

UNITED STATES
v.
LEO D. JACKSON ET AL.

IBLA 79-51

Decided March 24, 1981

Appeals from the decision of Administrative Law Judge Mesch holding 31 mining claims invalid and 2 mining claims valid. Utah 10747.

Affirmed in part, affirmed as modified in part.

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

For a mining claim to be valid there must be a discovery of a valuable mineral deposit within the limits of the claim. There has been a discovery where minerals have been found in sufficient quantity and of sufficient 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. Mining Claims: Discovery: Generally

The "prudent man test" is met only where it appears that the mineralization on the claim has been physically exposed and is valuable enough to yield a fair market value in excess of the costs of extraction, removal, and sale. Evidence of mineralization which would justify further exploration, but not development, does not suffice to meet the discovery requirement.

3. Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally -- Mining Claims: Withdrawn Land -- Withdrawals and Reservations: Generally -- Withdrawals and Reservations: Effect of

Where the land on which the mining claim is located is subsequently withdrawn, the validity of the claim must be determined both as of the date of the withdrawal and the date of the hearing. If there was no discovery as of the date of the withdrawal, the land would not be excepted from the effect of the withdrawal and the claim could not thereafter become valid even though the requirement of discovery was satisfied at a later date.

4. Administrative Procedure: Burden of Proof -- Administrative Procedure: Hearings -- Mining Claims: Contests

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. Where a Government mineral examiner testifies that he has examined a claim and found the quantity of minerals insufficient to support a finding of discovery, a prima facie case of invalidity has been established and the burden shifts to the claimants to show by a preponderance of the evidence that a discovery has been made. Government mineral examiners are not required to perform discovery work for a claimant or to explore beyond a claimant's workings.

5. Mining Claims: Generally -- Mining Claims: Discovery: Geologic Inference

Geological inference alone cannot support a finding of discovery.

6. Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally

Where, as to certain claims, the Administrative Law Judge finds that the contestee preponderates on the issue of discovery, it is proper to dismiss the Government's contest as to those claims.

7. Mining Claims: Generally -- Mining Claims: Discovery: Generally -- Mining Claims: Location

The apex law gives the owner of a properly located claim on a vein the right to an indefinite extension on the dip of the vein beyond the vertical planes through the side lines of his claim. For a claim to be properly located there must be a discovery within the limits of the claim. The apex law cannot be utilized to establish the validity of another claim absent an independent showing of a valid discovery.

8. Administrative Authority: Estoppel -- Equitable Adjudication: Generally -- Estoppel -- Federal Employees and Officers: Authority to Bind Government

Equitable estoppel against the Government will not lie where there has been no affirmative misconduct by an authorized agent or officer resulting in a misrepresentation of fact upon which a party was led to rely to his ultimate detriment.

APPEARANCES: Duane A. Frandsen, Esq., Price, Utah, for contestees; John McMunn, Esq., Office of the Solicitor, Department of the Interior, San Francisco, California, for contestant.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

The contestees 1/ appeal from that portion of the October 3, 1978, decision by Administrative Law Judge Mesch holding 31 lode mining

1/ The named contestees are Leo D. Jackson, Blaine Albrecht, Barbara Albrecht, Nina Tanner Chappell, Norman Tanner, Ferren Tanner, Gwen Stephenson, Ruthaleen Knezek, Nora Fricke, Naylor Equipment Company, Ron Belvoir, W. P. Rogers, Thomas Turner, J. S. Alden, and Earl Fricke.

In his decision at p. 2 Judge Mesch states:

"At the hearing, it was represented that the owners of the mining claims are Leo D. Jackson, Ethel B. Jackson, Earl Fricke, J. S. Alden, Nina Chappell, Leonard Albrecht, and Verda Albrecht, and the answer to the complaint was filed in behalf of all of the owners. (Tr. 129). It was also represented that Sharon M. Bullard, dba, Colt Mesa Mining Company, and Energy Fuels Nuclear, Inc., have interests in the claims under a lease and purchase agreement with the owners. (Tr. 127, 216). All of the alleged parties in interest were represented by counsel or were present during the hearing."

claims invalid for lack of discovery. 2/ The United States, contestant, appeals that portion of the decision finding two mining claims, the Rainy Day Group 1 (R.D. 1), claim Nos. 2 and 3, valid.

The contest was initiated August 26, 1976, by the Bureau of Land Management (BLM), at the request of the National Park Service (NPS). The hearing was held on March 29 and 30, 1978, at Richfield, Utah.

