

Editor's note: Appealed -- aff'd, Civ. No. 78-119 (D.Oreg. March 26, 1980), rev'd, No. 80-3482 (9th Cir. Feb. 28, 1984) 726 F.2d 1376

UNITED STATES

v.

R. E. RODGERS AND BARBARA J. RODGERS

IBLA 77-66

Decided September 2, 1977

Appeal from decision of Administrative Law Judge Dean F. Ratzman declaring mining claims null and void. Contests OR 10909, OR 10911, OR 10912.

Affirmed.

1. Administrative Procedure: Generally--Contests and Protests:
Generally--Evidence: Generally--Mining Claims: Contests--Rules of
Practice: Evidence--Rules of Practice: Government Contests

In a mining claim contest where a contestee is of the opinion that the Government did not make a prima facie case of no discovery, he may move to have the case dismissed at the conclusion of the Government's case, and then rest. The contest complaint could be dismissed if the Administrative Law Judge rules that no prima facie case had been made of lack of discovery and there is no other evidence in the record to support the charges in the complaint. But if the contestee goes forward after making such a motion to dismiss and presents his evidence, that evidence must be considered as part of the entire record and its probative value will be weighed. Thus, even if the Government has failed to make a prima facie case, evidence presented by the contestee which supports the Government's contest charges may be used against the contestee, regardless of the defects in the Government's case.

2. Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Discovery

Where a mining claim occupies land which has subsequently been withdrawn from the operation of the mining law, the validity of the claim must be tested by the value of the mineral deposit as of the date of the withdrawal, as well as the date of the hearing. If the claim was not supported at the date of the withdrawal by a qualifying discovery of a valuable mineral deposit, the land within its boundaries would not be excepted from the effect of the withdrawal, and the claim could not thereafter become valid even though the value of the deposit thereafter increased due to a change in the market.

3. Administrative Procedure: Generally--Contests and Protests: Generally--Evidence: Generally--Mining Claims: Contests--Rules of Practice: Government Contests

In a proceeding to determine the validity of an unpatented mining claim the claimants must prevail, if at all, upon the strength of their own case, rather than upon any weakness in that of the Government.

4. Classification and Multiple Use Act of 1964--Mining Claims: Lands Subject to--Public Records--Segregation: Generally

Publication in the Federal Register of a notice of proposed classification pursuant to 43 CFR 2461.2 will segregate the affected land to the extent indicated in the notice.

5. Classification and Multiple Use Act of 1964--Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Discovery--Mining Claims: Lands Subject to--Segregations: Generally

Where mining claims occupy land which has subsequently been withdrawn from the operation of the mining laws by a notice of

proposed classification, 43 CFR 2461.2, the validity of the claim must be tested as of the date of the published notice, as well as of the date of determination. If the claim was not supported by such a discovery at the date of the published notice of classification, the land within the claim located in the classified area would not be excepted from the effect of the withdrawal.

6. Mining Claims: Contests--Mining Claims: Discovery--Mining Claims: Marketability

The "marketability rule" requiring a demonstration of present marketability at a profit is (and always has been) applicable to all mining claims, whether for base metals or for precious minerals.

7. Mining Claims: Generally--Mining Claims: Discovery

A locator of a mining claim on public land has taken only the initial step in seeking to secure a gratuity from the Government and obtains no rights against the United States until there has been a discovery of a valuable mineral deposit within the limits of the claim.

APPEARANCES: William B. Murray, Esq., Portland, Oregon, for appellants; Lawrence E. Cox, Esq., Office of the Solicitor, Portland, Oregon, for the Government.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

R. E. Rodgers and Barbara J. Rodgers, his wife, have appealed from a decision dated November 8, 1976, of Administrative Law Judge Dean F. Ratzman insofar as it declared Clay-Matt #1, Clay-Matt #2, Spectrum #1, Sun Queen #1 and Sun Queen #2 mining claims null and void for lack of a discovery of valuable minerals within the limits of the claims prior to October 8, 1970, when the lands were withdrawn from operation of the mining laws. 1/

1/ The decision of Judge Ratzman held that evidence of the contestees preponderated with respect to the Bytownite #1 mining claim and all charges in the complaint against that claim were dismissed.

