

UNITED STATES OF AMERICA

v.

DAVID L. KING ET AL.

IBLA 77-583

Decided February 10, 1978

Appeal from decision of Administrative Law Judge Dean F. Ratzman declaring null and void the Johnny Boy placer mining claim, CA-2, CA-1843.

Affirmed.

1. Mining Claims: Location—Mining Claims: Placer Claims

No location of a placer mining claim on Federal lands may include more than 20 acres for each individual claimant.

2. Mining Claims: Contests—Mining Claims: Discovery: Generally—Mining claims: Hearings—Rules of Practice: Government Contests

Where the Government contests a mining claim for lack of discovery, it assumes only the burden of making a prima facie showing that discovery is lacking, and the burden of showing a valuable discovery by a preponderance of the evidence then falls upon the claimants.

3. Mining Claims: Discovery: Generally

A valuable discovery of a mineral deposit is established where a claimant, by a preponderance of the evidence, establishes the presence of mineralization which would justify a prudent man in expending his labor, time, and money on the claim with an expectation of developing a valuable mine.

APPEARANCES: Robert W. Fisher, Sr., Esq., Sacramento, California, for Appellants; Charles F. Lawrence, Esq., Office of the General Counsel, U.S. Department of Agriculture, San Francisco, California, for Appellee.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

By decision of August 26, 1977, Administrative Law Judge Dean F. Ratzman declared null and void the Johnny Boy placer mining claim and rejected the patent application (CA-1843) filed by David L. King and Kathryn King in connection with that claim. This decision was the latest in a series of administrative challenges to the validity of the claim, a history which began in 1966 with a government complaint alleging that there was no valuable mineral discovery within the limits of the Johnny Boy. This 1966 complaint gave rise to a decision subsequently sustained on appeal, which held the claim subject to the Surface Resources Act of 1955 after finding an absence of valuable discovery on the claim.

This action to invalidate the Johnny Boy placer mining claim was initiated March 16, 1973, when BLM issued a complaint in Contest CA-2 at the request of the Forest Service, U.S. Department of Agriculture, charging that there are not disclosed within the boundaries of the mining claim minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery, and that the land embraced within the claim is nonmineral in character. The claim is situated in the NE 1/4 sec. 10, T. 22 N., R. 11 E., Mount Diablo meridian, within Plumas National Forest, Plumas County, California. The claimants denied the allegations and the matter went to hearing before Administrative Law Judge Dean F. Ratzman at Sacramento, California, on December 14, 1973. Thereafter, on May 14, 1974, the contestees filed application CA-1843 for a mineral patent to the Johnny Boy placer mining claim. By consent of the parties, this matter was consolidated with Contest CA-2, and subsequent hearings were held before Judge Ratzman on October 7, 1976, and on February 14, 1977. The contestees were represented by counsel at each hearing.

The contested claim was located in 1953 as a 160-acre placer association claim by a group of eight persons including Mr. and Mrs. King, and his mother and stepfather. As the decision below states, Mr. King was familiar with an earlier claim at the same location, having worked with his stepfather on the claim when he (King) was 11 or 12 years old and having worked for a mining company on the same property. King is thus familiar with or responsible for all of the assessment work and sampling performed on the claim during the last 20 years.

An Amended Certificate of Previous Location which changed the description of the claim to include only the NE 1/4 sec. 10, T. 22 N., R. 11 E., was recorded on October 31, 1958, by only four locators – Kathryn and David King and David King's mother and stepfather. Kathryn and David King obtained full ownership of the unpatented claim prior to 1962.

It appears from the record below (Tr. 77 - p. 23) that no actual mining has been conducted on the land now denominated as the Johnny Boy claim since before World War II, although Mr. King asserts that he has expended about \$5,000 per year in assessment and sampling work on the Johnny Boy and various other placer mining claims in Plumas County throughout the last decade. King attributes his failure to develop an active mining operation to "harrassment by government agencies," under the Surface Resources Act of 1955, but testified that he was employed full time at outside jobs for at least 18 years prior to his retirement in 1970 (Tr. 77 - p. 27). He stated that, since World War II, he has had a number of offers to purchase his claims as well as offers of investment for the development of the claims. King declined, however, to identify the source of any of the offers (Tr. 77 - p. 28).

