

UNITED STATES
v.
LEE NICHOLSON, ET AL.

IBLA 77-77

Decided July 7, 1977

Appeal from decision of Administrative Law Judge John R. Rampton, declaring certain mining claims null and void. Arizona 7071-1 through 7.

Affirmed.

1. Mining Claims: Determination of Validity-
Mining Claims: Discovery: Generally

There has been no discovery of a valuable mineral deposit within a mining claim where the evidence provides no basis for a reasonable expectation that minerals from the deposit can be mined, removed and marketed at a profit.

2. Evidence: Weight-Mining Claims: Contests-
Mining Claims: Determination of Validity-
Mining Claims: Discovery: Generally-Rules
of Practice: Evidence

Past evidence of successful mining activity has limited probative value in determining whether there is a present discovery of a valuable mineral deposit on a mining claim, and assay reports can be given little weight when they are not supported by evidence as to who took the sample assayed, where it was taken, and what procedures were followed in taking the sample.

APPEARANCES: Thayer S. Lindauer, Esq., Phoenix, Arizona, for appellants; Fritz L. Goreham, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona (at the hearing).

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

This is an appeal from the November 15, 1976, decision of Administrative Law Judge John R. Rampton finding null and void all of the claims involved in a consolidated contest against certain lode mining claims in Maricopa County, Arizona. 1/

Among other matters, the contest complaints against the claims charged that minerals have not been found within the limits of the claims in sufficient quantities and qualities to constitute a valid discovery. Judge Rampton found that there was not a discovery of a valuable mineral deposit within any of the claims.

The Judge summarized the Government's evidence as follows:

The evidence presented by the contestant consisted primarily of the testimony of Richard Harty, a graduate geologist employed by the Bureau of Land Management, U.S. Department of the Interior. Mr. Harty spent, by his own estimate, approximately seventeen days examining

1/ This contest was a consolidation of the following contests against the designated claims situated in whole or in part within section 25, T. 4H..R. 5 E., GSR Meridian, Arizona:

<u>Contest Numbers</u>	<u>Contestees</u>	<u>Mining Claims</u>
Arizona 7071-1	Lee Nicholson, Homer Gillespie, Robert Gillespie, and Donald Pruitt	Jenell, Surprise #4, Surprise #5, Surprise #6, and Surprise #7
Arizona 7071-2	Homer Gillespie and Carl J. Peterson	Pink Pup and Myora #1
Arizona 7071-3	Myora Mining Corporation Hale C. Tognoni, Statutory Agent	Aztec #5, Surprise #2, Myora #'s 1 through 8, 10, 12, & 13
Arizona 7071-4	Nancy McCollough, Homer Gillespie and Robert Gillespie	Clipper (Amended), Raymond, Seth Parker (Amended), Summit, and Uncle John (Amended)
Arizona 7071-5	Homer Gillespie, Robert Gillespie, and Chas. Grissler	Silver Horn #'s 4, 5, and 6; Bertha Extension: and Bertha Extension #2
Arizona 7071-6	Myora Mining Corporation; Hale C. Tognoni, Statutory Agent; and Lee Nicholson	Wilma #'s 1 and 2
Arizona 7071-7	Donald Pruitt and Robert Gillespie	Suprize #1 (or Surprise #1), Surprise #3 (or Surprise #3)

the claims on the ground between the period from early September, 1975, until mid-January, 1976; again immediately prior to the hearing as scheduled in February and prior to the hearing as held in April. The claims had been previously examined by Mr. Thomas Rowley for the Bureau of Land Management, but Mr. Rowley died prior to the hearing and the examination by Mr. Harty was independent of the previous examination. Because Mr. Harty was unable to effectuate a meeting with any of the mining claimants to conduct a joint examination or to have them point out to him the location of the claims on the ground, he used a map (Gov. Ex. D) previously furnished to Mr. Rowley by the mining claimants as a guide. He found few corner monuments and was unable to verify the location of the claims as shown on the map and from the descriptions contained in the claim notices. He, therefore, walked the entire South one-half of Section 25, searching for outcroppings or evidence of mineralization in numerous cuts, pits, and particularly in the workings known as the Dixie mine, which has been developed on the South one-half of Section 25.