The 44 mining claims named in the contest complaint were located by contestees for uranium during the early 1950's. Eleven of these were relinquished by contestees at the hearing. Evidence was received on whether or not minerals had been found of sufficient quality and/or sufficient quantity on the remaining 33 claims to constitute a discovery under the mining laws. The claims abut one another and are located in secs. 3 and 4, T. 35 S., R. 8 E., and secs. 33 and 34, T. 34 S., R. 8 E., Salt Lake meridian, Garfield County, Utah. There are several adits on the claims, only two of which have been developed (Exh. 8, p. 9). The two connect to a drift or incline that extends approximately 2,300 feet from one of the portals. The portals are located on R.D. 1, claim Nos. 1 and 2. They connect within claim No. 2 and then the drift or incline extends into claim No. 3. The lower portion of the incline has been flooded for several years (Tr. 156, 198).

Eight thousand and ninety-eight tons of uranium ore with a weighted average assay of 0.276 percent uranium oxide were produced and sold from the claims between 1954 and 1967 (Tr. 164; Exhs. D and F). Most of the ore was produced from the main incline or drift. There has been no production since 1967. On January 20, 1969, the land was withdrawn from location under the mining laws and added to the Capitol Reef National Monument, 83 Stat. 922 (1969). See also 50 Stat. 1856 (1937) and 43 CFR 3811.2-2. Pursuant to 16 U.S.C. § 273 (1976), the lands are now within Capitol Reef National Park.

Judge Mesch ruled there were 26 claims which "undoubtedly have some value because of the geology of the area and the possibility that a valuable deposit of uranium might be found within the limits of one or more of the claims" (Decision at 4, 5). However, he found appellants presented no evidence of an actual discovery of a valuable mineral deposit on the claims and held these claims invalid.

Four claims were identified by Leo D. Jackson, one of the owners and original locators of the claims, as claims on which ore had been found (Tr. 138-41). 3/ This testimony related to the assay values of samples taken from these claims and indicated the quality of the

2/ The 31 claims are Rainy Day Group 1, claim Nos. 1 and 4 through 7; the Rainy Day Group 2, claim Nos. 1 through 8; the Rainy Day Group 3, claim Nos. 1 and 2; the Yellow Streak Group 1, claim Nos. 1 through 8; the Yellow Streak Group 2, claim Nos. 1 through 8.

3/ These are the Rainy Day Group 2, claim Nos. 1 through 3, and the Yellow Streak Group 1, claim No. 1.

deposits. When asked about the amount of ore on these claims Mr. Jackson was unable to do more than speculate based on geological inferences (Tr. 142). Judge Mesch found this evidence insufficient to support a finding of discovery either in 1969, when the lands were withdrawn, or at the time of the hearing.

The remaining three claims, R.D. 1, claim Nos. 1 through 3, were those on which the mining activities had centered. Judge Mesch found that R.D. 1, claim Nos. 2 and 3, were shown to contain valid discoveries both in 1969 and presently, and held these claims valid. He found that the R.D. 1, claim No. 1, was exhausted by 1969, and therefore invalid.

On appeal contestant asserts that as far as contestees knew in 1969, the ore in R.D. 1, claim Nos. 2 and 3, was exhausted, and therefore there was no discovery and the claims are invalid. Contestant bases this assertion on evidence it believes shows that the last mining done on the claims was of the ribs and pillars, which "is never done until the miners have determined their mine to be exhausted" (Contestant's Statement of Reasons at 8). Contestant also relies on evidence of an oversupply of uranium in 1969, and a consequent loss of market, to indicate that the claims were unprofitable to mine in 1969.

In Contestees' reply brief and statement of reasons for appeal, they first assert that the ruling on R.D. 1, claim Nos. 2 and 3, is based on substantial evidence and should not be disturbed on appeal. Contestees also note that "at the hearing, counsel for the Contestant stated that if the judge found any of the claims valid, the Park Service would allow these claims to operate and that the Park Service would 'live with' the decision (Tr. 332, lines 16-25)" (Contestees' Brief at 9). This, contestees urge, should estop contestant from appealing the decision.

Contestees next argue there was sufficient evidence to support a finding of discovery both on the date of withdrawal and at the present time on all the claims, and most particularly on the Yellow Streak Group 1, claim No. 1, and Rainy Day Group 2, claim Nos. 1 through 3. Contestees again urge that the Government is estopped, this time on the basis of the Atomic Energy Commission's (AEC), denial of a discovery bonus for more than one of the claims. Contestees urge the AEC by denying the bonus "had implied that there is a valid discovery that applies to all the claims in the cluster" (Contestees' Statement of Reasons at 12).

