

Appeal from a decision of Administrative Law Judge E. Kendall Clarke declaring a lode mining claim null and void. CA 2954.

Affirmed.

1. Mining Claims: Discovery: Generally

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.

2. 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; the burden then 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.

3. 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.

4. 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Where a mining claim occupies land which has subsequently been withdrawn from the operation of the mining law, the validity of the claim must be tested by the value of the mineral deposit as of the date of the withdrawal, as well as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.

APPEARANCES: Reginald L. Knox, Jr., Esq., Horton, Knox, Carter and Foote, El Centro, California, for Appellants; Robert D. Conover, Esq., Field Solicitor, U.S. Department of the Interior, Riverside, California, for Appellee.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

This is an appeal from a decision dated March 25, 1977, by Administrative Law Judge E. Kendall Clarke, declaring the Mary Lode Mining Claim (also known as the Mary Lode No. I Mining Claim) null and void for lack of discovery of a valuable mineral deposit.

The claim, encompassing approximately 20.66 acres, is situated in sections 14 and 15, T. 12 S., R. 18 E., San Bernadino meridian, Imperial County, California.

The lands on which the claim is situated were temporarily segregated for use of the Department of the Navy on April 14, 1953, by noting the Navy's proposed withdrawal application, LA 0102641, on the official records. The lands were withdrawn by Act of Congress dated September 6, 1963 (77 Stat. 152) (Contestant's Exhibit 2).

The contest was initiated by the Bureau of Land Management (BLM), which filed a complaint on May 21, 1975, and an amended complaint on October 9, 1975. The amended complaint alleged that the lands embraced within the claim were nonmineral in character and that no valuable minerals existed thereon at the time of the segregation of the lands by the notation of the Navy's withdrawal application on April 14, 1953.

An evidentiary hearing was conducted on April 27, 1976, in El Centro, California. In his decision the Administrative Law Judge stated the issue to be whether:

[There was a discovery of a valuable mineral sufficient to satisfy the mining laws of the United States at the time the land encompassed by this mining claim was withdrawn from further mineral location and, if there was such a discovery at that time, whether it continued to the time of the hearing.

[1, 2, 3] The Judge found from the evidence that the contestant established a prima facie case of no discovery, and that the contestee failed to show by a preponderance of the evidence that a discovery existed at the time of the hearing. The Judge's decision sets out the pertinent evidence and the applicable law. We agree with the decision and therefore adopt it as the decision of this Board. Such decision is attached hereto.

Appellants' first contention on appeal is that the Judge misstated the issue. Appellants contend that the issue is whether there was a discovery in 1939. Secondly, appellants urge that the evidence given by the Government's expert witness should be rejected because this witness believed that no discovery ever occurred on the claim.

[4] With respect to the first contention, 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, i.e., April 27, 1976. United States v. Arcand, 23 IBLA 226 (1976); United States v. Fleming, 20 IBLA 83 (1975); United States v. Rodgers, 32 IBLA 77 (1977). If the claim was not supported at the dates of the segregation and withdrawal by a qualifying discovery of a valuable mineral deposit, the land within its boundaries would not be excepted from the effects thereof, and the claim could not thereafter become valid even though the value of the deposit increased due to a change in the market. ' See United States v. Arcand, *supra*. The land embraced within this claim was segregated in 1953 and withdrawn in 1963. Whether there was a discovery of a valuable mineral deposit in 1939 is therefore not controlling to the disposition of this case.

The Government's expert witness, who gathered and assayed samples, related his findings to prices obtaining in 1953. He concluded that at that time and continuing to the time of the hearing, insufficient mineralization remained to justify a prudent man's expenditure of money and labor in the hope of developing a paying mine. "Lease findings were not cast into doubt by any evidence given by either of Appellants' two witnesses, nor did those witnesses produce any reliable quantitative data tending to show a discovery in 1953 or since.

Appellants have demonstrated no reason to reject the evidence of the Government's mineral examiner or to disturb the findings and conclusions of the Judge.

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.

Frederick Fishman
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Martin Ritvo
Administrative Judge

March 25, 1977

United States of America, : Contest No. CA-2954
Contestant : Involving the Mary Lode
v. : Mining Claim aka Mary Lode
Andrew J. Van Derpoel, at al., : No. I Mining Claim, situated
Contestees : in Secs, 14 and 15, T, 12 S.
: Re 18 E-, San Bernardino Base
: and Meridian Imperial County,
: California

DECISION

Appearances: Robert D. Conover, Field Solicitor, U. S. Department of the Interiors
Riverside, California, for the Contestant;

Reginald L. Knox, Jr., Esq., Horton, Knox, Carter, and Foote, El Centro
California for the Contestees.

