

Editor's note: Appealed -- aff'd, No. 81-424 (9th Cir. May 19, 1982)

UNITED STATES v. JON ZIMMERS and CLAIRE KELLY

IBLA 79-456

Decided November 30, 1979

Appeal from decision of Administrative Law Judge Dean F. Ratzman declaring placer mining claims null and void. CA 4949.

Affirmed.

1. Administrative Authority: Generally -- Mining Claims: Contests -- Mining Claims: Determination of Validity -- Secretary of the Interior

The Secretary of the Interior has the authority to determine the validity of mining claims on any public lands of the United States after adequate notice and opportunity for a hearing. A mining claim contest may be initiated under the authority of the Secretary of the Interior by the Bureau of Land Management at the behest of the U.S. Forest Service and prosecuted by counsel employed by the U.S. Department of Agriculture, with U.S. Forest Service employees as witnesses.

2. Administrative Procedure: Burden of Proof -- Evidence: Generally -- Mining Claims: Determination of Validity

A Government mineral examiner in evaluating a mining claim is not required to perform discovery work, to explore or sample beyond a claimant's workings and it is incumbent upon the mining claimant to keep discovery points available for inspection by a Government mineral examiner. While it is true that under proper circumstances, the testimony of the mineral examiner may establish

a prima facie case of lack of discovery even though he was not physically on each mining claim, in the case at bar we need not decide whether a prima facie case was made by contestant since the totality of the evidence establishes invalidity of the claims.

3. Administrative Procedure: Administrative Law Judges --
Administrative Procedure: Decisions -- Mining Claims: Contests --
Mining Claims: Hearings

An Administrative Law Judge in rendering a decision need not make a separate ruling on each finding of fact and conclusion of law. It is sufficient if the decision summarizes the controlling principles of law and the testimony of witnesses relative thereto and explains why appellants' evidence was insufficient to meet the legal test for a discovery of valuable mineral.

4. Mining Claims: Discovery: Generally

A discovery of a valuable mineral deposit has been made where locatable minerals have been found within the limits of a claim and the evidence is such that a person of ordinary prudence would be justified in the further expenditure of his labor and means in a reasonable prospect of success in developing a valuable mine.

5. Administrative Procedure: Burden of Proof -- Mining Claims: Contest -- Mining Claims: Discovery: Generally

When the Government contests a mining claim on a charge of no discovery, it has by practice assumed the burden of going forward with sufficient evidence to establish a prima facie case; when it has done so, the burden 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.

6. 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.

7. Mining Claims: Common Varieties of Minerals: Generally

Whether a deposit of clay is a common variety and no longer locatable under the mining laws since the Act of July 23, 1955, or is still locatable depends on whether it has a unique property giving it a special and distinct value.

8. Administrative Procedure: Burden of Proof -- Evidence: Generally -- Mining Claims: Determination of Validity

The Board properly adopts a decision of an Administrative Law Judge holding mining claims null and void for lack of discovery of certain minerals, *i.e.*, gold, silver, iron, titanium, feldspar, mica, silica refractory clay, stonework clay, refractory sand and glass, where non-discovery is established by the totality of the evidence.

APPEARANCES: William B. Murray, Esq., Portland, Oregon, for appellants Jon Zimmers and Claire Kelly; Charles F. Lawrence, Esq., U.S. Department of Agriculture, Office of the General Counsel, San Francisco, California, for appellee.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Jon Zimmers and Claire Kelly appeal from a decision of Administrative Judge Dean F. Ratzman, declaring null and void the Northwest Mining Assn. #1, #2, #3; the Monday Creek P.M.C.; the Northwest Mining Assn. #6 and #8 placer mining claims.

On April 17, 1978, the Bureau of Land Management (BLM), on behalf of the U.S. Forest Service (Forest Service) filed a complaint charging *inter alia* that there was no discovery of valuable minerals on the claims.

A hearing on the contest was held on December 13 and 14, 1978, in Sacramento, California. 1/ The Judge's decision sets out the pertinent evidence, the applicable law, as well as his analysis 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.

