

UNITED STATES
v.
JOHN BURT ET AL.

IBLA 80-559

Decided November 5, 1981

Appeal from decision of Administrative Law Judge R. M. Steiner declaring various mining claims null and void for lack of discovery of a valuable mineral deposit. CA-5255.

Affirmed.

1. Appeals -- Attorneys -- Constitutional Law: Due Process -- Mining Claims: Contests -- Mining Claims: Hearings -- Rules of Practice: Government Contests -- Rules of Practice: Hearings

Failure to obtain counsel at a hearing into the validity of a mining claim will afford the mining claimant no greater rights on appeal than if he had obtained counsel.

2. Mining Claims: Hearings -- Rules of Practice: Evidence -- Rules of Practice: Hearings

To warrant a further hearing in a mining claim contest based upon asserted lack of discovery, an appellant must make an evidentiary tender of proof of discovery. Evidence of a past discovery is not sufficient by itself to warrant a further hearing.

APPEARANCES: Robert H. Ziprick, Esq., Bloomington, California, for the appellants; John W. Burke III, Esq., Office of the Field Solicitor, San Francisco, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

John Burt, Robert Howells, Russell Miller, and Thomas have appealed from a decision of Administrative Law Judge R. M. Steiner, dated February 29, 1980, declaring various mining claims null and void for lack of discovery of a valuable mineral deposit. 1/

This case was initiated with the filing of a contest complaint on November 17, 1978, by the Bureau of Land Management (BLM), on behalf of the National Park Service (NPS), charging that: "There are not presently disclosed within the boundaries of the mining claim[s] minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery."

Appellants filed a timely answer, and on April 11, 1979, a hearing was held in Las Vegas, Nevada. Based on evidence adduced at the hearing, the Administrative Law Judge concluded that the Government had established a prima facie case as to the lack of discovery "as of the effective date of the withdrawal, September 28, 1976," and that appellants had failed to overcome this case by a preponderance of the evidence (Decision at 10).

The evidence presented at the hearing, as summarized by the Administrative Law Judge, is as follows:

Walter Rosenthal, a former lessee of several of the All Mineral[s] claims which encompass the Jubilee Mine, testified on behalf of the Contestant. 2/ He developed the Jubilee Mine and produced over 10,000 tons of ore that were shipped to the South Gate Smelter in Oakland, California, from 1963 to 1969. (Tr. 11). He has a Masters Degree in civil engineering and has had 10 years of mining experience. He examined the All Minerals claims and found some high grade galena outcrops on the surface. (Tr. 13). Thereafter, he entered into a lease with the Contestees. Mr. Rosenthal agreed to do all the development work. (Tr. 14). He brought in the necessary equipment and began mining. A great number of exploratory holes were drilled

1/ This case involves the following 29 claims, situated in portions of protracted secs. 2 through 4, 9 through 11, and 15, T. 21 N., R. 3 E., San Bernardino meridian, Inyo County, California, within the Death Valley National Monument: Blue Sky, Blue Skies Nos. 2 through 8 and 10 through 12, Inyo Iron, Payloader, No Rose #1 and #2, Red Dog #1, All Minerals No. 1, All Mineral #2 through #4, All Minerals No. 7 Extension, All Minerals Nos. 7 through 9 and 11 through 14, and The All Minerals #6. The lands within the Death Valley National Monument were withdrawn from mineral entry pursuant to the Act of Sept. 28, 1976, 16 U.S.C. § 1901 (1976), subject to valid existing mineral rights.

2/ Apparently the Jubilee Mine itself was located on only one of the mining claims, the All Minerals No. 1 (Tr. 32, 77).

in search of ore. Since he did not want to miss any deposits, he expended close to a quarter of a million dollars in exploratory drilling during a five year span. (Tr. 17).

After having a geologist, Art Baker, make a mineral report on the Jubilee Mine in 1969, Mr. Rosenthal stopped down several drifts 200 feet below the surface. However, he found no mineralization. (Tr. 17).

The ore deposits in the mine were formed by mineral solutions forced upward and then shifted around by faulting. (Tr. 20). Further exploratory drilling was done in the area adjacent to the Jubilee Mine to uncover any further mineral deposits. Mr. Rosenthal followed every indication of potential mineralization nearby but did not find any more deposits of lead. (Tr. 20). There may be some small deposits of lead remaining in the mine, but it would be uneconomical to remove it. It cost \$50 a ton to mine ore in 1969 in labor alone. (Tr. 21).

