

UNITED STATES
v.
GROVENOR B. MONTAPERT ET AL.

IBLA 80-679

Decided March 30, 1982

Appeal from the decision of Administrative Law Judge R. M. Steiner declaring the Ronald Morris placer mining claim invalid.

Affirmed.

1. Mining Claims: Discovery: Generally--Mining Claims: Discovery: Marketability

A discovery of valuable minerals under the Federal mining laws exists only where the minerals found are of such a character that a person of ordinary prudence would be justified in further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Discovery requires a showing that the mineral can be presently extracted, removed, and marketed at a profit.

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 Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally--Mining Claims: Withdrawn Land

When land is withdrawn from location under the mining law subsequent to the location of a mining claim, the claim must be supported by discovery at the date of withdrawal.

3. Administrative Procedure: Burden of Proof--Evidence: Preponderance--Evidence: Prima Facie Case--Mining Claims: Contests--Mining Claims: Determination of Validity

Where the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit prior to the date when the lands embraced by the

claim were withdrawn from mineral location, the claimant, as proponent of the rule, has the ultimate burden of proof. The Government must initially present sufficient evidence to establish a prima facie case. The burden then shifts to the claimant to show by a preponderance of credible evidence that a discovery has been made on the claim.

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 Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally--Mining Claims: Withdrawn Land

Where the Government has established a prima facie case of invalidity of a mining claim because of a lack of discovery and the claimant testifies that he has not produced from his claim but was only investigating the market, and offers no evidence of marketability beyond speculation of future profitability, the claimant has failed to carry his burden of showing that a discovery is present within the limits of his claim.

APPEARANCES: G. G. Baumen, Esq., Los Angeles, California, for contestees; John W. Burke III, Esq., for contestant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Grovenor B. Montapert, et al., 1/ have appealed the decision of Administrative Law Judge R. M. Steiner declaring the Ronald Morris placer mining claim null and void. The claim is located in a portion of sec. 5, T. 21 S., R. 47 E., Mount Diablo meridian, Inyo County, California, within the Death Valley National Monument. The Death Valley National Monument was withdrawn from further mineral location as of September 28, 1976. 2/

On July 24, 1978, the Bureau of Land Management (BLM), on behalf of the National Park Service, issued a contest complaint charging that "[t]here are

1/ Agnes Kohn, Ronald Fischer, Jo-Ann Fischer, Frank Francomarcaro, Josephine Francomarcaro, Marvin Ross, and Helen Ross, the other record claimants of the Ronald Morris placer claim, also join in this appeal.

2/ Section 3 of the Mining in the Parks Act, Act of Sept. 28, 1976, 90 Stat. 1342, closed Death Valley National Monument to entry and location under the mining laws by repealing the Act of June 13, 1933, 43 Stat. 139. In addition, section 4 of that Act, 16 U.S.C. § 1903 (1976), in effect, placed a 4-year moratorium beginning on Sept. 28, 1976, on surface operations for the purposes of mineral exploration and production in the Death Valley National Monument. The Secretary of the Interior was also directed to determine the validity of any unpatented claims in the area. 16 U.S.C. § 1905 (1976).

not presently disclosed within the boundaries of the mining claim minerals of a variety subject to the mining laws, sufficient in quantity, quality and value to constitute a discovery." The claimants denied the charge. A hearing was held on March 8, 1979.

The Ronald Morris claim was located for perlite in 1974. The hearing record reflects that appellant Montapert had been involved in earlier locations at the site of the claim in 1953 and 1963. Approximately 300 yards of perlite were shipped for processing as a result of the 1953 location but no further development occurred under either prior location (Tr. 10-14).

The Government presented two expert witnesses at the hearing. L. S. Zentner, a Park Service mining engineer and mineral appraiser, testified that he had examined the claims and found no signs of recent mining activity. He expressed doubt as to the quality of the perlite found on the claim (Tr. 16). He indicated that he had investigated the perlite market, as well as production in the general area of the claim, and had concluded that a prudent person would not be justified in developing the claim because of the costs attendant to strip mining at this location, the lack of either available power or nearby employee housing, the need to develop a market for the perlite, and the necessity of installing a processing plant. The Government's second witness, Park Service mining engineer Charles Weiler, who had also examined the claim, could not express an opinion as to the quality of the perlite (Tr. 77), but stated that he would not recommend development of the claim because there was very little evidence of the extent of the perlite deposit (Tr. 85). This conclusion was, admittedly, based on observation, not quantitative testing (Tr. 87).