He testified that the entire area consisted of Precambrian granite, Precambrian schist and Quaternary alluvium, and erodent product of the granites and schists, with some quartzite dikes, quartz veins and relatively narrow shear zones. (Tr. 54) Some areas showed evidence of iron oxide appearing as gossan and what mineralization he found was related to these iron oxidized areas. (Tr. 54)

In the literature available he found that there were no productive properties in the area and no mineral developed except for the Dixie mine, which was developed prior to 1917. (Tr. 55)

Some of the cuts and pits showed no visible evidence of mineralization or significant structures exposed and no samples were taken at these points. Where he found silicified iron stained schist rock with minor quartz veins or fracturing and in the workings of the old Dixie mine where he found showings of copper sulphate, a precipitate mineralization caused by percolation of acidic water through surface rock, samples were taken and assayed. Although the map of the workings on the Dixie mine (Exs. DD, GG and 2-MC) showed the shaft extending to 220 feet in depth with secondary tunnels, he was unable to go below the 70-foot level because the workings deeper than this point were filled with water.

Of a total of nine samples taken and assayed for gold, silver, and copper, six showed only a trace or insignificant amounts of these minerals. One sample taken from the Dixie mine, approximately 50 feet in from the portal, assayed .01 ounces gold, 1.10 ounces silver per ton, and .24 percent copper, which he computed had a total recovery value, as of prices quoted in 1973, of \$6.73 per ton. A sample taken approximately 130 feet in from an adit leading from the 70-foot level, assayed values of .005 gold, .45 silver per ton, with 1.03 percent copper, for a total recoverable value of \$14.14. The third sample taken from the face of the main drift at the 70-foot level in the Dixie mine assayed .005 gold, .10 ounces silver per ton, and .35 percent copper, for a total recoverable value of \$5.06 per ton.

Mr. Rarty, quoting from an Arizona Bureau of Mines' publication of 1966, stated the break-even point for small underground mines was \$31.50 per ton. (Tr. 127) Since that time, the costs have increased considerably and he estimated the values would have to exceed \$50 per ton for a profit to be made. (Tr. 144)

Mr. Harty stated that he knows of no mine in the United States where precipitated copper, such as he saw in the Dixie mine, is being mined economically; that Chile is the only area where a large blanket of high percentage copper deposit is being mined. (Tr. 126)

Based upon his examination and the results of the assays received from the samples taken, Mr. Harty was of the opinion that there were no valuable minerals exposed on any of the claims situated in the South one-half of Section 25 which would warrant further expenditure by a prudent man with a reasonable expectation of developing a paying mine.

Mr. Robert A. McColly, the senior mineral examiner with the Bureau of Land Management in Arizona, visited the claims with Mr. Harty on two occasions. He was shown where and how the samples were taken, and as a result of the assays made, he concurred with the testimony and conclusions given by Mr. Harty.

(Decision, 3-5).

Appellants concede that the government had made a prima facie case against the validity of the claims and that the burden of proof to establish the validity of the claims fell upon them. *Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959). However, appellants assert

that they met this burden with respect to the "approximately 8 claims consisting of the 'Dixie Mine.'" ^{2/} The thrust of appellants' contentions on appeal go to the Judge's weighing and analysis of contestees' evidence. The Judge summarized that evidence as follows:

In rebuttal, the evidence presented by the contestees consisted mainly of documentary evidence in the possession of Mr. Homer Gillespie, an officer of Myora Corporation. Exhibit 1-MC is a map of the claims as plotted by the claimants sometime after Mr. Rowley's examination in 1973. This map was not made available to Mr. Harty and it does vary from the map used by Mr. Harty in the location of certain of the claims in relationship to each other and as to several claim names.

The location certificate descriptions are so vague as to preclude using these descriptions as more than a general guide. It was, therefore, agreed by the parties that Exhibit 1-MC be accepted as correctly portraying the claims as they were located on the ground and the claim names. The claims as listed in the caption have been corrected to reflect this agreement.

Exhibit 2-MC is a mapping of the adits on the 75- and 125-foot levels on the Dixie mine drawn by R. Wagnon, a mining engineer who operated on the property in 1961 and 1962. Exhibit 4-MC is an assay report from a sample ostensibly taken from the Adams tunnel on the Uncle John claim in 1972, which shows silver values of 79.3 ounces per ton. Exhibit 5-MC is an assay report obtained from H. Gratton Lynch, who leased the mining claims at one time. Mr. Gillespie testified that he assumed the assay is from samples taken from the Dixie mine, but does not know where and at what level. Exhibit 6-MC is an assay report of a sample presumably taken from the Dixie mine, on which someone unknown had added the words "200-foot level." Exhibits 7- and 8-MC are smelter returns of some 12-1/2 tons, again presumably from the Dixie mine. These exhibits were received in evidence as corporate records and do show substantial and possibly marketable values of ore. At the present time, however, because the mine is

^{2/} The record does not clearly establish that the Dixie mine extends to eight claims. The record tends to show that the Dixie mine is primarily within the Uncle John Claim but may continue into the Seth Parker claim and another claim. (See, *£.£.*, Tr. 109, 199, 205, 270.) There is insufficient evidence to support any inferences that the mine extends into other claims.

flooded, no verification can be made of the mineralization below the 70-foot level in the Dixie mine.

