is incumbent upon the holder of a claim to demonstrate a discovery of a valuable mineral deposit within the claim as of the time of the Act, and also at the time of the hearing.

2. Administrative Procedure: Hearings--Rules of Practice:
Evidence--Mining Claims: Generally

Government witnesses in a contest proceeding who are qualified by education and experience are competent to testify as experts with reference to the prudent man rule.

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

Where the Government contests a mining claim, it has assumed only 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 his claim is valid. Where a Government mineral examiner testifies that he extensively examined the claims and workings thereon, and had assayed numerous samples taken from the claims but found no evidence of a valuable mineral deposit that would support a discovery, a prima facie case of lack of a mineral discovery has been made.

4. Mining Claims: Surface Uses--Surface Resources Act: Generally

Under section 5 of the Surface Resources Act of July 23, 1955, the effect of a decision that no mineral discovery has been shown is to permit the Government to manage and dispose of the vegetative and other surface resources without disturbing claimant's right to develop his mining claims by using the subsurface and surface to the extent necessary to conduct his mining operations.

APPEARANCES: Herb Lombard, Esq., of Sahlstrom & Lombard, Attorneys at Law, Eugene, Oregon, for appellant; Albert R. Wall, Esq., Office of the General Counsel, U.S. Department of Agriculture, Portland, Oregon, for the United States.

OPINION BY ADMINISTRATIVE JUDGE RITVO

A. O. Bartell has appealed from a decision of Administrative Law Judge E. Kendall Clarke, dated February 23, 1977, which declared appellant's mining claims 1/ subject to the limitations and restrictions of section 4 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 612 (1970).

1/ The seven mining claims involved in this proceeding are: the Oak Grove, Oak Grove Butte, Portland, Mt. Mitchell, Lake, Triangle and Irene Mining Claims, situated in Secs. 4 and 5, T. 6 S., R. 7 E., W.M., Clackamas County, Oregon. Mr. Bartell also filed a verified statement for the Marjory J. lode claim located in the SW 1/4 sec. 4, T. 6 S., R. 7 E., W.M. That claim was not considered here because it had previously been declared null and void by a departmental proceeding in 1964.

This contest proceeding was initiated at the request of the United States Forest Service pursuant to section 5 of the Surface Resources Act, 30 U.S.C. § 613 (1970). The purpose of the proceeding was to determine appellant's right, asserted in his verified statement filed March 11, 1963, to use and dispose of the vegetative and other surface resources embraced within the boundaries of his mining claims. The Forest Service asserted that a discovery of a valuable mineral deposit had not been found within the limits of the several unpatented mining claims involved.

After a hearing was held on January 8, 1976, at Oregon City, Oregon, the Administrative Law Judge issued his decision ruling that, from the totality of the evidence submitted at the hearing, there was no demonstration of a discovery on the subject claims. The Government had presented testimony from a qualified mining engineer employed by the United States Forest Service who had researched the technical publications on the mineralization of the area and found there had been no activity on the claims since 1943. He examined the claims and took several test samples from the major veins and had them assayed for mercury. He testified these samples showed insignificant values which in his opinion would not justify further expenditure of time or money to develop the claims either in 1955, the date in which Public Law 167 went into effect, or at the time of the hearing. The Judge then concluded that appellant's testimony and that of his experts did not present substantial evidence that appellant could operate the mining property at a profit and that appellant's evidence was insufficient to overcome the Government's prima facie case and establish the validity of the claims.

[1] On Appeal to the Board appellant merely reiterates the arguments made below and presents no new evidence or different questions for our consideration. Both appellant and the Government have resubmitted their original briefs to the Administrative Law Judge as the basis for the statement of reasons and the response to the Board. We have carefully reviewed the record and considered the Judge's decision which concisely summarizes the pertinent evidence and principles of law involved and discusses the various issues raised by appellant. We conclude that the discussion and findings are correct. Accordingly, we adopt the decision as the decision of the Board, a copy of which is attached as Appendix A.

