

UNITED STATES
v.
UBEHEBE LEAD MINES CO.

IBLA 80-211

Decided July 15, 1980

Appeal from a decision by Administrative Law Judge E. Kendall Clarke declaring null and void certain lode mining claims. CA-5127.

Affirmed.

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

In order to establish the existence of a discovery on a lode mining claim, there must be found within the limits of the claim a vein or lode of rock in place, bearing mineral 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 valuable mine.

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

Evidence in a mining claim contest showing only that further exploration might be warranted is insufficient to establish the discovery of a valuable mineral deposit.

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

Exhaustion of an ore deposit or a change in economic conditions which makes mining unprofitable may cause the loss of a previous discovery on a mining claim.

4. Mining Claims: Discovery: Generally – Mining Claims: Withdrawn Land – Withdrawals and Reservations: Effect of

When land is withdrawn from the operation of the mining laws subject to valid existing rights, as was the Death Valley National Monument on Sept. 28, 1976, the validity of a mining claim located prior to the withdrawal must be established as of the date of the withdrawal as well as of the date of the hearing.

5. Evidence: Burden of Proof – Mining Claims: Contests

When the United States contests a mining claim, it has assumed only the burden of going forward with sufficient evidence to establish a prima facie case on the charges in the contest complaint. The burden then shifts to the contestee to refute, by a preponderance of the evidence, the Government's case. The United States has established a prima facie case when a qualified Government mining engineer testifies that he has examined the claim and found the mineral values insufficient to support the discovery of a valuable mineral deposit.

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.

APPEARANCES: Joseph J. Snyder, Esq., Sepulveda, California, for appellant; John W. Burke III, Esq., Office of the Solicitor, U.S. Department of the Interior, San Francisco, California, for contestant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Ubehebe Lead Mines Co. appeals from the decision dated November 16, 1979, wherein Administrative Law Judge E. Kendall Clarke declared the Copper Bell, Copper Bell #1, Copper Bell #2, Copper

Bell #3, Butte #6 through #10, and West Extension Butte #3 lode mining claims null and void for lack of a discovery sufficient to satisfy the mining laws of the United States.

Counsel for the United States filed a motion to dismiss the appeal for procedural reasons. The Judge's decision is dated November 16, 1979. The notice of appeal was filed with the Judge within the 30-day period provided by 43 CFR 4.411. The statement of reasons was filed with this Board on January 7, 1980, well within the 30-day period allowed by 43 CFR 4.412. Proof of service of each document upon the Government's counsel was timely filed. We apperceive no procedural defect in this appeal. Accordingly, the Government's motion to dismiss is denied.

On July 7, 1978, the California State Office, Bureau of Land Management, at the request of the National Park Service, issued contest complaint CA 5127, charging that there are not presently disclosed within the boundaries of the aforementioned mining claims minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery. Contestee Ubehebe Lead Mines Co. answered timely, denying the charge. The matter came on for a hearing before Judge Clarke at Lawndale, California, on February 8, 1979.

The subject mining claims are situated within Death Valley National Monument in secs. 1, 2, 11, and 12, protracted T. 14 S., R. 40 E., Mount Diablo meridian, Inyo County, California. The site of the claims was closed to the further location of mining claims by the Act of September 28, 1976, 16 U.S.C. §§ 1901-1912 (1976). Under Congressional mandate, 16 U.S.C. § 1905 (1976), the Secretary of the Interior was directed to determine the validity of all unpatented mining claims within Death Valley National Monument within 2 years after September 28, 1976. Initiation of this contest proceeding by the complaint issued July 7, 1978, satisfied the statutory requirement. See United States v. Peterson, 47 IBLA 92 (1980).

Appellant states these reasons in support of its appeal:

1. Substantial evidence was introduced that a mineral deposit at the subject property has been found and 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.
2. Substantial evidence was introduced that the mine of Appellant has a proximity to a market at which there is a present demand for its product and the product can be marketed at a profit.

3. The opinions of the witnesses for Contestee [sic] were not based upon a complete inspection of the mine.

4. The opinion of the mining engineer testifying for Appellant was entitled to greater weight than given because of his experience in smaller mines of the type under consideration.

The law of the case may be summarized as follows:

[1] 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). It is well established that the sine qua non for a valid mining claim located on public land of the United States is discovery. The 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). Under the so-called "prudent man test," 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 consistently thereafter. Accord, 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); Adams v. United States, 318 F.2d 861 (9th Cir. 1963). The "prudent man test" has been complemented by the "marketability test" requiring a claimant to show that the mineral can be extracted, removed, and marketed at a profit. United States v. Coleman, supra; Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).