All of the claims are situated within sections 2, 3, 10, and 11, T. 33 S., R. 24 E., W.M., Lake County, Oregon. A proposed amendment to Classification of Public Lands for Multiple Use Management, Oregon 1630 (43 U.S.C. §§ 1411-18), to segregate the W 1/2 sec. 1, all sec. 2, E 1/2 sec. 3, E 1/2 sec. 10, all sec. 11, W 1/2 sec. 12, T. 33 S., R. 24 E., W.M., from operation of the general mining laws was published at 35 F.R. 15855, October 8, 1970, allowing 60 days for public comment on the proposed segregation. The original classification of this land, published at 32 F.R. 16285, November 29, 1967, segregated the land only from appropriation under the agricultural land laws and from public sale, and provided the land shall remain open to the mining and mineral leasing laws. Notice of the amended classification was published at 35 F.R. 19031, December 16, 1970, such publication having the effect of segregating the land from operation of the general mining laws.

The contest complaints alleged that minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery, and that minerals were not found within the limits of the claims prior to October 8, 1970, in sufficient quantity to constitute a valid discovery. By motion of counsel, each complaint was amended to include a charge that a discovery of valuable mineral was not made within the limits of the claim prior to October 8, 1970. Contestees filed timely answers denying all charges in the amended complaints. A hearing was held at Portland, Oregon, on June 25, 26 and 27, 1975. The contestees appeared in person and were represented by counsel.

The claims are situated in an unpopulated arid part of southeastern Oregon, where ancient flows of igneous rocks are exposed at the surface or lie beneath a thin layer of top soil. Within some

fn. 1 (continued)

The Government did not take a cross-appeal from the decision. The original contest complaints were addressed as follows:

Oregon 10909 Truman Mitchell	Clay Matt #1 and #2 located September 26, 1970
Oregon 10910 R. E. Rodgers	Bytownite #1 located August 3, 1970
Oregon 10911 Don W. Sellers R. E. Rodgers Barbara J. Rodgers	Spectrum #1 located September 15, 1970
Oregon 10912 George A. Marshall Helen B. Marshall	Sun Queen #1 located August 19, 1970 Sun Queen #2 located September 12, 1970

7 square miles surrounding the claims, the basaltic host rock contains varying amounts of phenocrysts of labradorite, the mineral for which the claims were located. The area has long been known to "rock hounds" as a source of labradorite specimens.

Labradorite is a mineral of the plagioclase feldspar series, and is a silicate of aluminum with varying amounts of both sodium and calcium. Labradorite may vary from transparent colorless to yellow, pink, red or green, with or without opalescence or iridescence (schiller effect). The phenocrysts of labradorite vary in size from microscopic to pieces large enough to be cut into faceted gem stones, which are sold by claimants under the name "sunstones." Labradorite occurs in a number of places throughout the United States, as well as in Labrador, where it is most typical and from whence it derives its name.

Recovery of the labradorite stones from the claims is by picking the stones from the surface, by processing the decomposed host rock over a screen and handpicking the phenocrysts which do not pass through, or by carefully prying stones from the unweathered host rock in small excavations. Stones from these claims have been sold mostly to "rock hounds" (collectors) without further processing after recovery from the host rock. Although contestees exhibited a number of faceted and cabochoned specimens in their personal collection, they do not ordinarily process their stones to such a condition before selling.

Although labradorite has a hardness 2/ of only about 6 on the Mohs scale, some specimens have been classified as "gems," but generally labradorite is considered to be in the semiprecious or nonprecious decorative or ornamental stone group as opposed to "gemstones." See P. E. Desautels, The Gem Kingdom (1973). 3/

At the hearing, Joseph Rudys, a mining engineer employed by the Bureau of Land Management (BLM), and Chris Bioli, a geologist employed by BLM, testified for the Government; Norman V. Peterson, a geologist

2/ Hardness in a mineral expresses its resistance to scratching. The Mohs scale expresses the relative hardness of 10 common minerals. For comparison a knife blade is a little more than 5; window glass 5-1/2; a steel file 6-1/2; quartz sand 7.

1 Talc	6 Orthoclase
2 Gypsum	7 Quartz
3 Calcite	8 Topaz
4 Fluorite	9 Corundum
5 Apatite	10 Diamond

3/ P. E. Desautels is Supervisor of the Division of Mineralogy in the Smithsonian Institution, Washington, D.C.

of the State of Oregon, Dr. Fredrick Pough, an eminent mineralogist, Del Davis, owner and operator of a rock shop in Lakeview, Oregon, Howard H. Studdard, an amateur faceter and rock collector, George A. Marshall, locator of the Sun Queen #1 and #2 claims, Mary Lee Sprague, manager of a rock shop in Portland, Oregon, and contestees, R. E. Rodgers and Barbara J. Rodgers, testified for the contestees. Testimony by deposition, after the hearing concluded was received from Leroy E. Bates, an accountant, and from James R. Miller, an export broker, each testifying on behalf of the contestees.

