

Editor's note: appealed - aff'd, Civ. No. S-80-593 MLS (E.D. Calif. Jan. 25, 1982), aff'd No. 82-4169 (9th Cir. May 23, 1983)

UNITED STATES

v.

JAMES S. SETTE

IBLA 79-365

Decided April 4, 1980

Appeal from decision by Administrative Law Judge Dean F. Ratzman holding Ruth Matapan lode mining claim null and void. CA 4240.

Affirmed.

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

Where a Government mineral examiner testifies that he has examined a claim and found the mineral value insufficient to support a finding of discovery, a prima facie case of invalidity has been established. Government mineral examiners are not required to perform discovery work for claimants nor to explore beyond a claimant's workings.

2. Administrative Procedure: Burden of Proof -- Mining Claims:
Contests -- Mining Claims: Discovery: Generally

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; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made.

3. Mining Claims: Discovery: Generally

It is a cardinal principle of mining law that mineralization that only warrants

further prospecting or exploration in an effort to ascertain whether sufficient mineral might be found to justify mining development does not constitute a valuable mineral deposit.

4. Mining Claims: Discovery: Generally

Discovery of a valuable mineral deposit has been made where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. Discovery of gold and other minerals sufficient to support a mining claim must be made on the claim itself, notwithstanding discovery of gold on nearby land which might persuade a reasonable prospector to continue his search for a valuable mineral deposit on the claim.

APPEARANCES: William B. Murray, Esq., Portland, Oregon, for appellant; Charles F. Lawrence, Esq., Office of the General Counsel, U.S. Department of Agriculture, San Francisco, California, for the Government.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

James S. Sette appeals from the April 3, 1979, decision of Administrative Law Judge Dean F. Ratzman, which declared the Ruth Matapan lode mining claim null and void because no discovery of a valuable mineral deposit was shown to exist within the limits of the claim.

This proceeding arose with the filing of a complaint by the Bureau of Land Management at the request of the United States Forest Service against the Ruth Matapan lode mining claim, situated within secs. 17 and 20, T. 45 N., R. 10 W., Mount Diablo meridian, Siskiyou County, California, in the Klamath National Forest. The complaint charged:

A. There are not presently disclosed within the boundaries of the mining claim minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery.

B. The boundaries of the claim have not been clearly marked on the ground.

The contestee denied the charges and the matter was heard before Judge Ratzman at Yreka, California, on November 14, 1978. The contestee was not represented by counsel at the hearing, but appeared on his own behalf.

We have reviewed the record in this case and the arguments advanced by the parties. The Judge's decision sets out a summary of the testimony, the pertinent evidence, and the applicable law. We are in agreement with the Judge's findings and conclusions, and adopt his decision in its entirety as the decision of this Board. A copy of the Judge's decision is attached hereto as Appendix A.

Appellant states that a profitable gold mine was operated on the land in issue under an earlier mining claim until 1942, when all gold mining ventures were shut down by War Production Board Order L-208 as nonessential mines. Appellant argues that half of the ore-bearing formation remains unmined and that the grade of ore being profitably mined pre-1942 would be likewise profitable under the current prices for gold. He contends that the examination by Forest Service examiner Emmett Ball, Jr., was not in accordance with established standards in the Field Handbook for Mineral Examiners, as published by the Bureau of Land Management. The samples taken by Ball in 1978 were chip samples, not channel samples as the Handbook suggests.

Appellant alludes to three contracts with the United States. One, the right of appellant's predecessor-in-interest under the mining law. Appellant's father, a successor to the original claimant, filed for mineral patent, but the patent application was not perfected at the time of his death in 1955. His mother later relinquished the claim in an alleged contract under the Johnson-Church Act (Mining Claim Occupancy Act), 30 U.S.C. §§ 701-709 (1976), whereby the Government (Forest Service) agreed to deed to her the 4 acres on which her home and improvements were situated. She died before final action was taken, and the case was closed. Thereafter, appellant relocated the Ruth Matapan lode mining claim as it had been surveyed under MS 6470 (California), and thus acquired a contractual right to possession of the claim and the option to apply for patent. He alleges that he has acted in good faith in his attempt to redevelop a paying mine and argues that the current increase in the price of gold be considered in this case. In this way, the marginal sample values obtained by Ball would be converted into probable profitable amounts. Appellant maintains that his claim is prospectively valuable under the rule set out in East Tintic Consolidated Mining Claim, 40 L.D. 271 (1911), and in the holdings of the courts in Adams v. Udall, 318 F.2d 861 (9th Cir. 1963).