[2] 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 might 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). It is not sufficient that high mineral values are attached to certain samples where no evidence is presented establishing the quantity of such

mineralization and where these samples are shown to be in areas of high concentration not representative of the claim. Sedgwick v. Callahan, 9 IBLA 216 (1973).

[3] Although the claim may have been valid in the past because of a discovery on the claim of a valuable mineral deposit, it must be shown as a present fact at the time of the hearing that the claim is still valuable for minerals. A claim is properly held invalid where it has been successfully mined in the past but mining ceases for over 23 years and thereafter the claimant is unable to show by a preponderance of the evidence that minerals still exist on the claim in sufficient quantities of sufficient value so as to justify a mining operation with a reasonable prospect of success, in view of existing costs of resuming mining, mining operations, transportation, and processing. United States v. Wingfield, A-30642 (February 17, 1967). The exhaustion of the ore deposit or a change in economic conditions which makes mining unprofitable may cause the loss of a previous discovery on a claim. United States v. Bechthold, 25 IBLA 77 (1976).

[4] 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).

[5] When the United States contests a mining claim, it has assumed only the burden of going forward with sufficient evidence to establish a prima facie case on the charges in the contest complaint; the burden then shifts to the contestee to refute, by a preponderance of the evidence, the Government's case. United States v. Springer, 491 F.2d 239 (9th Cir. 1974). The United States has established a prima facie case of the invalidity of a mining claim when a qualified Government mining engineer testifies that he has examined the claim and found the mineral values insufficient to support the discovery of a valuable mineral deposit. United States v. Taylor, 25 IBLA 21 (1976).

[6] It is the duty of the mining claimant whose claim is being contested to keep discovery points available for inspection by Government mineral examiners. Mineral examiners have no affirmative duty to search for indications of a discovery on a mining claim, nor do they have to go beyond examining the discovery points of the claimant. The function of the Government's examiners is to examine the discovery points made available by the claimant and to verify, if possible, the claimed discovery. United States v. Bryce, 13 IBLA 340 (1973). Where a claimant fails to keep his discovery points open and safely available for sampling by the Government's examiner, he assumes the risk

that the Government examiner will be unable to verify the alleged discovery of a valuable mineral deposit. United States v. Knecht, 39 IBLA 8 (1979); United States v. Bechthold, *supra*.

The Government's case was presented by Ellen F. Black, a mining engineer employed by the National Park Service, and by Lewis S. Zentner, Chief, Division of Mining and Minerals, National Park Service. Each is a graduate engineer and each has experience in evaluating lead mining properties in the private sector, as well as in validity examinations of unpatented mining claims on Federal lands.

Black acknowledged that her primary source of information for the subject mining claims was a report by James F. McAllister entitled Geology of Mineral Deposits in the Ubehebe Quadrangle, Special Report 42, California Division of Mines (1955), supplemented by Geological Survey Map GQ 95, Geology of Ubehebe Peak Quadrangle (1956). She testified that production from the Ubehebe mine occurred following discovery circa 1908, in a sporadic fashion, with a high point circa 1928, and no reported production since 1951. Total production from the mine was estimated to have been between 3,000 and 4,000 tons during the entire 70-year period from discovery in 1908. The ore shipped from the mine was a high grade lead, which had probably been handpicked to upgrade its quality.

Black testified that the principal workings were on the Butte #8 and #9, the Ubehebe mine, and on the Copper Bell, but at the time of her examinations, the workings appeared to have been abandoned, as there was no indication of any recent work and the mining camp itself was in disrepair (Tr. 13).

The points within the Butte #9 claim, where the claimants believed the best mineral showings to be, were inaccessible to her for examination. This lack of access was caused by unsafe conditions at the back, the caving of the workings there, and by the absence of a ladder to the Snyder stope (Tr. 17). It was her opinion that the conditions rendering the purported best showings inaccessible were not of recent origin. She reported that on one visit to the subject claims she had been accompanied by a Mr. Polk, a mine inspector for the Mining Enforcement and Safety Administration (MESA), who ruled the condition of the workings in the Snyder stope on Butte #9 unsafe because of lack of ladders, presence of hanging slabs which would have to be scaled down, and lack of ground control measures (Tr. 21). These same deficiencies prevailed in other areas of the claim, especially the No. 4 stope, which also was dangerous because its lack of ventilation had raised the CO₂ level above the legal limit (Tr. 22-3).

