

Editor's note: appealed - aff'd, sub nom. Hernandez v. Watt, Civ.No. 81-35 (D.Mont. Sept. 15, 1982)

UNITED STATES
v.
LEON R. WHITNEY
CESAR T. HERNANDEZ

IBLA 79-15

Decided October 31, 1980

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., holding mining claims and millsite invalid (M 33664).

Affirmed.

1. Mining Claims: Discovery: Generally

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.

2. 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.

3. Mining Claims: Discovery: Generally

The prudent man test is an objective not a subjective standard. The value that an

ordinary person would expect to receive for his labor must be taken into account, while the willingness of a claimant to subsist on unusually low remuneration must be disregarded.

4. Mining Claims: Discovery: Generally Mineralization that only warrants further prospecting or exploration in an effort to ascertain whether sufficient mineralization may 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.
5. Mining Claims: Discovery: Generally -- Mining Claims: Discovery: Geologic Inference

In evaluating a mineral deposit geologic inference may be used where the deposit has been adequately physically exposed. However, it cannot be used as a substitute for evidence sufficiently showing the existence of an ore body or bodies necessary to warrant a prudent man to develop a valuable mine.

6. Millsites: Generally -- Mining Claims: Millsites

Sec. 15 of the Act of May 10, 1872, 30 U.S.C. § 42 (1976), requires that a millsite be used or occupied distinctly and explicitly for mining or milling purposes. Where a cabin on a millsite is used for residential purposes and the use of the cabin for mining purposes is only incidental to its use as a residence, the millsite must be declared null and void.

7. Millsites: Determination of Validity -- Mining Claims: Millsites

A mineral claimant who has not made a discovery of a valuable mineral deposit

within the limits of his lode or placer mining claims is not the proprietor of a "vein, lode or placer" within the context of 30 U.S.C. § 42 (1976), and cannot establish any right to a millsite claim based on such unperfected mining locations.

8. Contests and Protests: Generally -- Mining Claims: Generally -- Mining Claims: Contests -- Mining Claims: Determination of Validity -- Rules of Practice: Government Contests

The motivation of any Government agency in initiating a contest against mining claims is irrelevant. The Board of Land Appeals cannot abnegate its responsibility to determine the validity of mining claims when that issue is presented upon appeal, and where that issue is so presented, mining claims properly are declared null and void upon a showing of lack of discovery of a valuable mineral deposit upon the claims.

9. Administrative Procedure: Hearings -- Hearings -- Mining Claims: Contest -- Rules of Practice: Appeals: Hearings

A second hearing of a Government mining contest will not be afforded where a claimant was given notice and an opportunity to appear at a hearing, where he was actually present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result. A petition to reopen a hearing of a Government mining contest will be denied when the contestee offers no valid justification for the neglect to offer evidence which was or could have been available at the original hearing. A further hearing will not be ordered merely to afford a claimant an additional opportunity to explore and make a discovery.

APPEARANCES: Peter C. Wagstaff, Esq., Coeur d'Alene, Idaho, for contestee; Lawrence M. Jakub, Esq., U.S. Department of Agriculture, Missoula, Montana, for contestant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Leon R. Whitney and Cesar F. Hernandez appeal from a September 6, 1978, decision of Administrative Law Judge John R. Rampton, Jr., holding invalid the Western Metals, Western Minerals, Venture Minerals, Western Metals Nos. 2, 3, 4, 5, 6, 7, and 8 lode mining claims, and Western Metals and Minerals millsite.

The claims were located between September 25, 1963, and April 1, 1975, and are situated in secs. 23 and 26, T. 27 N., R. 34 W., Principal meridian, Sanders County, Montana.

On March 16, 1976, at the request of the United States Forest Service, the Bureau of Land Management (BLM), filed a complaint seeking cancellation of the 10 lode claims and the millsite. The complaint listed these contentions:

(1) No discovery of a valuable mineral deposit sufficient to support a mining location has been made upon or within the limits of any of the subject claims.

