

UNITED STATES

v.

WILLIAM LAVON CHAPPELL ET AL.

IBLA 79-89

Decided August 13, 1979

Appeal from decision of Administrative Law Judge Morehouse holding the Double Ladder lode mining Claims Nos. 1 through 8 invalid. Utah 10749.

Affirmed.

1. Mining Claims: Determination of Validity – Mining Claims: Discovery: Generally

For a mining claim to be valid there must be a discovery of a valuable mineral deposit within the limits of the claim. There has been a discovery where minerals have been found in sufficient quantity and of sufficient quality 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. Mining Claims: Discovery: Generally

The "prudent man test" is met only where it appears that the mineralization on the claim has been physically exposed and is valuable enough to yield a fair market value in excess of the costs of extraction, removal, and sale. Evidence of mineralization which would justify further exploration, but not development, does not suffice to meet the discovery requirement.

3. Mining Claims: Determination of Validity – Mining Claims: Discovery: Generally – Mining Claims: Withdrawn Land – Withdrawals and Reservations: Generally – Withdrawals and Reservations: Effect of

Where the land on which the mining claim is located is subsequently withdrawn, the validity of the claim must be determined as of the date of the withdrawal and through the date of the hearing. If there was no discovery as of the date of the withdrawal, the land would not be excepted from the effect of the withdrawal and the claim could not thereafter become valid even though the requirement of discovery was satisfied at a later date.

4. Administrative Procedure: Burden of Proof – Administrative Procedure: Hearings – Mining Claims: Contests

When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case. Where a Government mineral examiner testifies that he has examined a claim and found the quantity of minerals insufficient to support a finding of discovery, a prima facie case of invalidity has been established and the burden shifts to the claimants to show by a preponderance of the evidence that a discovery has been made. Government mineral examiners are not required to perform discovery work for a claimant or to explore beyond a claimant's workings.

5. Administrative Procedure: Burden of Proof – Administrative Procedure: Hearings – Mining Claims: Contests

The entire evidentiary record in a mining contest is considered and if evidence presented by a contestee is damaging to the contestee's case it may be used against the contestee regardless of any deficiencies in the Government's presentation. Therefore, regardless of whether the Government established a prima facie case of lack of

discovery, if the entire record establishes that a discovery was not made on a claim it is properly declared null and void.

6. Administrative Procedure: Hearings: Evidence: Admissibility – Mining Claims: Contests – Mining Claims: Hearings – Mining Claims: Withdrawn Land – Rules of Practice: Evidence

It was proper to deny mining claimants' request to redrill on mining claims after the land was withdrawn from mining where the work would be an effort to make a discovery of a valuable mineral deposit within the claim rather than simply a confirmation or corroboration of a discovery prior to the withdrawal.

APPEARANCES: Duane A. Frandsen, Esq., Frandsen, Keller and Jensen, Price, Utah, for contestees; John McMunn, Esq., Office of the Solicitor, Department of the Interior, San Francisco, California, for contestant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

The contestees appeal from the November 2, 1978, decision by Administrative Law Judge Morehouse declaring the Double Ladder lode mining Claims Nos. 1 through 8 invalid for lack of discovery. The claims are located in secs. 7 and 18, T. 31 S., R. 7 E., Salt Lake meridian, Garfield County, Utah. They are within the Capitol Reef National Park. The claims were located under the General Mining Laws of 1872, as amended, 30 U.S.C. §§ 21-47 (1976).

The contest was initiated by the Bureau of Land Management (BLM) January 19, 1977, at the request of the National Park Service (NPS). The complaint charged that the claims are invalid because the lands on which they are located are nonmineral in character and minerals have not been found on the claims of sufficient quality and/or quantity to constitute a valid discovery under the mining laws. The hearing was held March 27 and 28, 1978, in Salt Lake City, Utah.

The subject land was withdrawn from entry and location under the mining laws on January 20, 1969, when it became part of the Capitol Reef National Monument. 83 Stat. 922. See also 50 Stat. 1856. In 1971 the Monument became the Capitol Reef National Park. 16 U.S.C. § 273 (1976).

These claims were originally located for uranium in January 1954. The locators built a road and drove an adit on Claim No. 1. Approximately 20 tons of ore were shipped in two loads to the Vitro Uranium

Company in Salt Lake City, Utah. The first load averaged 40 U[3]O[8], and the second load averaged .16 U[3]O[8]. The average total average for both loads, taking into account varying tonnage, was .22 U[3]O[8], and Vitro informed the owners that this was too low (Tr. 73). These are the only shipments of ore from the claims made to date. In June 1954 the claims were leased to Halbert and Jennings who drilled extensively on Claim No. 1. They advised the owners that "they hadn't found anything that really suited them, but we [the owners] could make a paying business out of the mine if we cared to keep at it" (Tr. 74). Information from this drilling has never been available to either the original locators or the contestees. No further mining activity has been conducted on the claims which were relocated by the present contestees in 1967.