In areas available for her examination, samples were cut by Zentner under her observation. Places sampled included the Red Dump adit on the Butte #8, a small working near the tramway on Butte #9, and the Copper Bell #2. Black averred that the samples were taken

from the best available areas which appeared to have mineralization. Each of the samples was a chip sample. The results of the assays of the samples were as follows:

	Gold	Silver	Lead	Copper	Zinc
	<u>oz. per ton</u>	<u>oz. per ton</u>	<u>%</u>	<u>%</u>	<u>%</u>
UBE CB[2]	.01	.20	.04	3.90	—
UBE CB[2] 3	.04	1.80	.03	3.75	—
UBE Butte 8	.015	.18	8.20	—	1.4
UBE Butte 9	—	1.52	5.80	—	—
UBE Copper B[2]	—	—	.002	6.30	.02

Based on her examination and the results of the assays, Black gave her opinion that no discovery of a valuable mineral deposit exists on any of these contested claims, and that a prudent person would not be justified in further expenditure of time and money with a reasonable prospect of success in developing a paying mine. In her further opinion, the original ore bodies had been mined out in the past (Tr. 40).

Zentner testified that if 4,000 tons of ore had been shipped from the Ubehebe mine as reported, the ore mined must have been of a lower grade than the 40- to 50-percent ore shipped because the volume of the stopes is greater than would be occupied by 4,000 tons of rock (Tr. 56). He testified that lead deposits in limestone or dolomite are usually small replacement bodies and that it is probable that the past mining operations exhausted the ore deposits on these claims. Like Black, he stated that he had not been in either the Snyder stope or the No. 4 stope because of their inaccessibility and doubtful safety. In his opinion, the subject claims were a very poor risk for exploratory activity and no prudent person would expend labor and means with a reasonable prospect of success in developing a valuable mine. The cost of an exploratory program, Zentner concluded, would exceed the value of any ore which might be found on the claims (Tr. 66).

Clair Kunkel, an experienced geologist and miner, testified on behalf of the contestee and also adverted to the McAllister reports (Exhs. A and B). He submitted two sets of smelter returns for ore allegedly shipped from the Ubehebe mine in 1927 through 1928 and in 1951 to the American Smelting and Refining Co. and in 1947 through 1953 to the International Smelting and Refining Co. He testified to his examination of the Ubehebe mine in January 1979, including a description of 10 samples he cut. From the west wall of the flat stope, his sample assayed 47-percent lead, 8.2-percent zinc, 3.2 ounces of silver per ton, and .06 ounces of gold per ton. His sample from the east wall of this stope was not ore grade. He surmised the existence of maybe 100 tons or more of ore in the flat stope, but admitted the ore deposits were replacements and so were spotty throughout the area (Tr. 86). He thought that more ore could have been taken from the

flat stope before mining operations were closed down. He was unsuccessful in his attempt to examine the #4 stope because of unsafe conditions. He did examine the Snyder stope after a new ladder had been provided for access. He cut two samples from the east side of the Snyder stope, which assayed a trace of gold, 3.1 ounces of silver per ton, 32.6-percent lead, and 5.6-percent zinc, and .02 ounces of gold per ton, 6.2 ounces of silver per ton, 14.6-percent lead and 4.4-percent zinc, respectively. Although this latter sample from the Snyder stope was below shipping grade, Kunkel thought it could be concentrated before shipment to a smelter. His examination persuaded him that the ore extended into the walls of the stope. He cut a single sample in the Waterson stope, which assayed a trace of gold, 3.6 ounces of silver per ton, 10.1-percent lead, and 12.3-percent zinc, a material that might be too lean to concentrate economically (Tr. 91). He stated it would be necessary to haul such material several miles westerly into Saline Valley to a site where water is available to effect the concentration of the ore.

His final samples were cut in the Tramway stope. The four samples had an average value of .01 ounce of gold per ton, 3.3 ounces of silver per ton, 16.4-percent lead, and 11.1-percent zinc.

Kunkel described his sampling procedures which involved hand selection of the ore (Tr. 101). Based on his observations and sampling, he opined the existence of between 2,000 and 3,000 tons of ore remaining in the Ubehebe mine, with an average grade of about 20-percent lead. He characterized the mining operation on these claims as "suspended," rather than "abandoned," but admitted the property has been badly vandalized during the period of non-operations (Tr. 105). He could not understand why more exploratory work had not been done. In his opinion, a prudent person would go ahead and develop this property with a reasonable degree of success from his investment of time and money (Tr. 108).