Appellants have submitted a statement of reasons in which they ask the Board to "rule upon" 22 findings of fact. As previously indicated, we find the facts accurately set forth and evaluated in light of applicable law in the Judge's decision. Consequently there is no need to specifically rule upon the facts as tabulated by appellants, and any relevant facts will be discussed only in connection with assignments of error directed at the decision appealed from.

[1] The first challenge made by appellants is that the Forest Service has no authority to initiate contents such as the one before us. The Forest Services' authority to initiate a mining claim contest is well established. It was discussed with ample citations of authority in United States v. Freese, 37 IBLA 7 (1978) and in United States v. Diven, 32 IBLA 365 (1977), where the Board stated at 366:

Although BLM will initiate a contest against a mining claim by issuing a complaint, the request for such may come from any Federal Agency which has Federal public lands under its jurisdiction encumbered by unpatented mining claims. * * *

* * * It is proper for the Government to be represented by counsel employed by the Department of Agriculture action on behalf of the Forest Service. * * * However, the final determination of the validity of such unpatented mining claims will be made by the Department of the Interior, after notice and opportunity for a hearing. Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); U.S. v. Dummer, 9 IBLA 308 (1973).

[2] Appellants' second and third challenges are directed toward the competency of the Government mineral examiner who testified that a prudent man would not spend further means and energy to develop any of the contested claims. Appellants state that the examiner did not sample nor did he physically go into each of the claims. They contend therefore that no prima facie case was made.

1/ Besides Jon Zimmers and Claire Kelly, there were originally six other colocators. None of the others chose to join Zimmers and Kelly in their appeal to this Board. Three of them filed letters with counsel for appellee disassociating themselves from the proceeding. For this reason counsel for appellee has raised the question whether the appeal is in fact authorized. The right of appeal is authorized by 43 CFR Part 4. The Judge's decision is final, however, as to those parties not timely availing themselves of their right of appeal. We do not reach appellee's contention that 30 U.S.C. § 36 (1976), precludes consideration of the appeal.

The Judge recited in the first 2 paragraphs of page 12 of his decision, that these assertions are defeated by appellant Zimmers' own conduct. The latter refused to show discovery points and stated that he did not want samples taken. A prima facie case may be established under proper circumstances even though the examiner was not physically on each mining claim and it is up to the claimant to make discovery points available for inspection. United States v. Zweifel, 11 IBLA 53, 80 I.D. 323 (1973), sustained sub nom. Roberts v. Morton, 549 F.2d 158, 163 (10th Cir. 1977), cert. denied, sub nom. Roberts v. Andrus, 434 U.S. 834 (1977); United States v. Johnson, 33 IBLA 121 (1977); United States v. Rukke, 32 IBLA 155 (1977). We need not decide whether a prima facie case had been made by contestant. The totality of the evidence submitted at the hearing warrants the finding of invalidity reached by the Judge.

[3] Appellants contend that the Judge refused to rule on each of their requested findings as is required by 43 CFR 4.452. They accuse the Judge of "name-calling and sneering at the modest proposal to engage in a lawful mineral enterprise * * *." 2/

The file contains a document entitled "Findings of Fact and Conclusions of Law." Insofar as the statements contained in this document are material to the facts and issues involved in the contest they are covered with considerable diligence in the Judge's decision. In any event, a separate ruling on each finding of fact and conclusion of law is not necessary. It is sufficient if the decision summarizes the controlling principles of law and the testimony of witnesses relative thereto and explains why appellants' evidence was insufficient to meet the legal test for a discovery of a valuable mineral. United States v. Shield, 17 IBLA 91 (1974).

[4, 5, 6, 7] Appellants contend that valuable discoveries of certain minerals were made on their claims. The evidence relating to these contentions is meager, at best, and was exhaustively discussed by the Judge. No new evidence is put forward on appeal nor has any error been demonstrated in the Judge's analysis.