A topographical map of the Jubilee Mine area was prepared by Atlas Minerals. (Ex. 1). Atlas Minerals conducted surface drilling but did not uncover any lead or other productive mineral deposits. Consequently, they abandoned an option which they had on the mine. (Tr. 22). Another map depicting Rosenthal's exploratory drilling 200 feet below the actual working of the Jubilee Mine was placed in the record. (Ex. 3). A 300-foot drift was driven. Exploratory drilling was done at every point where Mr. Baker believed mineralization might be encountered. Drill holes were made on both the top and bottom as well as both sides of the excavations following the ore underground. (Tr. 28.) A fault had cut off exposed mineralization in the mine. No further mineralization was found. (Tr. 25).

Although he has uncovered some talc outcrops on the south side of the Jubilee Mine, he did not believe he could extract the talc economically. (Tr. 30). His reasons were that the inaccessibility of the talc deposits made it difficult to mine and that there were large talc operations already in existence which he felt he could not compete with. (Tr. 31). He has explored around the area of the Jubilee Mine at every place possible. (Tr. 33). The ore deposits in the Jubilee Mine on the All Minerals claims are mined out. (Tr. 36). He stated, "[i]t is ridiculous for anybody to go and put his own money out of his pocket in anything like this. . . . The showing at the mine itself I don't think justifies a company to go in there." (Tr. 36). The chances of recovering mining costs would be one in a thousand. (Tr. 37).

On cross-examination, Mr. Rosenthal was asked about the All Minerals #6 placer mining claim. He stated that he conducted drilling on that claim. Based on his experience and examination of the claim, he does not believe anyone can economically mine a lead placer claim. (Tr. 39). After Mr. Rosenthal closed operations on the Jubilee Mine, a subsequent lessee, Mr. Bradshaw; removed 25 tons of ore and abandoned his mining operations after working there for 2 months. (Tr. 44). If similar mineral deposits were found in a mine elsewhere, Mr. Rosenthal currently would not develop them. (Tr. 59). There is no smelter nearby to process the ore. (Tr. 60). In 1968, it cost \$50 per ton to ship the ore by train to the smelter. It cost \$15 per ton to haul ore to the railroad. (Tr. 61).

The current conditions would not justify development of the Jubilee Mine. (Tr. 61). In order to mine the pockets of high grade ore in the Jubilee Mine you must drill and blast and then hand sort the ore. (Tr. 65). This kind of operation is expensive. Any attempt to mine low grade ore would not be economically feasible because of the cost of transportation to the mill, the amount of waste rock intermixed with the lead, and the labor and smelting costs. (Tr. 67). Although the price of lead has risen since 1969, the cost of mining has increased more. (Tr. 68). When Mr. Rosenthal asked Mr. Rokita to waive royalty payments in lieu of further exploration, Mr. Rokita refused to do so. Mr. Rokita could not identify for Mr. Rosenthal any mineral deposits in the mine which had not already been worked. (Tr. 70).

Mr. L.S. Zentner, Chief, Division of Mining, National Park Service, after having been duly qualified as a mining engineer, testified that he examined the Jubilee Mine or the All Minerals No. 1 claim and had made a reconnaissance of the other claims. (Tr. 75). His initial inspection was made in January 1976. Others were in August 1977, April 1978, and April 1979. (Tr. 76). He visited the claims with Mr. Burt but did not ask him where his discoveries were. Mr. Zentner did not find any commercial mineral deposits on the claims he visited. (Tr. 76). He found only a few small galena blebs measuring 3 to 4 inches in diameter in the uppermost level of the Jubilee Mine. (Tr. 78).

Mr. Zentner [sic] did not find continuous stopes in the mine but found that the irregular bodies of ore were followed and mined accordingly. There was a fault running through the workings. (Tr. 80). When asked whether the Jubilee Mine had been mined out, Mr. Zentner [sic] replied:

I believe that this particular ore body has been mined out. I also believe based on the drill logs that I examined, and the drill holes that are evident in the mine workings that they have carried out a program, an exploration program around this ore body that was mined out, far beyond what you see in most mining properties in the hope that they would find other ore (Tr. 82).