All witnesses agreed on the manner of the occurrence of the labradorite phenocrysts in the host basaltic rock, and that the deposit covered approximately 7 square miles surrounding the claims in question. Likewise, there was unanimity in the testimony concerning the method of recovery of the phenocrysts--generally screening the extracted material and handpicking the phenocrysts which failed to pass through the screen. It was not clearly demonstrated that the deposit of labradorite is better on the claims than it is throughout the whole area of 7 square miles.

Based on their examinations of the material on the claims and as a result of minimal market surveys, the Government witnesses each gave his opinion that the material was not a "gemstone," that there was a limited market for the material, and that a prudent person would not expend further time and means in the hope or expectation of developing a valuable mine on the land.

The record does not reflect any testimony that extensive sales or other disposition of the labradorite had occurred before the land was withdrawn from operation of the mining laws in 1970, or that the existing market for the material--sales to rock hound collectors mostly--was such that a prudent person would expend time and means in hope of developing a valuable mine. Testimony was given that sales of the mineral material, in limited quantities, from some of the claims have occurred since 1970, but the record is sketchy on that point. The contestees did not make a case that there is a continuing viable market for the material, and they did not establish that their collector's items--large colored stones faceted or cabochoned--are to be found on each claim. It might be said that anyone in the area could recover labradorite stones from the surrounding area by employing the same method of operation as utilized by the claimants, and that such a practice was frequently followed by rock hounds, rather than to purchase the recovered stones from the claimants. Indeed, it has been suggested that the purpose of the classification-withdrawal of the area of deposition from operation of the mining laws was to protect the mineral material from private exploitation and keep it as a source for the public to enjoy in the pursuit of rock hounding activities.

Evidence was introduced to indicate that the contestees have a large business in the sales of rocks and rock products, but only a small portion of the gross can be attributed to these claims. Indeed, sales of the claims, following the service of the contest complaints, by the locators to the Rodgers is indicative that there was not a market adequate to support all the claims, and that the Rodgers, being there first, had really cornered the lion's share of whatever market existed from production from the Bytownite #1 claim, so that no one else could break into the market successfully.

Following the hearing Judge Ratzman found that the Government had made a prima facie case of no discovery of a valuable mineral deposit on any of the contested claims included in this appeal. The Judge denied a motion by contestees to dismiss the charge that discovery of a valuable mineral deposit had not been made within the limits of the contested claims prior to October 8, 1970, but he dismissed the original two charges in the complaints. The Judge held that no discovery of a valuable mineral was made prior to October 8, 1970, within the limits of the Clay Matt #1, Clay Matt #2, Spectrum #1, Sun Queen #1 and Sun Queen #2 mining claims and declared each of these claims null and void.

Appellants' allegations of the issues as to which the Judge erred and our discussion of each follow:

First: whether contestees' motion to dismiss for want of substantial evidence to establish a prima facie case should be allowed.

[1] When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it bears 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 a discovery has been made. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). Where a Government mineral examiner testifies that he has examined a claim and found mineral values insufficient to support a finding of discovery, a prima facie case of invalidity has been made. United States v. Arcand, 23 IBLA 226 (1976). The Government's witnesses, Rudys and Bioli, a mining engineer and a geologist, respectively, testified as to their separate examinations of the claims; as to the method of occurrence of the feldspar phenocrysts known as labradorite; as to their opinion that it was not a gemstone and that most of the recovered stones were not colored or otherwise unique but rather were saleable only to a limited market of rock collectors; and that a prudent person would not expend further of his time or means in anticipation of developing a valuable mine. Such testimony supported the finding of no discovery and established a prima facie case.

In a mining claim contest where a contestee is of the opinion that the Government did not make a prima facie case of no discovery,

he may move to have the case dismissed at the conclusion of the Government's case, and then rest. The contest complaint could then be dismissed if the Administrative Law Judge rules that no prima facie case had been made of lack of discovery and there is no other evidence in the record to support the charge in the complaint. But if the contestee goes forward after making such a motion to dismiss and presents his evidence, that evidence must be considered as part of the entire record and its probative value will be weighed. Thus, even if the Government has failed to make a prima facie case, evidence presented by the contestee which supports the Government's contest charges may be used against the contestee, regardless of the defects in the Government's case. United States v. Arizona Mining & Refining Co., 27 IBLA 99 (1976); United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975). However, in this case we find the Government did make a prima facie case of no discovery and that the Judge correctly denied contestees' motion to dismiss.

