

UNITED STATES  
v.  
TEMPEST MINING CO.

IBLA 79-197

Decided April 27, 1979

Appeal from decision of Administrative Law Judge Robert W. Mesch declaring certain lode mining claims invalid. Contest I 13363.

Affirmed.

1. Administrative Procedure: Burden of Proof--Administrative Procedure:  
Hearings--Mining Claims: Discovery: Generally--Mining Claims: Hearings

The Government has established a prima facie case of a lack of discovery, thus shifting the burden of going forward, when an expert witness testifies that he has examined the claim and has found the mineral value insufficient to support a finding of discovery.

2. Mining Claims: Discovery: Generally

Mineralization that only warrants further prospecting or exploration in an effort to ascertain whether sufficient mineralization might be found to justify mining or development does not constitute a valuable mineral deposit, i.e., a valuable mineral deposit has not been found simply because the facts might warrant a search for such a deposit.

3. Mining Claims: Discovery: Generally

To establish a discovery of a valuable mineral deposit, a claimant must show more than that a prudent man would explore the claim further. The claimant must show that a valuable mineral deposit has been physically exposed within the limits of the claim.

APPEARANCES: Lloyd J. Walker and Associated, Attorneys at Law, Twin Falls, Idaho, for appellant; Erol R. Benson, Esq., Office of the General Counsel, Department of Agriculture, Ogden, Utah, for appellee.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Tempest Mining Co., appeals from a decision of Administrative Judge Robert W. Mesch, dated January 5, 1979, declaring invalid the Warm Springs No. 1, Warm Springs #2, June Bug, and Hydro lode mining claims and the Warm Springs Millsite claim.

On September 27, 1977, the Bureau of Land Management (BLM), on behalf of the Forest Service, issued a complaint charging *inter alia*, that there was no discovery of a valuable mineral on the claims and that the millsite was not being utilized for mining operations.

A hearing on the contest was held on October 26, 1978, in Boise, Idaho. The Judge's decision sets out a summary of the pertinent evidence and the applicable law as well as his findings and conclusions. We are in agreement with his decision and adopt it as the decision of this Board. A copy of it is attached hereto.

Appellant challenges the decision with the following contentions:

- 1) The testimony of one Government witness was sufficient to establish only the approximate location of the claims;
- 2) A prima facie case was not established because testimony revealed the existence of silver on the claims;
- 3) The prudent man rule, requiring only a reasonable expectation of finding minerals was misapplied;
- 4) The finding that there was mineralization which might justify further exploration rather than a discovery of a valuable mineral deposit was in error;
- 5) The millsite claim is valid because there was a discovery.

Appellant's contentions are without merit. The location of the claims at issue is clearly a matter of record. <sup>1/</sup> Throughout the

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<sup>1/</sup> The claims are described as follows:

"Warm Springs #1 (amended as Warm Springs No. 1) lode mining claim, situated in NW 1/4 Sec. 32; Warm Springs #2 lode mining claim, situated in W 1/2 Sec. 32; June Bug lode mining claim, situated in NW 1/4 Sec. 32; Hydro lode mining claim, situated in the center of Sec. 32; and Warm Springs Millsite, situated in NW 1/4 Sec. 32, T. 8 N., R. 17 E., Boise Meridian, Custer Country, Idaho."

proceeding, appellant has never questioned the location or identity of the claims which are too well-established to permit doubt.

[1] There is no dispute that the claims at issue were extensively examined and sampled by a Government mining engineer who concluded that there was no evidence of discovery, though there was some mineralization, and that a prudent man would not expend labor and means in the hope of developing a paying mine (Tr. 56). This evidence constitutes a prima facie case of no discovery of a valuable mineral deposit. Appellant points to nothing in the record which would preponderate against it.

[2] A prima facie case of no discovery is not overcome by evidence showing some mineralization which might warrant further prospecting or exploration. A valuable mineral deposit has not been found simply because the facts might warrant a search for such a deposit. Barton v. Morton, 498 F.2d 288 (9th Cir. 1974); United States v. Dillman, 36 IBLA 358 (1978). Appellant makes the statement that "a valuable mineral deposit had already been discovered." The record completely fails to bear out such an allegation.