Before: Administrative Law Judge Clarke

This proceeding was initiated by the Bureau of Land Management, on behalf of the Department of the Navy, through the filing of a Complaint on May 11, 1975 and an Amended Complaint on October 9, 1975* The Amended Complaint" in paragraph five alleges as follows:

- "A. The land embraced within the claim is nonmineral in character.
- B. Valuable minerals did not exist on the claim at the time of the segregation of lands by the withdrawal application of the Department of the Navy on April 14, 1953, so as to constitute a valid discovery within the meaning of the mining laws."

On June 19, 1975, an Answer to the Complaint was filed, By Notice of Hearing issued on March 2, 1976 the matter was set for hearing on April 27, 1976, in El Centro, California, and-was held as scheduled,

SUMMARY OF EVIDENCE

Counsel for each of the parties has summarized the evidence in their briefs. The following summary of evidence is a composite of Counsels' summaries taking the summary of testimony of the witness as prepared by Counsel on whose side the witness appeared. This method casts the testimony from each witness in the best possible light, and at the same time, a careful analysis of the record shows that these summaries do accurately reflect the testimony which was taken at the hearing.

Dr. Carl F. Austin, a geologist having particular expertise in assessing the economic viability of mineral claims (Tr. 7-8, 45-46, Exhibit I), testified that he visited the claim in 1972, thoroughly inspected it (Tr. 11-20), took samples of the remaining material which he felt were representative and would demonstrate both past and current mineralization (Tr. 28-34), and had his samples assayed at a commercial laboratory (Tr. 35). Based upon his review of the general geology, the results of his investigation, the samples and their assays, and his knowledge of - historical mining costs, he concluded that no substantial quantities of gold or other valuable minerals could ever have been extracted from the mine at a profit (Tr. 39-42). The statements by the Contestee (Exhibit B) that \$29,000.00 worth of gold was withdrawn from the mine in the space of a few years during the late 1930's and early 1940's could only be true if there had been a tubular deposit of ore which followed the exploratory shafts (Tr. 63-67). However, it was Dr. Austin's expert opinion that the geology of the claim was incompatible with the presence of such tubular deposits of ore (Tr. 43).

Dr. Austin also voiced his expert conclusion that when activities on the claim ended, there remained no gold or other valuable minerals which could be commercially mined (Tr. 64). His conclusion as to the commercial nature of any remaining materials was based upon the costs of mining and marketing gold extant in 1953 and today (Tr. 42). He testified further that the tunnels which exist on the claim were professionally prepared and were located so as to reveal any ore which might have existed within the boundaries of the claim (Tr. 14-15). Dr. Austin's expert opinion is that, based upon the geology of the claim and the assays of the samples taken by him, no gold remains in place which could have been economically mined in 1953 or could be so mined today (Tr. 42). This conclusion was made with full knowledge of the presence of a thin band of high-value quartz which is present in the stope. This band does not affect his conclusion because it is a small pocket, and its assay is an "erratic high assay", and the pocket is not commercially minable (Tr. 155-156).

In summary, Dr. Austin testified that the Mary Lode No. 1 has never been a viable mining operation and never will be.

Everett C. Van Derpoel, one of the Contestees herein, testified that the claim was discovered in April of 1939 (Tr. 69). He dug out about 20 pounds of high grade ore from the original point of discovery which was at Shaft No. 3 as shown on Exhibit 7A (Tr. 70). Approximately \$15,000.00 worth of gold was recovered from material taken from Shaft No. 1 (Exhibit 7). The ore was hauled to San Diego and averaged at least \$300.00 per ton (Tr. 73-74). 6

The vein was about three feet thick and occupied most of the top half of the tunnel which is Shaft No. 1 (Tr. 114). The good ore was bagged in the shaft. A little less than half of all the material removed from Shaft No. 1 was good ore and the balance was waste (Tr. 122-123). There was also good ore in the drift from Shaft No. 1 which was worth \$200.00 per ton or better (Tr. 88). Approximately 30 tons of ore worth \$200.00 or better was taken from the drift where the bulge appears in the drawing on Exhibit 7 (Tr. 88).

All together approximately 350 tons of ore was processed. The mint receipts and smelter returns contained in Exhibit B represent the value of gold and silver recovered totaling \$28,514.28 (Tr. 107-108). He thinks that some of the mint returns are missing; however, Exhibit B includes all that can now be found (Tr. 130).