He further stated that any lead placer deposit would not be economical to mine because it would be difficult to find any concentrated deposits. (Tr. 82). He found a small 2-foot wide deposit of talc which he considered impractical to mine. This was the only talc deposit he uncovered. (Tr. 83). There are other talc deposits operated by other mining companies that bear larger volumes of talc. (Tr. 84). All of the contested claims are within the Death Valley National Monument. (Tr. 84). Mr. Zentner expressed an opinion only on the feasibility of a mining venture on the All Minerals No. 1 claim. He stated that a prudent person would not be justified in developing that claim. (Tr. 85).

On cross-examination, Mr. Zentner reaffirmed Mr. Rosenthal's conclusion that the Jubilee Mine had been thoroughly explored and that there are no mineral deposits presently exposed. (Tr. 90).

Mr. Walter Gould, after having been duly qualified as a mining engineer, stated he inspected all 29 claims in this contest on September 24 and 25, 1977, with Mr. Burt. Other examinations were made on April 4 and 6, 1979. He asked Mr. Burt to point out discoveries and Mr. Burt did so. (Tr. 95). Mr. Gould inspected all the discovery points except for the Jubilee Mine. (Tr. 96). He found a small talc deposit on the Blue Sky Nos. 2, No. 3, No. 4 and All Minerals No. 7 extension claims. A vein of lead zinc was found on the All Minerals No. 11 claim. No other exposed mineralization was detected. (Tr. 96). He sampled each claim where there were exposed talc deposits and also the All Minerals No. 11. (Tr. 99). The samples were sent to Fred Yarcho in Darwin, California for assay. (Tr. 102). Talc samples were sent to Osborne Laboratories, Inc., in Santa Fe Springs, California. Samples from the Blue Sky Nos. 2 and 3 claims revealed a pale buff color. Talc from the Blue Sky Nos. 4 and 5 claims were olive bister (khaki brown). He stated that the talc found was not a good bright white color which generally indicates that the talc is of high quality. (Tr. 104, Ex. 15).

A spectrographic and petrographic analysis was made which revealed the talc sampled had a very high shrinkage character and a low grade brightness factor. (Ex. 15, Tr. 105). At the minimum the brightness factor should be 90. (Tr. 106). The brightness factor of all of the talc samples was the minimum. (Ex. 15). Moreover, the samples contained high percentages of calcite, chlorite, dolomite or tremolite which contaminate the talc and limit its uses. (Tr. 106).

An assay of a channel sample from rock-in-place from the All Minerals No. 11 lode claim disclosed a good lead value of 40%. (Ex. 15, Tr. 107). There was no significant quantity of marketable talc or lead found on the claims. Mr. Gould does not believe there is a commercial deposit of talc on any of the claims because the quality is inferior, a market must be developed, and the quantity is not sufficient to warrant development. Nor did he find any other commercial ore bodies on any of the claims. (Tr. 109). It was his opinion that a prudent man would not be justified in developing any of the claims.

Mr. Gould asked Mr. Burt to indicate his discoveries and samples were taken from each designated point with the exception of the Jubilee Mine. (Tr. 118). He did not find corner markers delineating each of the claims or discovery monuments for each of the claims. (Tr. 121). There is no talc being produced from the area of the claims. The closest talc producing mine is 20 miles away. (Tr. 123). Companies now producing talc have their own captive markets that they have developed. The quality of the talc on the claims is below that which is being mined across the valley. (Tr. 124).

Mr. Zentner then testified that talc is used in the production of insecticides, ceramics, paints, paper and cosmetics. (Tr. 129). He contrasted the claims with other talc producing properties and determined that the claims present additional problems since an access road must be constructed and additional freight costs would be tremendous. (Tr. 130). Furthermore, a market must be found for the talc that might be produced from the claims. (Tr. 131). There would be safety problems in mining any of the talc deposits that contained a high amount of tremolite. (Tr. 133). There are California State safety standards that limit the amount of dust created when mining operations are conducted. (Tr. 133).

Dennie W. Troxel, a registered geologist and lecturer at the Geology Department of the University of California, Davis, was called as a witness for the Contestees. He has

mapped the Jubilee Mine area. He was on a field trip on the Jubilee Mine in 1978. Although there may be no surface indications of galena deposits, he believes a person should still develop a mine. (Tr. 142). Some of the drill hole logs submitted by the Government are not adequate to disprove the existence of ore bodies. The exploratory drilling program performed is modest and incomplete [sic]. (Tr. 143). It was his opinion that further exploration is warranted. (Tr. 144). Likewise, there is enough material left in the walls of the mine that would defray the cost of further exploration and development. However, a new exploration program must be undertaken before a final decision to mine the claims is made. (Tr. 152).