[8] The Board properly adopts a decision of an Administrative Law Judge holding mining claims null and void for lack of discovery of certain minerals, i.e., gold, silver, iron, titanium, feldspar, mica,

2/ This charge is related to a characterization by the Judge of one of appellants' proposals for their claims as "moving from a plan which is merely impractical * * * to ideas which seem to be the product of day-dreaming." (Dec. p. 13). Appellants, who also charge that the decision is based on conjecture rather than substantial evidence, fail to tabulate any data which would cast doubt upon the prima facie case made by contestant, or remove appellants' proposals -- a flotation plant, a hydro electric power plant, among others -- from the realm of imagination to that of prudently founded and rationally planned enterprise. Of course, discovery is the sine qua non of any enterprise based on the minerals to be extracted.

silica refractory clay, stonework clay, refractory sand and glass sand, where non-discovery is established by a totality of the evidence. That is the situation presented by the case at bar.

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:

Anne Poindexter Lewis
Administrative Judge

Joseph W. Goss
Administrative Judge

May 9, 1979

United States of America,	:	<u>Contest No. CA-4949</u>
	:	
Contestant	:	Involving the Northwest
	:	Mining Assn #1; Northwest
v.	:	Mining Ass'n #2; Northwest
	:	Mining Ass'n #3; Northwest
Jon Zimmers; Claire Kelly;	:	Mining Association #4
Jon Zimmers as agent for Ron	:	through #12; and Monday
LaForge; Matt Kemeny; Alex	:	Creek P.M.C., formerly
Paul; Lori Paul; Bill Hoppe;	:	Northwest Mining Associa-
and Gordon Van Zee,	:	tion #4 placer mining
	:	claims situated in SW-1/4
Contestees	:	Sec. 8, N-1/2 Sec. 17, all
	:	Sec. 18, and W-1/2 Sec. 20,
	:	T. 35 N., R. 9 W., and
	:	N-1/2 Sec. 13, T. 35 N.,
	:	R. 10 W., Mount Diablo
	:	Meridian, Trinity County,
	:	California

DECISION

Appearances: Charles F. Lawrence, Esq. Office of the General Counsel
Dept. of Agriculture For the Contestant

U.S.

Jon Zimmers In Propria Persona, Contestee *

Claire Kelly In Propria Persona, Contestee

Before: Administrative Law Judge Ratzman

This contest was brought by the Bureau of Land Management on behalf of the United States Forest Service, pursuant to the Hearings and Appeals Procedures of the Department of the Interior, 43 C.F.R. Part 4, to determine the validity of the above-named placer mining claims.

* Mr. Zimmers also appeared on behalf of others. Tr. 1.

The Contestant filed a Complaint on April 17, 1978, which alleges separately and collectively that:

- "a. There are not presently disclosed within the boundaries of the mining claim, nor were there disclosed from July 23, 1955, to the present, minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery.
- b. The land embraced within the claim is non-mineral in character.
- c. The claim is not held in good faith for mining purposes."

Jon Zimmers filed an Answer on behalf of all the Contestees on May 15, 1978, controverting the charges in the Complaint (Claire Kelly signed the Answer). The Contestees contended the mining claims are not situated within the area described in the Complaint. Furthermore, they stated that the Northwest Mining Association #5, #7, #9, #10, #11 and #12 placer claims were abandoned on February 21, 1978.

Mr. William Hoppe (aka Bill Hoppe) filed a relinquishment with the BLM on April 9, 1979 abandoning any right, title or interest in the above-mentioned mining claims.

Emmett B. Ball, a mining engineer for the U.S. Forest Service, with an extensive background in evaluation mineral properties, was called to testify on behalf of the Contestant. He examined the claims on August 11, 1977. Tr. 106. Mr. Ball submitted a topographical map of the Trinity Dam Quadrangle, California, on which he had depicted claim boundaries indicating that the claims lie within the Trinity National Forest. Ex. 3. He introduced another Trinity Dam Quadrangle map with boundaries of the disputed mining claims corresponding to amended location notices filed by Mr. Zimmers in 1978. Ex. 4, Tr. 24. Under Mr. Ball's analysis of the amended location notices, the Northwest Mining Association No. 8 claim was moved south a quarter of a section; the Northwest Mining Association No. 1 was extended to include more than 160 acres; a portion of the Northwest Mining Association No. 2 was subtracted and a

portion added; the Northwest Mining Association No. 3 was reduced to a 20-acre claim; the Lady Claire took up most of the area that was within the Northwest Mining Association No. 6. Tr. 27.