Second: whether the discovery evidence in the record as a whole is sufficient proof of discovery.

[2] Where a mining claim occupies land which has subsequently been withdrawn from the 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. United States v. Arcand, *supra*; United States v. Fleming, 20 IBLA 83 (1975). If the claim was not supported at the date of the withdrawal by a qualifying discovery of a valuable mineral deposit, the land within its boundaries would not be excepted from the effect of the withdrawal, and the claim could not thereafter become valid even though the value of the deposit increased due to a change in the market. United States v. Arcand, *supra*. The land embraced within these claims was withdrawn from operation of the mining laws on October 8, 1970, the date of publication of the proposed classification in the Federal Register, 43 U.S.C. § 1414 (1970).

What did the contestees show as to discovery as of that date? The general testimony given was that the calcic feldspar occurs throughout the area of some 7 square miles. The Government witnesses stated that in 1970 the market for the "sunstones" was limited to rock collectors and nothing indicated that any market increase was in prospect. None of the contestees' witnesses offered contrary evidence as to sales of rock recovered from these five claims prior to October 1970. The mere presence of phenocrysts of labradorite on a mining claim does not satisfy the requirements of a discovery of a valuable mineral deposit under the mining laws where it has not been shown that a continuing market exists for such stones and that a prudent person would expend further time and money in a reasonable anticipation of developing a valuable mine. *Cf.* United States v. Zuber, 13 IBLA 193 (1973).

When a contestee is seeking to validate a group of mining claims he must prove a valuable mineral deposit exists on each individual claim. A showing that all the claims taken as a group satisfy the requirements of discovery is not sufficient. United States v. Colonna & Co., 14 IBLA 220 (1974). For a mining claim to be valid the required discovery must be made within the limits of the claim as located, as a discovery outside the claim cannot serve to validate despite the proximity of the discovery to the claim. United States v. Clear Gravel Enterprises, Inc., 505 F.2d 180 (9th Cir. 1974), cert. denied, 421 U.S. 930 (1975).

To satisfy the requirement that deposits of minerals of widespread occurrence be marketable, it is not enough that they are theoretically capable of being sold, but it must be shown affirmatively that minerals from the particular claim could have been extracted and marketed at a profit. United States v. McCall, 2 IBLA 64, 78 I.D. 71 (1971). ^{4/} The requirement that deposits of labradorite be marketable at a profit prior to the withdrawal of the lands embracing the claims has not been satisfied where it is clear that no open market for the stones existed, no mining operations had been conducted on the claims, no sales of stones had been made, and no effort to establish a market for these specific labradorite deposits had been made by the claimants prior to the date of the withdrawal. Cf. United States v. Bartlett, 2 IBLA 274, 78 I.D. 173 (1971). Contestees did not show affirmatively there was a viable market in 1970 for sunstones from all the contested claims here appealed or from any one of them.

Third: whether a bald conclusion as to discovery has probative value when unsupported by evidentiary facts.

[3] The claimants to an unpatented mining claim must prevail, if at all, upon the strength of their own case, rather than upon any weakness in that of the Government. As discussed above, the Government made a prima facie case of no discovery. The succeeding evidence and testimony on behalf of the contestees did not preponderate as to the five claims here under consideration. We find no merit in this argument of appellants. The decision of the Judge is based upon evidentiary facts in the whole record.

Fourth: whether faulty procedure invalidated attempts to amend classification of public lands for multiple-use under the Taylor Grazing Act; if so, what is the critical date for proof of mineral discovery.

^{4/} Litigation is pending in McCall v. Boyles, Civil No. 74-68 (RDF, D. Nev.).

[4] Appellants' argument is simply answered. On November 29, 1967, BLM published Notice of Classification of Public Lands for Multiple Use Management, 32 F.R. 16285, pursuant to the Act of September 19, 1964, 43 U.S.C. § 1411 et seq. (1970). A Notice of Proposed Amendment of Classification of Public Lands for Multiple Use Management was published October 8, 1970, at 35 F.R. 15855. Section 2 of the Notice provides that the purpose of the proposed amendment of classification is to further segregate the land listed from operation of the general mining law, 30 U.S.C. § 21 (1970), and that publication of the Notice shall have the effect of segregating the land. The area described in the Notice is W 1/2 sec. 1, all sec. 2, E 1/2 sec. 3, E 1/2 sec. 10, all sec. 11, W 1/2 sec. 12, T. 33 S., R. 24 E., W.M., Oregon. The applicable statute, 43 U.S.C. § 1414 (1970), provides that publication of notice in the Federal Register of a proposed classification under the Act of September 19, 1964, supra, shall have the effect of segregating such land to the extent proposed. Thus, publication of the Notice of Proposed Classification on October 8, 1970, segregated the lands therein described from operation of the mining laws as of that date. Publication of the Amended Classification on December 16, 1970, at 35 F.R. 19031, and publication of minor editorial amendments on June 22, 1973, did not affect the original date of segregation. It is well established that the validity of the mining claim must be determined as of the date the land is withdrawn from operation of the mining law.

