

UNITED STATES v. D. J. POLASHEK

IBLA 80-779

Decided August 25, 1981

Appeal from decision of Administrative Law Judge Robert W. Mesch declaring mining claims invalid. Arizona 9860.

Affirmed.

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 Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally -- Mining Claims: Withdrawn Land

When land is withdrawn from location under the mining laws subsequent to the location of a mining claim, the claim must be supported by discovery at the date of withdrawal to be valid.

2. Mining Claims: Discovery: Generally

A discovery of a valuable mineral deposit has been made where minerals have been found and the evidence is of such a character that a prudent person would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

3. Mining Claims: Discovery: Generally

Evidence of mineralization which may justify further exploration, but not development of actual mining operations, is not sufficient to establish that a discovery of a valuable mineral deposit has been made.

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

In mining claim contests, the United States has assumed the burden of establishing a prima facie case that no discovery has been made on the mining claims by the contestee; the burden of proof then shifts to the contestee to show by a preponderance of the evidence that a discovery has been made and still exists within the limits of each mining claim. Evidence which may justify further exploration is insufficient either to establish a discovery or to overcome a prima facie case of lack of discovery.

5. Administrative Procedure: Burden of Proof -- Mining Claims:
Determination of Validity

A prima facie case of lack of discovery of a valuable mineral deposit is established when a mineral examiner testifies for the United States that he examined each claim and could find no evidence showing the discovery of a valuable mineral deposit. Mineral examiners are not required to perform discovery work for claimants or to explore beyond a claimant's workings.

APPEARANCES: D. J. Polashek, pro se.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

D. J. Polashek has appealed the June 11, 1980, decision of Administrative Law Judge Robert W. Mesch declaring the Carlo Nos. 4, 5, and 6 lode mining claims, located in Pima County, Arizona, invalid for lack of discovery of valuable minerals on the claims. 1/

1/ The certified mail return receipt in the file shows that appellant received his copy of Judge Mesch's decision on June 13, 1980. His notice of appeal is dated July 12 and was received in the Salt Lake City Office of Hearings and Appeals on July 15, 1980. It appears therefore that the notice of appeal was filed after the 30-day period allowed in 43 CFR 4.411(a), but within the 10-day grace period provided in 43 CFR 4.401(a). If a notice of appeal is filed during the 10-day grace period, the delay in filing will be waived if it is determined that the notice was transmitted or probably transmitted before the end of the filing period. See Ilean Landis, 49 IBLA 59 (1980). As the notice of appeal was transmitted within the appeal period, the case may be considered on its merits.

The Arizona State Office, Bureau of Land Management (BLM), instituted Contest No. Arizona 9860 on behalf of the Bureau of Indian Affairs. The Government's complaint charged that no valuable minerals so as to constitute a discovery under the mining laws had been found on the claims, and that the land embraced by the claims was not mineral in character.

Contestee denied the charges and on January 18, 1979, a hearing was held before Judge Mesch in Tucson, Arizona.

[1-5] We have thoroughly reviewed the record of this case and the arguments advanced by the parties. Judge Mesch's decision sets out a full summary of the testimony, the relevant evidence, and applicable law. We agree with the Judge's findings and conclusions and adopt his decision as the decision of the Board. A copy of the Judge's decision is attached as Appendix A.

In his statement of reasons on appeal to this Board appellant contends that the claims are valuable for building stone and minerals which appellant would extract and sell.

These arguments are the same as those presented to Judge Mesch prior to his June 11 decision and reveal no error therein. We find that the decision fully responds to these arguments and further discussion is therefore unnecessary.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we affirm the decision of the Administrative Law Judge and adopt it as our own.

Anne Poindexter Lewis
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Gail M. Frazier
Administrative Judge

June 11, 1980

UNITED STATES OF AMERICA,	:	ARIZONA 9860
	:	
Contestant	:	Involving the Carlo Nos. 4,
	:	5 and 6 lode mining claims
v.	:	located in unsurveyed
	:	Section 35, T. 12 S., R. 8 E.,
D. J. POLASHEK,	:	and partly in surveyed
	:	Sections 1 and 2, T. 13 S.,
Contestee	:	R. 8 E., GSR Mer., Pima
	:	County, Arizona.

DECISION

Appearances: Fritz L. Goreham, Office of the Solicitor,
 Department of the Interior, Phoenix, Arizona,
 for contestant;

D. J. Polashek, Marana, Arizona, and Anthony Lane,
 Tucson, Arizona, for contestee.

Before: Administrative Law Judge Mesch.