Jon Zimmers, a Contestee and locator of the mining claims was called as an adverse witness by the Contestant. He is authorized to act as an agent for all of the named Contestees in the Complaint except for Claire Kelly. Tr. 34. Ron LaForge, Matt Kemeny, Alex Paul, Lori Paul, Bill Hoppe and Gordon Van Zee were not on the claims prior to location. None of them have any training or experience in mining. They are business people or artists. Tr. 46.

Mr. Zimmers contended that all the claims were "located for all the valuable minerals" or "whatever might be there." At this time he intends to recover gold, silver and iron. Tr. 52. The Northwest Mining Association No. 1 was located for "[a]ll valuable minerals." He later narrowed that down to iron, gold, silver and titanium. On the Northwest Mining Association No. 2 he intends to mine feldspar, iron, gold, mica, silver, silica and titanium. The asserted discovery on the Northwest Mining Association No. 3 is for iron, gold, silver and titanium. Northwest Mining Association No. 8 is located for the same minerals as No. 3. The Monday Creek P.M.C. is located for iron, titanium, gold, silver, feldspar, silica, mica, refractory clay, stonework clay, refractory sand and glass sand. The Lady Claire is located for refractory sand, glass sand, iron, gold, silver, feldspar, silica, mica and titanium. Tr. 57.

Mr. Zimmers was asked what led him to believe that he has made discoveries of the above-mentioned minerals on the claims. He responded (Tr. 56-58):

"I talked to a few attorneys. I talked to several geologists. The attorneys were also mining engineers and geologists. And I also did some research as far as different publications of what the geology was of the area, what previous mines had been in the Stuart Fork district, what they were located for.

And I talked to other miners around in the county, to get an idea of what's there, what to look for.

Q. (By Mr. Lawrence) Well, what you have described so far is information roughly available to everybody, is it not?

A. Yes.

Q. Now, What if anything did you do on the ground?

A. I walked around and chipped rocks.

Q. Is that all?

A. Yes.

Mr. Zimmers further stated that he took samples of feldspar, silica, mica and clay at the time of discovery. Tr. 58. At the time he located the claims, his examination for minerals was confined to research of a United States Geological Survey publication and a few general geology books. Tr. 58. He contended the minerals on the claims are "abundant and obvious," and could be seen as he walked around the area. In addition, he relied on a USGS mineral survey. Tr. 59; Ex. 5.

On the basis of samples which he has taken, Mr. Zimmers contended the sand on the claims is uncommon and useful as refractory sand. According to him, "some of it (the sand) is really fine and some of it is really coarse." Some can be found mixed with clay, older and more altered, or fresh from granite and granodirite. He agreed that the sand on the claims has the same general attributes as sand elsewhere. Tr. 60-61.

When he was asked about the market for the minerals found on the claims, Mr. Zimmers contended there is a good market in the ceramics industry for feldspar, silica, mica and iron. Tr. 62. Part of the market would be requirements of the Contestees themselves. Tr. 63. He conducted tests to determine the suitability of the sand and clay on the claims for stonework purposes. Tr. 67. Mr. Zimmers relied on the USGS mineral survey (Ex. 5) in determining what other minerals were on most of the other claims. Tr. 77. He did not stake out his claim corners. Tr. 85. He conceded

that he viewed the claims as valuable for gold, silver, iron and titanium because these minerals were reported present in the area by a USGS mineral survey. Ex. 5, Tr. 86. He has not made any sales of any of the specified minerals. Tr. 88. Mr. Zimmers contends the mining claims have different boundaries than those depicted in the Government's exhibits. See Ex. 8. He also asserts that there is a townsite application for all the land in Section 18, 35 N., 9 W. Tr. 96.

Mr. Zimmers testified that he intends to set up a ceramics factory to process the clay and manufacture stoneware products. Tr. 97. He also plans to smelt iron, and sell raw minerals. Businesses established on the townsite will be part of the market for the minerals. Presently, there is a building on the Monday Creek claim where Mr. Zimmers resides and does his work. Tr. 101. The Lucky Strike lode claim also encompasses some of the area that lies within the Monday Creek placer claim as it is depicted by the Forest Service. Tr. 103.