The Forest Service did not submit an answer to appellant's statement of reasons.

[1] A prima facie case is established by the United States when a Government mineral examiner testifies that he has examined the claim

and could find no evidence showing a discovery of a valuable mineral deposit. United States v. Harder, 42 IBLA 206 (1979); United States v. McClurg, 31 IBLA 8 (1977); United States v. Reynders, 26 IBLA 131 (1976). Government mineral examiners are not required to perform discovery for claimants, nor to explore beyond a claimant's workings. United States v. Harder, *supra*; United States v. Bechtold, 25 IBLA 27 (1976).

[2] The record more than adequately demonstrates that the Government established its prima facie case in this proceeding. The burden then shifted to the claimant to show by a preponderance of the evidence that his claim is valid. United States v. Zweifel, 508 F.2d 1150 (10th Cir. 1977); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Tempest Mining Co., 40 IBLA 297 (1979). The claimant herein did nothing more than to suggest he was still looking for the ore body which his father had contended still existed within the claim.

[3] To establish a discovery of a valuable mineral deposit, a claimant must show more than that a prudent man would explore the claim further; he must show that a valuable mineral deposit has been physically exposed within the limits of the claim. United States v. Tempest Mining Co., *supra*. 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. United States v. Russell, 40 IBLA 309 (1979). See also Chrisman v. Miller, 197 U.S. 313 (1905); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969).

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 contestee shows that there has not been a discovery of a valuable mineral deposit, it may be used in reaching a decision that the claim is invalid for lack of discovery, regardless of any defects in the Government's prima facie case. United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975).

[4] Appellant's reliance on Adams and Converse is misplaced. Adams held that discovery of a valuable mineral deposit within the limits of the claim is essential to a valid location, but value, in the sense of proved ability to mine the deposit at a profit, need not be shown. 318 F.2d at 870. The sine qua non of a valid mining location is discovery of a valuable mineral deposit. Appellant has not shown that he has made such a discovery within the limits of the Ruth Matapan claim. Converse held that the test relating to discovery should be strictly applied against the claimant in a Government mining contest, and that the finding of some mineral, or even a vein or lode, is not enough to constitute discovery. The extent and value of the mineral must be considered also. 399 F.2d at 619. Further, Converse

stated that the marketability test set out in United States v. Coleman, 390 U.S. 599 (1968), requiring that the mineral can be extracted, removed, and marketed at a profit, is applicable to all mining claims, including those for precious metals.

East Tintic Consolidated Mining Claim, 40 L.D. 271 (1911), cited by appellant, held at 273-74: "To constitute a valid discovery upon a lode mining claim for which patent is sought there must be actually and physically exposed within the limits thereof a vein or lode of mineral-bearing rock in place, possessing in and of itself a present or prospective value for mining purposes." However, the decision also states:

The exposure * * * of substantially worthless deposits on the surface of a lode mining 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.

Id. at 273.

After subsequent reconsideration, the Department rendered its decision, East Tintic Consolidated Mining Co., 43 L.D. 79 (1914), holding in the syllabus:

A discovery of ore in commercial quantities is not necessary to a valid lode location; but it is sufficient if a vein be found bearing mineral in such quantity and of such quality as would justify a person of ordinary prudence in making further expenditures of money and labor with a reasonable prospect of success in developing a valuable mine.

This decision followed Jefferson-Montana Copper Mines Co., 41 L.D. 320 (1912), which defined the requirements for discovery in a lode mining claim as follows:

After a careful consideration of the statute and the decisions thereunder, it is apparent that the following elements are necessary to constitute a valid discovery upon a lode mining claim:

1. There must be a vein or lode of quartz or other rock in place;

2. The quartz or other rock in place must carry gold or some other valuable mineral deposit;

3. The two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine.

It is clear that many factors enter into the third element: The size of the vein, as far as disclosed, the quality and quantity of mineral it carries; its proximity to working mines and location in an established mining district, the geological conditions, the fact that similar veins in the particular locality have been explored with success, and other like facts, would all be considered by a prudent man in determining whether the vein or lode he has discovered warrants a further expenditure or not.

