

UNITED STATES
v.
MALIN W. LEWIS

IBLA 81-61

Decided October 8, 1981

Appeal from decision of Administrative Law Judge John R. Rampton, Jr., dismissing Government contest complaint challenging validity of lode mining claims. AZ 9862.

Affirmed.

1. Administrative Practice: Hearings--Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Hearings--Rules of Practice: Government Contests

Absent a patent application, the dismissal of a contest complaint by an Administrative Law Judge does not establish the validity of the claim, but merely establishes that, on the issues raised by the evidence, the contestee has preponderated. Therefore, there is no requirement beyond preponderation as to the issues raised by the evidence, that a mining claimant affirmatively establish the validity of a claim.

2. Administrative Practice: Hearings--Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Hearings--Rules of Practice: Government Contests

Absent a patent application, in a mining contest hearing where the Government's evidence of lack of discovery relates only to insufficient quality and quantity of mineralization and the mining claimant produces evidence sufficient to preponderate on those issues, the contest complaint is properly dismissed.

APPEARANCES: Fritz L. Goreham, Esq., Office of the Field Solicitor, Phoenix, Arizona, for the Bureau of Land Management; Charles Jones, Esq., Phoenix, Arizona, for appellee.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

The Bureau of Land Management (BLM) has appealed from a decision of Administrative Law Judge John R. Rampton, Jr., dated August 25, 1980, dismissing without prejudice Government contest complaint, AZ 9862, challenging the validity of six lode mining claims, Mond Tel Nos. 1, 4, 6, 8, 9, and 12. 1/

This case was initiated with the filing of a contest complaint on March 8, 1979, by BLM on behalf of the Bureau of Indian Affairs (BIA), charging that valuable minerals had not been found within the limits of the claims "so as to constitute a valid discovery within the meaning of the mining laws" and that the land was "non-mineral in character." The contested mining claims are situated in unsurveyed T. 14 S., R. 2 E., Gila and Salt River meridian, Pima County, Arizona, within the Papago Indian Reservation.

Hearings were held on January 29 and April 23, 1980, in Phoenix, Arizona. Based on evidence adduced at the hearings, Administrative Law Judge Rampton concluded that the Government had presented a prima facie case of the lack of discovery of a valuable mineral deposit, but that appellee had overcome that case by a preponderance of the evidence.

By the Act of May 27, 1955, P.L. 47, 69 Stat. 67, Congress withdrew all land within the Papago Indian Reservation from exploration, location, and entry under the mining laws, subject to valid existing claims. All of appellee's claims were located while the land was open to mineral entry.

It is well established that the sine qua non for a valid mining claim is the discovery of a valuable mineral deposit. 30 U.S.C. § 22 (1976). Under the so-called "prudent man test," a discovery has been made where there is 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. Chrisman v. Miller, 197 U.S. 313 (1905). The "prudent man test" has been augmented 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, 390 U.S. 599 (1968). Where land occupied by a mining claim has been withdrawn

1/ The contest complaint was originally filed against 12 lode mining claims, Mond Tel Nos. 1 through 12. By order dated Sept. 27, 1979, pursuant to a motion filed by the Office of the Field Solicitor on behalf of BLM, the Administrative Law Judge dismissed the contest complaint without prejudice as to the Mond Tel Nos. 2, 3, 5, 7, 10, and 11 claims. All 12 claims are situated on the south flank of Brownell Peak within the Papago Indian Reservation.

from the operation of the mining laws, the validity of the claim must be tested by the value of the mineral deposit as of the date of the withdrawal, as well as of the date of the hearing. United States v. Chappell, 42 IBLA 74 (1979); United States v. Garner, 30 IBLA 42 (1977).

The evidence introduced by the Government consisted primarily of the testimony of Dr. Charles L. Fair, an economic geologist, whose firm, C. L. Fair and Associates, had conducted a validity examination of all 12 Mond Tel claims under contract with BIA during the period 1976-77. The claims were thought to be valuable for "porphyry copper." Samples were taken from mineralized outcroppings in each of the claims and assayed. Dr. Fair then evaluated the assay results using a standard of 1 percent copper, which he considered a minimum standard for a porphyry copper deposit (I Tr. 28).