Mr. Gillespie testified that he has been on the 200-foot level of the Dixie mine and has seen a 14-foot wide vein exposed. Re further testified as to a hole being drilled by North American Mining Company on the Uncle John claim and that he knows the assay results of the core sample, but does not know where the assay is now. He stated he has had assays of samples taken from the Dixie mine, but had none available with him at the hearing. It might be further noted that Mr. Gillespie makes no claim to have mining experience or to a mining degree.

Mr. Donald F. Reed, a graduate consulting mining engineer, testified that he had examined the claims for Maricopa County in 1966. He looked at all of the assay records and smelter runs available, and as a result, advised the County that the claims were valid. He based this opinion on the fact that the property is on a broad mineralized belt and that although no known mining operations have existed within close proximity, the presence of the minerals shown in the adit and underground workings on the Dixie mine indicates that primary mineralization was formed from ascending solutions and, therefore, there is a possibility of ore bodies at depth. (Tr. 263)

Mr. Reed admitted he made no thorough investigation and he did not examine the Dixie mine. No examination was made of Section 25 because the County was not interested in that section.

In his opinion, there is a good possibility the structures and mining values on the Dixie mine would extend into Section 25, but the only way to tell would be to do extensive diamond drill work. When asked what work would be necessary to determine the value, he stated that if he had an interest in the mine, he would first dewater the Dixie mine and explore further on the lower workings. (Tr. 267)

(Decision, 5-6).

Judge Rampton then discussed the law concerning discovery of a valuable mineral deposit and burden of proof. He concluded that the Government had made a prima facie case of lack of discovery, and that the contestees had failed to overcome that case. Specifically, he stated:

The evidence presented by the mining claimants was, woefully inadequate to meet their burden. The assay reports and results of the mill-run tests ostensibly taken from material removed from the lower levels of the mine are strictly hearsay, can be given little or no weight, and could be received in evidence only as exception to the hearsay rule. The Government had no opportunity through cross-examination to determine the places and methods of sampling and the amounts of ore present. All of these factors must be determined before conclusions can be reached as to whether there is even a possibility of working the Dixie mine at a profit.

Although Mr. Gillespie stated that he had taken samples from the claim, and that drilling work had been done, he was unable to offer any assay report, of his own samples or assays to the drill cores. Viewed in its most favorable light, the testimony of the contestees consisted of hopes and beliefs based on work done by their predecessors in the interest that valuable ore exists at depth. In the case of Henault Mining Company v. Tysk, 419 F.2d 766 (1969), cert. denied, 398 U.S. 950 (1970), the court said:

. . . A reasonable prediction that valuable minerals exist at depth will not suffice as a discovery" where the existence of these minerals has not been physically established. (Emphasis added)

It appears clear that the mining claimants are still in an exploratory stage at this point. The testimony of the mining claimants' own expert witness, Donald F Reed at pages 265-266 of the transcript illustrates this finding:

- Q. Well, now, in terms of the Dixie mine and the claims very close to it, would a reasonable and prudent man be justified in expending his labor and means with a reasonable prospect of developing a paying mine there?
- A. I would say that a reasonable and prudent man would be justified in spending limited amount of money, say \$25,000 or \$50,000, in doing this exploratory work. If that exploratory work was disappointing, of course, he would have simply lost that money, I mean this is speculation.

If it proved that there was, that there did exist ore bodies at depth along this structure then, of course, he would be justified in spending more money and more time and labor.

This is a thing that you do step by step.

And at pages 266-267:

- A. The things that I've just explained to you, the potentiality of the property. There is a potential there. Now, whether the mineral is there or not in sufficient value on volume to make a profitable mining operation I can't tell you and no one else can tell you until this exploratory work has been done.

It is clear from the evidence available at the present time that no prudent man would proceed to the development of any of the claims in contest without: (1) dewatering the mine, (2) doing further drillings to ascertain whether and to what extent values exist at depth, and (3) further sampling the lower workings. That work, as recommended by the mining claimants' own witness, is not in the nature of development of a discovered ore body, but a search for values which would justify development.