(2) The subject claims and the Western Metals and Minerals Millsite are not being held in good faith.

(3) The subject claims are improperly located under the laws of the State of Montana (Chapter 7, Title 50 R.C.M. 1947).

(4) The Western Metals and Minerals Millsite is not being occupied for the purposes of mining or milling.

(5) The Western Metals and Minerals Millsite is improperly located under the laws of Montana (§ 50-705, R.C.M. 1947).

Whitney and Hernandez both filed answers denying the charges.

A hearing was held on August 24, 1977, and August 25, 1977, before Judge John R. Rampton, Jr.

The following is a summary of the testimony presented at the hearing as stated by Judge Rampton in his decision.

In support of its allegation that no discovery had been made upon any of the mining claims, the Government

called as an expert witness Mr. Raymond Wallace, a mining engineer who has taken graduate courses leading toward a master's degree in geology, and who had examined the mining claims and millsite on five different occasions. From reading published literature, he stated there had been some limited mining activity in the general area of the claims in previous years. In the 1960's, major mining companies had prospected, looking for strata-bound copper deposits, but at present there are no producing mines in the area.

For illustrative purposes, he prepared a sketch map (Ex. 1) showing the orientation and approximate dimensions of the claims. The sketch map was shown to Mr. Whitney, who agreed with the locations as depicted.

Mr. Whitney and Mr. Hernandez were present on his first visit in 1974. He was unable with accuracy to determine the claim boundaries because the monumentation was poor and no one could show him the exact location of the claim corners. The particular area had been located for claims previously and there were numerous markings having no reference to any particular claim. He did find a tobacco can nailed to a tree, which Mr. Whitney told him was the location notice for the Western Metals claim. He did not verify the notice because he could not do so unless he destroyed the can.

On his second visit in 1975 he attempted to verify the claim corners of all of the claims in issue. Considerable difficulty was encountered because of the numerous blazed or marked trees which had no specific markings as to a particular claim. With the help of the contestees, he located the northwest corner of the Western Minerals contiguous with the Western Metals Nos. 3, 4 and 5, the southwest and southeast corners of the Western Metals and northwest corner of the Western Metals and a location notice for the Western Metals No. 2 claim posted at the southwest corner. The southwest corner of the Western Metals No. 5 contiguous to the northwest corner of the Western Metals No. 4 was found. The four corners of the millsite were located and verified on the ground.

Based upon the information obtained from the contestees and the location notices, he concluded that the millsite overlaid portions of the Western Metals Nos. 4 and 5 claims.

In his searches of the claims for development work, he found on his first visit in 1974 a small pit in the bottom of the creek on the Western Metals claims and road cuts which had exposed bedrock. Mr. Whitney had told him the claims were located for gold, silver, copper, zinc and lead and he took a total of four samples. Three were from the face of the adit on the Western Metals claim and the fourth from one of the road cuts. The samples were taken from three separate zonations of materials at the face of the adit and the one from the road cut was taken of exposed variegated-colored material. No other samples were taken on his first visit because the contestees informed him they had no other exposures of mineral and there was therefore nothing available to sample. The samples were assayed and the minerals present were found to be very low to insignificant amounts.

On his second visit he made a general reconnaissance to determine what workings or development may have occurred since the first visit, and he also examined the millsite. He found no new workings but the adit on the Western Metals claim had been enlarged. Three more samples were taken from the adit: two samples from the pit area on the bank above the adit and one more sample from another or the road cuts. The samples were taken of the most favorable-appearing material, were assayed and the results showed no traces of copper, antimony or other mineralization of value. The range of values calculated for all of the samples taken from the Western Metals claims ranged from \$ 0 to \$ 1.44 a ton. He concluded that the minerals exposed could not be extracted at a profit and they were therefore valueless.

The only other improvement he found was an octagonal-shaped structure on the millsite with a small outbuilding behind and a fence. On one of his visits he went inside the structure and found the normal things pertinent to a cabin or residence: stove, cabinet for dishes, table, chairs, sewing machine and a bed. When he asked the occupants, Mr. Hernandez and Colleen Hines Hernandez, the purpose of the cabin, he was told it was to be used in conjunction with mining and milling operations on the Western Metals group claims.