Fifth: whether mining claimants who are diligently making a bona fide effort to perfect discovery have the right to continue work to earn patent on claims located prior to any alleged amended classification order.

[5] There can be no question that for a mining claim to be valid a discovery of a valuable mineral deposit must be shown to have existed prior to withdrawal of the land in question from operation of the mining law. Cases so holding are legion. E.g., Palmer v. Dredge Corp., 398 F.2d 791 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969); United States v. Vaux, 24 IBLA 289 (1976); United States v. Gunsight Mining Co., 5 IBLA 62 (1972). There is no merit in the contention that claimants have the right to pursue exploratory efforts seeking to perfect a discovery of a valuable mineral deposit after the land embraced in the claims has been withdrawn from operation of the mining laws. As appellants point out, citing Cameron v. United States, 252 U.S. 450 (1920), the Secretary of the Interior has the duty to eliminate invalid claims, as well as to see that valid claims are recognized. In eliminating the invalid claims in this proceeding the Secretary is merely exercising his authority properly.

Sixth: whether allegations in the complaint are adequate to raise the issue of marketability.

[6] The issue of marketability is firmly embedded and intertwined in any determination of validity of a mining claim. The so-called "prudent man rule" first enunciated in Castle v. Womble, 19 L.D. 455 (1894), has been recognized as requiring a demonstration of present marketability at a profit. United States v. Coleman, 390 U.S. 599 (1968). This marketability rule is (and always has been) applicable to all mining claims, whether for base metals or for precious minerals. Converse v. Udall, 399 F.2d 616 (9th Cir. 1968). Thus, whether or not specifically set out in a charge in a contest complaint, marketability at a profit is an intrinsic facet of discovery. After a prima facie case by the Government of no discovery due to lack of marketability, failure of a contestee to demonstrate marketability on the date the land was withdrawn from operation of the mining laws compels a finding that no discovery has been made and the claims are properly declared null and void.

Seventh: whether the Bureau of Land Management can substitute a taking of the Rodgers' constitutionally protected property without compensation for a taking for public use by condemnation with compensation.

[7] Mining claims supported by a discovery as defined in Coleman, supra, are property, as contended by appellants. But as the Supreme Court has held repeatedly, the Interior Department has plenary authority over the public lands, and so long as legal title remains in the Government, it has power, after proper notice and upon adequate hearing, to determine whether a mining claim is valid, and if it is found invalid, to declare it null and void. E.g., Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1973); Cameron v. United States, 252 U.S. 450 (1920). A locator of a mining claim on the public domain has taken only the initial step in seeking to secure a gratuity from the Government and obtains no rights against the United States until there has been a discovery of a valuable mineral deposit within the limits of the claim. Multiple Use, Inc. v. Morton, 504 F.2d 448 (9th Cir. 1972). Where a mining claim is declared null and void there is no compensable right against the Government. Humboldt Placer Mining Co. v. Secretary of the Interior, 549 F.2d 622 (9th Cir. 1977). As the claims at issue have been determined to be invalid for lack of discovery, after notice and a hearing, the claimants lost no constitutionally protected property right. They had none. Their argument to the contrary is devoid of any merit.

We have considered the proposed findings and conclusions submitted, and, except to the extent that they have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts or because they are not relevant to the rulings that have been made. See National Labor Relations Board v. Sharples Chemicals, Inc., 209 F.2d 645 (6th Cir. 1954); United States v. Zweifel, 11 IBLA 53, 80 I.D. 323 (1973).

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 Administrative Law Judge Ratzman appealed from is affirmed, and the Clay Matt #1, Clay Matt #2, Spectrum #1, Sun Queen #1 and Sun Queen #2 mining claims are declared null and void.

Douglas E. Henriques
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

Joan B. Thompson
Administrative Judge