Contestees' third argument on appeal is that under the "apex rule" the discoveries on R.D. 1, claim Nos. 1, 2, and 3, apply to all the claims on the channel, and that they have extralateral rights to possession of the continuous ore channel. Referring again to the AEC ruling, contestees argue that

[t]he Contestants should not be allowed to contradict the actions of another governmental agency so that both agencies take advantage of the locator while arguing mutually

inconsistent points: one discovery applies to all claims within the channel versus a discovery can apply only to the particular claim, in spite of the common formation.

(Contestees' Statement of Reasons at 14).

Finally, contestees argue that the fact that mining has been done only on R.D. 1, claim Nos. 1 through 3, does not negate the discovery of mineralization on other claims. They state at page 15:

A small mining operator * * * cannot afford to spread men and equipment over an entire area and work all claims at once. Instead, he will wisely concentrate on one claim or set of claims and move on to others when he has completed his work on the first or at least gotten his first into adequate operation * * *. A prudent man can also be expected to forego continuous mining operations if he believes that the market in the future may be stronger than that in the present, and so long as the present market conditions are such that he can economically operate the mine, his discovery is not lost.

Contestant submitted a reply brief, responding to three points raised by contestees. First, contestant addresses one of the asserted grounds for estoppel, the statement that the Park Service will "live with" the decision. The exact words in the transcript, at page 332, are that Park Service will live with the "final conclusion on validity." (Emphasis contestant's. Reply Brief at 2.) Contestant correctly argues there is no final decision until this Board decides these appeals. Additionally, contestant states that a spontaneous statement at a hearing by counsel can not bind a Government agency.

Contestant responds to contestees' arguments concerning the AEC ruling by urging it is self-contradictory to say the decision by AEC "to grant the contestees a bonus payment reflecting only one discovery on their whole group of claims somehow implies that in fact a myriad of discoveries exists on the claims" (Contestant's Reply Brief at 2). To the contrary, contestant asserts, the AEC ruling supports contestant's position that only one discovery was ever made on R.D. 1, claim No. 1, and it has since been mined out.

Contestant's third comment asserts the inapplicability of the apex rule to the subject claims. Application of the rule "would amount to granting carte blanche validity to large numbers of claims which lack individual proof of discoveries as required by law" (Contestant's Reply Brief at 3).

[1] For a mining claim to be valid there must be a discovery of a valuable mineral deposit within the limits of the claim. 30 U.S.C. §§ 22, 23 (1976); 43 CFR 3811.1. There has been a discovery where minerals have been found in sufficient quantity and of sufficient 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, 457, (1894). This "prudent man test" has been repeatedly approved by the Supreme Court and in Departmental decisions. E.g., 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); Chrisman v. Miller, 197 U.S. 313 (1905); United States v. Burns, 38 IBLA 97 (1978); United States v. Becker, 33 IBLA 301 (1978); United States v. Arcand, 23 IBLA 226 (1976).

[2] The "prudent man test" is met only where it appears that the mineralization on the claim has been physically exposed and is valuable enough to yield a fair market value in excess of the costs of extraction, removal, and sale. United States v. Edeline, 39 IBLA 236 (1979); United States v. Kiggins, 39 IBLA 88 (1979); United States v. Melluzzo, 38 IBLA 214 (1978). Evidence of mineralization which would justify further exploration, but not development of a mine, does not suffice to meet the discovery requirement. United States v. Edeline, *supra*.

[3] Where the land on which the mining claim is located is subsequently withdrawn, the validity of the claim must be determined both as of the date of the withdrawal and the date of the hearing. If there was no discovery as of the date of withdrawal, the land would not be excepted from the effect of the withdrawal and the claim could not thereafter become valid even though the requirement of discovery was satisfied at a later date. United States v. Arcand, *supra*; United States v. Fleming, 20 IBLA 83, 98 (1975); United States v. Henry, 10 IBLA 195, 199 (1973).

[4] When the Government contests a mining claim on a charge of no discovery, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case. The testimony of a Government mineral examiner that he has examined the claim and found the mineral values insufficient to support a finding of discovery establishes the prima facie case and shifts the burden to the claimant to show by a preponderance of the evidence that a discovery has been made. Government mineral examiners are not required to perform discovery work for a claimant, nor to explore beyond a claimant's workings. United States v. Arcand, *supra*. It is the claimant who bears the risk of nonpersuasion. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Arcand, *supra*; United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975).

The issue before us is whether or not contestees have met their burden of showing by a preponderance of the evidence that there was a discovery on any or all of these claims on January 20, 1969, the date of the withdrawal and on the date of the hearing. This Board has specifically ruled that where there are several claims grouped together, a discovery must be shown on each claim. United States v. Rukke, 32 IBLA 155 (1977). The claimant must actually expose a valuable mineral deposit within each claim. United States v. Walls, 30 IBLA 333 (1977).

