

UNITED STATES
v.
JOHN B. BURT ET AL.

IBLA 79-513

Decided October 29, 1979

Appeal from a decision of Administrative Law Judge Dean F. Ratzman holding the Wonder lode mining claims Nos. 1 through 3 invalid. Contest No. CA-4936.

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 that with actual mining operations under proper management a profitable venture may reasonably be expected to result.

3. 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.

4. Evidence: Weight – Mining Claims: Discovery: Generally – Rules of Practice: Evidence

Assay reports have limited probative value as to the existence of a valuable mineral deposit on a mining claim when they are not supported by evidence as to how and where the samples were taken.

5. Administrative Procedure: Hearings – Evidence: Admissibility – Evidence: Hearsay – Hearings – Mining Claims: Assays – Mining Claims: Hearings

The rule of evidence excluding hearsay is not strictly adhered to in administrative proceedings, particularly where the evidence, such as assay reports with a proper foundation concerning the sampling, submission of the samples for assaying, and the reputation of the assayer, is competent and relevant. After such reports are admitted, the factfinder may give the appropriate weight according to the circumstances surrounding the specific report. However, it is not improper to exclude an assay report where neither the assayer nor the sampletaker testifies concerning its origins, and no other foundation is laid for its introduction.

6. Mining Claims: Contests

It is incumbent upon a mining claimant to keep his discovery points available for inspection by Government mineral examiners. Where he does not, he assumes the risk that the mineral examiner will not be able to verify the discovery of the alleged mineral

deposit, and his unsupported argument that the samples taken by the examiner are not representative will be rejected.

APPEARANCES: John McMunn, Esq., Office of the Solicitor, U.S. Department of the Interior, San Francisco, California, for the contestant. John Burt, Robert Howells, and Thomas Rokita, contestees, each pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The contestees here appeal from a decision by Administrative Law Judge Dean F. Ratzman rendered on June 21, 1979, which declared lode mining claims Wonder Nos. 1 through 3 null and void for lack of discovery. The lode mining claims are located in the Death Valley National Monument, Inyo County, California. The lands located within the Monument were withdrawn from mineral entry on September 28, 1976 (16 U.S.C. §§ 1901-1912 (1976)). The Bureau of Land Management (BLM), initiated the action on behalf of the National Park Service (NPS) to contest the validity of the Wonder lode mining claims. The complaint filed by the contestant alleged that "there are not presently disclosed within the boundaries of the mining claims minerals of a variety sufficient in quantity, quality, and value to constitute a discovery." Contestees filed an answer timely, and a hearing was held on August 29, 1978, in Las Vegas, Nevada.

At the hearing, the Government witness, a geologist for the National Park Service, testified that he had inspected the claims with one of the contestees in August 1977 and August 1978. During the later inspection, samples were taken from the claims. One mine shaft on Wonder claim No. 1 was inaccessible and the NPS mineral examiner was admonished by the attendant claimant not to descend because of "bad air" in the shaft. The mineral examiner testified that he would have descended the shaft had it been accessible. The samples taken by the NPS geologist were submitted to Jacobs Assay Laboratory for a fire assay. The mineral values from the samples were very low. The Government witness estimated the cost of extraction to be \$40 a ton while the value of the minerals was only \$3 a ton. Therefore, the Government witness concluded that "because the grade of ore was too low and present in insufficient quantities, a prudent person would not further expend his funds or effort upon any of the claims with a reasonable prospect of success in developing a valuable mine."

One contestee was allowed to introduce two assays into evidence, the results of one were derived from grab samples. These results were more favorable to the contestees than those obtained by the NPS geologist. The contestees' second assay was much less favorable. Also the contestee could not identify the sample locations. A third assay report was offered in evidence by the contestees but was not admitted by the Administrative Law Judge because the person who had

taken the samples was not available for cross-examination and testimony as to where and how he had taken the samples and what they consisted of.

The issues raised by contestees on appeal are: a) whether or not there exist in the mining claim minerals in sufficient quantity and 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; b) whether or not the Administrative Law Judge should have received in evidence the assay report (Ex. B), even though the engineer who took the samples was not present to testify as to where and how he got them; c) whether or not the NPS geologist performed an inspection adequate to support the presentation of prima facie case by the contestant.

[1] In order for there to be a valid mining claim there must be a discovery of a valuable mineral deposit within the limits of the claim. 30 U.S.C. § 22 (1976); United States v. Chappell, 42 IBLA 74 (1979); United States v. Edeline, 39 IBLA 236 (1979); United States v. Rukke, Registered Agent, Valumines Inc., 32 IBLA 155 (1977). The mineral must be of such quality and quantity 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 paying mine. Chrisman v. Miller, 197 U.S. 313 (1905); Barton v. Morton, 498 F.2d 288 (9th Cir. 1974), cert. denied, 419 U.S. 2021; Castle v. Womble, 19 L.D. 455 (1894).