Emmett B. Ball was recalled and testified that during his mineral examinations of the claims he saw Mr. Zimmers and Ms. Kelly there. Tr. 105. During a mineral examination on August 11, 1977, Mr. Zimmers stated his mineral discoveries were "made by the geological survey in their report." Tr. 106. Mr. Ball asked Mr. Zimmers to point out areas where samples could be taken. However, Mr. Zimmers declined to do so and stated he did not want any samples taken. A discovery marker for the Monday Creek claim was shown. It was the only discovery marker revealed by Mr. Zimmers. Mr. Ball did not take any samples on that date. He examined the USGS mineral report relied upon by Mr. Zimmers, but was unable to determine the location of mineral deposits on the claims from that document. Tr. 107. The mineral report disclosed that minerals existing on the claims could be also found elsewhere in the same general area. Tr. 108.

Mr. Ball returned to the claims in October, 1978, and found that a small cabin had been built on the Monday Creek claim. Tr. 109, Ex. 10-H. He took a sample near the discovery monument (Ex. 9-F) for the Monday Creek claim and he also sampled some alluvial material. See Ex. 10-B and 10-C, Tr. 109. No mining activities were observed on the claims,

although fifteen or twenty year old cuts were found on a hillside east of the cabin. Ex. 10-D. No mining equipment was found. Tr. 111. The material in the samples was panned and the concentrates were sent to Metallurgical Laboratories, Inc., in San Francisco, California for assay. Ex. 11-14. Tr. 122. Sample AFS 3663 was taken from an alluvial deposit on the surface. A free gold determination and spectrographic analysis was made. Tr. 123. Only 1.105 milligrams of gold valued at 50 cents a yard were recovered. Ex. 11. Material of that value could not be processed profitably. Tr. 127. A chip sample, AFS 3664, was taken near the discovery marker on the Monday Creek claim. It was analyzed for gold, silver and manganese. A spectrographic analysis was also made. Gold recovery was .015 ounces per ton, silver 2.93 ounces per ton, and manganese 20.11%. Ex. 13. Mr. Zimmers never gave permission to sample the claims and he did not point out the claim boundaries. Mr. Ball could not detect any difference in the nature of the area of one claim as compared to another. Tr. 125-126.

The Contestant's mineral examiner concluded that the assay results did not indicate mineral deposits worthy of development. Tr. 129. He stated the gold values were too low and the silver could not be extracted from the rock at a profit. Tr. 129. The spectrographic analysis of his chip sampled material showed mineral values that in a general sense are typical of the earth's crust. The silver content and manganese content are higher than average, but it would not be practicable to mine for those minerals because of a lack of volume and the difficulty of recovery. Mr. Ball concluded that a prudent person would not be justified in expending further funds in attempting to develop any of the contested claims. He based his conclusion on his mineral examinations and a USGS mineral report which states that the Stuart's Fork area is not mineralized. Tr. 130.

On cross-examination, Mr. Ball testified that he sampled "anything that had been dug." He acknowledged that he has never been on the Northwest Mining Association No. 1, 2, 3 or 8 claims. Tr. 132. The cost of hydraulic mining on the claims would be \$1.50 a yard. Tr. 133. Construction of debris basins would be required as part of a mining operation. Noting that Mr. Zimmers intends to mine feldspar and silica, Mr. Ball asserted that unless there is a deposit consisting of feldspar only or a deposit consisting of

silica only, it would be too expensive to separate the minerals out of the host rock. Tr. 135. Mr. Ball has seen mining operations that attempted to mine feldspar and silica from the same deposit. However, this operation was unable to compete with operations utilizing ore which required no separation of minerals. Tr. 137. In his opinion, the cost of production of feldspar and silica or any other mineral from these claims would be too high to allow them to be marketed. Tr. 141. Mr. Ball did not find any clays during his examinations. The Contestee did not point out clay deposits. Tr. 142.