Several galena outcrops were found by Mr. Troxel. (Tr. 154). He believes these outcrops could produce unique specimens for rock collectors. (Tr. 155). There may be 25 tons of such galena in the underground workings in the Jubilee Mine. (Tr. 157). The road to the claim has been destroyed.

John Burt, one of the Contestees, testified that he leased out the claims to Mr. Rosenthal and received royalty payments over a 5-year period totalling \$34,000. (Tr. 163). After the lease was terminated in 1969, the mine was leased again, but currently there is no mining activity. (Tr. 164). After the Selby Smelter had shut down, it was difficult to ship lead ore. Mr. Howells expended \$6,000 trying to develop the talc claims, but he did not produce anything. (Tr. 166). There is a tight market for talc. He stated that it is not the market that is important but whether deposits of talc exist. Talc deposits occur extensively throughout the mountains. (Tr. 166).

Thomas Rokita, one of the Contestees, testified that he could sell galena from the Jubilee Mine to tourists at some of the local rock shops. One hundred dollars was received for 100 pounds of such material. (Tr. 174). He has committed 16 years to this mine and demands that he be permitted to continue mining. The quantity of minable minerals on the All Minerals No. 7 Extension is unknown to Mr. Rokita and he admits further exploration is needed. (Tr. 183). He stated that the subject talc is a good quality and free of impurities. (Tr. 184). Furthermore, extracting and shipping the talc is not that difficult if he could bring the talc down by "gravity." (Tr. 184). The shipping cost of lead ore from the Jubilee Mine to the Selby Smelter totaled \$190,000 for 10,000 tons. (Tr. 191-192). For a period of time there was an overproduction of lead in the market and the Selby Smelter was not purchasing lead. (Tr. 192). A \$100 sale of material from the claims

is the largest sum received by Mr. Rokita through his own personal efforts. (Tr. 196). No other minerals were mined from any of the claims except the Jubilee. (Tr. 197).

An assay report from the Mariposa Spectrographic Laboratory, dated September 4, 1964, indicated a silver value of \$35.08 ounces per ton in a sample taken from the All Minerals No. 11 claim. However, no evidence is in the record as to the volume of the sample, the manner in which the sample was taken, or the extent or nature of the deposit from which the sample was taken. (Ex. K). An assay report from the Eisenhower Laboratories in Los Angeles, California dated December 27, 1963, submitted by the California Division of Mines disclosed 8.36 ounces of silver per ton and 10.8% lead borne in a sample taken from a 3 foot hanging wall in the Jubilee Mine. (Ex. 10F).

An affidavit from Richard H. Franklin, dated March 15, 1979, indicates he inspected and sampled the Blue Sky, Blue Skies No. 2 through No. 12 and the All Minerals No. 7 Extension, at the request of the Desert Minerals, Inc., of Los Angeles, California. (Ex. X). The inspection was conducted on April 5, 1967. A talc deposit was found on a canyon wall south of Ashford Canyon in the Southern Black Mountains east of Death Valley. The talc sampled is a good grade with a good white color. American Minerals and Desert Minerals had an adequate supply of talc to their customers demands and they did not wish to obtain this material. The quantity of talc in the deposit is unknown.

In their statement of reasons for appeal, appellants contend that there was "substantial" evidence of a discovery presented at the hearing, which the Administrative Law Judge "ignored"; that appellants' due process rights were violated because they failed to obtain proper legal representation, in part due to "comments from certain adverse parties," and were induced to present their case "in a rush"; and finally, that they have "new evidence" which they feel "could change the ruling" in the case. They request a rehearing in order to present such new evidence. Appellants argue that they have evidence that "freight rates * * * were substantially less than certain testimony claimed which was offered at the prior hearing"; that ore sales between 1963 and 1969 totalled approximately \$2 million (Exh. P at 6); that the Jubilee mine was "operated profitably prior to this proceeding"; that "numerous indications of substantial remaining ore reserves have brought offers and inquiries * * * from parties wishing to acquire an interest in said mine"; that an exploration contract indicates that Rosenthal "knew substantial ore reserves existed"; that Rosenthal was "forced out of the mining claims at issue in part by litigation"; that Rosenthal lacked mining experience; that Rosenthal "attempted to expand his interests in said mine"; and of "numerous smelter returns and royalty statements."