This is a proceeding involving the validity of three lode mining claims located under the Mining Law of 1872, as amended, 30 U.S.C. § 22, *et seq.* The proceeding was initiated by the Arizona State Office, Bureau of Land Management, at the request and on behalf of the Bureau of Indian Affairs.

Pursuant to 43 CFR 4.451, the Bureau of Land Management issued a complaint on March 8, 1979, charging, among other things, that the subject mining claims are invalid because they have not been perfected by the discovery of a valuable mineral deposit. The contestee filed a timely answer and denied the charges in the complaint. A hearing was held on January 18, 1980, at Tucson, Arizona. The contestant has filed a posthearing brief.

The complaint originally sought the invalidation of four claims. Prior to the hearing, the contestant moved to withdraw the complaint with respect to the Carlo No. 7 claim. The motion was granted.

The contested mining claims are situated within the Papago Indian Reservation. By an act of May 27, 1955, 69 Stat. 67, 25 U.S.C. § 463, Congress withdrew all land within the Papago Indian Reservation from all forms of exploration, location and entry under the mining laws. The claims were located prior to the date of that act.

The mining claims cannot be recognized as valid unless (1) all requirements of the mining laws were met on May 27, 1955, when the land was withdrawn from location and entry, and (2) the claims presently meet the requirements of the law. Cameron v. United States, 252 U.S. 450 (1919); Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963); United States v. Clemans, 45 IBLA 64 (1980).

The Department of the Interior and the Courts have held that (1) a mining claim does not create any rights against the United States and cannot be recognized as valid unless a valuable mineral deposit has been discovered within the limits of the claim; (2) a valuable mineral deposit is an occurrence of mineralization of such quality and quantity as to warrant a person of ordinary prudence in the expenditure of time and money in the development of a mine and the extraction of the mineral, i.e., the mineral deposit that has been found must have a present value for mining purposes; and (3) 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, i.e., a valuable mineral deposit has not been found simply because the facts might warrant a continued search for such a deposit. Chrisman v. Miller, 197 U.S. 313 (1905); United States v. Coleman, 390 U.S. 599 (1968); Hallenbeck v. Kleppe, 590 F.2d 852 (10th Cir. 1979); Barton v. Morton, 498 F.2d 288 (9th Cir. 1974); United States v. Porter, 37 IBLA 313 (1978).

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. A prima facie case is made when a qualified mineral examiner testifies that he has examined the claim and found no mineralization sufficient to warrant exploitation. If a prima facie case is presented, the mining claimant then has the burden of showing by a preponderance of the evidence

that the claim is valid, i.e., that he has actually found a mineral deposit of sufficient quantity and quality to justify the development of a mine. Hallenbeck v. Kleppe, supra; Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Porter, supra.

The sole function of a government mineral examiner in examining a mining claim is to verify whether the mining claimant has, in fact, found a valuable mineral deposit. He has no obligation to explore or sample beyond those areas which have been exposed by the claimant or to perform discovery work for the claimant. The purpose of such an examination is to determine whether the claimant has found mineralization and, if so, whether it constitutes a valuable mineral deposit. The examination is not intended to determine whether other mineralization might be found somewhere within the limits of the claim that might constitute a valuable mineral deposit. Hallenbeck v. Kleppe, supra; United States v. Porter, supra.

The contestant presented the testimony of a qualified consulting geologist who, based upon his education, experience, examination of the claims, and the assay results of sampling, expressed the opinions that the mineralization found within the claims was not such as to warrant a prudent person, either at the present time or at the time of the withdrawal in 1955, in the expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. The witness arrived at these opinions because the value of the mineralization exposed within the claims was not sufficient to meet the costs of any recognized mining operations suitable for the property. In addition, he found no geologic indications that there was a sufficient tonnage of mineralization to warrant a mining operation.

The testimony of this expert witness constituted a prima facie case in support of the allegation that the mining claims are invalid because a valuable mineral deposit has not been found within the limits of any one of the claims.

The contestee asserts that the claims are valuable for copper, silver, possibly gold, and as a source of building stone for use in the construction industry. As noted above, the contestee has the burden of showing that a valuable mineral deposit was actually found within the limits of each of the contested claims prior to the withdrawal in 1955 and that each claim is presently supported by the discovery of a valuable mineral deposit.