Jon Zimmers retook the stand and testified on his own behalf. He has been involved with arts and crafts for 15 years and attended college for five years, majoring in sculpture and design. He and Ms. Kelly founded the Northwest Artists Workshop, and received a \$6,500 grant from the National Endowment of the Arts to support a ceramics workshop. However, the Cherry Flat Project must raise a matching amount. Tr. 147. Mr. Zimmers attempted to obtain funds from CETA but was rejected because it appears to the County that the Contestees are trespassers. Tr. 149.

Mr. Zimmers submitted two Bureau of Mines publications concerning the production of feldspar. Ex. I and J. A chart titled "Mineral Extraction Costs" was also submitted. Ex. A. He intends to construct a flotation plant to mine feldspar. He contended that the cost of separating the feldspar and silica would total \$8.91 a yard. Tr. 152. After examining the current cost for feldspar and silica in the Portland, Oregon area, Mr. Zimmers concluded he would have an edge in the market. Tr. 154. See Ex. D. He also prepared an abstract of the minerals that are on the claims. Ex. K. He intends to construct a hydro-electric plant to provide power for his ceramics plant, and plans to smelt the iron and pour it into forms. Tr. 156. He estimates that the total amount recoverable from an operation which mined all valuable minerals on the claims would be about \$198 a yard. Tr. 157, Ex. K. Furthermore, he asserts that the clay on the claims is suitable for stoneware and refractory purposes. Tr. 158, See Ex. E, F & G. He believes he can separate out the iron from the other minerals by using a magnet. Tr. 160. A blacksmith's forge will be used to smelt the iron. Tr. 164. Woodburning stoves will be manufactured from this iron. Vol. II, Tr. 3.

Mr. Zimmers testified that the clay samples submitted were taken from the Monday Creek claim along the banks of Sunday Creek. Vol. II, Tr. 2. He stated that the material in Ex. G is suitable for refractory clay and can be used to produce natural stoneware. It came from a 15-foot high and 100-foot long outcropping along the right bank of Sunday Creek. He believes the clay can be mined from the surface with a loader at \$1.50 a yard. Vol. II, Tr. 3. Mr. Zimmers said that it would be imprudent for him to not continue to develop these claims. He insists there is a discovery under the prudent man rule. Vol. II, Tr. 9.

Claire Kelly, one of the locators of the contested association placer claims, testified that she has a background in the arts and history. She attended Brown University, the Rhode Island School of Design and the University of Iowa. She has worked for the Art Institute of Chicago and the Portland Art Museum. Vol. II, Tr. 10. She is a specialist in the craft of creating indigenous pottery, and has sold that type of pottery in commercial galleries. She stated that the local art center has expressed an interest in wanting to sell clay pottery. Therefore, she believes there is a potential market for such articles. Vol. II, Tr. 11.

On cross-examination, Ms. Kelly acknowledged that she lives on one of the claims. She intends to produce clay items such as plates, cups, jugs and other functional or decorative things. Vol. II, Tr. 13, 20. Most of the products would be hand-manufactured. In her opinion the products will appeal to people and could be sold. She does not know how many would be sold, but believes there is an existing market. Vol. II, Tr. 15, 19. Costs of production would be relatively modest.

Mr. Zimmers testified about the anticipated amounts of materials that would be used. He envisions use by the Cherry Flat project of about 100 to 200 tons of clay and ceramic materials a year. Individual potters would use another 100 tons a year. Mr. Zimmers hopes to sell low cost ceramics to major outlets. He envisions a mass production method for producing clay utensils and decorative tile that would require 500 to 1,000 tons of ceramic materials a year. Vol. II, Tr. 22. He estimates material for ceramic use would cost \$100 to \$150 a ton. He intends to sell this raw material to other potters throughout the country. Vol. II, Tr. 23.

Upon further questioning, by the Contestant's counsel, Mr. Zimmers stated that bringing in power from the local electric company would be expensive. The nearest power-line is three miles down the river. Vol. II, Tr. 39. When asked if he had made studies to determine whether his proposed magnetic separation method would be feasible for recovery of iron from the stream sediment, Mr. Zimmers gave a negative reply. Vol. II, Tr. 48. His research to determine if he could recover all the minerals listed in Ex. K has been very limited. Vol. II, Tr. 50. He has not run any tests on silver from the claims. Vol. II, Tr. 61. Mr. Zimmers contends that he would need all the claims to support his townsite project. Vol. II, Tr. 63.