[2] We note that appellant questions the Government mineral examiner's qualifications and experience as an expert in quicksilver operations and asserts that he did not properly evaluate the mining claims. Appellant concludes that this testimony was inadequate and should not have been the basis for the Judge's decision. There

is no merit to this argument. Contrary to appellant's beliefs it is not necessary for the Government's expert to be an accomplished quicksilver miner to be able to examine his claim, take samples, and subsequently render his professional opinion on the relative worth of the operation. It has been repeatedly established that Government witnesses with essentially the same qualifications as those in this case, were competent to testify as experts with reference to the prudent man test. United States v. Jack L. Gardener, 18 IBLA 175, 178 (1974); United States v. Mellos, 10 IBLA 261, 268 (1975); Udall v. Snyder, 405 F.2d 1179 (1968), cert. denied, 396 U.S. 819 (1969). Moreover, admissibility of expert testimony in a mining contest is determined by the Administrative Law Judge, who exercises a wide latitude of discretion in making these determinations. United States v. Winters, 2 IBLA 329, 78 I.D. 193, 195 (1971). The Judge was well within his province according whatever weight to that evidence that he determined it justified in relation to the other evidence of record. Appellant has not demonstrated that the Judge's evaluation was in error. 2/

[3] It has long been established that the Government need only present a prima facie case that there has been no discovery; after such presentation the burden devolves on the mineral claimant to prove by a preponderance of the evidence that there has been such a discovery. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); United States v. King, 15 IBLA 210, 213 (1974). In this case the competent testimony of the Government mineral examiner that he extensively examined the claims, and had assayed numerous samples taken from the claims but found no evidence of a valuable mineral deposit that would support a discovery on any of the claims, was sufficient to establish a prima facie case of a lack of discovery. United States v. Mineral

 2/ In a contest involving another nearby group of claims, also located for mercury, the claims were held invalid for lack of discovery. United States v. Kiggins, A-30827 (July 12, 1968). Kiggins contains a full discussion of how assay values must be interpreted in the light of the surrounding facts, particularly assays based on samples from mines once worked, but long inactive. On March 18, 1976, the Board granted a petition for reconsideration of Kiggins and remanded the case for a further hearing on the basis of evidence developed by appellant after the close of the first hearing, that 10,000 tons of minable ore had been blocked out. However, the Board found that on the basis of the record of the first hearing the original decision was correct. United States v. Kiggins, 24 IBLA 187 (1976). Here appellant has presented no comparable evidence.

Ventures, Ltd., 14 IBLA 82, 92 (1973); United States v. Mellos, *supra* at 267; United States v. Jones, 2 IBLA 140, 148 (1971).

[4] We also wish to emphasize the nature and the effect of this proceeding. Section 5 of the Surface Resources Act, *supra*, establishes the procedure whereby the United States Government obtains a determination as to the respective rights of the United States and the claimants as to surface resources of the claims located prior to the Act. The principal effect of a section 5 proceeding is the limitation prior to patent as to the management and disposition of vegetative surface resources and management of other surface resources. Where a determination has been made to subject appellant's claims to the restrictions of section 4 of the Act, ^{3/} appellant may still proceed to develop his mining claims. He remains entitled to all the subsurface rights he had prior to such a proceeding. He is also entitled to those surface resources reasonably necessary for conducting his mining operations. United States v. Trussel, 7 IBLA 225 (1972); Arthur L. Rankin, 73 I.D. 305, 311 (1966). Thus, Bartell remains in possession of the claim for mining purposes, subject to the restrictions of section 5, *supra*.

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.

Martin Ritvo
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Frederick Fishman
Administrative Judge

^{3/} Section 4 of the Act, 30 U.S.C. § 612 (1970), reserved to the United States Government the right to manage and dispose of the vegetative surface resources and to manage other surface resources (except mining deposits subject to location under the mining laws of the United States) of claims located after the effective date of the Act.

APPENDIX A

February 23, 1977

UNITED STATES OF AMERICA	:	Oregon 012727-B (P.L. 167
	:	
v.	:	Involving the Oak Grove, Oak
	:	Grove Butte, Portland, Mt.
A. O. BARTELL, Mining Claimant	:	Mitchell, Lake, Triangle and
	:	Irene Mining Claims, situated
Mining Claimant	:	in Secs. 4 and 5., R. 7 E., W.M.
	:	Clackamas County, Oregon

DECISION

Appearances: Albert Wall, Attorney, Office of the General Counsel, U.S. Department of Agriculture, Portland, Oregon, for the United States; Herb Lombard, Attorney, Sahlstrom, Lombard, Starr and Vinson, Eugene, Oregon, for the Mining Claimant.