[3] The prudent man test, as formulated in Castle v. Womble, 19 I.D. 455, 457 (1894), is as follows:

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 requirement of [30 U.S.C. § 22 (1976)] have been met.

Chrisman v. Miller, 197 U.S. 313, 322 (1905); see also United States v. Coleman, 390 U.S. 599 (1968); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); and Cameron v. United States, 252 U.S. 451 (1920).

In United States v. Coleman, *supra*, the Supreme Court elaborated on the prudent man test in approving the Interior Department's "marketability rule." According to the court, the purpose of 30 U.S.C. § 22 (1976) was to reward and encourage the discovery of minerals valuable in an economic sense. Thus, an important consideration in applying the prudent man test is whether the claimant can extract, remove, and market the mineral at a profit.

Since the record is devoid of evidence of mineralization other than that which would warrant further exploration, there can be no reasonable expectation of success in developing a valuable mine. Thus, the prudent man rule was properly applied herein.

There being no discovery, the millsite claim is also invalid. United States v. Parsons, 33 IBLA 326 (1978); United States v. Rukke, 32 IBLA 155 (1977); United States v. Highley, 30 IBLA 21 (1977).

Although appellant requests oral argument on its appeal, it does not appear that any useful purpose would be served thereby. The request for oral argument is denied.

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.

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Frederick Fishman  
Administrative Judge

We concur.

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Douglas E. Henriques  
Administrative Judge

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Joseph W. Goss  
Administrative Judge

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

Hearings Division  
6432 Federal Building  
Salt Lake City, Utah 84138  
(Phone: 801-524-5344)

January 5, 1979

UNITED STATES OF AMERICA,	:	IDAHO 13363	
Contestant	:		
	:	Involving the mineral location of	v.
	:		Warm Springs
: the Warm Springs #1 (amended as	:		
No. 1) lode mining TEMPEST MINING COMPANY,	:	claim, situated in NW 1/4 Sec.	
Contestee : 32; Warm Springs #2 lode mining	:		claim, situated
in W 1/2 Sec. 32;	:		June Bug lode mining claim,
	:	situated in NW 1/4 Sec. 32; Hydro	
: lode mining claim, situated in	:		the center of
Sec. 32; and Warm	:		Springs Millsite, situated in NW
	:	1/4 Sec. 32, T. 8 N., R. 17 E.,	
: Boise Meridian, Custer County,	:		Idaho.

DECISION

Appearances: Erol R. Benson, Esq., Office of the General Counsel,  
for contestant;

Department of Agriculture, Ogden, Utah,

Lloyd J. Walker, Esq., Twin Falls, Idaho, for contestee.

Before: Administrative Law Judge Mesch.

This is a proceeding involving the validity of four lode mining claims and a mill site claim located under the General Mining Laws of 1872, as amended, 30 U.S.C. § 22 et seq. The proceeding was initiated by the Idaho State Office, Bureau of Land Management, Department of the Interior, at the request of the Forest Service, Department of Agriculture.

Pursuant to 43 CFR 4.451, the Bureau of Land Management issued a complaint on September 27, 1977, charging that:

- (a) There are not presently disclosed nor were there disclosed on August 22, 1972, within the boundaries of the lode mining claims materials in place of a variety subject to the mining laws sufficient in quality, quantity, and value to constitute a discovery.
- (b) The land embraced within the lode claims is nonmineral in character.
- (c) The millsite is not being used or occupied by the proprietor of a vein, lode, or placer for mining, milling, processing, or beneficiation purposes or other operations in connection with such mines.
- (d) The millsite has no quartz mill or reduction works thereon.
- (e) The land embraced within the claim is not held in good faith for bona fide mining and/or milling purposes.

The contestee filed a timely answer and denied the charges in the complaint. A hearing was held on October 26, 1978, at Boise, Idaho. The parties have submitted posthearing briefs.