The mining operation was profitable up to the start of World War II in December 1941 (Tr. 84). The mill was constructed and put into operation in January of 1942. He does not know how much was expended for the mill, but it took approximately two months of labor (Tr. 84-85). A water supply was developed which produced approximately 700 to 750 gallons per day (Tr. 85-86). Most of the tailings from ore processed after January 1942 at the mill was either washed away or was used for road maintenance (Tr. 86-87).

The mill operated from January of 1942 and processed approximately 100 tons of ore (Tr. 76). Gold mining was prohibited after the start of World War II, and operation ceased in July of 1942 (Tr. 77). The property was -- leased to the Navy beginning in 1943 or 1944 (Tr. 78). He tried to operate after the war and ran about 20 tons of ore through the mill. He intended to diamond drill the property when the Navy advised that they might come in and run him out at any time, so the operation was closed down (Tr. 78-79).

In approximately 1955 he refused to renew the lease with the Navy and since that time has been prevented from operating the property by a succession of condemnation actions (Tr. 92). After the first little mill was installed, he was offered \$50,000.00 in cash for the property by the Holmes Brothers which he refused (Tr. 93). In recent years, he has been offered \$40,000.00 in cash plus a royalty, provided that the property was released from the condemnation action (Tr. 94).

He thinks there are valuable minerals within the limits of the claim and indicated by a series of "X" marks on Exhibit 7A where he thinks valuable minerals are to be found (Tr. 101, 106). The vein in Shaft No. 1 did not pinch out and continues into the righthand wall of Shaft No. 1 (Tr. 128- 129). He thinks a prudent person would spend money in hopes of developing a profitable mine, and If the property was released by the Navy, there are people who would buy It and spend money on it (Tr. 107).

Ralph E. Pray, a consulting engineer, mining and metallurgy, testified that in his examination of the Mary Lode No. 1 mine, he had a report by Mr. McComas and was able to identify the sites of his samples (Tr. 135). In his opinion valuable minerals exist on the claim (Tr. 136). The reasons for this opinion are:

"The primary factor is based on Mr. Ranson's visit to the property in 1942 while he was based in the Los Angeles office of the California Division of Mines and Minerals.

He visited the property several times and wrote about it, The writing of Mr. Ranson has been introduced as evidence and from that point on, chronologically, to the point where I visited the property and then my reading of Dr. Austin's report and those of the others that I received. yesterday morning. My assay work and Mr. Van Derpoel's integrity and the history of the deposits, I have no reason to believe otherwise." (Tr. 136-137).

In his opinion a person of ordinary prudence would expend substantial sums in the expectation that a profitable mine might be developed (Tr. 137). He also relied on the reports of Mr. Egger, Mr. Payne, and Dr. Austin (Tr. 140).

On cross-examination he was asked about the report of Mr. McComas and testified that one of his samples showed 34.29 ounces of gold per ton or a value of approximately \$5,000.00 per ton (Tr. 142-143).

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 Contestees must show by a preponderance of the evidence that the claim is valid, Foster v. Seaton, 271 F 2nd 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 this mining claim was 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 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 issue which we must necessarily deal with in this case is whether or not there was a discovery of a valuable mineral sufficient to satisfy the mining laws of the United States at the time the land encompassed by this mining claim was withdrawn from further mineral-location and, if there was such a discovery at that time, whether it continued to the time of the hearing.

The Contestant has presented evidence through an extremely well qualified expert witness from whose testimony one can only conclude that there presently is no mineral revealed which would be sufficient in quantity to constitute a valuable discovery, and thus, the Contestant has fulfilled its first obligation by going forward with so much of the evidence as to establish a prima facie case. The burden then rests with the Contestees to overcome that testimony.

The testimony of Mr. Everett C. Van Derpoel shows that considerable recovery of gold and silver was had from this mining claim. The smelter returns, although not well identified, do show some \$28,000.00 recovery. What must be concluded, however, is that this mineralization was removed from an enriched area which is no longer in existence, There well may be other enriched areas within the boundaries of this mining claim, but there is nothing in the evidence supplied by any of the witnesses which shows that there is a probability that such an 'enriched zone exists which is extensive enough to supply the incentive for a reasonably prudent man to expend his time and means with a reasonable prospect of developing a paying mine, a requirement which must be met if this claim is to be found valid.

I find that the Contestees have not preponderated against the prima facie showing by the Contestant that there was no discovery of a valuable mineral sufficient to satisfy the mining laws of the United States at the date of the hearing.

CONCLUSION

Based upon the foregoing analysis of the evidence presented at the hearing, I find the Mary Lode Mining Claim, also known as the Mary Lode No. 1 Mining Claim, to be null and void.

E. Kendall Clarke
Administrative Law Judge

Editor's note: Appeal information and distribution found at the bottom of page 257 and on page 258 have not been included.