Dr. Fair concluded as to the six Mond Tel claims subsequently dismissed from the contest, with assay results of 1 percent or higher, that a discovery had been made. He also concluded as to the six Mond Tel claims that were the subject of the hearings, with assay results less than 1 percent, that a discovery had not been made. Furthermore, he stated in the examination report:

[T]he area is cut by large fracture zones which break up the bedrock over large areas and have allowed mineralizing solutions to alter and mineralize large volumes of rock. As with the case of most porphyry copper outcrops, however, not all of the mineralized outcrops are high grade, and much of the intervening area between shear [sic] zones is barren.

Balanced against the favorable aspects of mineralization is the failure of the claimant over a period of approximately 20 years to develop the property and do systematic exploration work which would expose discovery outcrops to their maximum potential. Indeed, showing discovery on porphyry copper prospects is often difficult because leaching and erratic distribution of alteration often creates surface exposures with very low assay values. Validity determinations are made doubly difficult in these situations because geologic inference cannot be used.

(Exh. G-1 at 5-6).

Dr. Fair testified that it was his opinion that a prudent person would not be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine on the claims in question. He based this conclusion on the low assay values and the lack of any visible tonnage on the claims either as of the date of the withdrawal or the date of the hearing (I Tr. 31).

[1] When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of

going forward with sufficient evidence to establish a prima facie case as to that charge; however, the mining claimant has the ultimate burden of refuting the Government's case by a preponderance of the evidence. Hallenbeck v. Kleppe, 590 F.2d 852 (10th Cir. 1979); United States v. Springer, 491 F.2d 239 (9th Cir.), cert. denied, 419 U.S. 834 (1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). Absent a patent application, where the mining claimant's evidence preponderates sufficiently to overcome the Government's prima facie case on the issues raised by the evidence, the contest should be dismissed and a ruling made on the issues by the Administrative Law Judge. United States v. Taylor, 19 IBLA 9, 25, 82 I.D. 68, 74 (1975). In such a situation dismissal of a contest complaint does not determine the validity of the claim, but merely establishes that, as to the issues raised in the hearing, the mining claimant has preponderated. Thus, there is no requirement that a mining claimant show that the claim is valid; rather, the mineral claimant's burden is to preponderate on the issues raised by the evidence. United States v. Hooker, 48 IBLA 22, 26-27 (1980).

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). Accordingly, we agree with the Administrative Law Judge that the Government established a prima facie case.

We note that at one point in his decision the Administrative Law Judge seems to have concluded that the Government's prima facie case was limited merely to the issue of quality. He states that Dr. Fair "made no tonnage estimates on the six claims now in issue, but based his conclusion of invalidity solely on the quality of the ore found in his samples" (Decision at 4). However, we do not believe that the evidence adduced by the Government was so narrow in focus, nor apparently did the Administrative Law Judge. Later in his decision he included a discussion of geological inference to establish the quantity of mineralization on the claims. We find that Dr. Fair's statement regarding the lack of any visible tonnage on the claims in question was sufficient to put the quantity of the alleged mineralization in issue.

Appellee produced assay results obtained from surface samples taken by Ted J. Scow, a consulting geologist, and Dr. Clyde Davis, an economic geologist. Two samples were taken on each of the claims in close proximity to each other (II Tr. 39). The assay results ranged between .012 percent and 9.40 percent copper. 2/

The Administrative Law Judge summarized the additional evidence on this subject and offered his conclusion:

2/ On page 3 of his decision the Administrative Law Judge set forth the following table comparing the assay results of the Government (Fair) and appellee (Scow and Davis) for the claims in question:

The testimony of Dr. Fair that the industry norm for an acceptable grade of porphyry copper deposits would be at least 1% was disputed by Ted Scow, who testified that most major mines used a cut-off point for paying ore at .5%. Dr. Davis also substantiated that testimony and said that many mines in Arizona set their mill heads at .5%. He stated that low-grade disseminated ore is mined commercially because of the practice of "blending" in the industry and that the Sierrita mine in the Duvall operation was successful at about .35%. Similarly, Hall Susie, the Government's own witness, disagreed with Dr. Fair's estimate of mineable- grade ore and testified that the average for mill heads operating in Arizona would probably be between .65 and .7%. Moreover, to maintain the mill heads for this level and not lose copper, he verified that it is necessary to blend low-grade ore that will run down to .4%.