Id. at 323-24.

It must be pointed out that East Tintic arose because the cost of drill holes had not been accepted by the Department as legitimate expenditures to support appellant's mineral patent application. This drill hole information was subsequently accepted as evidence in determining that discovery had been shown.

The case of the appellant in this proceeding is not bolstered by any such drill hole information. Accordingly, we must affirm the Judge that the evidence of the claimant did not preponderate over that submitted by the Government in its prima facie case. Having so determined, it was not necessary for the Judge to rule on the second charge of the contest complaint.

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.

Douglas E. Henriques
Administrative Judge

I concur:

Edward W. Stuebing
Administrative Judge

ADMINISTRATIVE JUDGE GOSS CONCURRING:

As to appellant's position that the Government should be estopped from the contest because of an asserted pressure on appellant's mother to relinquish her mining rights in order to file for patent to her homesite under the Mining Claims Occupancy Act, 30 U.S.C. §§ 701-09 (1976), the record shows she was represented by an attorney. Appellant has not shown such prejudice nor affirmative misconduct as could be the predicate for any claim of estoppel. See INS v. Hibi, 414 U.S. 5, 8 (1973).

Although the Board recognizes the importance of the recent increases in the price of gold and silver, appellant has not presented sufficient evidence either as to quantity of ore of a particular quality, nor as to the expenses to be expected in mining and marketing. Further, appellant, as a prudent man, has himself declined to invest additional sums in exploring the mine. For example, he stated at the hearing:

Everybody who worked in the tunnel says I should shove it in for about another 70 or 100 feet, you know. Well, if I was a man of a lot of means, I would, but if I want to shove a tunnel in 70 feet, you know, it's a gamble and I have a family I must support.

(Tr. 63).

Much of the material submitted by appellant is not directed toward the Ruth Matapan claim, concerned herein, but rather toward the Matapan claims in general. E.g., Exhibits F and G. As one example, appellant alleges that \$2,500,000 in ore has been extracted from the Matapan group of claims. Even if accepted as correct, this is not definitive evidence as to the Ruth Matapan claim and of course does not show what values are present today.

I concur in the main opinion. A discovery on the Ruth Matapan has not been proven.

Joseph W. Goss
Administrative Judge

April 3, 1979

United States of America,	:	<u>Contest No. CA! 4240</u>
	:	
Contestant	:	Involving the Ruth Matapan
	:	lode mining claim, situated
v.	:	in Secs. 17 and 20, T.
	:	45 N., R. 10 W., M.D.M.,
James S. Sette, :	:	Siskiyou County, California
	:	
Contestee	:	

DECISION

Appearances: Charles F. Lawrence, Attorney, Office of
the General Counsel, U.S. Department of
Agriculture, for the Contestant

James S. Sette, Medford, Oregon
In Propria Persona, Contestee

Before: Administrative Law Judge Ratzman

This is a contest brought by the Bureau of Land Management, United States Department of the Interior, on behalf of the United States Forest Service (USFS), Department of Agriculture, pursuant to the Hearings and Appeals Procedures, 43 CFR Part 4, to determine the validity of the above-named lode mining claim.

The contestant filed a Complaint on May 27, 1977, which alleges: "There are not presently disclosed within the boundaries of the mining claim minerals of a variety subject to the mining laws sufficient in quantity, quality, and value to constitute a discovery." The Complaint also avers: "The boundaries of the claim have not been clearly marked on the

ground." The contestee filed an Answer denying the allegations in the Complaint on June 27, 1977. A hearing was held on November 14, 1978 in Yreka, California. The claim is situated near Scott Bar in the Klamath National Forest in Siskiyou County, California.

Emmett B. Ball, Jr., a mining engineer for the USFS was called to testify on behalf of the contestant. He has a degree in mining engineering from the Mackay School of Mines (University of Nevada) and extensive experience in examining and evaluating property for mineral character. Tr. 12. He has examined the Ruth Matapan claim on three occasions. The initial inspection was made in 1971. Tr. 14. At that time he took a hand-selected quartz sample. Other inspections were made in September, 1976 and June, 1978. Tr. 37. He found a pit that appeared to have been previously worked. The overburden had been washed off and several quartz veins were visible. Tr. 19, Ex. 7. He also found a trailer, small cabin, large house, garage and old gasoline pump on the claim. In 1976, Mr. Sette showed him a reopened adit 480 feet long. Tr. 20, Ex. 9.