Henry W. Jones, a mining engineer employed by the Forest Service, testified at each of the three hearings held in connection with the various contests involving the Johnny Boy claim. Jones' qualifications as a mineral examiner and his activities respecting the Johnny Boy claim are described in the decision below as follows:

He [Jones] has worked in his profession for more than 25 years since graduating from the University of Nevada. After examining mines for the Bureau of Mines for seven years, he transferred to the Forest Service in 1959. Tr. 76 - p. 7. In his youth he worked with his father on gold placer mines in California and Nevada. His testimony was the basis for the prima facie case that no discovery of valuable minerals had been made on the Johnny Boy claim, discussed in the Departmental decision (A-30867) issued on February 28, 1968, under the Surface Resources Act. At the 1973 hearing on these contests, Mr. Jones first discussed the samples he took in 1966 at "an area on the bank that was exposed by Mr. King's bulldozing." An assayer reported with respect to those samples that at \$35 per troy ounce for gold the value per cubic yard was a little more than two cents (about eight cents in 1977). During visits to the claim in 1972 and 1973, Mr. Jones walked over "the entire Johnny Boy" claim as he knew it. He found no fresh digging or excavation – additional sites were not available for sampling at that time. Tr. 73 - p. 21. On the

basis of those visits, the sampling in 1966, and samples which he had taken in 1975, he retained the opinion that a prudent man would not be justified in expending additional time and effort in the expectation of developing a paying mine. Tr. 73 - p. 18-20, 27; Tr. 76 - p. 35-37.

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After the King patent application was filed, Mr. Jones, assisted by other Forest Service employees, took twelve samples from twelve sites on the Johnny Boy. He visited the claim on at least four days in the fall of 1975. Mr. King met the Forest Service representatives on the first day. He had prepared prospect pits with a bulldozer, and after Forest Service representatives explained "the ten acre rule," Mr. King excavated three or four additional pits. Tr. 76 - p. 9. Mr. King was on the claim when the contestant's 1975 samples were taken, but he did not stay with the sampling team or observe the work.

The areas tested in 1975 represent all of the sites brought to Mr. Jones' attention by Mr. King. Tr. 76 - p. 20. Each sample was submitted to a San Francisco assayer to be assayed for total free gold content by amalgamation. Tr. 76 - p. 24. A composite sample of the "Tails After Amalgamation" was fire assayed. Exh. 104. The total free gold by amalgamation reflected the following values:

<u>Sample</u>			
55	22.0	[cents]	per cu. yd.
56	73.0	"	" " " "
57	1.0	"	" " " "
58	2.5	"	" " " "
59	9.0	"	" " " "
60	3.6	"	" " " "
61	10.8	"	" " " "
62	31.3	"	" " " "
63	13.0	"	" " " "
64	7.3	"	" " " "
65	3.4	"	" " " "
66	4	"	" " " "

Tr. 76 - p. 27; Exh. 104.

The figures listed above show the gold quantities that normally would be recovered by a typical placer operation. Tr. 76 - p. 28. They have been increased by approximately 30 percent to correspond to the price paid for gold in the

summer of 1977. An item of .11 ounces per ton is listed for the material that was fire assayed following the removal of gold by amalgamation. However, since this process would not be utilized in a commercial placer mining operation, no purpose will be served by a further discussion of the gold derived from the tails.

Jones concludes, from the results and from his on-site observation, that Johnny Boy presents no values which would prompt a prudent man to expend substantial time and effort on the claim with an expectation of developing a paying mine. In his opinion, the values shown might, at best, justify further prospecting in the northeast corner of the Johnny Boy (Tr. 76 - p. 34, 35, 39).

Michael L. Owens, a mining geologist, also employed by the Forest Service, accompanied Mr. Jones and assisted him in his September 1976 examination of the claim. Owens testified that the sampling made at that time was less than a "detailed examination" which, in his opinion, would have necessitated "many hundreds or even thousands of additional samples." (Tr. 76 - P. 70.) He stated, however, that the sampling was an adequate examination of the sites which King had prepared (Tr. 70), and concluded that their sampling was a reliable "prima facie evaluation of the claimants' points, which we sampled."

Mr. King, in commenting on the government's sampling of his claim, had a number of objections which proceeded mostly from his assertion that the government should have collected samples in the same manner in which he (King) proposed to mine the deposits (Tr. 76 - p. 13). More specifically, King contended that the government's sampling was "worthless" in that the Forest Service geologists failed to take sufficiently large samples and failed to use mercury in their sluice boxes, a procedure which King felt was necessary for the recovery of the finer particles of gold in the samples. (Tr. 77 - p. 12). At an earlier hearing King protested that the government samples were taken from too small a sluice box (Tr. 73 - p. 43) and that the mineral examiner's sluice box was faulty due to a quarter inch crack in its side (Tr. 73 - p. 49).