Before: Administrative Law Judge Clarke

MINING CLAIMS SUBJECT TO SECTION 4
OF THE ACT OF JULY 23, 1955

This is an action brought by the United States Forest Service pursuant to Section 5 of the Act of July 23, 1955 (69 Stat. 367; 30 U.S.C. 611-615 herein referred to as the Act). The above-named mining claimant filed a verified statement on March 11, 1963 claiming rights contrary to or in conflict with the limitations or restrictions specified in Section 4 of said Act, under and by virtue of the above-identified mining claims. Thereafter, there was filed with the Office of Hearings and Appeals a request that a hearing as to such unpatented mining claims be held pursuant to Section 5(c) of the Act, asserting: "A discovery of a valuable mineral deposit has not been found within the limits of the unpatented mining claims listed above." By a Notice of Hearing dated November 12, 1975, the subject matter was scheduled for hearing on January 8, 1976 in Oregon City, Oregon and was held as scheduled.

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).

An objection was raised by the mining claimant at the time of the hearing concerning evidence relating to the state of mineralization and discovery subsequent to July 23, 1955. Subsequently in the mining claimant's brief, the issue was again raised. At the hearing a ruling was withheld on the objection to permit the parties to brief the legal question. It appears from the cases that the Departmental position on this point requires that not only is there to be shown a discovery on July 23, 1955 but that it must be continuing to the time of the hearing. See United States v. Signa Lauch, et al., IBLA 71-201, 9 IBLA 60 (1973) where it was stated:

"Where proceedings are brought by the government under Sec. 5 of the Act of July 23, 1955, to determine the rights to surface resources on lands embraced within mining claims, it is incumbent upon the holder of a claim to demonstrate a discovery of a valuable mineral deposit within the claim as of the time of the Act, and also at the time of the hearing. See United States v. A. Speckert, 75 I.D. 367 (1968); United States v. Independent Quick Silver Company, 72 I.D. 367 (1965); United States v. Ford M. Converse, 72 I.D. 141 (1965); aff'd Converse v. Udall, 262 F. Supp. 583 (D. Ore. 1966), aff'd Converse v. Udall, 399 F. 2d 616 (9th Cir. 1968), cert. den. 393 U.S. 1025 (1969)."

Also see United States v. Ramsey, 15 IBLA 152 (1974).

SUMMARY OF EVIDENCE

The evidence indicates that of the claims here involved the four in which Mr. Bartell maintains an interest and on which he has been doing assessment work are the Mt. Mitchell, Irene, Oak Grove Butte and Oak Grove, outlined in orange on Exhibit E. The claims are located in the Mount Hood National Forest some two hours drive southeast of Portland in Clackamas County, Oregon on the Oak Grove Fork of the Clackamas River immediately below Lake Harriet Dam of the Portland General Electric Company. (See Exhibit B-1).

Zean R. Moore, a qualified mining engineer employed by the United States Forest Service in Portland, Oregon examined the claims on September 30, 1970. Although he attempted to get the claimant to accompany him on the examination, he was unable to do so. Mr. Bartell's refusal to accompany Mr. Moore was based upon the fact that he had furnished all the information and accompanied Mr. Plog, a mining engineer formerly employed by the United States Forest Service, in an earlier examination. Mr. Moore explained that Mr. Plog

was no longer with the Forest Service and had not completed his examination so that the entire effort was repeated. Although he had had reference to Mr. Plog's notes, he did not rely on any of his sampling. Mr. Moore testified that he had examined the various publications dealing with this particular area of mineralization and found that the recorded production from the claims in question was 102 flasks, however, the unofficial production indicated a production between 150 and 200 flasks. He found there had been no activity on the claims since 1943. Mr. Moore took samples from the major veins on the claims and had them assayed for mercury and found that the mercury ranged from a high of 7.4 pounds per ton to none. He testified that he took the samples from places where it appeared most favorable for a mineral showing. (Tr. 70). Based on his examination of the claims, the literature in the field and the results of his assays, it was his opinion that a prudent man would not be justified in expending his time and means with a reasonable prospect of developing a paying mine on the claims involved in this contest. (Tr. 48). He further felt that the property was not economically feasible at the time of the hearing and it was not so in 1955.