He visited the claims again on August 10, 1977, and invited the mining claimants to be present to give them an opportunity to show him any later improvements or discoveries that may have been made. Mr. Whitney was present and told him the adit had been enlarged and there was

another pit dug up the hill to the north. He observed the main adit had been advanced approximately 10 feet, enlarged to about 10 by 12 feet in length and width and there were four log sets of timber in place at the portal. A sample taken at the face of the adit assayed no gold, lead, zinc or antimony, .05 oz silver per ton, .10% copper, and .07% molybdenum. Based on these values, he could not change his previous opinion as to the mineral potential as exposed.

The new pit was about 5 feet deep by 3 feet long and 3 feet wide, exposing quartzite or quartzitic argillic bedrock. No sample was taken because he saw no vein structure or visually observable mineralization exposed. Selected rock specimens from the dump, inspected visually with the aid of a 10- and 20-power hand lens, showed some pyrite and iron sulphide. He did not have them assayed because they were selected specimens and would not have represented any tonnage involved as representative of the material exposed in the hole.

In the millsite area he found new improvements consisting of a log-type structure approximately 10 by 12 feet; a miniature 8-sided building similar to the large octagonal structure was also being built. There were water hoses lying in front of the cabin and the garden area had been greatly improved and enlarged. There were also two beehives that had not been there on his previous visits. He observed no mining machinery or mining equipment except for a shovel and a single jackhammer. His observations as to the activities and improvements on the millsite were confirmed by the testimony of William O'Brien, the District Ranger, and Art Howell, a resource forester, who had visited the claims on different occasions.

On his fifth visit on August 19, 1977, he was accompanied by Thomas Gentilo, a geologist, and three employees of the Forest Service. The crew spread out into intervals of a few yards and traversed all of the claims. He and Mr. Gentilo were continuously prospecting the rock materials and looking for evidence of mineralization. They found no workings or development relating to mining on Western Metals Nos. 6, 8 and 7. Since there were no exposures of valuable minerals, he concluded that the three claims were located on land which is nonmineral in character. He found no evidence on the millsite of activities related to mining or milling and on none of the visits observed any ongoing mining activities relating to the

removal of ore on any of the claims involved. Based on his examinations, the samples taken, and the assay results received, in his opinion, a prudent man would not be justified in the further expenditure of labor and monies with a reasonable prospect of success in developing a valuable mine on any of the claims in issue.

On cross-examination, he admitted that assays of samples showing 7.2 oz of silver per ton would indicate significant mineralization and that if the samples were taken across a minable width, a profitable operation might be conducted.

Testifying on his own behalf, Mr. Whitney stated that several samples were taken from the adit on the Western Metals claim. Several have been lost or mislaid or the results not received, but he identified Exhibits BB and CC as the assay results of two samples taken from the adit and the pit on the Western Metals claim. One sample was taken by himself and the other by a Mr. Frank Caldron. He was unsure of which sample came from which location. One assay showed 7.27 oz. silver per ton, which at the current price of \$ 4.54 per oz. computes to \$ 32.69 per ton value. Mr. Whitney characterized this assay as encouraging and, while not as yet a profitable operation, he thought the values might improve at depth. He also anticipated that a concentrating plant at Hope, Idaho, 18 miles distant from the claims would be completed in the future, which would reduce the present cost of \$ 40 a ton transportation cost to the nearest concentrating plant at Kellogg, Idaho.

Mr. Cesar Fernando Hernandez testified that the millsite was located because it is strategically placed between two different groups of claims; eight claims in the Blu Creek area approximately two air miles from the millsite and 30 in the Star Gulch area about one and a half miles distant. He refused to divulge the extent of the work done and the exact location of the claims but admitted that they were still in the prospecting and exploration stage.