The contestee presented evidence showing that he had drilled three 12-foot holes on the Carlo No. 4 claim between 1977 and 1980 and found mineralization assaying from 0.65 to 0.95 percent copper, from 0.45 to 2.20 ounces of silver, and from a trace to 0.015 ounces of gold per ton of material. He did not present any evidence relating to (1) the average or representative value of the mineralization that might be extracted from the claims, (2) the amount of mineralization that might be available for extraction from the claims, or (3) the cost of extracting and marketing the mineralization. Without some information relating to each of these three factors, no one could conclude that a mineral deposit has been found that is valuable for mining purposes.

A sharp distinction must be drawn between finding some mineralization (even of high potential value) and finding a valuable mineral deposit. In Barton v. Morton, supra, the Court quoted the following with approval:

It is nowhere suggested that any quantity of material of the quality of the vein matter thus far disclosed would constitute a minable body of ore. The evidence does not, in fact, establish any mineral quality of any consistent extent. Although appellants have found ore samples with indicated values exceeding \$70 per ton, the record does not support a finding that they have found a deposit yielding ore of that quality, or of any other quality, the exploitation of which may be contemplated * *

*. (p. 291)

The contestee also presented evidence showing that he had sold about two tons of building stone in 1977 for a total sales price of \$55.00. This stone came from the Carlo No. 5 claim. He stated that he has other potential buyers for the building stone from the claims. He believes he can mine the building stone for about \$10.00 per ton and sell it for \$37.50 per ton. The contestee did not present any evidence relating to (1) the quantity of building stone within the claims that might be suitable for extraction and sale, or (2) the amount of building stone that might be sold on an annual or other bases. Again, without some information relating to these two factors, no one could conclude that a mineral deposit has been found that would justify the expenditure of time and money in the development of a mine.

In Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971), the court, in affirming a decision of the Department, stated:

* * * [The Department's decision] pointed out that the quantity of material actually sold by appellant * * * was, in and of itself, too insubstantial to establish that a prudent man would have tried to develop the Grout Creek claim. (p. 82)

* * * * *

* * * What is required is that there be, at the time of discovery, a market for the discovered material that is sufficiently profitable to attract the efforts of a person of ordinary prudence. (p. 83)

The evidence presented by the contestee does not establish that there was a market for the building stone at the time of the withdrawal in 1955 or at the time of the hearing that was sufficiently profitable to attract the efforts of a person of ordinary prudence.

The mining claims were examined in the late 1950's by mineral examiners with the Bureau of Land Management. They concluded that the claims were valid. The evidence does not contain any information as to how or why they arrived at that conclusion. The contestee apparently relied on the actions and conclusions of the Bureau's mineral examiners when he purchased the claims in 1976. This is an unfortunate situation. Nevertheless, I must decide the case on the basis of the evidence presented at the hearing and not on past actions of employees of the Bureau of Land Management. I cannot conclude on a theory of estoppel or res judicata or some other theory that the claims are valid simply because mineral examiners with the Bureau previously concluded, for unknown reasons, that the claims were valid. I can find the claims valid only if the evidence shows that the requirements of the mining law have been met. See Ideal Basic Industries, Inc., v. Morton, 542 F.2d 1364 (9th Cir. 1976), and in particular, United States v. Clemans, supra, which involved an identical situation where the Bureau's mineral examiners had previously found claims valid within the Papago Indian Reservation.

The Carlo Nos. 4, 5 and 6 lode mining claims are found to be invalid because they were not perfected by the discovery

of a valuable mineral deposit prior to the withdrawal on May 27, 1955, and they are not presently supported by the discovery of a valuable mineral deposit.

Robert W. Mesch
Administrative Law Judge

APPEAL INFORMATION

The contestee, as the party adversely affected by this decision, has the right of appeal to the Interior Board of Land Appeals. The appeal must be in strict compliance with the regulations in 43 CFR Part 4. (See enclosed information pertaining to appeals procedures.)

If an appeal is taken the adverse party, the Bureau of Land Management, can be served by service upon its attorney at the address listed below. In addition, a copy of the notice of appeal and of any statement of reasons, written arguments, or briefs, must be served on the Associate Solicitor, Division of Energy and Resources, whose address is: Office of the Solicitor, United States Department of the Interior, Washington, D.C. 20240.

Enclosure: Information Pertaining to Appeals Procedures

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By Certified Mail

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