The claimant, Mr. Bartell, has an education as a geologist and mining engineer and is currently involved in operating a silica mine in Weiser, Idaho. He bought in as a partner with George Nisbet in the claims in question in December of 1954 and has had an interest in the property ever since. He is now sole owner of the property which he acquired from the Nisbet estate in July of 1959. In 1960 Mr. Bartell obtained an O.M.E. loan for drilling to explore the claims and to this end he built a road in 1960 on which to move the drill rig. He believes the exploration showed that the veins are continuous for a distance. The veins which he has indicated exist on the claims are shown on Exhibit E in red. Although he took no assays on the claims, Mr. Bartell believed the Government report which included assays was sufficient for this purpose and had no reason to doubt it. He stated that he would be willing to bet considerable time and effort that he could mine the claims at a profit. (Tr. 104). At the present time he is merely holding the claims until his retirement before he commences any work.

Mr. Randall Brown, a geologist with a master's degree from Yale in geology and in additional graduate work in mining engineering from Stanford, testified that from 1942 to 1945 he was employed by the United States Geological Survey to investigate domestic quicksilver sources. (Tr. 136). He identified Exhibit A as an unpublished report which he submitted to the Geological Survey. Exhibit D is a map he and George Walker made in 1943 covering the Nisbet property. (Tr. 138). He last visited the properties the day before the hearing and could see no sign of further mining activity from the time when he last visited the property in 1943. (Tr. 144). It was his opinion as well

as that of Mr. Walker's in 1943 that with proper mining these properties could be an efficient small producer. (Tr. 144). With figures which he had been supplied of 151 flasks of mercury, he estimated that the past production was based on ore which ran from 10 to 15 pounds per ton although he did not verify these findings himself. (Tr. 148). In 1943 Mr. Brown recommended that more exploration be undertaken. (Tr. 151).

Mr. Barton provided testimony through a stipulation (Tr. 160) that he was production superintendent for the mine in July of 1940 when Mr. Nisbet owned the claims. He worked for approximately six months time at which time the furnace was operated and mining was performed and the operation broke even. The mining at this time was done on a hand operated basis with five nonexperienced mining employees. He had not been to the property since 1940 or '41 until just a few days prior to the hearing at which time he found the property in substantially the same condition as when he left in 1940. (Tr. 161).

DISCUSSION

Exhibit 15 is a graph on which is plotted the production from the Nisbet property from 1937 to 1943 in green against the price for mercury which varied over the years from approximately \$90 in 1937 to highs as great as \$570 in 1965. (See Exhibit 16). In 1940 at the height of the production from the Nisbet property, the price per flask of mercury was \$176.86 and at that time according to the testimony of the production superintendent, it was only a break even proposition. Although for short periods the value of mercury more than doubled that of 1940, over the same period it would be a matter of public knowledge that wages and other costs more than doubled.

This is a property in which virtually no work has been accomplished or upon which no production activity has been carried out since approximately 1943. This is true even though the price of mercury which fluctuated greatly reached its peak in 1965. In 1975 the price had declined to a level lower than at the time Mr. Barton testified the operation was only break even.

Mr. Moore a qualified mining engineering made an examination of the property and took samples, studied the literature available and concluded that a reasonable prudent man could not expect to operate this property with a reasonable prospect of making a paying mine either in 1955 the date in which Public Law 167 went in effect and the time of the hearing. Although the mining claimant here is a geologist and mining engineer and testified that he believed that he could operate the property at a profit, there is no substantial evidence in the record that in fact he could do so. There is nothing in the record that

overcomes the prima facie case which has been established by the United States Forest Service which demonstrated that there was no discovery of a valuable mineral sufficient to satisfy the mining laws of the United States in either July of 1955 or at any time during the intervening period to the time of the hearing.

This is not a proceeding to declare a mining claim null and void. A failure to find a discovery merely vests in the United States the right to manage the surface of the mining claim in a way which does not interfere with the mining or exploration until the mining claimant qualifies and is able to obtain a patent to the claims.

CONCLUSION

I find from the totality of the evidence submitted in the hearing that there has been no demonstration of a discovery on these claims and therefore declare the Oak Grove, Oak Grove Butte, Portland, Mt. Mitchell, Lake, Triangle and Irene mining claims to be subject to the Act of July 23, 1955 (69 Stat. 367-372; 30 U.S.C. 611-615 (1970)).

Kendall Clarke
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, 1976). 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 a copy of the notice of appeal and other documents is the attorney for United States Department of Agriculture whose name and address appear on page 7.

Enclosure: Additional information concerning appeals.