

UNITED STATES
v.
CLARK J. GUILD ET AL.

IBLA 78-140

Decided May 3, 1978

Appeal from a decision of Administrative Law Judge Dean F. Ratzman declaring placer mining claims null and void and denying mineral patent application in Contest No. N 1321.

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.

APPEARANCES: Clark J. Guild, Jr., Esq., for appellants.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

This is an appeal from a decision dated December 2, 1977, by Administrative Law Judge Dean F. Ratzman declaring the Bovie-Lew, Bovie-Lew Nos. 1, 2, and 3 Placer Mining Claims null and void for lack of discovery of a valuable mineral deposit.

On April 15, 1976, the Bureau of Land Management (BLM) filed a complaint charging that the land of the claims was nonmineral in character, and that no valuable minerals had been found thereon so as to constitute a discovery under the mining laws.

An evidentiary hearing was conducted on May 4, 1977, at Reno, Nevada.

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

Appellants' first contention on appeal is that the lands of the claims are under lease for a development and exploration, a fact the Judge did not take into consideration. Appellants have attached a copy of the lease which is dated October 1, 1977, to their statement of reasons. Appellants' other assignment of error is that the Judge failed to take into account the "mineral character" of the claims and ignored the impact on the world market of the accelerating price of gold.

We find these contentions to be without substance. The fact that appellants contemplate leasing the claims has no relation to their validity or nonvalidity under the mining laws. The Judge considered all relevant data, including the price of gold; exploratory

1/ The Judge inadvertently stated on page 3 of his decision "on the basis of a gold price of \$150.00 per cubic yard," Mallery computed the value of the mineral in issue. On page 4 the Judge recited "an assay value of \$13.59 predicated upon the price for gold * * * [at] \$137 per ton." Both references obviously refer to the price of gold per ounce.

work done on the claims reveals that no discovery of gold or other valuable mineral had been made within the meaning of the mining laws. (Decision pp. 5-6, 9).

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:

Douglas E. Henriques
Administrative Judge

Martin Ritvo
Administrative Judge

December 2, 1977

United States of America	:	Contest No. N-1321
	:	
	:	
Contestant	:	Involving the Bovie-Lew, Bovie-
	:	Lew Nos. 1, 2, and 3 Placer
v.	:	Mining Claims, situated in the
	:	SE-1/4 SW-1/4, SW-1/4 SE-1/4 of
	:	Sec. 8, W-1/2 NE-1/4, E-1/2
Clark J. Guild,	:	NW-1/4, NE-1/4 SW-1/4, NW-1/4
Ralph Hall,	:	SE-1/4 of Sec. 17, T. 13 N., R.
J. A. Baker and	:	24 E., M.D.M., Lyon County,
Tessie I. Pittwood,	:	Nevada
	:	
Contestees	:	

DECISION

Appearances: Clark J. Guild, Jr., Guild, Hagen & Clark, Ltd., Attorneys at Law, Reno, Nevada, for the Contestees;

Otto Aho, Field Solicitor, Office of the Solicitor, U.S. Department of the Interior, Reno, Nevada; and Burton J. Stanley, Attorney, Office of the Solicitor, U.S. Department of the Interior, Sacramento, California, for the Contestant.

Before: Administrative Law Judge Ratzman

PATENT APPLICATION REJECTED
MINING CLAIMS DECLARED NULL AND VOID

Four placer mining claims, located on July 1, 1951, are the subject of this mineral contest. The claims were located by Clark J. Guild, Sr., (whose interest at his death devolved to Clark J. Guild, Jr., the contestees' attorney), J. A. Baker, Ralph Hall, and Tessie I. Pittwood, (whose interest at her death devolved to Ralph Hall, her son). The claims are situated in portions of Sections 8 and 17, T. 13 N., R. 24 E., M.D.M., Lyon County, Nevada. A total land area of 320 acres lies within the claims, which are about nine airline miles west of Yerington, Nevada, the nearest town.

On June 9, 1967, the contestees filed an application with the Bureau of Land Management for a patent to the four claims involved in this contest, alleging a discovery of gold and other valuable placer minerals. On April 15, 1976, the Bureau of Land Management filed its Complaint against the named claims charging that:

- "1. The land embraced within the claims is nonmineral in character.

2. Valuable minerals have not been found within the limits of the claims so as to constitute a valid discovery within the meaning of the mining law.

