

Editor's note: Reconsideration denied by order Aug. 20, 1980

UNITED STATES
v.
ROY PETERSON AND CHARLES R. SWEET

IBLA 79-534

Decided April 23, 1980

Appeal from decision of Administrative Law Judge Robert W. Mesch declaring lode mining claims invalid. CA 5049.

Affirmed.

1. Act of September 28, 1976 -- National Park Service Areas: Land: Mining

The Secretary of the Interior is not precluded from contesting a mining claim by the provisions of sec. 6, Act of Sept. 28, 1976, P.L. 94-429, 16 U.S.C. § 1905 (1976), where a contest complaint has been filed within 2 years of the date of enactment of the statute.

2. Mining Claims: Discovery: Generally

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

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

When the Government contests mining claims on a charge of no discovery, it assumes the

burden of going forward with sufficient evidence to establish a prima facie case. When it has done so, the burden shifts to the claimants to show, by a preponderance of the evidence, that a discovery of a valuable mineral deposit has been made and still exists within the limits of each claim under contest.

4. Evidence: Generally -- Mining Claims: Contests

The decision of an Administrative Law Judge will not be disturbed on appeal where the preponderance of the evidence supports the result reached, and the appellants have not pointed out any error in the decision.

APPEARANCES: Irving L. Kerper, Esq., Northridge, California, for appellants; John McMunn, Esq., Office of the Solicitor, San Francisco, California, for appellee.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

This appeal arises from a decision by Administrative Law Judge Robert W. Mesch ^{1/} declaring 33 lode mining claims, DV No. 1 through DV No. 29 and DV No. 37 through DV No. 40, invalid. The claims are situated in secs. 28, 29, and 33, T. 21 N., R. 2 E., San Bernardino meridian, Inyo County, California, within Death Valley National Monument.

On May 11, 1978, the Bureau of Land Management (BLM), on behalf of the National Park Service, issued a complaint charging that there was no discovery of valuable minerals of a variety subject to the mining laws presently disclosed on any of the claims. The claimants denied the charges and the matter came on for a hearing.

The hearing was held on May 2, 1979, in Lawndale, California. Judge Mesch issued his decision holding the claims invalid on June 26, 1979.

The issues to be considered on appeal are two in number:

^{1/} Judge Mesch was appointed to the position of Hearing Examiner in the Interior Department pursuant to 5 U.S.C. § 3105 (1976). The title "Hearing Examiner" was changed to "Administrative Law Judge" by an order of the Civil Service Commission (now the Office of Personnel Management), published at 37 FR 16787 (Aug. 19, 1972).

First: Is the United States estopped by the terms of P.L. 94-429, 16 U.S.C. § 1905 (1976), from challenging the claims contested in this proceeding?

Second: Was the decision of Judge Mesch that the contested claims are invalid correctly based on the record of this proceeding?

Section 6, P.L. 94-429 (16 U.S.C. § 1905 (1976)), reads as follows:

Within two years after [September 28, 1976] the Secretary of the Interior shall determine the validity of any unpatented mining claims within Glacier Bay National Monument, Death Valley and Organ Pipe Cactus National Monuments and Mount McKinley National Park and submit to the Congress recommendations as to whether any valid or patented claims should be acquired by the United States, including the estimated acquisition costs of such claims, and a discussion of the environmental consequences of the extraction of minerals from these lands. The Secretary shall also study and within two years submit to Congress his recommendations for modifications or adjustments to the existing boundaries of the Death Valley National Monument and the Glacier Bay National Monument to exclude significant mineral deposits and to decrease possible acquisition costs.