If the sole criterion for determining the validity of a claim could be based upon the amount of mineralization showing in the samples taken from surface outcroppings, then based upon the averages of the three sets of samples taken, one would have to conclude that the claims are valid. The results of the surface sampling indicate the presence on five of the claims of commercial grade copper. Ore sample taken from the Mond Tel No. 6 also shows a percentage

fn.2 (continued)

MOND TEL CLAIMS: Summary Table

Assay Values (percent copper) of Representative Samples

Contested

Claim No.	Fair Sample	Scow Sample	Davis Sample
1	traces	0.75% copper	0.346% copper
4	.68% copper	1.50%	0.529%
6	.44%	0.18%	0.012%
8	traces	0.45%	0.774%
9	traces	1.10%	1.052%
12	.65%	9.40%	6.93%

Dr. Fair's assay results for the claims dropped from the contest prior to the hearing were:

Mond Tel Claims
Summary Table

Claim No.	Zone Thickness (Ft)	Assay %	Visible Tonnage	A x T
2	10	0.92	9,400	8,684
3	6	1.75	5,600	9,800
5	8	0.81	7,500	6,075
7	8	1.50	7,500	11,250
10	6	1.03	5,600	5,768
11	8	1.45	7,500	10,875

Exh. G-1 at 6.

of copper that could be blended with higher grade ore to maintain the average mill head level. The claims are located as a group and would be worked as a group.

The presence of commercial grade copper, however, does not ipso facto satisfy the requirements of the mining law as to the need for a discovery of a valuable mineral as expressed in United States v. Coleman, 390 U.S. 599 (1968); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). * * *

The question then arises as to whether the extent or quantity of the mineralization can be determined from the showings on the surface.

Dr. Fair is of the opinion that it can, for in his report he made visible tonnage estimates on the six claims and concluded that the claimants had made on these claims a valid discovery. He made no tonnage estimates on the six claims now in issue, but based his conclusion of invalidity solely on the quality of the ore found in his samples. [Decision at 3-4]

In discussing the issue of quantity the Administrative Law Judge cited United States v. Hooker, supra, which quoted United States v. Larson, 9 IBLA 247 (1973), aff'd, Larson v. Morton, No. 73-119 TUC-JAW (D. Ariz. 1974), for the proposition that quantity may be established under certain circumstances by geologic inference. Finally, he stated: "Dr. Davis, who has considerable experience in evaluating mining claims, testified that it is an acceptable practice and his general practice on porphyry claims to infer from the surface capping whether there is an enriched deposit in depth" (Decision at 8).

In his testimony, Dr. Davis expanded on the concept of "surface capping":

What we look at, we go into a mining property, a porphyry and we look at the capping, and what it does is try to tell us if there has been a lot of leeching [sic]. Your rain water will come in and if it has sulfides it makes a weak sulfuric acid and it will take your copper and your other material in solution and redeposit it, sometimes to the water table level where they get an enrichment, and we can usually tell from the capping if there's been much of an enrichment or if we feel by the sweat of minerals and the clay and the type of capping, if we feel there might be something in depth.

* * * * *

JUDGE RAMPTON: What about this capping. How do you mean by capping? Is that just the surface rock?

THE WITNESS: That's the surface rock and we do this with gold and silver and oil. You look at the surface rock and if you have a certain type of mineralization and clay minerals, we'll look at the clay, we feel that it has a good chance of making a deposit in depth.

JUDGE RAMPTON: That's through the trapping of the water and the leeching [sic].

THE WITNESS: That's through the leeching [sic] as it goes down.

JUDGE RAMPTON: Through the cap.

THE WITNESS: Right. Now on the surface though you've got to have some of the residual mineral. You should by your scratch and by various methods that we use, we should say that there is a potential of a deposit in depth and that's why any time I'd ever go on a porphyry and I had Bill Lacy, because he was Cerro De Pasco's top geologist on capping in South America. That was all he did. I would always take him to look at these caps because of his experience and I'd try to get from him how he related it with other areas throughout the world that he had been in.

JUDGE RAMPTON: What you're really saying is that you do have mineralization in the samples.

THE WITNESS: That's right.

JUDGE RAMPTON: And this mineralization is very promising combined with the geologic conditions that exist there.