Mr. Hernandez has formed a corporation, the "Northwest Citizens for Wilderness Mining Company," whose purpose is to engage in mining activities within actual or proposed wilderness areas in such a way that the quality of the wilderness will not be sacrificed. Since access into the wilderness areas prohibit motorized vehicles, transportation would either have to be by animal or pedestrian and the only tools used would be a pick and shovel.

Once outside the wilderness area, motorized transportation would be used to transport the ore.

In his decision declaring the claims invalid, Judge Rampton found that: (1) The contestant established by "a preponderance of the evidence that the mining claims in issue lack discovery of a valuable mineral"; (2) the millsite is not being used for a mining and milling purpose; and (3) the millsite is improperly located.

In their statement of reasons, appellants present four general contentions. First, appellants allege that there is a valid discovery as defined by the mining laws of the United States. Under this point, appellants explain that Mr. Hernandez did not use the term "exploration" at the hearing in its correct context. He used this term in connection with mining and ore removal, and did not use it in a restrictive sense as meaning exploration. Appellants stress that under the law they are only required to show that they validly have a reasonable expectation of developing a valuable mine in the future. They submitted assays which show silver in the amount of 7.2 ozs. per ton, with a value of \$ 4.50 per oz. and \$ 32.65 per ton. Appellants note that the Judge did not find that these assays were faulty or incorrect. Appellants reason that if they can use the concentrating mill at Hope, transportation costs would be lowered tremendously. They state their labor costs are \$ 2,500 to \$ 3,000 per year.

Appellants contend that they "presented geologic inference in their case to reveal the extent and value of the lode." They cite cases for the proposition that after location of minerals, geologic inference can be used to establish the extent and value of the lode. Appellants assert that through their assays, they made actual findings. Appellants presented documents at the hearing which indicate a presence of minerals in the area covered by appellants' claims. Appellants conclude that these documents, together with the assay reports, indicate a valuable and extensive lode of mineral deposits on their claims.

Appellants' second contention is that the millsite is being used for a mining and milling purpose. Appellants urge that the erection of dwelling houses for occupancy by workmen is a mining and milling use; that Hernandez resides there with his wife in order to pursue mining activities; that the claims are readily accessible from the millsite; that the cabin provides the only access to the mining claims in the winter; that the building is used for the storage of tools; that it was necessary to have someone there to guard tools; that assessment work itself is sufficient to constitute mining purposes for a millsite.

Appellants further allege that the Forest Service contested all 10 claims simply to remove the cabin and that such action is harsh, radical, and unnecessary. Appellants note that a millsite may be

declared invalid for failure to satisfy the statutory requirements pertinent to it even though no contest is brought against the mining claims with which it is associated.

Appellants' third point is that the Government failed to present a prima facie case that the millsite is improperly located. Appellants refer to the Government's position that the certificate of location of the millsite must describe by appropriate reference the mining claim to which it is appurtenant. Appellants admit that the millsite location certificate does not do this. They contend that the Government was aware of the claimants' status and could not argue that the omission was material. Appellants answer the Government's argument that the location of the millsite over the ground covered by a subsisting location is void and cannot ripen into a valid location. Thus they contend that no survey has been made and that the demonstrative guide used by the Government is not sufficiently accurate to constitute evidence of the location of the claim. Therefore, appellants conclude that the Government has not presented a prima facie case that their millsite covers other mining claims.

Appellants' fourth contention is that the Government has failed to prove that the claims are situated on Federal land. The Government alleged in its complaint that "1. [t]he lands hereafter described are public lands of the United States." Appellants contend that the Government presented no testimony at the hearing by a surveyor to prove Federal ownership of the lands.

Throughout their statement of reasons, appellants emphasize that the Forest Service minimizes the role of the individual miner. Mr. Hernandez stated that they were trying to make their existence as miners "compatible with the wilderness of the area." Appellants allege that the Forest Service is unable to accept their progressive view of developments in mining. According to appellants, the Forest Service view is that a valid mining operation can only comprise a huge business enterprise of industry giants.