The mining claimants contend that work necessary to prove the existence of ore was not done because it is impossible to obtain investment money when the claims are under contest and, further, that the lease and option to purchase to North American was not carried out solely because the principal of North American died at the outset of the transaction. However, that transaction was to be entered into in 1968 (Ex. 9-HC), and the contest proceedings were not brought until 1973. However, the original locations of mining claims on this property date back many years, and the claims were either acquired by the contestees or located in the period 1961 through 1963. Given this length of time between the acquisition of the claims and the filing of the contest, I find little merit to the argument that the mining claimants have been unable to do the necessary work to establish that they do have valid discoveries on the claims in accordance with the established case law.

(Decision, 8-10).

[1] The real question presented in this appeal is whether contestees' evidence is sufficient to establish the existence of a

valuable mineral deposit on the claim* or at least rebut the Government's, prima facie case that no such valuable deposit has been discovered. The standards for discovery of a valuable mineral deposit are well established. 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 valuable mine * * *." Castle v. Womble, 19 L.D. 455, 457 (1894); approved in Chrisman v. Miller 197 U.S. 313, 322 (1905). Implicit in this condition is the concept that the mineral material may be mined, removed and marketed at a profit. United States v. Coleman, 390 U.S. 599 (1968); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969). Where further exploratory work is necessary to demonstrate either the extent of the mineral deposit or that it can probably be exploited profitably, there is no discovery*. United States v. Winters, 2 IBLA 329, 78 I.D. 193, (1971). As Judge Rampton pointed out, the testimony of the contestants' own expert witness (Tr. 265-67) fully supports the conclusion that there can be no basis for a reasonable expectation of profit until further exploratory work has indicated whether or not there is a large enough volume of ore to sustain a profitable mining operation. Appellant has been unable to show adequately the existence of a valuable mineral deposit on any of the claims containing minerals in sufficient quantity and of sufficient quality to support a mining operation.

[2] Nevertheless, despite the opinion of their own expert witness concerning the present condition of the workings of the Dixie mine and the need for further exploration to establish if there are, in fact, minerals within the mine, appellants contend that documentary evidence submitted at the hearing establishes a discovery of a valuable mineral deposit. They assert that Judge Rampton failed to give appropriate evidentiary weight to certain exhibits which "conclusively establish the presence of substantial tonnages in ores and that from the ores present a profitable mine can be worked." (Statement of Reasons, 4.) These exhibits consist of assays made in 1968 (Ex. 4-MC) and 1962 (Exs. 5-MC and 6-MC) along with mill runs from 1940 (Exs. 7-MC and 8-MC). Appellants contend that these exhibits indicate the presence of values which exceed the cost of mining the ore.

Appellants take issue with Judge Rampton's stated reason for giving little weight to this evidence, *i.e.*, that it was hearsay and not subject to cross-examination. Appellants fail to recognize the gravamen of the Judge's reason why the evidence should be given little weight: that there was no foundation testimony, subject to cross-examination, which tended to show that the samples or past production represent the material that can now be mined from the claims.

The exhibits which are the subject of appellants' argument do not, by themselves, establish the existence of a valuable mineral deposit

on the claims, nor are they sufficient to rebut the government's prima o facie case, so as to require dismissal of the contest. See generally, United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975). The present and prospective value of any mine consists in what is in the earth, not in what has been taken from it. Assay results have no probative value without further evidence establishing how each sample was taken and where the sample was taken from so that the fact-finder can determine how accurately the sample represents what remains in the ground. By themselves, the assay reports do not tell us whether the samples were taken from areas of isolated mineral occurrences or from areas of continuous mineralization. They tell us nothing about the size or extent of the deposit from which they were taken. Without such information, it is impossible to form a basis for a reasonable belief that the mineral in the ground can be mined, removed, and marketed at a profit. The mill runs (smelter returns) may establish that large quantities of valuable material had been removed in the past, but by themselves, they do not tell us whether more minerals remain. Evidence of past production is not sufficient to establish the discovery of a valuable mineral deposit; if the mine is worked out, a discovery is lost. U.S. v. Houston, 66 I.D. 161 (1959). For these reasons, assay reports and records of past production, by themselves, can be given little weight in determining the validity of a mining claim. See United States v. Maley, 29 IBLA 201 (1977); United States v. Avgeris, 8 IBLA 316 (1972). We find that Judge Rampton properly gave these exhibits little weight in his evaluation of the evidence, and correctly found the claims null and void for lack of discovery.

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.

Joan B. Thompson
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Joseph W. Goss
Administrative Judge