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 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).

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 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).

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 of the lack of discovery of a valuable mineral deposit at the time of withdrawal. ^{3/} In addition, we find that the evidence also supports a finding of lack of discovery of a valuable mineral deposit at the time of the hearing.

Moreover, we conclude that the evidence presented by appellants was not sufficient to overcome the Government's prima facie case. Appellants did establish that the Jubilee Mine was operated successfully

^{3/} We note that lack of discovery as of the date of the withdrawal was not specifically charged in the contest complaint filed by BLM, which charged only that a discovery was "not presently disclosed within the boundaries of the mining claim." (Emphasis added.) Nevertheless, this matter was raised at the hearing, without any objection by appellants. In a mining contest, a matter not charged in the complaint cannot be used as a ground to invalidate a claim, unless it has been raised at the hearing and the contestee has not objected. United States v. Williamson, 45 IBLA 264, 297 (1980), and cases cited therein.

during the middle 1960's, with ore sales totalling approximately \$2 million. However, the preponderance of the evidence indicates that the Jubilee Mine is no longer a viable mining operation. It does not contain a sufficient quantity of lead to justify the costs of extraction and removal. At best, appellants have established that further exploration is necessary in order to determine the existence of any further minable bodies of ore.

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).

Appellants have also failed to establish the presence of valuable mineral deposits of any other minerals on their claims. While there is some evidence of talc on some of the claims, and an assay report indicates the presence of silver, appellants have presented no evidence that talc of sufficient quality, or silver in sufficient quantity, exist on any of the claims as would justify a prudent man in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.

[1] We find no evidence that appellants have been deprived of due process of law in violation of the United States Constitution. The procedures followed in mining contests where the mining claimant is afforded notice and an opportunity to be heard comport with the requirements of due process under the United States Constitution. United States v. Gray, 50 IBLA 209 (1980); United States v. Wilson, 44 IBLA 1 (1979); United States v. Stevens, 14 IBLA 380, 81 I.D. 83 (1974). Appellants were given adequate notice of and appeared at the hearing into the validity of their mining claims. They were able at that time to present evidence on their own behalf and to cross-examine witnesses for the Government.

As to appellants' contention that they should have been represented by counsel, we need only point out that their failure to obtain counsel affords them no greater rights on appeal than if they had had counsel. United States v. Long, 43 IBLA 150 (1979), and cases cited therein. It was their responsibility to obtain counsel, if desired. The Department is not obligated by the Constitution or statute to furnish counsel for a party to an administrative hearing. United States v. Gayanich, 36 IBLA 111, 117 (1978). Furthermore, appellants were fully counseled by the Judge as to their rights to cross-examine, to present evidence, and to otherwise participate in the hearing (Tr. 7-9).

[2] Evidentiary submissions made on appeal will only be considered for the limited purpose of determining whether a further hearing should be granted. United States v. Franklin, 45 IBLA 54, 58 (1980);

United States v. Mattox, 36 IBLA 171, 174 (1978). Generally, to warrant a further hearing where the question of discovery is at issue, an appellant must make an evidentiary tender of proof of the discovery. United States v. Gray, *supra*. New hearings are generally granted only when there is some indication that a different finding might result. United States v. Freese, 37 IBLA 7, 11 (1978), and cases cited therein.

At best, appellants' "new evidence" indicates that the Jubilee mine was a profitable operation between 1963 and 1969. This fact had been established at the hearing (Exh. L) and was not disputed by the Government. However, appellants have offered no evidence that a valid discovery existed on the claims at the time of the withdrawal, September 28, 1976, or at the time of the hearing into the validity of the claims. Evidence of a past discovery is not sufficient to prove the present existence of a valuable mineral deposit, because of the possibility of exhaustion of the deposit and changing economic conditions. United States v. Gray, *supra*; United States v. Bechthold, 25 IBLA 77, 90 (1976).

Appellants indicate that there are substantial remaining ore reserves, presumably on all of the claims, but have offered no evidence to establish the existence of a valuable mineral deposit on any of the claims. Evidence that other parties have expressed an interest in investing in mining with respect to the claims will not suffice in this regard. Accordingly, we have been shown no reason to indicate that the Administrative Law Judge might rule differently should we grant an additional hearing. The request for a rehearing is denied.

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.

Bruce R. Harris
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