After hearing Mr. Zimmer's testimony concerning the mining methods that are to be employed on the claims, Mr. Ball testified that it would be impractical to utilize any of them. He stated that the percentage of iron depicted on the Contestee's tabulation in Exhibit K is wrong and that a calculation based upon a concentration ratio of 750 to 1 would more accurately reflect the quantity of iron present in relation to the material that must be mined. Vol. II, Tr. 68. He also stated the mining expenses shown in Ex. A are extremely low. Vol. II, Tr. 69. It would cost at least \$240 a day to transport 25 tons of material to a plant and have it crushed, ground and run through a flotation plant operating 24 hours a day. Vol. II, Tr. 75. The cost of extracting minerals by a flotation method would be \$37.50 a ton. Vol. II, Tr. 79.

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.

No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim located [after July 23, 1955] under such mining laws. Act of July 23, 1955, 30 U.S.C. Sec. 611 (1976). If there is insufficient evidence that a stone is an uncommon variety within the meaning of 30 U.S.C. Sec. 611, it is not locatable under the mining laws. United States v. Margaret Mansfield, 35 IBLA 95, 98 (1978), citing United States v. Coleman, 390 U.S. 599 (1968).

In determining whether a deposit of clay is locatable as a valuable mineral deposit under the mining laws, a distinction must be made between a deposit considered to be a common or ordinary clay, which is not locatable, and a locatable deposit having exceptional qualities, useful and marketable for purposes for which common clays cannot be used. United States v. Thomas J. Peck, 29 IBLA 357 (1977); United States v. Schneider Minerals, Inc., et. al., 36 IBLA 194 (1978). "Common clay" includes clay that is usable for the production of pottery, ordinary earthenware and stoneware. United States v. Thomas J. Peck, supra.

In a mining contest, the mining claimant is the proponent of a rule or order that he has complied with the mining laws entitling him to validation of the claim, and the claimant has the ultimate burden of proof. The Government assumes the burden of going forward with sufficient evidence to establish a prima facie case of invalidity. When this has been done the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid. United States v. Zweifel, 508 F.2d 1150, 1157 (10th Cir. 1975); Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959); United States v. Alex Bechthold, 25 IBLA 77, 82 (1976).

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); United States v. Paul P. Fisher and Buel B. Fisher, 37 IBLA 80 (1978).

A Government mineral examiner in evaluating a mining claim is under no duty to undertake discovery work or to explore beyond the current workings of a claim. It is incumbent upon the mining claimant to keep discovery points available for inspection by a Government mineral examiner. United States v. Johnson, 33 IBLA 12 (1977); United States v. Becker, 33 IBLA 301 (1978). Moreover, a Government mineral examiner need not excavate or rehabilitate any purportedly mineralized area which is concealed by overburden or is otherwise difficult of access. Under proper circumstances, the testimony of the mineral examiner may establish a prima facie case of lack of discovery even though he was not physically on each mining claim. United States v. Rukke, 32 IBLA 155 (1977); United States v. Long Beach Salt Co., 23 IBLA 41 (1975).

In determining the validity of a mining claim in a Government contest, the entire evidentiary record must be considered; therefore, if evidence presented by the Contestees shows that a discovery has not been made, it may be used in reaching a decision that the claim is invalid because of a lack of discovery, regardless of any defects in the Government's prima facie case. United States v. Roger and Stephanie Cichetti, 36 IBLA 124 (1978); United States v. Michael Slater, 34 IBLA 31 (1978); United States v. Clarion W. Taylor, Sr., et al., 19 IBLA 9 (1975).

Where a claimant has held mining claims for several years and has attempted little or no development or operations, a presumption is raised that he has failed to discover valuable mineral deposits or that the market value of discovered minerals is not sufficient to justify the costs of extraction. United States v. Zweifel, 500 F.2d 1150 (10th Cir. 1975); United States v. David L. King, et al., 34 IBLA 15 (1978).