The issues in this appeal are whether or not there was a valid discovery on the claims through the time of the hearing and at the time of the withdrawal. In their brief, contestees assert that the evidence and testimony supports a finding of discovery at the relevant times. They state that drilling occurred on all eight claims. Contestees argue that the Government failed to establish a prima facie case of no discovery on Claim Nos. 2 through 8; therefore, contestees had no duty to present evidence on those claims. Finally, contestees urge that the Government should be estopped from denying the validity of the claims because NPS refused to grant contestees permission to reopen the drill holes on the claims.

In the reply brief contestant asserts that there is "no evidence whatsoever in support of a discovery upon the DOUBLE LADDER Nos. 2 through 8. They are clearly null and void." Regarding Claim No. 1, the Government argues that no work was performed from 1954 until 1975, and that the shipments by the original locators are irrelevant to the validity of contestees' claims. Contestant asserts that the assay results from the two samples taken on Claim No. 1 by the Government mineral examiner and contestees' expert "do not establish the existence of an ore body in a commercial quantity and grade on that claim as of January 20, 1969" (Tr. 18-23; 29-32; 40-41; 208-212; 219). Contestant points to Exhibit R-8, page 6, a 1954 Atomic Energy Commission (AEC) report on these claims, which states "it is not possible to predict reserves, average monthly production and months of operation" and contestees' witness' testimony that the AEC report was accurate at least up to 1969 (Tr. 177-178; 187-188). Contestant concludes there was no discovery of a commercial quantity of ore in 1969, the date of the withdrawal.

[1] For a mining claim to be valid there must be a discovery of a valuable mineral deposit within the limits of the claim. 30 U.S.C. §§ 22, 23 (1976); 43 CFR 3811.1. There has been a discovery where minerals have been found in sufficient quantity and of sufficient quality "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." Castle v. Womble, 19 L.D. 455, 457 (1894). This "prudent man test" has been repeatedly approved by the Supreme Court and in Departmental decisions. E.g., Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Cameron v. United States, 252 U.S. 450 (1920); Chrisman v. Miller, 197 U.S. 313 (1905); United States v. Burns, 38 IBLA 97 (1978); United States v. Becker, 33 IBLA 301 (1978); United States v. Arcand, 23 IBLA 226 (1976).

[2] The "prudent man test" is met only where it appears that the mineralization on the claim has been physically exposed and is valuable enough to yield a fair market value in excess of the costs of extraction, removal, and sale. United States v. Edeline, 39 IBLA 236 (1979); United States v. Kiggins, 39 IBLA 88 (1979); United States v. Melluzzo, 38 IBLA 214 (1978). Evidence of mineralization which would justify further exploration, but not development of a mine, does not suffice to meet the discovery requirement. United States v. Edeline, *supra*.

[3] Where the land on which the mining claim is located is subsequently withdrawn, the validity of the claim must be determined as of the date of the withdrawal and through the date of the hearing. If there was no discovery as of the date of withdrawal, the land would not be expected from the effect of the withdrawal and the claim could not thereafter become valid even though the requirement of discovery was satisfied at a later date. United States v. Arcand, *supra*; United States v. Fleming, 20 IBLA 83, 98 (1975); United States v. Henry, 10 IBLA 193, 195 (1973).

[4] When the Government contests a mining claim on a charge of no discovery, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case. The testimony of a Government mineral examiner that he has examined the claim and found the mineral values insufficient to support a finding of discovery establishes a prima facie case and shifts the burden to the claimant to show by a preponderance of the evidence that a discovery has been made. Government mineral examiners are not required to perform discovery work for a claimant, or to explore beyond a claimant's workings. United States v. Burns, *supra*; United States v. Arcand, *supra*. See also United States v. Zweifel, 508 F.2d 1150 (10th Cir. 1975); United States v. Springer, 491 F.2d 239 (9th Cir. 1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

[5] If a mining claimant does not believe the Government has made a prima facie case of the claim's invalidity, by timely motion the claimant may move to have the case dismissed and rest his case. United States v. Taylor, 19 IBLA 9, 23, 82 I.D. 73 (1975). If, however, the contestee goes forward and presents evidence, that evidence is properly considered as part of the entire evidentiary record and if damaging to the contestee's case may be used against him regardless of any deficiencies in the Government's presentation.

Id. While there is some question concerning the adequacy of the Government's case here as to Claims Nos. 2-8 because the mineral examiner did not actually examine those claims, the reason given was that it would have been hazardous to ascend a ladder to reach the mesa upon which those claims were located and one of the claimants who was with him had not been able to find holes allegedly drilled by a prior locator (Tr. 12). The implication in the examiner's entire testimony is that the claimant had not indicated to him that there was actually a discovery within those claims and that the claimants relied upon an alleged discovery on Claim No. 1.

The testimony of the claimants' witness disputes the fact alleged by the examiner that the witness had not found the drill holes. Cross-examination of the Government's examiner also indicates that other access to the mesa by a longer road may have been available. e.g., Tr. 27. Nevertheless, from the entire evidence presented by the contestees it is clear that there has been no discovery of a valuable mineral deposit within the limits of Claims Nos. 2-8. No discovery work had been performed by these claimants and they did not show that the drill holes made by prior locators showed the existence of a valuable mineral deposit. Thus, regardless of whether a prima facie case was made by the Government here, the entire evidence in the record establishes that a discovery was not made on Claims Nos. 2-8 and they were properly declared null and void.