[5] As pointed out by Judge Mesch, there was no evidence presented of a discovery at any time on 26 of these claims. Nor was

anything brought out on appeal which would show error in that conclusion. The only evidence pertaining to mineralization within these claims is derived from knowledge of the geology of the area. Geological inference alone cannot support a finding of discovery. United States v. Walls, *supra*; United States v. Arizona Mining and Refining Co., 27 IBLA 99 (1976); United States v. Henault Mining Co., 73 I.D. 184 (1966), *aff'd*, 419 F.2d 766 (9th Cir. 1969). Therefore, these 26 claims must be considered invalid.

The Government mineral examiner testified that he asked the claimants to show him the discovery points on each claim and they examined all of the adits. He used a Geiger counter to find places to sample, stating that he only found one place which registered worth sampling (Tr. 14-16). He testified, "I believe there was at one time a discovery on the one claim, Rainy Day No. 1 * * *. There were no discoveries that I could find on these other claims" (Tr. 20). This and additional testimony met the Government's burden of establishing a prima facie case of no discovery and shifted the burden to contestee to show a discovery on each claim by a preponderance of the evidence. United States v. Clare Williamson, 45 IBLA 264, 87 I.D. 34 (1980).

Contestees did present some evidence of mineralization on the R.D. 2, claim Nos. 1 through 3, and the Yellow Streak Group 1, claim No. 1. Contestee Jackson admitted he could only speculate as to the quantity of ore which might lie within these claims (Tr. 142). When asked if he would mine these claims without doing any drilling, the following exchange occurred:

The Witness: Well, today, yes.

The Court: Why is that?

The Witness: Because the price of uranium has gone up and things that were marginal in '66 are good commercial ore now.

The Court: '66 or '69?

The Witness: Well, '69 is the date we are more concerned with, I suppose. In 1969 ore buying people were a lot scarcer than they are today too.

(Tr. 142, 143). Jackson conceded that mining these claims would have been marginal in 1969. While the geological evidence does indicate that these claims would warrant further exploration, this does not constitute a discovery. See United States v. Netherlin, 33 IBLA 86 (1977). On the basis of this record, we cannot find that contestees have met their burden of proof with respect to these four claims.

Judge Mesch found the R.D. 1, claim Nos. 2 and 3, valid but found the R.D. 1, claim No. 1, invalid for the reason that the claim was exhausted. A claim, to be valid, must be supported by a discovery both

at the time the land was withdrawn from mineral entry and at the present; that is, the time of the hearing. United States v. Clemans, 45 IBLA 64 (1980). Judge Mesch accurately summarized the evidence on the R.D. 1, claim Nos. 1 through 3, at pages 7 through 8 of his decision:

The only evidence presented with respect to the nature and extent of the mineralization within the three claims that was (1) actually found, and (2) in place within the claims at the time of the 1969 withdrawal and at the time of the hearing, shows that there was, on a conservative basis, at least 533 tons of proven mineralization with an average grade of 0.317 percent uranium oxide, 206 tons of indicated mineralization with an average grade of 0.375 percent uranium oxide, and 400 tons of inferred reserves with similar average grades. (Tr. 172-176, Ex. B) The combined tonnage of the proven and indicated mineralization, i.e., 739 tons, has an average grade of 0.332 percent uranium oxide. (Ex. B) This mineralization occurs at nine locations along the ribs or walls of the main incline and extends over an area of about 550 feet from the flooded portion of the incline back toward the two portals. (Ex. B) The mineralization is within the Rainy Day Group 1, claims No. 2 and No. 3. (Exs. A and B) I accept the expert testimony, which is undisputed, concerning the quantity and quality of the mineralization and conclude that a prudent person could, at the time of the withdrawal and the time of the hearing, have reasonably expected to mine at least 739 tons with an average grade of 0.33 percent uranium oxide from the two claims.

No specific evidence was presented as to the value of 0.33 percent uranium in 1969 or 1978. However, a Park Service witness testified that in 1969 uranium of 0.30 percent could have been sold for \$23.40 a ton. (Tr. 329) This figures out to \$3.90 per pound of uranium. I find that the 0.33 percent uranium within the two claims could have been sold for at least \$25.74 per ton in 1969. The only evidence of present day values shows that 0.30 percent uranium sold for \$130.63 a ton during February 1978. (Ex. R.) This figures out to \$21.77 per pound of uranium. I find that the 0.33 percent uranium could have been sold for at least \$143.68 per ton during February of 1978.