[1] Appellants argue that the clear wording of this statute establishes that the Secretary must determine the validity of unpatented mining claims within Death Valley National Monument, inter alia, within 2 years after September 28, 1976, and within the same period, the Secretary must also make recommendations to the Congress relative to acquisition of any existing claims, including environmental consequences, and relative to modification of the boundaries of Death Valley National Monument to exclude significant mineral deposits. It is the position of appellants that inasmuch as the Secretary had not invalidated the subject claims within the 2-year period provided by statute, he is now precluded from proceeding against them under P.L. 94-429. Appellants further argue that if the present proceeding is under the Secretary's general powers to administer the mining laws on public lands, the contestants should be free to do further exploratory drilling upon expiration of the 4-year moratorium set out in section 4 of P.L. 94-429. 2/

2/ Section 4 of P.L. 94-429 (16 U.S.C. § 1903 (1976)) reads as follows:

"For a period of four years after [September 28, 1976,] holders of valid mineral rights located within the boundaries of Death Valley National Monument, Mount McKinley National Park, and Organ Pipe Cactus

The Government replies that the legislative history of P.L. 94-429 does not discuss the question of whether the Government would be estopped to contest a mining claim if a final determination of the validity of a claim were not made by September 28, 1978. It argues that the legislative history seems to indicate that the purpose of section 6 was to give Congress time to consider possible acquisition of valid claims in Death Valley National Monument during the period of temporary cessation of certain mining activities in Death Valley as provided by section 4. The Government contends that initiation of a contest complaint is an implicit finding by the Secretary that the contested claims need not be considered for acquisition by condemnation or by purchase. It is suggested that the Secretary is not required by the Act to make a final determination of the validity of each unpatented mining claim within Death Valley National Monument by the end of the 2-year period. Inasmuch as exhaustion of all administrative processes can easily consume more time than 2 years, the Government maintains that the Act is satisfied by the issuance of a complaint.

In the legislative history of P.L. 94-429, as reprinted in [1976] U.S. Code Cong. and Ad. News 2487, 2490, H.R. Rep. No. 94-1428 states:

fn. 2 (continued)

National Monument shall not disturb for purposes of mineral exploration or development the surface of any lands which had not been significantly disturbed for purposes of mineral extraction prior to February 29, 1976: Provided, That if the Secretary finds that enlargement of the existing excavation of an individual mining operation is necessary in order to make feasible continued production therefrom at an annual rate not to exceed the average annual production level of said operation for the three calendar years 1973, 1974, and 1975, the surface of lands contiguous to the existing excavation may be disturbed to the minimum extent necessary to effect such enlargement, subject to such regulations as may be issued by the Secretary under section [1902 of this title.] For purposes of this section, each separate mining excavation shall be treated as an individual mining operation."

The argument by appellants that they should be allowed to resume their exploratory drilling after the termination of the 4-year moratorium imposed by section 4 of the Act does not withstand close scrutiny. The Act closed Death Valley National Monument to mining exploration, subject to valid existing mineral rights, and limited mining operations within the monument to those places where actual extraction of mineral had been ongoing prior to February 29, 1976. Inasmuch as these appellants were not extracting mineral from any of the claims on February 29, 1976, the validity of their claims had to be established as of September 28, 1976, the date P.L. 94-429 was enacted. We cannot see that their rights have been detrimentally prejudiced by the moratorium.

"It is contemplated by the terms of the bill that the Secretary will determine within two years the validity of the claims and recommend to the Congress whether or not they should be acquired." We believe, as did Judge Mesch, that the initiation, within the 2-year period, of this contest against the validity of the claims satisfied the statute. The contest complaint was notice to the claimants that the Department believed the claims to be invalid, and the hearing below allowed the claimants an opportunity to rebut the Government's contentions. In the circumstances of this case, the Government is not precluded after the 2-year period from initiating contest proceedings.

[2] We look now at the second issue, that is whether the record supports Judge Mesch's holding that the subject mining claims are invalid.

The law of the case may be epitomized as follows:

Valuable mineral deposits on lands belonging to the United States within Death Valley National Monument were open to operation of the mining laws prior to September 28, 1976, the date of enactment of P.L. 94-429, 90 Stat. 1342, 16 U.S.C. §§ 1901-1912 (1976). 30 U.S.C. § 22 (1976). Location of a mining claim conveys no rights to the claimant until there is shown a discovery of a valuable mineral deposit within the limits of the claim. 30 U.S.C. § 23 (1976). Discovery has been achieved when one finds a mineral deposit of such 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. Castle v. Womble, 19 L.D. 455 (1894), approved by the Supreme Court in Chrisman v. Miller, 197 U.S. 313 (1905), and followed frequently thereafter, e.g., Cole v. Ralph, 252 U.S. 286 (1920); Cameron v. United States, 252 U.S. 450 (1920); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); United States v. Coleman, 390 U.S. 599 (1968). The "prudent man" test has been complemented by the "marketability" test requiring a claimant to show that mineral can be extracted, removed, and marketed at a profit. United States v. Coleman, *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. A valuable mineral deposit has not been found simply because the facts might warrant a search for such a deposit. Barton v. Morton, 498 F.2d 288 (9th Cir. 1974); United States v. Porter, 37 IBLA 313 (1978). Similarly, it is not enough that the mineral values exposed justify further exploration to determine whether actual mining operations would be warranted. In order to have a valid mining claim, valuable minerals must be exposed in sufficient quantities to justify development of the claim through actual mining operations. United States v. Marion, 37 IBLA 68 (1978).

When land is closed to location under the mining law subsequent to the location of a mining claim, the claim cannot be recognized as valid unless (a) all requirements of the mining law, including discovery of a valuable mineral deposit, were met at the time of the withdrawal, and (b) the claim presently, *i.e.*, at the time of the hearing, meets the requirements of the law. United States v. Porter, supra; United States v. Netherlin, 33 IBLA 86 (1977).

[3] When the Government contests the validity of a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case. The burden then shifts to the claimant, who is seeking the benefits of the mining law, to overcome the Government's showing by a preponderance of the evidence. United States v. Springer, 491 F.2d 239 (9th Cir. 1974); United States v. Porter, supra.

[4] Judge Mesch succinctly, but adequately, reported the evidence and testimony he received at the hearing as follows:

The 33 contested claims were located in May of 1969. They were located to cover an area that the Contestees had been claiming under mining claims located in 1964. Each claim embraces 20 acres. The claims are contiguous and cover approximately a square-mile area. They are situated in the vicinity of Wingate Wash, about 5 miles southwest of the Amargosa River, in the southern portion of Death Valley National Monument. The nearest settlement is Shoshone, California, about 40 miles to the east. The only structure on the claims is a lean-to about 6 feet by 8 feet. The claims allegedly contain valuable deposits of lead with associated zinc, copper and silver. In 1969 the claimants shipped 15 tons of mineralization to a smelter at Selby, California. This material came from a pit on the DV No. 37 claim and was concentrated by hand sorting prior to shipment. No other mineralization from the claims has been sold.

A qualified mining engineer with the National Park Service, L. S. Zentner, examined the mining claims on several occasions between 1976 and the time of the hearing. He took four samples from the pit on the DV No. 37 and one sample from the DV No. 10 claim. Mr. Zentner testified that he did not find any mineralization worthy of sampling on the remaining claims. He expressed the opinion that a person of ordinary prudence would not be justified in the expenditure of labor and means upon any one of the claims with a reasonable prospect of success in developing a valuable mine. Mr. Zentner reached this conclusion because of "the weak mineralization over a very limited area" (Tr. 66). He thought that the claims were

"probably a pretty poor prospect" for even finding a valuable mineral deposit at depth (Tr. 65).

I find that the National Park Service presented a prima facie case in support of the allegation that the claims are invalid because they have not been perfected by the discovery of a valuable mineral deposit.

The mining claimants called Ronald J. Grabyan who had conducted an extensive investigation into the geology and mineralization of the claim area in 1972 and 1973. Mr. Grabyan published a thesis covering this work in 1974 in partial fulfillment of the requirements for a Master of Science Degree in Geological Sciences. He testified that the purpose of his work was to determine whether there "was enough evidence to say that there was possible or probable ore in this area, and whether or not to continue exploration of these prospects" (Tr. 131). In his thesis Mr. Grabyan concluded:

The partial superposition of the magnetic low, gravity highs, geochemical highs, alteration features, and strong ore occurrence indicates to me that there is strong potential for substantial ore in this area. The first step in the expansion of an exploration program in this area, however, should involve additional bulldozer stripping around the Wingate Wash mine. The second phase should provide for drilling three exploratory holes from 500 to 1000 feet deep as shown in Figure 54 (Exh. C, p. 214).