In its answer, the Forest Service contends that the claimants' appeal should be denied for the following reasons:

- (1) No discovery of a valuable mineral has been made upon any of the claims in issue;
- (2) The millsite is not being used for a mining and milling purpose; and
- (3) The millsite is improperly located.

The Government alleges that the contestees have failed to present credible evidence by any expert to support a discovery on the claims in

issue and that the evidence presented is deficient in meeting the accepted test for a discovery on any of the claims. The Forest Service points out that there was a lack of credible sampling and assaying evidence; that the assays of two samples were introduced into evidence; that two persons responsible for taking one sample were not at the hearing to testify; that contestees were not sure where this sample was taken; that the method used in taking a second sample does not represent a method for taking a credible mineral sample so as to present reliable evidence in support of a discovery. Also, the Forest Service points out that there was no testimony to establish the value of the mineral assayed from the samples in relationship to costs of extraction, removal, and transportation.

As for the millsite, the Forest Service contends that it is not being used for a mining or milling purposes; that it is used principally for residential purposes; that the millsite is improperly located; that with reference to the mining claims, no extraction of minerals or development is occurring; that where the use or occupation of a millsite is related to a lode claim, the showing must be of a function or utility intimately associated with the removal, handling, or treatment of the ore from the vein or lode; that some step in or directly connected with mining or some feature of milling must be performed; and that appellant has failed to meet this test.

The Forest Service denies appellants' accusation that it lacked objectivity in its treatment of appellants' claims. Finally the Government finds no merit in appellants' argument that the Government did not prove through the use of a survey that the lands described within the location notices are public lands.

We shall first discuss appellants' contention that there was a valid discovery of a valuable mineral within the limits of their claims.

[1] 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. United States v. Coleman, 390 U.S. 599 (1968); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Cameron v. United States, 252 U.S. 450 (1920); 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).

The prudent man test has been complemented by the "marketability test" requiring a claimant to show that a 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] It is well settled that a prima facie case is established by the United States when a Government mineral examiner testifies that he has examined a claim and can find no evidence of a discovery of a valuable mineral deposit. United States v. Chambers, 47 IBLA 102 (1980); United States v. Harder, 42 IBLA 206 (1979); United States v. McClurg, 31 IBLA 8 (1977); United States v. Reynders, 26 IBLA 131 (1976). At the hearing, Mr. Wallace testified that based upon his examination of the claims in issue and all the samples that he participated in taking and the assay results, it was his opinion that minerals have not been found which would justify a person of ordinary prudence in the further expenditure of labor and money with a reasonable prospect of success in developing a valuable mine (Tr. 193-194). Thus, the Government's prima facie case was established. The Government having established its case, the burden shifts to the claimant to show by a preponderance of the evidence that a discovery has been made. United States v. Chambers, *supra*.

[3] Appellants make reference to United States v. Myers, 74 I.D. 388 (1967), to support their contention that the Department has not required that a mining claimant show that he has found a mineral deposit which can assuredly be mined at a profit. That decision cited Adams v. United States, 318 F.2d 861, 870 (9th Cir. 1963), in which the court stated that the Department considered the relevant evidence "not to ascertain whether assured profits were presently demonstrated, but whether, under the circumstances, a person of ordinary prudence would expend substantial sums in the expectation that a profitable mine might be developed." We do not find that the evidence submitted by appellants met this standard.

Appellants rely on their assay of 7.2 ozs. of silver per ton to support their proposition that they may be able to make a profit. Even assuming that the assay was properly taken, appellants' ability to make a profit from mining these claims is conjectural at best. A profitable operation would depend upon the use of the mill in Hope, which is only a possibility. The record shows that appellant has failed to prove that the mineral could be extracted, removed, and marketed at a profit. United States v. Coleman, *supra*. Appellants' willingness to make a small profit is not sufficient to meet the prudent man test. The prudent man test is an objective not a subjective standard. The value that an ordinary person would expect to receive for his labor must be taken into account, while the willingness of a claimant to subsist on unusually low remuneration must be disregarded. United States v. Slater, 34 IBLA 31, (1978); *see also* United States v. Reynders, *supra* at 136; United States v. Arcand, 23 IBLA 226, 231 (1976); United States v. Heard, 18 IBLA 43, 48 (1974); United States v. Stocker, 10 IBLA 158, 160 (1973); United States v. White, 72 I.D. 522 (1965), *aff'd*, White v. Udall, 404 F.2d 334 (9th Cir. 1968).

