

UNITED STATES  
v.  
JAMES BECKER

IBLA 77-528

Decided January 10, 1978

Appeal from decision of Administrative Law Judge R. M. Steiner declaring placer mining claim null and void. OR-15493.

Affirmed.

1. Administrative Procedure: Generally -- Appeals -- Rules of Practice:  
Appeals: Generally

Under 43 CFR 4.401(a), a notice of appeal to the Board of Land Appeals may be considered even if not filed within the 30-day appeal period, where it is filed within 10 days of the deadline date and is transmitted within the appeal period.

2. Mining Claims: Discovery: Generally

A discovery of a valuable mineral deposit is not made unless minerals have been found on a claim, the evidence of them 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, and the deposit may be perceived by a prudent man as susceptible to extraction, removal and marketing at a reasonable profit.

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

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

4. Administrative Procedure: Burden of Proof -- Mining Claims: Contests

Where a Government mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery, a prima facie case of invalidity has been established. Government mineral examiners are not required to perform discovery work for claimants or to explore beyond a claimant's workings.

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

The prudent man test cannot be satisfied by a claimant's assertion that he is willing to accept a meager income from the claim. Determination of the validity of a mining claim can rest only on objective criteria, not subjective considerations.

APPEARANCES: James Becker, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

James Becker (Appellant) appeals from the July 14, 1977, decision of Administrative Law Judge R. M. Steiner, declaring his mining claim null and void. The claim, known as the Hit or Miss Placer Mining Claim, is located in portions of sections 29 and 30, T. 38 S., R. 5 W., Willamette meridian, Josephine County, Oregon. The contest proceedings were initiated by the Bureau of Land Management. The complaint charged that minerals have not been found within the limits of the claim in sufficient quantities to constitute a valid discovery. Appellant answered timely and denied the charge.

A hearing was held before Judge Steiner on September 14, 1976, at Grants Pass, Oregon, at which evidence was taken concerning whether minerals had been found within the limits of the claim in sufficient quantities to constitute a valid discovery. Appellant appeared at this hearing and represented himself.

On July 14, 1977, Judge Steiner issued a decision declaring Appellant's claim null and void because the Government had established a prima facie case that there are no mineral deposits exposed on the claim which would justify a person of ordinary prudence in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, and because Appellant did not present sufficient evidence to the contrary to overcome this showing. The decision contains no notice to Appellant of his right of appeal to this Board. Appellant received this decision on July 20, 1977.

On August 23, 1977, 34 days after his receipt of this decision, Appellant filed his notice of appeal thereof. This notice of appeal was transmitted on August 19, 1977, by placing it in the United States mails.

[1] The requirements for filing a notice of appeal of a decision to this Board are set out in 43 CFR 4.411(a), which provides as follows:

A person who wishes to appeal to the Board must file in the office of the officer who made the decision (not the Board) a notice that he wishes to appeal. The notice of appeal must give the serial number or other identification of the case and must be transmitted in time to be filed in the office where it is required to be filed within 30 days after the person taking the appeal is served with the decision from which he is appealing. The notice of appeal may include a statement of the reasons for the appeal and any arguments the appellant wishes to make.

However, under 43 CFR 4.401(a), if the notice of appeal is filed within 10 days after its due date, and it was transmitted before this due date, the 30-day time limit may be waived; viz.:

Grace period for filing. Whenever a document is required under this subpart to be filed within a certain time and it is not received in the proper office during that time, the delay in filing will be waived if the document is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed. Determinations under this paragraph shall be made by the officer before whom is pending the appeal in connection with which the document is required to be filed.

Appellant's notice of appeal of Judge Steiner's decision was not filed within 30 days of his receipt thereof, as required by 43 CFR 4.411(a). However, it was filed on August 23, 1977, within 10 days of the due date, August 19, 1977. The envelope in which it was mailed bears a postmark of August 19, 1977, indicating conclusively that the notice of appeal was transmitted before the end of the filing period. Accordingly, we waive the 30-day time limit for Appellant's filing his notice of appeal.

[2] Under the mining laws of the United States (30 U.S.C. § 22 et seq. (1970)), a valid location of a placer mining claim requires discovery of a valuable mineral deposit within the limits of the claim. The Department of the Interior defined the phrase "discovery of a valuable mineral deposit" in an early case, Castle v. Womble, 19 L.D. 455, 457 (1894):

[W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine, the requirements of the statute have been met.

That definition, known as the "prudent man test," has received the continuing approval of the Supreme Court. Chrisman v. Miller, 197 U.S. 313, 322 (1905); Cameron v. United States, 252 U.S. 450, 459 (1920); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963).

Over the years since the promulgation of the prudent man test the Department has refined the law of discovery to include what has become known as the "marketability test," that is, the mineral deposit must be perceived by a prudent man as one that is susceptible to extraction, removal and marketing at a reasonable profit. The Supreme Court characterized the marketability requirement as a "logical complement" to the prudent man test. United States v. Coleman, 390 U.S. 599, 603 (1968). While the Department does not require a "sure thing," United States v. Kosanke, 3 IBLA 189, 217, 78 I.D. 285, 298 (1971), vacated on other grounds, 12 IBLA 282, 80 I.D. 538 (1973), the nucleus of value which sustains a discovery must be such that with actual mining operations under prudent management a profitable venture may reasonably be expected to result. Converse v. Udall, 399 F.2d 616, 623 (9th Cir. 1968), cert denied, 393 U.S. 1025 (1969).