3. No discovery of a valuable mineral has been made within the limits of the claims because the mineral materials present cannot be marketed at a profit now and/or could not be marketed at a profit prior to the Act of July 23, 1955."

The contestees filed a timely answer containing a general denial of the above-quoted charges. A hearing on the contest was held on May 4, 1977, at Reno, Nevada.

The contestant's only witness was Harrie W. Mallery, employed by the Bureau as a professional geologist and engineer. The contestees stipulated to Mr. Mallery's qualifications as a professional geologist and engineer. Tr. 8. He has a bachelor of science degree (geology, mineralogy and engineering) plus three years of graduate study in geology and mineral pedrology. Tr. 7. He was employed by large private concerns as a geologist and engineer for seven years. Since 1955 he has been a Federal agency geologist, and in that capacity has examined approximately 1200 mining claims "in detail." He is a member of five professional societies or institutes. Tr. 9.

In his examination of the contested claims Mr. Mallery inspected them during all or part of 15 days between the summer of 1966 and early May, 1977. On some of his visits he was accompanied by one or more of the locators.

The Bureau's mineral examiner found that the contested properties have exposed bedrock at the northern part of the Bovie-Lew and the Bovie-Lew No. 1 claims. The remainder of the 320 acres is underlain almost exclusively by gravel composed of coalluvium. The bedrock observed by Mr. Mallery is primarily a rhyolite, a form of volcanic rock. The claims contain material composed largely of rhyolite fragments mixed with sand and clay. Tr. 18.

The improvements on the claims are an old wooden shack (tool shed) and cuts and trenches described by Mr. Mallery. Tr. 20-31.

Taking into account the patent application and statements made by the mining claimants, Mr. Mallery examined the contested claims for "gold and other valuable placer minerals * * * things like black sands, that is, magnetite or ilmenite" (Tr. 36). Representatives of the contestees pointed out to Mr. Mallery "discovery points on each of the four claims." Tr. 38, 85. The Bureau's mineral examiner, assisted by another geologist, took sixteen samples from the designated discovery points on the contested claims. Tr. 50; Exhibit 3. When Mr. Mallery submitted his samples to assaying firms he requested that the total sample be assayed, and ordered a report on the total amount of gold in milligrams in each sample (Tr. 51). In 1975 he received information from the assayer on "Average Gold Fineness" and on the percentages of other minerals or compounds in material that had been submitted. Exhibit 3. After obtaining the assay report, Mr. Mallery computed the value of the gold per cubic yard, for each sample, on the basis of a gold price of \$150.00 per cubic yard (Tr. 51). A tabulation of complete information concerning the samples is set forth in Exhibit 3. Mr. Mallery testified that gold is associated generally with relatively heavy concentrations of black sand (Tr. 58). He saw no significant amounts of black sand (except for the bottom of a gravel working on the Bovie-Lew No. 2). A magnetometer survey which he conducted did not show concentrations of black sand (Tr. 60).

Mr. Mallery stated that, in his opinion, a prudent man would not be warranted in spending his time and money in an endeavor to develop a profitable operation with respect to the minerals on the contested claims. At that point in his testimony he expressed that opinion without giving consideration to sand and gravel values. Tr. 68. Mr. Mallery explained:

"The samples contained gold in places but on an average, which I would attempt to approximate with the average grade of material, the grade is just too low to warrant . . . the expenditure of funds for capital, equipment, and for operation of a plant and a mining operation to extract those golds and recover the gold at a profit." Tr. 69.

The Bureau's mineral examiner testified that his answer as to what a prudent man would do applies to all lands within the four contested claims – he would not have a different view concerning any specific ten acre tract. In Mr. Mallery's opinion further exploration might

be warranted in limited areas on the claims. Tr. 102-104. Water is available in the valley but a source of water has not been developed on the contested properties. Tr. 72.

In 1964 or 1965 a sand and gravel company commenced operations in southerly portions of the Bovie-Lew No. 2 and Bovie-Lew No. 3 claims. The area from which gravel has been removed is shown on Exhibit 2. Areas to the north of the gravel pit have undesirable angular fragments or a high clay content. The location opened up by Mr. Tibbals (Valley Ready Mix) contains rounded gravel, relatively free of clay, which is suitable for many commercial purposes. Tr. 73; Tr. 108.