Kunkel gave an estimate of mining costs at about \$229 a ton, including \$90 for smelter treatment, \$25 for actual mining, \$25 for hauling to a railhead, and \$89 freight to the smelter. He conceded that he had not figured any capital costs for equipment into his estimate figure, assuming a group operation with the members pooling their existing equipment. For ore to be profitable at his estimated cost of \$229 a ton, it would have to run at least 26-percent lead. Any gold or silver in the ore would be extra profit. To obtain 26-percent lead would require selective mining and upgrading of leaner ores. Such upgrading or concentrating would probably cost \$25 a ton, plus \$15 a ton for hauling to the concentrator site. A ton of concentrate would have costs of \$464, but if the lead value were 60 percent, a profit of \$64 per ton should be realized, plus any gold or silver which might be recovered in the operation. Kunkel discounted the McAllister report, which he acknowledged indicated a rather low probability of finding commercial lead in the Ubehebe mine, as being a cautious conclusion by Geological Survey and one not made for the purpose

of evaluating specific properties. He conceded his high grade samples could have been mere remnants of the former ore bodies and that there is not continuity of ore throughout the mine.

Zentner, in rebuttal, disagreed with the ore reserves postulated by Kunkel, because complex faulting exists in the area. He also disagreed with the startup costs for a mining operation, labor, timber, and other incidentals, expressing his opinion that \$50,000 would be a conservative figure to be spent in any attempt to ready the Ubehebe mine for operation (Tr. 135).

From the evidence and testimony given at the hearing, Judge Clarke determined that the Government had made a prima facie case in support of the charge of lack of discovery of a valuable mineral deposit, based on the conclusions of Black and Zentner that a prudent person would not be justified in spending time and money with a reasonable prospect of success in developing a paying mine. He found their conclusions to be thoroughly supported by samples and observations made on the subject claims. The Judge recognized that Kunkel, who examined the claims on behalf of the contestee, did not agree with the conclusions of the Government's witnesses on the appraisal of the remaining mineralization, but concluded that Kunkel had offered no real proof that the mineralization was more extensive than as testified to by the Government's examiners. The Judge ruled that the contestee had not overcome the ample prima facie case demonstrated by the Government. We agree.

Appellant contends that the opinions of both Government witnesses were based upon incomplete examinations of the Ubehebe mine and argues that they failed to inspect the most valuable part of the mine in the Snyder stope.

At the times of their examinations of the Ubehebe mine, both Government examiners were of the opinion that the Snyder stope was unsafe to attempt to enter, an opinion reportedly shared by an inspector from MESA. It is the responsibility of the claimant-contestee to keep open and available for inspection by the Government the alleged discovery points. United States v. Knecht, *supra*; United States v. Bechthold, *supra*. Although claimant later provided access to the Snyder stope for examination thereof by Kunkel, the samples he cut were not wholly representative inasmuch as the samples had been hand-selected more than ordinary sampling methods would allow (Tr. 101). Nor did Kunkel make any satisfactory explanation why ore of the quality suggested by his observation was not mined out when the Ubehebe mine was active. As Judge Clarke opined, the passage of many years without any mining activity gives rise to an inference that minerals sufficient in quality and quantity for a mining operation do not exist on these claims.

Appellant contends also that substantial evidence was introduced to show the Ubehebe mine is proximate to a market at which there is a

present demand for its product, which can be marketed at a profit. Kunkel gave as his opinion that between 2,000 and 3,000 tons of 20-percent lead-bearing ore remained in the mine, but that such ore would have to be concentrated or upgraded to attain at least 26-percent lead content. He gave estimates of costs for the various facets in the mining operation, but did not include any capital costs for equipment. Zentner gave his opinion that at least \$50,000 would be required to make the Ubehebe mine ready for operation. Appellant made no rebuttal to this figure.

The record supports the finding of Judge Clarke that the Government made a prima case of lack of discovery of a valuable mineral deposit and that the appellant did not meet its burden by presenting a preponderance of the evidence. Judge Clarke properly concluded that the Copper Bell, Copper Bell #1, Copper Bell #2, Copper Bell #3, Butte #6, Butte #7, Butte #8, Butte #9, Butte #10, and West Extension Butte #3 (formerly Butte) lode mining claims are null and void.

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, and the subject lode mining claims are declared null and void.

Douglas E. Henriques
Administrative Judge

We concur.

Anne Poindexter Lewis
Administrative Judge

Edward W. Stuebing
Administrative Judge