[3, 4] When the Government contests a mining claim on a charge of no discovery, 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, 838 (D.C. Cir. 1959); United States v. Springer, 491 F.2d 239, 242 (9th Cir.) cert denied, 419 U.S. 834 (1974); United States v. Zweifel, 508 F.2d 1150 (10th Cir. 1975), cert denied, U.S. (1976). The Government has established a prima facie case when a mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery. United States v. Bechthold, 25 IBLA 77 (1976); United States v. Blomquist, 7 IBLA 351 (1972). It is true that the mineral examiner's conclusion must be based on reliable, probative evidence. United States v. Winters, 2 IBLA 329, 335, 78 I.D. 193, 195 (1971). But Government mineral examiners are not required to perform discovery work, to explore or sample beyond a claimant's workings, or to conduct drilling programs for the benefit of a claimant. Henault Mining Co. v. Tysk, 419 F.2d 766 (9th Cir. 1969), cert denied, 398 U.S. 950 (1970). United States v. Grigg, 8 IBLA 331, 343, 79 I.D. 682, 688 (1972).

Thus, the propriety of Judge Steiner's holding that the Government had successfully contested the validity of Appellant's placer mining claim depends on whether the Government established a prima facie case that minerals were not found on the claim, that a prudent man would not be justified in the expenditure of labor and means to develop the mineral deposits, or that a prudent man would not perceive the deposit as one susceptible to extraction, removal, and marketing at a reasonable profit, and, if so, whether Appellant successfully met his burden of showing by a preponderance of the evidence to the contrary. We conclude that Appellant's claim was properly declared null and void.

The record clearly indicates that the Government has established its prima facie case. There was no discovery of any appreciable amount of colored soapstone, the only mineral alleged to be present on Appellant's claim. David Sinclair, witness for the Government, testified that he visited Appellant's mining claim on four different occasions in 1976 (Tr. 9), but that, except for one single rock, he found no soapstone on the claim on any of these visits (Tr. 11). He also testified that he contacted Appellant on his first visit (Tr. 9), but that Appellant was unable to show him any soapstone on the claim except for several pieces which he had in his cabin (Tr. 11), or to disclose any discovery point of soapstone at the claim (Tr. 14). There was no evidence on any of these visits of mining activity (Tr. 12).

The market for what soapstone was found there was very poor. This soapstone has no commercial use other than for artistic carving, due to its high content of iron impurities which brightly color it (Tr. 10, 12-13). Soapstone used for artistic purposes sells only for approximately 15 to 20 cents per pound (Tr. 12, 26-27).

Due to the facts that soapstone was not found on Appellant's claim in any appreciable amounts and that the market for this soapstone is poor, it is clear that it was impossible to extract, remove, and market it at a reasonable profit, and that a prudent man would not be justified in expending his labor and means on the claim with a reasonable prospect of success in developing a valuable mining operation. Since the value of the colored soapstone is low, there would have to be large quantities of it on the claim in order to be able to market it successfully. The evidence shows that there is, at best, very little soapstone on the claim.

Appellant's evidence is insufficient to contradict the Government's prima facie showings and, instead, generally supports the conclusion that a discovery of a valuable deposit of soapstone was not made. Appellant admitted that he had collected a total of only approximately 1,000 pounds of soapstone, worth only approximately \$100 (Tr. 23-27). Appellant stated only that it seemed that there is enough soapstone near the surface of the claim to make mining it worth pursuing (Tr. 22). He made reference to "concentrations of soapstone" on the claim (Tr. 25), but did not specify where they are located and did not explain why he was unable to show them to Sinclair on his first visit there.

Appellant also did not establish that there is a good market for soapstone. He maintained at the hearing only that it was not clear that the market for soapstone is inadequate (Tr. 22). However, he testified that he would have to undersell current suppliers of soapstone and charge only 15 cents per pound or less in order to be able to sell his stone (Tr. 27). This testimony strongly suggests that the market for soapstone is very poor.

Appellant asserts as his sole argument on appeal that, "In the past year we have begun to make progress in establishing a market for our stone, which was not shown in our last court appearance." Even putting aside the question of whether this Board may receive evidence on appeal [\*\*12] in the absence of a compelling showing that it could not be produced at the hearing, 1/ this argument avails Appellant nothing.

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1/ It is not the function of this Board to receive evidence tendered on appeal in the absence of a compelling showing that the evidence could not be produced at the hearing, and even then such evidence may only be considered for the purpose of deciding whether a further hearing is warranted. United States v. Hallenbeck, 21 IBLA 296, 302 (1975). Due process requires notice and an opportunity to be heard. United States v. O'Leary, 63 I.D. 341 (1956). Appellant was given that opportunity. In the absence of a compelling reason to the contrary, due process does not require a second hearing. United States v. MacIver, 20 IBLA 352, 359 (1975). No such reason has been offered in this instance.

Even if a good prospective market for colored soapstone did exist, Appellant would not prevail, in view of the absence of discovery by him of any appreciable amount of this soapstone.

[5] Appellant suggested at the hearing that there was enough soapstone at the claim to make it worth his while, personally, to pursue mining it (Tr. 22). The fact that Appellant is willing to accept a return which is relatively meager does not satisfy the prudent man test, as a prudent man would not invest his labor and means if his only expectations were meager profits at best. United States v. Reynders, 26 IBLA 131 (1976); United States v. Heard, 18 IBLA 43 (1974); United States v. King, 15 IBLA 210 (1974), aff'd, King v. United States, Civ. No. 74-151 (D. Ariz., filed July 10, 1975). 2/ The prudent man test is objective, and subjective considerations, such as willingness to work for little or no return, simply have no place in the calculus of prudence. United States v. Reynders, supra; United States v. Arcand, 23 IBLA 226 (1976).

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

Edward W. Stuebing  
Administrative Judge

We concur:

Douglas E. Henriques  
Administrative Judge

Martin Ritvo  
Administrative Judge

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2/ Appeal pending.