THE WITNESS: That is correct. [Emphasis added.]

(II Tr. 78-80). 3/

3/ Appellee also introduced into evidence a one-page letter from Willard C. Lacy to appellee indicating that Dr. Davis and he had spent 7 days "within the Mond-Tel claim group" conducting an "examination and geological mapping of the area" (Exh. C-7). While the Mond Tel claims are shown to be located in a mineralized zone on an attached map, the letter also states: "In view of the low pyrite content of the rocks, copper values would not be leached during weathering processes. Thus, a geochemical survey of rock samples on a grid pattern within the altered area would give a good evaluation of the potential of the claims and areas of copper concentration."

This statement was not explained at the hearing, although it seems to conflict with Dr. Davis' testimony concerning leaching. Dr. Fair's report indicates that leaching does occur. Exh. G-1 at 6.

The Administrative Law Judge summarized the testimony of appellee's witnesses as follows:

The gist of their testimony is that they are very favorably impressed with the surface showings of mineralization, that the geologic conditions are favorable, that some of the old workings and dumps indicated 3 and 4% ore, but that prior to mining the economics of the operation be determined by ascertaining the amount of the ore through a drilling program.

(Decision at 6).

[2] In its statement of reasons for appeal BLM argues that appellee's mining experts both characterized the subject claims as "prospect[s]," indicating that drilling was necessary to determine the extent of the mineral deposit. BLM also argues that appellee did not establish by geologic inference the extent of the deposit because he "did not include one shred of testimony on inferred tonnage as discussed in [United States v. Hooker, supra, relied on by the Administrative Law Judge]."

There seems little doubt that the subject claims contain commercial grade copper ore. The assay reports produced by appellee show values as high or higher than the values for the samples taken by the Government from the claims which Dr. Fair thought were valid and for which the contest was dismissed prior to the hearing. We hold, therefore, that appellee has preponderated on the issue of the quality of the mineralization.

With respect to the issue of quantity, appellee relies on geologic inference, primarily the phenomenon of "surface capping," to establish that surface showings of the porphyry copper continue to depth. It is clear that the Administrative Law Judge found appellee's evidence more persuasive than Dr. Fair's statement in his examination report that "geologic inference cannot be used" due to the erratic distribution of the copper (Exh. G-1 at 6). Dr. Fair apparently had no problem making visible tonnage estimates for the six claims not at issue herein. See Exh. G-1 at 6.

Appellee's evidence establishes a deposit of "inferred ore," as defined in United States v. Hooker, supra at 35. ^{4/} Given the weak

^{4/} "Inferred ore" is defined as:

"[O]re for which quantitative estimates are based largely on broad knowledge of the geologic character of the deposit and for which there are few, if any, samples or measurements. The estimates are based on assumed continuancy or repetition for which there is geologic evidence. This evidence may include comparison with deposits of similar type. Bodies that are completely concealed may be included if there is specific geologic evidence of their presence."

United States v. Hooker, supra at 35.

nature of the prima facie case concerning quantity presented by the Government, we find that appellee's evidence is sufficient to preponderate on the quantity issue.

We are not unmindful of the testimony of appellee's witnesses indicating that drilling was necessary to determine the extent of the deposit (II Tr. 19, 59-60, 83). Appellee was not required, however, to "block out a deposit" or even to conduct a comprehensive drilling program. United States v. Hooker, *supra* at 30. Appellee's witnesses also characterized the claims as a "favorable prospect," justifying further exploration and development (II Tr. 19-20, 80). 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).

While such testimony might be fatal given the facts of some cases, see United States v. Lee Western, Inc., 50 IBLA 95, 106 (1981), examination of the entire record reveals that it is not in this case. The primary reason for this is the weakness of the Government's prima facie case. Because of that, the amount of evidence necessary for appellee to produce to preponderate on the issues raised by the Government's case was lessened. Appellee's evidence concerning the quality and quantity of the mineralization on the claims in issue was sufficient to overcome the Government's case, despite the characterization of the claims as a "favorable prospect" by appellee's witnesses.

The Administrative Law Judge properly dismissed the contest complaint.

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.

R. Harris

Administrative Judge

Bruce

We concur:

C. Randall Grant, Jr.
Administrative Judge

Douglas E. Henriques
Administrative Judge