All of the exploration by claimants and mining by others on these claims was on Claim No. 1. Approximately 20 tons of ore, in two loads averaging .22 U[3]O[8] were shipped from the claim in 1954. The lessees of the original locators drilled on the claims and then dropped the lease, without sharing the information gathered from drilling. The contestees did nothing on the claim until 1975 when they negotiated a lease with Butch Bullard. This lease did not materialize because it was contingent on approval for redrilling the drill holes from NPS, which was not forthcoming. The samples taken by O'Brien averaged .108 U[3]O[8]. He testified that both at 1969 prices and 1978 prices, mining costs for this mine would exceed the selling price (Tr. 20-22).

Judge Morehouse summarized much of contestees' evidence as follows:

Butch Bullard testified that he is in the mining business and runs several small mining companies. He has operated the Horse Head Mine, which is within three miles of the claims in question, and his operation is geared to small deposits of uranium ore running between 1,500 to 3,000 tons. He has all the necessary equipment to mine and haul from the adit located on Claim No. 1. He first went on Claim No. 1 in 1975 and after examining the drill holes and the adit, made the offer to lease the claims described above.

... He found one hot spot near the adit entrance approximately three inches thick which assayed at .47 U[3]O[8].

... He stated that the way the drilling pattern is "tightened up" indicates there is ore in the area and he thinks there is at least 2,000 tons of .16 ore on the south rib of the drift that runs southeast-northwest. (See, Ex. R-12 and area marked in blue ink on Exhibit G-3). This area includes the sample DL-2 taken by Mr. O'Brien which assayed at .36 U[3]O[8]. His opinion is based on his examination of the drill holes and numerous Geiger counter readings taken from the rib in addition to the particular formation of the scour pattern in the geologic strata.

Decision, pp. 3-4. Bullard testified that he believed the claim could be profitably mined, both in 1969 and 1978 (Tr. 160-16; see Ex. R-9, Ex. R-14, Ex. R-15). Judge Morehouse continued, at p. 4 of his decision:

Dr. H. Clyde Davis, a geologist and director of mineral developments for Brigham Young University, testified that he examined the claims in June 1977 and took samples from the three drifts that branch off from the adit entrance on Claim No. 1. (See, Ex. R-10.) He felt that the drill hole pattern indicated that the people conducting the drilling were trying to determine the ore trend to the southeast. The number of holes and closeness of some of the holes indicates mineralization. He stated that the indications were that there was present a favorable ore-bearing formation for uranium ore and it would need to have continued development. (Tr. 208.)

Davis stated that in 1978 the claim could be profitably mined (Tr. 219). He was less sure about 1969, repeating that Bullard testified he would have mined it in 1969, but admitting that he would do more drilling first (Tr. 218-220). Bullard also testified that he would do more drilling on the claim before mining (Tr. 185-186). Contestees had no evidence, other than speculation by Bullard and Davis, indicating the quantity of ore in the claim.

This evidence is not sufficient to meet contestees' burden of showing by a preponderance of the evidence that a discovery existed in 1969 and 1978. Furthermore, there was insufficient evidence to establish that there had been a valid discovery on the claim before 1969, even assuming that a discovery by the original locators could satisfy appellants' discovery requirement. Inferences that can be drawn from the evidence concerning the earlier activities on the claim suggest more that there was not a sufficient quantity and

quality of ore-bearing mineral within the claim than that there was an exposure of a sufficient amount to constitute a discovery. The Double Ladder Claim No. 1 was also properly held invalid.

[6] Contestees' argument that the Government is estopped to deny the validity of the claim by NPS's refusal to allow redrilling must be rejected. Contestees possessed no information on those drill holes in 1969, and to reopen them at a later date could not satisfy the requirement of a discovery as of the date of the withdrawal. Also, there is no exposed mineral on the claims to be sampled under the proposed redrilling program. One of the mining claimants testified that he had examined several of the holes and stated that there was "only one hole that showed any radioactivity, but it was meager" (Tr. 53). Thus, reopening of the holes would not be work aiming to make a new discovery. As the land has been withdrawn, it is too late to permit the claimants to perform work to establish a discovery. That had to be accomplished prior to the withdrawal. Sampling and other testing of claims after a withdrawal is only allowed to confirm and corroborate the preexisting exposures of a valuable mineral deposit discovered prior to a withdrawal. *E.g., United States v. Foresyth*, 15 IBLA 43 (1974). At most we have here only a guess as to what the drill holes might show. There has been no exposure of sufficient mineralization to establish any discovery prior to the withdrawal to warrant further evidence solely for corroborative purposes. Thus, appellants' request for redrilling and reopening work was properly rejected.

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.

Joan B. Thompson
Administrative Judge

We concur.

Joseph W. Goss
Administrative Judge

James L. Burski
Administrative Judge