With the exception of a small portion of land in the northwest corner of the June Bug claim, all of the land within the contested claims lies within the Sawtooth National Recreation Area. The Recreation Area was established by

an Act of August 22, 1972, 16 U.S.C. § 460aa et seq. Section 10 of the Act withdrew, subject to valid existing rights, all Federal lands in the area from all forms of location, entry, and patent under the mining laws. 16 U.S.C. § 460aa-9. The Warm Springs claims Nos. 1 and 2 were located in 1938. The June Bug claim was located in 1955. The Warm Springs Millsite claim was located in 1958. The Hydro claim was located in 1962. The claims cannot be recognized as valid unless (1) all requirements of the mining laws were met on August 22, 1972, when the land was withdrawn from acquisition under the mining laws, and (2) the claims presently meet the requirements of the law. Cameron v. United States, 252 U.S. 450 (1919); Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963); Mulkern v. Hammitt, 326 F.2d 896 (9th Cir. 1964); United States v. Gunsight Mining Company, 5 IBLA 62 (1972); United States v. Werry, 14 IBLA 242, 81 I.D. 44 (1974); United States v. Cuneo, 15 IBLA 304, 81 I.D. 262 (1974).

After studying the record in this proceeding, I see no reason to consider any issues other than (1) whether the lode claims presently meet the discovery requirements of the mining laws, and (2) whether the mill site claim presently meets the requirements of the mill site provisions of the mining laws.

The lode mining claims will be considered first. The Department of the Interior and the courts have consistently held that (1) a mining claim does not create any rights against the United States and cannot be recognized as valid unless a valuable mineral deposit has been physically found, and presently exists, within the limits of the claim; (2) a valuable mineral deposit of such quality and quantity as to warrant a person of ordinary prudence in the expenditure of time and money in the development of a mine and the extraction of the mineral, i.e., the mineral deposit that has been found must have a present value for mining purposes; and (3) the ultimate burden is on the mining claimant to show by a preponderance of the evidence that the claim has been perfected by the discovery of a valuable mineral deposit. Chrisman v. Miller, 197 U.S. 313 (1905); United States v. Coleman, 390 U.S. 599 (1968); United States v. Springer, 491 F.2d 239 (9th Cir. 1974); Barton v. Morton, 498 F.2d 288 (9th Cir. 1974); United States v. Winegar, 16 IBLA 112, 81 I.D. 370 (1974); United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975); United States v. Frisco, 32 IBLA 248 (1977); United States v. Porter, 37 IBLA 313 (1978).

No useful purpose would be served by summarizing all of the evidence presented by the parties with respect to the discovery question. At Best, the evidence simply shows that the claims might warrant further prospecting or exploration. A consulting mining engineer called by the contestee testified that the steps in developing a mine are "prospecting and exploration, development, and mining" and that "you would just be starting the exploration phase" on the claims. (Tr. 142) He stated that he would recommend drilling and probably extending a drift another three or four hundred feet "to find targets for your exploration." (Tr. 143) In a report prepared for the contestee, the mining engineer stated:

This is a raw prospect that has merit. There are two veins and a strong shear zone exposed underground, all slightly mineralized. The Wood River formation is noted for spotty ore bodies that are fairly hi-grade when they can be found.

I would recommend a limited drilling program followed by drifting in search of ore bodies on this property. (Ex. B)

The attorney for the contestee, who is also a one-fifth owner of the Tempest Mining Company, testified that he and the other four owners purchased the property in 1973 "with the intention of completing or performing further exploratory work for the purpose of determining whether or not it was capable of being developed into a producing property." (Tr. 159-160) He also stated that it is their desire and intention "to continue with normal mining practices, to do such exploratory work as may be desirable, recommended by engineers, and as it proves or is disproved to continue if successful." (Tr. 160-161)

There is a sharp distinction between finding a valuable mineral deposit, i.e., one that warrants the expenditure of time and money in developing a mine, and finding some mineralization that might warrant the expenditure of time and money in an effort to ascertain whether a valuable mineral deposit might be found. The distinction between finding a valuable mineral deposit and searching for one, and the fact that the latter cannot be substituted for the

actual discovery of the deposit, no matter how bright the prospects might be, are aptly illustrated in Barton v. Morton, *supra*; Henault Mining Company v. Tysk, 419 F.2d 766 (9th Cir. 1969); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968); and, among innumerable decisions of the Department, East Tintic Consolidated Mining Company, 40 L.D. 271 (1911), which was cited with approval in the Henault case. In the East Tintic decision the Department stated:

. . . The exposure, however, of substantially worthless deposits on the surface of a claim; the finding of mere surface indications of mineral within its limits; the discovery of valuable mineral deposits outside the claim; or deductions from established geological facts relating to it; one or all of which matters may reasonably give rise to a hope or belief, however strong it may be, that a valuable mineral deposit exists within the claim, will neither suffice as a discovery thereon, nor be entitled to be accepted as the equivalent thereof. (p. 273)

The contestee argues that Barton v. Morton, *supra*, is not applicable because that case involved a patent application and, according to the contestee, the court "recognizes clearly the difference in the proof required for a patent and the proof required to hold a claim to determine if there is sufficient ore available to secure a patent." I do not read the Barton decision as recognizing that (1) different standards apply in determining the validity of a mining claim depending upon whether a patent application has or has not been filed, and (2) if a patent is not involved, the discovery of a valuable mineral deposit is not required to sustain the validity of a claim if the facts warrant a prudent prospector in expending time and money searching for such a deposit.

In any event, patent applications were not involved in Henault or Converse or countless other decisions of the courts and the Department that have invalidated mining claims because there was not an actual discovery of a valuable mineral deposit. See, for example, Udall v. Snyder, 405 F.2d 1179 (10th Cir. 1968); Barrows v. Hickel,

447 F.2d 80 (9th Cir. 1971); United States v. Zweifel, 508 F.2d 1150 (10th Cir. 1975); Roberts v. Morton, 549 F.2d 158 (10th Cir. 1977); and, among the most recent decisions of the Department, United States v. Burns, 38 IBLA 97 (1978); United States v. Porter, *supra*; United States v. Cichetti, 36 IBLA 124 (1978); United States v. Dillman, 36 IBLA 358 (1978).

In addition, where the occasion has arisen, the Department has specifically ruled that the same criteria applies in patent and nonpatent cases and the proof of discovery necessary to sustain a patent application is the same as the proof of discovery necessary to hold a claim without patent. United States v. Carlile, 67 I.D. 417 (1960); United States v. Baranof Exploration & Development Co., 72 I.D. 212 (1965); United States v. Cascade Ornamental Building Stone, Inc., 8 IBLA 447 (1972).

Since the evidence establishes that a valuable mineral deposit has not as yet been found within any one of the contested lode claims, it must be concluded that the discovery requirements of the mining laws have not been met and the claims are invalid.

The mill site claim will now be considered. Section 2337 of the Revised Statutes, as amended, 30 U.S.C. § 42, provides for two classes of mill sites. The validity of the first class is dependent upon the use or occupation of the land for mining, milling, or related purposes in connection with a specific lode or placer mining claim with which the mill site is associated. The validity of the second class is dependent solely upon the existence of a "quartz mill or reduction works" on the land. The owner of such a facility need not be the owner or proprietor of an associated mine. Alaska Copper Company, 32 L.D. 128 (1903); United States v. S.M.P. Mining Company, 67 I.D. 141 (1960); United States v. Wedertz, 71 I.D. 368 (1968); United States v. Werry, *supra*; United States v. Cuneo, *supra*.

There are no improvements on the mill site and it is not being used or occupied for any mining, milling, or related purposes. The contestee anticipates that if and when a valuable mineral deposit is discovered on any of the contested lode claims the mill site claim might then be used for mining, milling or related purposes. This does not meet the requirements of the law and it must be concluded that the mill site claim is invalid. In United States v. Werry, *supra*, the Department stated:

... [A] vague intention to use the land at some future time does not satisfy the requirements of the statute. (p. 49)

For the reasons stated, the Warm Springs No. 1, Warm Springs No. 2, June Bug and Hydro lode mining claims and the Warm Springs Millsite claim are found to be invalid.

Robert W. Mesch  
Administrative Law Judge

Appeal Information

The contestee, as the party adversely affected by this decision, has the right of appeal to the Interior Board of Land Appeals. The appeal must be in strict compliance with the regulations in 43 CFR Part 4. (See enclosed information pertaining to appeal procedures.)

If an appeal is taken the adverse party, the Forest Service, can be served by service upon:

Office of the General Counsel  
U. S. Department of Agriculture  
Forest Service Building  
207 25th Street  
Ogden, UT 84401

Enclosure: Information Pertaining to Appeals Procedures

See page 8 for distribution

Tempest Mining Company  
Idaho 13363

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