The best and most reliable evidence of costs shows that in 1969 the uranium mineralization within the two claims could have been mined and transported to a mill for a total cost per ton of less than \$15.17. (Ex. T) This would give a net profit per ton of at least \$10.57 or a total profit for the 739 tons of something in excess of \$7,800.00. Similar evidence for 1978 shows total costs per ton of less than \$25.15 (Ex. U) This would give a net

profit per ton of at least \$117.53 or a total profit from extracting the ore along the ribs or walls of the main incline of something in excess of \$86,800.00.

On the basis of the above figures, I cannot conclude that the commercially valuable mineralization within the Rainy Day Group 1, claims No. 2 and No. 3, was exhausted and there was a loss of discovery prior to the withdrawal in 1969. I find that the two claims were supported by a discovery of a valuable mineral deposit at the time of the withdrawal and the time of the hearing.

I cannot make the same finding with respect to Rainy Day Group 1, claim No. 1, since there is no evidence that a valuable mineral deposit was (1) actually found and (2) in place within the limits of the claim at the time of the withdrawal.

[6] As previously indicated, a major thrust of contestant's argument with respect to the claims found valid by the Judge, is that the contestees may have been unaware of the extent of mineralization in 1969. Their awareness, however, does not bear directly on the determination of validity. The test is whether there was a discovery at the time of withdrawal continuing to the time of the hearing. The findings tabulated by the Judge show that this test was met as to Rainy Day Group I, claim Nos. 2 and 3 but not claim No. 1 and those findings preponderate over countervailing data cited by contestant. Since no error has been shown, the Judge's findings will not be disturbed on appeal and the contest complaint as to Rainy Day Group I, claims No. 2 and claim No. 3 will be dismissed. See United States v. George C. Hooker, 48 IBLA 22, 26 (1980).

[7] "The apex law gives the owner of a properly located claim on a vein the right to an indefinite extension on the dip of the vein beyond the vertical planes through the side lines of his claims." U.S. Department of the Interior, Bureau of Mines, Dictionary of Mining Minerals and Related Terms 46 (1968). Contestees refer to this law as the "apex rule" which they cite for the proposition that finding a valid discovery on one claim within the channel where the ore is located entitles them to a finding of a valid discovery for all claims within the channel. However, under the apex law a vein in a claim is pursued downward within the boundary lines of the claim, and the vein which apexes in one claim has no relevance to the existence or nonexistence of a valuable mineral in an adjacent claim.

Under 30 U.S.C. § 26 (1976), the locator of a mining claim has the exclusive right of possession and enjoyment "of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically." 30 U.S.C. § 23 (1976) mandates that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." The regulations implementing these requirements, 43 CFR 3831.1 and 3841.3-1, require a discovery on each claim prior to its

location. Therefore, each claim is challenged individually and it follows that appellant cannot utilize the apex law to establish the existence of a discovery for another claim absent an independent showing of a discovery. See United States v. Arizona Manganese Corporation, 57 I.D. 558 (1942). As 31 of contestees' claims are invalid, the apex law cannot be used to render them valid.

[8] Finally, we must reject both of contestees' grounds for estoppel. Even assuming, arguendo, that a statement by the contestant's attorney at the hearing could bind the Government under these circumstances, as contestant points out in its reply brief, the statement neither stated nor implied that contestant would not appeal an adverse decision. The statement stated only that the Park Service would live with the final decision. As for the second ground, the denial by the AEC of more than one discovery bonus does not aid contestees' case. The AEC may have determined contestees were entitled to one discovery bonus because the claims were held in a single ownership. In any event, administering the public lands, including determining the validity of mining claims, has been entrusted to the Department of the Interior which must determine if contestees have satisfied the requirements of the law. See generally Cameron v. United States, supra. Furthermore, contestees have not shown the elements required to estop the contestant in either instance. See State of Alaska, 46 IBLA 12 (1980). There is no allegation that contestees were induced to act to their detriment, nor that the Government intended that its conduct be so acted on. Thus, the requisite basis for an estoppel is not present. See Utah v. United States, 284 U.S. 534, 545 (1932); Cramer v. United States, 261 U.S. 219, 234 (1923); Peignand v. Immigration and Naturalization Service, 440 F.2d 757 (1st Cir. 1971); United States v. Johnson, 23 IBLA 349, 355 (1976).

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 as to 31 claims found invalid and affirmed as modified as to Rainy Day Group I, claims No. 2 and No. 3.

Gail M. Frazier
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Bruce R. Harris
Administrative Judge