....

The various techniques used in this study have all contributed positively to the conclusions herein. The geological studies provided a framework for designing the geophysical and geochemical surveys. The geophysical investigations delineated specific areas of economic potential, and the geochemical studies provided supporting evidence of potential ore at depth. The integration of these techniques, however, has contributed the strongest evidence for potential ore at depth (Exh. C, p. 217).

The mining claimants also called Peter E. Galli who has an extensive background as a mining engineer and geologist and who has been working as a private consulting geologist since 1970. He investigated the mining claims

in 1975 for a Canadian based company. As part of his work, seven holes were drilled on the property with a rotary percussion drill. The holes varied in depth from 140 feet to 465 feet. Mr. Galli testified that as a result of his work "we felt it was certainly a good prospect and it certainly required additional drilling, and I so recommended in the company report" (Tr. 73). Nevertheless, they terminated further exploration efforts in the fall of 1975 because, among other things, "we just felt it wasn't much hope of really mining in the Park if we did find a major deposit" (Tr. 73). Mr. Galli characterized the property as "a significant mineral discovery" that "requires a lot more geological investigation and drilling" (Tr. 77). He also testified:

[T]here has to be a lot more drilling done, and I think with a lot more drilling, I think you are going to substantiate the fact that there are some extremely large amounts of mineral -- of lead silver and copper in the area, and I am certain that you are going to eventually or if possible, if you could really get in there and perform the job, that you would find a viable ore deposit, eventually (Tr. 76, 77).

....

... [W]ith what is available there in way of both surface sampling, the favorable geology, I mean, results of the drilling thus far, I think the possibilities are good, are good that you will come up with a viable ore deposit (Tr. 91).

....

... [T]his is a prospect that requires, in my opinion, added exploration, and the stage that I would begin at, I would come in with a fairly extensive exploration program, and I would do it by rotary, because I can drill rotary holes a hell of a lot cheaper than you can diamond drill or even reverse circulation at this point, and I would just get in and I would say, use a 100-foot grid pattern, and just drill the heck out of it (Tr. 96, 97).

....

Q. Okay, now once you have done that, if it looked promising, you would drill some more, is that correct?

A. I would drill some more (Tr. 93).

....

Q. And if it looked pretty bad, or the other end of the spectrum, you would in fact say --

A. Pick up my marbles and go home (Tr. 98).

Charles R. Sweet, one of the mining claimants, also testified. He presented a comprehensive, but preliminary, feasibility study relating to mining operations on the claims. The study is based on many assumptions including the potential or possible ore reserves that might be found within the claims. While the study might be helpful in determining whether further exploration work should be done on the claims, it does not have any particular significance to the question of whether a valuable mineral deposit has, in fact, been found within any one of the claims. The following comments of Mr. Sweet are, however, significant:

But again, we are at the point of where we -- I think everybody at this point has recognized, that there needs to be -- what we have is a mineral occurrence that is encouraging, there has been some holes drilled, the holes were more than anomalous, by -- and I call one -- anything from five-tenths lead on up anomalous, and I think I can get some concurrence on that, that we do have the indications that we should go into a program like this of more drilling, at least on a widespread basis where you can pick up mineralization practically anyplace [sic] you drill a hole in a perimeter, whether or not the mineralization is commercial at this point in time, I don't know what the real significance of that is (Tr. 199, 200).

The evidence presented by the Contestees shows only that a prudent man might be warranted in spending further time and money in exploration work on the claims with a prospect of success in finding a valuable mineral deposit. This is not, however, sufficient to meet the requirements of the mining law. What is required is the actual finding of a mineral deposit of sufficient quality and quantity to justify, as a present fact, the expenditure of time and money in developing a mine.

From this evidence and testimony, Judge Mesch found that a valuable mineral deposit had not been discovered within any of the claims,

and concluded that the discovery requirement of the mining law had not been met so that each of the 33 contested claims is invalid. We agree.

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

We concur:

Frederick Fishman
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