For his own part, King has submitted a varied group of assay reports in connection with the several hearings concerning the validity of the Johnny Boy claim. The reports are adequately summarized in the decision below as follows:

In 1973 he [King] stated that after the Public Law 167 proceeding, he prospected and took a lot of samples. Two samples were sent to the Rombough Laboratories in 1969. Mr. King watched those samples pass through "sluice boxes

at various machines" and "go through the fire kiln to be burned and everything" for a fire analysis. Tr. 73 - p. 41. The Rombough Laboratories assay report (Exh. A) uses the term "free gold recovery" in listing \$0.6459 and \$0.4013 (with no reference to the quantities of material to which the values are related) but does not differentiate between the gold recovered by fire assay as opposed to gold recovered by gravity means plus amalgamation. Mr. King testified that Rombough utilized a fire assay. Tr. 73 - p. 41, 63. The 1968 Departmental decision refers to Rombough assay results in unflattering terms, and emphasizes the lack of evidence tending to establish the extent or consistency of the deposit. Mr. King's testimony in 1973 and 1977 did not rehabilitate the Rombough assay.

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The third hearing was held in 1977 after Mr. King had filed his patent application. He sent material from three unweighed samples to an assayer in El Cajon, California, in 1975. Mr. King submitted a handwritten certificate (Exh. B) which does not state who ordered the assaying work. He testified that he asked for a "straight gold assay" but assayer D. R. Curry gave him "more of a quantitative one," unlike those obtained previously which "had been just for the straight free gold content." Tr. 77 - p. 4. The certificate gives the weight of the sample after "the mercury was removed and dried." The gold values per ton [1/] listed on the certificate are:

No. 1	\$3860 per ton
No. 2	\$3900 per ton
No. 3	\$5920 per ton

The samples were sent to the assayer in El Cajon by Mr. Everette Jacks, a jeweler in Grass Valley, California. The case record does not disclose the instructions given by the jeweler to Mr. Curry. The contestant's post-hearing brief points out that Mr. Curry's reported value for Sample 1 would require an assumed value of about \$196 per ounce (gold), and that the method of calculating values for Samples 2 and 3 obviously is inconsistent with the method used for Sample 1.

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1/ I.e., values per ton of ore concentrate.

Mr. King testified that he obtained the three samples tested by Curry at locations AFS-02957 and 02958 on Exh. 101. The contestant's mining engineers found values at those two locations averaging less than 3 [cents] per cubic yard. Under Mr. King's interpretation of the Curry assay report, the values at those locations would be 80 to 350 times as great.

Two of three samples listed on a report obtained by Mr. King from a Fallon, Nevada, assaying concern (Exh. C, dated February 7, 1977) show exceptionally high quantities, similar to those in the Curry report (for example, 846.75 milligrams recovered from a 370.60 gram sample). The samples sent to the Fallon assayer were obtained at the same locations as those listed in the Curry report. Tr. 77 - p. 8.

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Upon cross-examination, Mr. King stated that he always adds approximately two ounces of mercury to each sample, using it as follows:

The mercury on any placer is either added to the material in the bank, in its natural position, prior to hydraulicking [sic] or any way you get into the box. It's added prior into the bank, or it is added in front of the box in front of the first [riffle]. Tr. 77 - p. 45.

Called as a rebuttal witness, mining engineer Jones noted that the Curry assay certificate listed the gold content "per ton," and observed that certificates on fire assays usually indicate the quantity on a per ton basis. Because gold is approximately 19 times as heavy as standard gravel, Mr. Jones can see no reason for adding mercury in the manner described by Mr. King. He has seen a process by which a sand product is passed over a copper plate coated with mercury. However, the sand product is first separated from coarser material by means of a sluice box. Tr. 77 - p. 62.

[1] Contestees complain on appeal that mineral values shown by government assays prior to 1976 should have been excluded from evidence by the Administrative Law Judge. They argue that samples taken prior to that time were subject to objection because "Discovery or non-discovery must be shown by a present-fact." While no authority is cited in support of this proposition, we find categorically that this is not a correct interpretation of the Federal mining laws.