A location notice for the Ruth Matapan lode mining claim was filed on February 3, 1975. Ex. 1. It states that the claim was located on December 17, 1974 by James Sette. During the 1976 inspection Mr. Sette showed Mr. Ball the pit and reopened adit, but he did not point out the claim corners. Tr. 24. In addition, Mr. Sette did not want any samples taken then because he had not found any gold at that date. Tr. 25. In June, 1978 a five pound sample was taken from a quartz exposure near the adit. This was a chip sample taken across an eighteen inch wide vein. The samples were sent to Metallurgical Laboratories in San Francisco, California for fire assay. Tr. 27. A December 5, 1977 assay report disclosed only 0.03 oz. of gold per ton, with a total value of \$6.00 a ton. The silver quantity was 0.43 oz. per ton, a value of \$2.40 a ton. Tr. 31, Ex. 5. The assay report on the 1978 sample (Ex. 6) revealed only 0.004 oz. of gold per ton.

To obtain a profit from a lode mining claim, \$50 to \$60 per ton ore values must be produced. Mr. Ball estimated \$20 a ton stoping costs and \$20 freight costs. Other expenses would be incurred in milling the material. Tr. 32. Sufficient ore reserves should be present, and Mr. Ball has not

found any exploratory drilling on the claim. Tr. 33. It was stipulated that the present day cost of excavating a tunnel would be \$100 to \$150 a foot. Tr. 82. In the opinion of the USFS mineral examiner, a prudent man would not be justified in expending time, money and effort on the contested claim with a reasonable expectation of developing a paying mine. Tr. 40.

On cross-examination, Mr. Ball admitted that a recovery of \$21 a yard would produce a viable operation if it was free gold from a placer operation. Tr. 49.

James S. Sette testified on his own behalf. He filed a location notice in 1974, but he had inherited a claim covering the same ground from his mother in 1968. Tr. 53. He contended that since August, 1975, he had received three firm offers for mining the claim. Tr. 54. At the hearing, Mr. Sette alluded to another firm offer made in November, 1978 by Mr. Milbourne. One person who made an offer stated that it would cost a million dollars to develop the claim. Tr. 57. Mr. Sette further testified that the 480 foot long adit on the claim was supplied with power when it was operated in the 1930s. Tr. 62. It was stipulated that corner markers were placed on a former claim called the Ruth Matapan in January, 1948. Tr. 65.

A Decision issued on June 26, 1953, by the BLM California Land Office accepting final proof of a mineral entry by Fred E. Sette was introduced into evidence. Ex. B. However, the Decision states "This final certificate is being issued subject to a field examination by a Representative of the United States as provided by circular 276, and the Regulations" (citations omitted). Another Decision from the Land Office dated November 22, 1955, requested that the applicant for the Ruth Matapan claim furnish additional evidence revealing where a vein or lode was exposed on the claim. Ex. 13. The Decision stated there was insufficient evidence to confirm that there was a valuable deposit within the claim at that time. A subsequent Decision, issued on October 3, 1956, indicated no response had been made by Maude F. Sette (administratrix of Fred E. Sette's estate) and additional evidence had not been furnished. Therefore the Sette application was closed. Ex. 16.

Mr. Sette introduced a letter dated July 16, 1949 from G.R.B. Elliot, a U.S. mineral surveyor. Ex. C. The letter referred to the Fred Matapan Fraction claim. The letter

<u>Matapan #4 - 30' - #1-6'</u>	Trace Gold nil silver
<u>Matapan Drift at 200' vein - 20"</u>	\$2.18 per ton gold \$0.04 per ton silver
<u>Matapan #6 Across 5' - 80' - #1</u>	\$12.50 per ton gold \$0.29 per ton silver
<u>Matapan #7 Drift Face 8" @480'</u>	\$3.79 per ton gold \$0.08 per ton silver
<u>Matapan #8 Portal Vein 24"</u>	\$0.92 per ton gold trace silver

Mr. Sette did not take these samples and did not submit evidence as to the quantity of material submitted for assay. Tr. 115-117. They were sent to the assayer by another person. Tr. 105.