Analysis

The testimony and documents submitted by the contestant's expert witness established a prima facie case that there are no mineral deposits exposed on the subject claims that would justify a person of ordinary prudence in attempting to develop them with a reasonable prospect of success. Mr. Ball's assay reports reveal there are negligible amounts of gold, silver and manganese on the claims. In addition, there were no signs of mining activity or mining equipment on the claims. Although Mr. Ball did not go on every one of the claims, he explained the circumstances which are set forth in the next paragraph and indicated that there was no reason to expect a significant difference between one area and another. It is noted that the contested claims cover a large area in California, and that the locators other than Mr. Zimmers and Ms. Kelly live in another state, and have never been active on the claims.

Mr. Zimmers was given every opportunity to show his discovery points, but refused to do so and stated that he did not want samples taken. Mr. Ball could not find any discovery markers. Since Mr. Zimmers contended he made his discoveries from a USGS mineral survey, Mr. Ball examined the survey but was unable to determine from that document where valuable mineral deposits can be found. A spectrographic analysis of some mineral samples did not reveal any unique or uncommon minerals on the claims. Consequently, Mr. Ball concluded no prudent person would take steps to develop them. In his view, there is no economically viable method of extracting minerals from the claims, and Mr. Zimmers' prospective mining methods are not practical.

Mr. Zimmers has no background in practical mining and has sold no minerals from the claims. Over a lengthy period he has been preoccupied with obtaining public lands for the Cherry Flat Project, rather than prospecting on the claims or developing them. Consequently, a presumption that these claims are invalid has been raised. In particular, Mr. Zimmers has failed to submit convincing evidence to lend support to his allegations that sand and clay on the claims have unique or exceptional qualities or that there is a sufficient quantity of such materials. He relies heavily upon a townsite which is to be occupied by artisans and craftsmen whose requirements will create a portion of the market for the minerals he intends to mine. Any such prospective market will not support a finding of marketability. See United States v. Michael Slater, 34 IBLA 31

(1978). Moreover, he intends to use clay found on the claims to produce stoneware, pottery and other functional items. These products normally utilize "common clay" which is not locatable. Mr. Zimmers acknowledged also that the sand found on the claims has the same general attributes of sand which is found elsewhere.

Mr. Zimmers has failed to introduce sufficient evidence to overcome the Agriculture Department's prima facie case. In discussing his proposals to install a flotation plant and a hydro-electric power source he moved from a plan which is merely impractical (separating out the constituents of the sands found on the claims) to ideas which seem to be the product of day dreaming. He has neither the experience nor the funds to carry out those proposals.

The locators of the contested claims have engaged in virtually no prospecting work, and have not arranged for the testing of samples by reputable assaying firms. The emphasis has been on cabin building and colonization. There is no indication that Mr. Zimmers' more recent activity -- the filing of amended notices, overlapping locations or relocations -- is tied to efforts to process materials or conduct further exploration on the claims.

The Contestant became aware of the Amended Notice for the contested Monday Creek P.M.C. placer mining claim (recorded in Trinity County in January, 1978) and incorporated a reference to that claim in the Complaint. However, as to the five other contested claims (Northwest Mining Association #5, #7, #9, #10, #11 and #12 having been abandoned -- see Answer filed May 15, 1978) the Complaint refers to location notices filed in 1976, rather than to amended notices filed approximately six weeks prior to issuance of the Complaint. This may provide an area for continued jousting by the parties. The validity of the Northwest Mining Association placer mining claim and The Lucky Strike lode claim does not seem to have been placed in issue by the Complaint and Answer in this contest.

The Contestant has sustained charge 5A of the Complaint as to each of the contested claims. Accordingly, the Northwest Mining Assn. #1; Northwest Mining Assn #2; Northwest Mining Assn. #3; the Monday Creek P.M.C.; the Northwest Mining Association #6; and the Northwest Mining Association #8

placer mining claims are hereby declared null and void. I will direct no ruling to charges 5B and 5C of the Complaint.

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, 1978). 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 Agriculture, whose name and address appear below.

Enclosure: Additional Information Concerning Appeals

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