Mr. Mallery concluded on the basis of observations and discussions with Mr. Tibbals that the principal market for the Valley Ready Mix gravel has been the area in and around Yerington, Nevada, which has a population of about 5000. Tr. 76. Between 1963 and 1966 approximately 15,200 cubic yards of material had been removed. Between 1966 and 1975, an additional 20,000 cubic yards were taken from the two southerly claims. In 1975 or 1976 Valley Ready Mix moved its processing plant to a location about nine miles closer to Yerington, Nevada. There has been little or no activity at the gravel pit on the claims in the last several years, other than the removal of stockpiled gravel. The Bureau of Land Management maintains several community gravel pits in the area. Tr. 76-77.

Mr. Mallery stated that Smith Valley has extensive alluvium and colluvium deposits, and that the gravel in the Valley Ready Mix pit is "just what you'd expect on slopes that are below desert ranges" – in his opinion the gravels found on the claims are not "particularly unique." Tr. 77.

Mr. Walter L. Hall, the son of one of the contestees, identified Exhibits A through G, which incorporate data, reports, maps and graphs relating to the contested claims. Tr. 116-132. He obtained his material from the files of three of the original mining claimants. Exhibit A contains items such as a 1974 report on black sand concentrates from a grab sample obtained on the Bovie-Lew No. 3 claim, which assayed at \$13.59 (the assay was for gold and silver when the price for gold was \$137 per ton). Included in that exhibit is a 1967 assay report on concentrates which sets forth a gold and silver value per ton of \$307.41, based on prices obtainable in 1967. It should be noted that these high values are for the concentrates sent to the assayer, and do not seem to be related to the quantity of material initially excavated or removed. Although it was not discussed at the hearing Exhibit A includes a report which shows values per ton in the \$3000-\$4300 range. These obviously distorted results are examples of the practice of relating values only to the volume of

concentrates received by the assayer. Results of that type should be compared to those in Exhibit B, which indicates that it was submitted by a geologist and an engineer. The average value for samples taken from the shaft on the Bovie-Lew down to the 45 foot level is about 37 cents per cubic yard (the calculations were made when the gold price was \$140 per ounce). It is even more significant that the Exploration Department of the Phelps Dodge Corporation, a major concern listed on the New York Stock Exchange, did not find promising quantities of silver and gold when Phelps Dodge employees dug trenches and made an examination in 1974. A letter from an official of Phelps Dodge to contestee Ralph Hall, dated August 21, 1974, (part of Exhibit C) states:

"The values are quite low, with the highest value coming from the bottom of trench #10. This is where you recommended we sample.

The reason for the trenching was to determine if the property should be drilled. It is felt that the values should have been more anomalous near the surface to make this a viable exploration target for placer gold. Therefore, it is my recommendation that no further work be done."

Mr. Hall testified that Phelps Dodge lost interest "because of economics." Tr. 140. Some of the assay results listed by the Duval Corporation in documents transmitted in 1970 (Exhibit D) are of little value because they state specifically that "samples were assayed on an ounces per ton of concentrate basis." Where the quantity of gold per yard of gravel is reported, the values are extremely low.

Exhibit E was prepared in 1965 by the late M. Campbell Dann, identified as a mining engineer. Tr. 122. His statements concerning the claims are favorable, but they do not correspond with the Phelps Dodge report. Also the subject of the Dann report is stated to be "Buckskin Gold-Nevada" or "Buckskin Gold Placers." It is by no means clear that the contested claims are the subject of his discussion.

Exhibit F contains a report prepared by engineer Ralph L. Reade. The words "Bovie-Lew Group" have been written in pen on the typed report by a person not identified in the case record. However, Dr. Reade gives the locations of the claims that he examined in his report, and does not include Section 17 or the S 1/2 Section 8, Township 13 North, Range 24 East, in which the contested claims are located. Exh. 2; Exh. F. I must conclude that his report does not cover the contested Bovie-Lew claims.

Mr. Hall does not contemplate operating a mine or mines on the claims only for recoverable gold. He testified:

"You have to look at the samples and you can find out the price of gold and silver and figure how much and you'll run a little short.

So, we wanted to know why so we sent away . . . and we got spectrograms to find out that there is a quite a bit more in titanium and a bunch of those others and there is new developments in this." Tr. 146.