Mr. Sette admitted on cross-examination that he has not done any mining on the claim since he inherited it in 1968. Tr. 117. None of the offers alluded to by Mr. Sette were signed by the offerors. Only one had been signed by Mr. Sette. Tr. 119, 126. He contends the entire claim can be mined and he wishes to lease it to someone else, since he is a novice in the field of mining. Tr. 128.

John Newkirk, the Secretary of the Jackson County Mining District Association, testified on behalf of the contestee. He has been an active miner since 1957. Tr. 130. He has taken several courses in geology and mineralogy at the Colorado School of Mines. Currently, he owns the Black Foot Mining Company in Medford, Oregon. He also owns approximately 500 mining claims in association with others. Tr. 131.

Mr. Newkirk took grab samples out of the 480 foot long adit at 35 foot intervals. He ran a chemical test and a fire assay on the samples. This was done after he concentrated the samples. Tr. 132. He asserted he recovered a considerable or ample amount of gold, but he did not state a specific quantity per ton. Tr. 133. He further claimed to have found silver, platinum, uranium tungsten, lead and iron. Tr. 133.

On cross-examination, Mr. Newkirk testified he took 17 five pound grab samples. Tr. 137. He dried the material, crushed and screened it, and processed it through a 200 mesh concentrator. The net effect is similar to a gravity separation method. Tr. 138. He then separated the larger particles from the smaller ones. Tr. 140. A chemical assay was made of a teaspoonful of the remaining material. Tr. 140.

Summary of Applicable Law

The mining statutes do not expressly define a discovery. However, it has been held that one exists where:

"* * * minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a profitable mine. . ." Castle v. Womble, 19 L.D. 457 (1894)

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

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 finding of mineralization may suggest the possibility of mineral of sufficient value and amount to justify further exploration, but it does not establish a discovery. Chrisman v. Miller, 197 U.S. 313 (1905), Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied 393 U.S. 1025 (1969).

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 discovery on one claim will not support rights to another claim or group of claims even though the claims are contiguous. A valuable mineral deposit must be found within the limits of each claim. Barton v. Morton, 498 F.2d 288, 290 (9th Cir., 1974); United States v. J. L. Block, 80 I.D. 571, 576 (1973).

Before a finding of discovery of a valuable mineral deposit within a mining claim is warranted, it must be shown as a present fact that the claim is valuable for minerals. Evidence of past profitable mining is not proof the claims are presently profitable. United States v. Nicholson, et al., 31 IBLA 224 (1977); United States v. John L. Maley and James F. Pagel, 29 IBLA 201, 207 (1977); United States v. Alex Bechthold, 25 IBLA 77, 90 (1976); United States v. Wallace W. Vaux, 24 IBLA 289 (1976).

Determination

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 Ruth Matapan claim which would justify a person of ordinary prudence in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine. Mr. Ball found little evidence of active mining. The samples he took produced negligible amounts of gold and silver. Mr. Sette was reluctant to allow sampling from the claim because he had not recovered any gold yet. After comparing the expense of mining with the values produced from his samples, Mr. Ball reached his negative conclusion regarding the existence of a discovery of valuable minerals.

Mr. Sette has failed to introduce sufficient evidence to refute the contestant's prima facie showing of invalidity. On the contrary, his assay reports reveal negligible values of gold and silver. Thus his evidence supports the case made by the contestant.

Mr. Sette admits it would cost a great deal of money to develop this claim. Although he has introduced evidence of a prior patent application for the Ruth Matapan claim, that application was closed because there was a failure to submit evidence to show there was a mineral deposit within the claim. Other documents which he has submitted have little or no bearing on the issue in this contest. The 1949 letter from G.R.B. Elliot refers to a discovery not on the Ruth Matapan claim but on the nearby Tip Top claim. Evidence of a discovery on another claim will not support a finding of discovery on the Ruth Matapan claim. As has been indicated, the letters referring to the past production from the Matapan Mine have little probative value in the inquiry as to the present validity of the claim. Mr. John Newkirk took grab samples only, and provided no specific information as to values.

It is concluded that there has been no discovery of a valuable mineral deposit within the limits of the contested claim. Accordingly, the Ruth Matapan lode claim is hereby declared null and void under the charge specified in Paragraph 5A 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, 1977). 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.

Distribution attached.