According to appellants' testimony, the main work on the claims has been on the adit of the Western Metals claim (Tr. 43). Appellants testify that they have dug, blasted, and removed rock from this area (Tr. 62). The facts show, however, that their work on the claims has not progressed beyond the exploratory stage. Hernandez testified that they had performed geochemical and geophysical work on the claims and mineral exploration to determine what is on the claims (Tr. 85, 87). Regardless of how appellants define "exploration," their activity on the claim cannot be labelled otherwise.

[4] Mineralization that only warrants further prospecting or exploration in an effort to ascertain whether sufficient mineralization may 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. Sweet, 47 IBLA 92 (1980); 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. Sweet, *supra*; United States v. Marion, 37 IBLA 68 (1978).

[5] Appellants stress the fact that mineralization in the area of their claims has been documented in several articles. Mineralization in the area cannot, however, be a substitute for a discovery on a particular claim.

In evaluating a mineral deposit geologic inference may be used where the deposit has been adequately physically exposed. However, it cannot be used as a substitute for evidence sufficiently showing the existence of an ore body or bodies necessary to warrant a prudent man to develop a valuable mine. United States v. Chambers, *supra*. United States v. Edeline, 39 IBLA 236 (1979). *See also* Henault Mining Co. v. Tysk 419 F.2d 766 (9th Cir. 1969); Before geologic inference may be used to project the value of a mineral deposit, it is necessary to determine whether there exists a vein or lode bearing minable material to justify any inference at all. The assays offered into evidence, with the possible exception of the one introduced by appellant, reveal values which clearly no prudent man would pursue. To establish the existence of a valuable mineral deposit on a lode claim there must be evidence of continuous mineralization along the course of a vein or lode; the mere showing of disconnected pods of mineral concentration, even of high values, does not satisfy the test. United States v. Chambers, *supra* at 47; United States v. Marion, 37 IBLA 68 (1978) United States v. Arizona Mining and Refining Co., 27 IBLA 99, 105 (1976); United States v. Ramsher Mining and Engineering Company,

Inc., 13 IBLA 268, 273 (1973). Based on this line of cases, appellant's assay alone would not be sufficient to constitute a discovery. Also, discovery of a mineral sufficient to support a mining claim must be made on the claim itself, notwithstanding discovery of the mineral on nearby land which might persuade a reasonable prospector to continue his search for a valuable mineral deposit on the claim. Humboldt Placer Mining Co. v. Secretary of the Interior, 549 F.2d 448 (9th Cir. 1977); United States v. MacLaughlin, 50 IBLA 176 (1980); United States v. McHenry, 43 IBLA 122 (1979). Therefore, we find that appellants have not made a discovery of a valuable mineral deposit within the limits of the claims.

[6, 7] Section 15 of the Act of May 10, 1872, 17 Stat. 96, 30 U.S.C. § 42 (1976), which authorizes the issuance of millsite patents, states in pertinent part:

Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith * * *. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section.

Since appellants do not have a quartz mill or reduction work on the site, they can only meet the requirements of this act by showing that the site is used or occupied by them for mining or milling purposes.

In Alaska Copper Company 32 L.D. 128, 131 (1903), the Department explained use or occupancy as contemplated by the statute as follows:

A mill site is required to be used or occupied distinctly and explicitly for mining or milling purposes in connection with the lode claim with which it is associated. This express requirement plainly contemplates a function or utility intimately associated with the removal, handling, or treatment of the ore from the vein or lode. Some step in or directly connected with the process of mining or some feature of milling must be performed upon, or some recognized agency of operative mining or milling must occupy, the mill site at the time patent thereto is applied for to come within the purview of the statute. [Emphasis in original.]