Mr. Mallery returned to give redirect testimony. Tr. 152. He stated that his practice of ordering fire assays was to the advantage of the mining claimants because fire assays show more gold than can be recovered by a commercial placer mining operation. Tr. 160. He also commented upon the practice of reporting on a "per ton of concentrate basis," as follows:

"The assayer here has submitted a piece of paper with numbers on it. He has made some calculations to arrive at these numbers but nothing has been shown to me that he had the information available . . . to enable him to make a proper calculation as to what this material ran in terms of value per cubic yard of raw material in place." Tr. 156.

Summary of Applicable Law

The mining statutes do not expressly define a discovery. However, it has been held that one 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. 457 (1894).

The above-quoted definition is approved in United States v. Coleman, 390 U.S. 599 (1968), which holds that in determining whether a mineral deposit is valuable, the Secretary of the Interior may require a showing that there is a reasonable expectation based upon the circumstances known at the time that the mineral can be extracted, removed and marketed at a profit. It is stated in Coleman:

" . . . Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus profitability is an important consideration in applying the prudent man test"

A finding of mineralization may suggest the possibility of mineral of sufficient value and amount to justify further exploration, but it does not establish a discovery. Chrisman v. Miller, 197 U.S. 313 (1905). A discovery is not shown when further exploration is necessary before the feasibility of development can be demonstrated. United States v. Theresa B. Robinson, 21 IBLA 363 (1975); United States v. McClurg, 31 IBLA 8 (1977). The quantity as well as the quality of available ore should be taken into account when an estimate of the value of a mineral deposit is made. United States v. Hines Gilbert Gold Mines Company, 1 IBLA 296 (1971).

Once the Government has established a prima facie case that a discovery is lacking, the burden of producing preponderating evidence of the existence of a valuable mineral deposit sufficient to support a discovery falls upon the claimants. Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959); United States v. Independent Quick Silver Company, 72 I.D. 367 (1965). The ultimate burden is on the mining claimants to prove that the charges by the contestant are not true and the mining claim is valid. United States v. Taylor and O'Connor, 19 IBLA 9 (1975).

A prima facie case that a discovery of a valuable mineral deposit is lacking is established when a Government mineral examiner gives his expert opinion that he examined a claim and found insufficient values

to support a finding of discovery. United States v. Alex Bechthold, 25 IBLA 77 (1976). A recent case, United States v. Zweifel, 502 F. 2d 1150, 1156 (10th Cir. 1975) discusses the decisions of the Department of the Interior, spanning eighty years, which conclude that if mining claimants have held claims for several years and have attempted little or no development or operations, a presumption is raised that they have failed to discover valuable mineral deposits or that the market value of existing minerals was not sufficient to justify the costs of extraction.

The contestant's mineral examiner is not required to perform discovery work for the claimants or sample beyond the claimants' workings. United States v. Alex Bechthold, *supra*. The examiner is not required to conduct drilling programs for the benefit of the claimants. United States v. Garner, 30 IBLA 42 (1977).

Reports on some samples showing very high values for gold are not conclusive evidence of a valid discovery. Other relevant factors must be considered, such as the extent of mineral deposits on the claims and the number of samples which showed mineral values to be low or not present. See United States v. C. F. Preuss Sr., et al., A-28641 (Aug. 22, 1961). The average value of samples taken is an accepted factor in evaluating a claim, and has a direct bearing on the question of discovery. See United States v. Richard and Nellie Effenback, A-29113 (Jan. 15, 1963).

Where contestees seek to validate more than one mining claim they must prove that a valuable mineral deposit exists on each individual claim. United States v. Colonna and Company, 14 IBLA 220 (1974). A discovery outside of the limits of a mining claim cannot serve to validate that claim despite the proximity of the discovery to the claim. United States v. Clear Gravel Enterprises, Inc., 505 F. 2d 180 (9th Cir. 1974), cert. den., 421 U.S. 930 (1975).

Common varieties of sand and gravel were withdrawn from location under the mining laws by the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 - § 615 (1970 ed.). A qualifying discovery of a deposit of common variety materials exists only if the deposit was valuable within the meaning of the mining laws in July, 1955. The value of the deposit is tested by economic standards "i.e., whether prior to July 23, 1955, the material could have been mined, removed and marketed at a profit." In the application of that test the utilization of the deposit as base material for roads, common fill and the like would not validate a claim because the mining laws have never countenanced the location of claims for such purposes. United States v. Urban Harenberg, 11 IBLA 153 (1973).