As noted, supra, the Johnny Boy claim was located as an association placer in 1954. The Kings acquired complete ownership of the unpatented claim in 1962 and, if they are to claim ownership of the entire association placer, they must demonstrate that the association had made discovery prior to the time of that assignment. This latter statement necessarily follows from the provisions of the Federal mining laws which dictate that no placer claim may include more than 20 acres for each individual claimant. 30 U.S.C. § 35 (1971), U.S. v. Toole, 224 F. Supp. 440 (D.C. Mont. 1963), United States v. McCall, 7 IBLA 23, 79 I.D. 457 (1972). Accordingly, the question of discovery prior to the 1962 assignment, as well as at the time of hearing, is properly at issue in this case.

In determining the rights of mining claimants, the "prudent man" test has long been the guide as to whether or not a discovery has been made under the mining laws. That test, as set forth in Castle v. Womble, 19 L.D. 455, 457 (1894), and approved on many occasions by the United States Supreme Court, e.g., Chrisman v. Miller, 197 U.S. 313 (1905); Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963); United States v. Coleman, 390 U.S. 599 (1968), is that

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, the requirements of \* \* \* [a discovery] have been met.

United States v. David L. and Kathryn King, A-30217 (December 29, 1964). See also, Verrue v. United States, 457 F.2d 1202 (9th Cir. 1972), United States v. Osborne (Supp. on Judicial Remand), 28 IBLA 13 (1976); United States v. Reynders 26 IBLA 131 (1976); United States v. Bechthold, 25 IBLA 77 (1976).

[2] Where the government contests a mining claim by asserting a lack of valuable discovery, it has assumed only the burden of going forward with sufficient evidence to establish a prima facie case, and the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid. United States v. Bartell, 31 IBLA 47 (1977), United States v. McClurg, et al., 31 IBLA 8 (1977). Where a government mineral examiner testifies that he examined the claim and workings thereon, and assayed a number of 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 discovery has been made. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959), United States v. Bechthold, supra. Further, a discovery is not shown when further exploration is necessary before feasibility of development can be demonstrated. United States v. Robinson, 21 IBLA 363 (1975).

In the case before us, contestees' first point of rebuttal to the government's case is their assertion that the government, through a failure to follow proper sampling techniques, has failed to establish a prima facie case of no discovery. While we take notice of the government examiners' observations that the values found on the Johnny Boy might warrant further prospecting in a limited area, we find that such additional exploration is not required of the government's examiner. The government's examining geologist is not required to sample beyond the claimant's workings and, in no case, is he required to perform discovery work for a claimant. United States v. Bechthold, supra. We find no substantial evidence in the record to suggest that the government's examination of the claim was inadequate or improperly conducted. On the contrary, we find that the government's 1975 examination of the Johnny Boy, wherein all of the sites which King brought to the examiner's attention were sampled over the course of at least 4 days (Tr. 76 - p. 9), was alone sufficient to support the examiner's opinion (Tr. 76 - p. 35-37) that a prudent man would not be justified in expending additional time and effort in the expectation of developing a paying mine. This studied opinion, in turn, sufficed to establish the government's prima facie case. Foster v. Seaton, supra.

[3] Contestees, in a second line of attack on the decision below, assert that the government's prima facie case was overcome by the evidence of valuable mineralization which they introduced in the form of various assay reports showing relatively high values for a number of samples taken from the Johnny Boy. See, supra. We agree with Judge Ratzman's conclusion that these assays, " \* \* \* leave too many questions unanswered, and do not stand up well against the presentation of the contestant's qualified and experienced mining engineers." We are also inclined to speculate, with the judge below, that, "It may be that he [King] does not take sufficient precautions against raising the value of a sample above that of the exposure sampled."

Whatever the reason for the wide discrepancy between the values shown by the government's assays and those shown by contestees' samples, the "prudent man" test of mineral discovery requires more than an isolated showing of high assay values. United States v. Vaux, 24 IBLA 289 (1976). What this test ultimately requires is a showing that the mineral in question can be extracted, removed and presently marketed at a profit, United States v. Coleman, supra, and contestees have failed to demonstrate that the Johnny Boy placer, either in 1962 or 1976, could have been operated in such a manner as to yield a net profit after the costs of extraction, shipping, and refining were deducted. Indeed, the very fact that no active mining operation has ever been attempted on the subject claim since it was located in 1953, itself, suggests strongly that no valuable discovery has been made. United States v. Zweifel, 502 F.2d 1150, 1156 (10th Cir. 1975).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior 43 CFR 4.1, the decision declaring the Johnny Boy placer null and void and rejecting appellants' patent application CA-1843 is affirmed.

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Douglas E. Henriques  
Administrative Judge

We concur.

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Edward W. Stuebing  
Administrative Judge

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Frederick Fishman  
Administrative Judge