[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 that with actual mining operations under proper management a profitable venture may reasonably be expected to result. United States v. White, 72 I.D. 522, 525 (1965), aff'd, White v. Udall, 404 F.2d 334 (9th Cir. 1968); United States v. Kiggins, 39 IBLA 88 (1979); United States v. Melluzzo, 38 IBLA 214 (1978). No discovery of a valuable mineral deposit is demonstrated where the amounts of mineral yielded by a claim are so small that mining could never be expected to produce an economic return in any way commensurate with the labor and cost involved in production. United States v. Kiggins, supra. The Government geologist's testimony that the Wonder claims could not be commercially mined at a profit, and that the quantity and quality of mineral are insufficient to support a finding of a discovery, presents a prima facie case of invalidity. United States v. Knecht, 39 IBLA 8 (1979); United States v. Fisher, 37 IBLA 80 (1978); United States v. Miles, Sr., 36 IBLA 213 (1978); United States v. Cichetti, 36 IBLA 124 (1978); United States v. Becker, 33 IBLA 301 (1978).

[3] 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. United States v. Bums, *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). The contestees attempted to carry their burden by introducing into evidence assays that allegedly indicated valuable mineral deposits existed on their claims. Of the two which were admitted into evidence, neither exhibited mineral deposits in sufficient quantity or quality that could be considered a discovery.

[4] Assay results have no probative value without further evidence establishing how and where each sample was taken so that the factfinder can determine how accurately the same represents what remains in the ground. By themselves, the assay reports do not tell us whether the samples were taken from areas of isolated mineral occurrences or from areas of continuous mineralization. They tell us nothing about the size or extent of the deposit from which they were taken, or do they indicate whether the material assayed was raw or concentrated, or whether the sample included all material across what would be a normal mining width, or what measures were taken to protect the samples from contamination.

Without such information, it is impossible to determine whether there is an occurrence of mineralization of such quantity and quality as to warrant a person of ordinary prudence in the further expenditure of time and money in the development of a mine and the extraction of the mineral. United States v. Porter, 37 IBLA 313 (1978); United States v. Nicholson, 31 IBLA 224, 233 (1977). Therefore, the assays proffered by appellants, who had obtained the samples but had forgotten their origin, were properly accorded less weight by Judge Ratzman.

[5] Appellants raise the issue of Judge Ratzman's exclusion from evidence of the assay report from which samples allegedly were taken by an expert who was not present at the hearing. This Board has held:

In this regard, Judge Steiner erred in refusing to admit the assay reports described above into evidence. It is well settled that the hearsay rule of evidence under which Judge Steiner excluded these reports is not strictly adhered to in administrative proceedings, particularly where the evidence is competent and relevant, such as assay reports with a proper foundation concerning the sampling, the submission of the samples to the assayer and the assayer's reputation. 5 U.S.C. § 556(c), (d) (1970); United States v. Jones, 2 IBLA 140, 145-46 (1971); United States v. Stevens, 76 I.D. 56 (1969); see, e.g., Willapoint Oysters, Inc. v.

Ewing, 174 F.2d 676, 690-91 (9th Cir.), cert. denied, 338 U.S. 860 (1949). After the assay reports are admitted into evidence, the factfinder may accord them appropriate weight in his deliberations according to the circumstances surrounding the particular report. See, e.g., United States v. Avgeris, 8 IBLA 316 (1972); United States v. Guthrie, 5 IBLA 303, 308 (1972).

United States v. Rukke, Registered Agent, Valumines, Inc., supra.

Notice, however, that although it was held in that case that assay reports should not have been excluded from evidence as hearsay merely because the assayer was not present to testify, the Board was concerned with the need to lay a proper foundation for their introduction. In that case, although the assayer was not present, the person who took the samples was, and he testified concerning the sample sites and the method of their collection. Therefore, we said, the reports should have been admitted.

In the instant case it is apparent that Judge Ratzman was adhering to our holding in the Rukke case. Although the assayers were not present, he admitted the assay reports of both sides where the person who took the samples which were the subject of the report was present and testified to that effect. However, with reference to the assay report excluded from evidence by Judge Ratzman, neither the assayer nor the sample-taker was presented for testimony so that there was virtually nothing which could be established about the report beyond the fact that it existed. Thus, the evidentiary value of the report was virtually nil, and it was not improper for the Judge to exclude it.

[6] Appellants also contend that the Government geologist performed an inadequate inspection of the claims in that he did not descend into one of the mines to recover samples. The Government geologist testified, with his testimony supported by one of the contestees, that when he descended the ladder at the head of a 60-foot shaft, the top rung broke. Also the claimant who was accompanying him admonished the NPS geologist about the bad air which was present in the mine. In light of the potentially hazardous conditions, the NPS geologist had sufficient reason not to fully inspect the mine. As indicated by the Board on a similar occasion:

It is incumbent upon the mining claimant to keep his discovery points available for inspection by Government mineral examiners. United States v. Gayanich, 36 IBLA 111, 117 (1978); United States v. Bechtold, supra at 85 (1976). If there were any deficiency in the sampling used by FS to show the absence of mineral values, which we do not find, it resulted from appellant's repeated unjustified refusal to allow inspectors to remove samples from the claim. Where a

claimant fails to keep his discovery points open and available for sampling, he assumes the risk that the mineral examiner will be unable to verify the discovery of the alleged mineral deposit. United States v. Bechtold, *supra*; United States v. MacIver, *supra*; United States v. Bass, 6 IBLA 113 (1972); United States v. Laing, 3 IBLA 108 (1971).

United States v. Knecht, *supra*.

The record discloses no evidence sufficient to support a finding of discovery. 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:

Frederick Fishman
Administrative Judge

James L. Burski
Administrative Judge