As in a mining claim contest, the Government assumes the burden of going forward with sufficient evidence to establish the invalidity

of a millsite claim. After the Government has made a prima facie case of invalidity, the claimant must assume the burden of going forward with sufficient evidence to show by a preponderance of the evidence that his location is valid. United States v. Paden, 33 IBLA 380, 384 (1978); United States v. Dietemann, 26 IBLA 356 (1976). In making its prima facie case, evidence was presented by the Government to show that the cabin on the site was used primarily for a residence and that any use associated with the mining claims was only incidental. Appellants testified that the millsite was necessary to store tools and equipment, and provide a ready access to the claim. They allege it is necessary to live on the site for protection against vandalism. Such use and occupancy of the claim is not sufficient to constitute "use or occupancy for mining * * * purposes" as envisioned by the statute.

The only work performed on the mining claims has been in the nature of exploration to find substantial mineralization. No work has been done in the way of developing production. Such evidence of mineralization, which may justify further exploration, but not development of a mine, does not establish the discovery of a valuable mineral deposit. United States v. Paden, *supra* at 384; United States v. Fichtner, 24 IBLA 128 (1976). Having made no discovery within the meaning of the mining laws, 30 U.S.C. § 22 (1976), appellant is not the proprietor of a "vein, lode or placer" within the context of 30 U.S.C. § 42 (1976). Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Cameron v. United States, 252 U.S. 450, 459 (1920); United States v. Paden, *supra* at 384. Clearly a prospector is not entitled to claim a millsite. United States v. Wedertz, 71 I.D. 368, 373 (1964). Therefore, the millsite claim was properly declared null and void.

[8] Appellants contend that the Forest Service contested all 10 claims simply to remove the cabin and that such action is harsh, radical and unnecessary. This argument is without merit. The motivation of any government agency in initiating a contest against a mining claim is irrelevant. The Board of Land Appeals cannot abnegate its responsibility to determine the validity of a mining claim when that issue is presented upon appeal, and where that issue is so presented, mining claims properly are declared null and void upon a showing of lack of discovery of a valuable mineral deposit upon the claim. United States v. MacLaughlin, *supra*.

Appellants' third point concerns the proper location of the millsite. Even assuming that appellants complied with all the regulations for locating the claim and properly marked the boundaries on the ground, the millsite would still be invalid for the reasons stated above. Therefore, it is not necessary to discuss whether or not the millsite was properly located.

Finally, appellants contend that the Government has not presented a prima facie case that the lands in issue are Federal lands. If the

lands in issue are not Federal lands, but rather on privately owned lands, the mining claims and millsite of necessity are invalid.

[9] On March 26, 1979, appellants filed a motion for further hearing in this case. They contend that they were denied a continuance prior to the first hearing; that they now have the results of a second assay which was made on the day of the hearing; that they have additional evidence regarding the expenses and profits expected in mining silver from the claims; and that they have further evidence regarding compliance with the law concerning location of the claims. The Government requested that the motion be denied.

The Board addressed the issue of a second hearing in United States v. Syndbad, 42 IBLA 313, 322 (1979), and stated:

A second hearing will not be afforded where a claimant was given notice and an opportunity to appear at a hearing, where he actually was present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result. Cf. United States v. Johnson, *supra* [33 IBLA 121 (1977)]. A petition to reopen a hearing for submission of further evidence will be denied when the contestee offers no valid justification for the neglect to offer evidence which was or could have been available at the original hearing. United States v. Hanson, 26 IBLA 300 (1976). A further hearing will not be ordered merely to afford a claimant an additional opportunity to explore and make a discovery of a valuable mineral deposit. United States v. Mattox, 36 IBLA 171 (1978).

Applying the same reasoning to this case, we deny appellants' motion for further hearing.

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.

Anne Poindexter Lewis
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Frederick Fishman
Administrative Judge