Where claims were located prior to July 23, 1955, and no mining was performed or sales were made prior to that date, the test of the validity of the claims (insofar as they are held for deposits of common variety sand and gravel) is whether the claimants could have mined

and marketed the sand and gravel profitably prior to that date and thereafter. United States v. Osborne, et al., 28 IBLA 13 (1976). The claimants must establish that by reason of accessibility, bona fides in development, proximity to market, existence of present demand and other factors, the common varieties of sand and gravel could have been extracted, removed and marketed at a profit prior to July 23, 1955. United States v. J. L. Block, 12 IBLA 393, 401 (1973).

Analysis and Conclusions

The counsel for the contestee stresses the point in his Answering Brief that the Bureau of Land Management has elected to challenge the four claims involved in this contest out of all of the vast area in Nevada. It is my impression that the Bureau did not select the Bovie-Lew claims at random as the subject of a mineral contest. Indeed, the Bureau appears to have no general and concerted program under which the validity of unpatented claims is tested. The record discloses that the Bureau took action against these claims because a sand and gravel operation was started on two of them nine or ten years after passage of the Surface Resources Act, and because the mining claimants filed an Application for Patent.

The testimony of the Bureau's mining engineer made a prima facie case, as to gold and silver, that no discovery of a valuable mineral has been made on any of the four contested claims. As a practical matter the further exploration suggested as a possibility by Mr. Mallery has been performed by Duval Corporation, Phelps Dodge and Polaris Resources. After examining and sampling the claims those companies expressed no further interest and made no suggestions for development. Phelps Dodge sent a letter advising that the values are quite low, and are found at levels which are too deep. The contestees have not submitted convincing and reliable evidence to overcome the strong showing that no discovery of gold, silver or black sands has been made.

The sand and gravel deposit on the two southern claims is a common variety. Mr. Mallery compared it with other sand and gravel in that part of Nevada, and expressed the opinion that it is not unique. Except for references to unspecified quantities that have been transported long distances, or utilized in the development and stabilization of water wells the contestees have not gone into the key questions of whether gravel from the claims has a unique property. It may be that since Valley Ready Mix had a plant on the claims it used them as a source of supply for all of the orders it received. The fact that a deposit contains pea gravel which can be used to pack wells does not establish a unique property. Even if it is assumed that the gravel deposit has a unique property, the

mining claimants have not advanced to the next stage – it must be shown that the deposit has a distinct and special value which is derived from the unique property. These requirements are discussed in United States v. Richard M. Lease, 6 IBLA 11, 17 (1972).

It is clear that the pit was not opened until 1964 or 1965. The mining claimants made no effort to demonstrate that the gravel (in this case a common variety) could have been excavated, transported and marketed at a profit on or prior to July 23, 1955. A finding of validity cannot be based upon conjecture that claimants could have sold sand and gravel at a profit prior to July 23, 1955. A mining claimant's desire in 1955 to hold a claim for speculative purposes in the hope that a future market will arise to warrant its development does not satisfy the marketability test. United States v. Taylor and O'Connor, 19 IBLA 9, 39 (1975).

The contestant has sustained Charge 2 and Charge 3, Paragraph 5, of the Complaint, as to each of the four claims in this proceeding. The Bovie-Lew, Bovie-Lew No. 1, Bovie-Lew No. 2 and Bovie-Lew No. 3 Placer Mining Claims are hereby declared null and void. There appears to be no need to go into the question of whether the claims are nonmineral in character, the issue raised by the first charge incorporated in the Complaint.

Mineral Patent Application N-1321 is hereby denied.

Dean F. Ratzman
Administrative Law Judge

Appeal Information

An appeal from this decision may be taken to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations in 43 CFR Part 4 (revised as of October, 1976). Special rules applicable to public land hearings and appeals are contained in Subpart E. If an appeal is taken, the notice of appeal must be filed in this office (not with the Board) in order to facilitate transmittal of the case file to the Board. If the procedures set forth in the regulations are not followed, an appeal is subject to dismissal. The adverse party to be served with a copy of the notice of appeal and other documents is the attorney for the United States Department of the Interior whose name and address appear on page 11.

Mr. Burton J. Stanley, Attorney
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Enclosure: Additional information concerning appeals.

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