The Government also called Grovenor Montapert as an adverse witness. In response to a question concerning his efforts to sell perlite from the claim, appellant stated:

A. I have no plant, no screening plant. I have no way to sell the material. That is not my purpose. My purpose in developing that is to develop the market, and then the next step would be to put up a mill. I certainly would not be delivering material. I would be looking for a market.

Q. Oh. Well, then, would one have to put in a screening plant or a mill before one could go around to the possible customers in the Los Angeles Basin?

A. No, that is what I am doing now, as I just explained. I am doing that first.

Q. Which?

A. I am exploring the market. The market is what I am interested in. I wouldn't put a dime into anything, unless I knew there was a market for it.

Q. I see. I just want to make sure I have the sequence straight. You are exploring the market in the Los Angeles Basin,

and if it appears to exist, then you will go to the next step and secure financing, or whatever, to develop a mill; is that correct?

A. Partially. I am covering the market, but it is extensively more than the Los Angeles area.

Q. What area are you looking into?

A. I would rather not say at this time.

Q. Now, over how long a period time have you been engaged in this market analysis?

A. Since I reclaimed the ground in '74.

Q. I see. I take it then you had been engaged in this market analysis effort for a bit over two years, then, in September of '76; would that be correct?

A. Yes, that is more than correct.

Q. And by that date, you had not been able to form an opinion upon whether or not to commit substantial funds to going into production; is that also correct?

A. No.

Q. Because you have not done so from that date to this date.

A. No. We are talking about a very large operation. Developing a market is a very simple thing, but when we are talking about a market that is going to be profitable, that is another thing. I can ship ore from there today, if I want.

(Tr. 64-65).

In rebuttal of the Government's case, Olger Klejnot, senior chemist for Truesdail Laboratories, testified that he had tested some perlite samples provided by appellants. Klejnot noted that depending on the mesh, the processed perlite expanded to a bulk density of 6.24 pounds per cubic foot (8- to 10-mesh) or 3.62 pounds per cubic foot (12- to 16-mesh). His report cited the 1970 edition of Mineral Facts and Problems, a publication of the Department of the Interior, to the effect that "perlite with a 3 1/2-pound-per-cubic foot density for low-temperature insulation use may sell for approximately \$130 per ton, while a 7 1/2-pound density product for plaster aggregate may sell for \$60 per ton" (Exh. S). Based on a comparison with these standards, Klejnot judged appellants' perlite deposit to be of "superior quality" (Tr. 112-15).

Appellant Montapert testified that the proper way to develop this perlite claim would be to set up a crushing and screening plant at Ludlow, California, rather than at the claim site. This would, he contended, cut the costs of power and labor. The operation at the mine would involve just

surface mining and loading of the perlite onto trucks for transport to Ludlow. (Tr. 134-37). He indicated that 4 miles of road would need to be constructed to complete the route to Ludlow (Tr. 138). Montapert also testified as to cost estimates of his proposed operation. He asserted that if he produced 160 tons of perlite per day, or 50,080 tons per year, the estimated cost of production, fuel, electricity, and any other expenses of running a mill would be \$205,000 per year and gross profit would be approximately one million dollars (Tr. 140). At the time of the hearing, according to Montapert, crude perlite was selling for \$24.75 per ton f.o.b. the millsite (Tr. 139-40) and the Perlite Processing Company of Sante Fe Springs, California, had made an offer to purchase 1,200 tons of appellants' perlite when available (Tr. 141).

Following the hearing, appellants submitted an additional report from Woodward-Clyde, consulting engineers, indicating that there was an extensive quantity of perlite on the claim.

[1] A discovery of valuable minerals under Federal mining laws exists only where the minerals found are of such a character that a person of ordinary prudence would be justified in further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. United States v. Coleman, 390 U.S. 599 (1968); Chrisman v. Miller, 197 U.S. 313 (1905); Castle v. Womble, 19 L.D. 455, 457 (1894). This "prudent man test" has been refined to require a showing of marketability; that is, a showing that the mineral in question can be presently extracted, removed, and marketed at a profit. United States v. Coleman, supra.

[2] Where the land is closed to location under the mining laws subsequent to the location of the mining claim, as in the present case, the claim must be supported by discovery at the time of the withdrawal. Cameron v. United States, 252 U.S. 450 (1920); Clear Gravel Enterprises v. Keil, 505 F.2d 180 (9th Cir. 1974); United States v. Netherlin, 38 IBLA 86 (1977).

[3] When the Government contests the validity of a mining claim for lack of a discovery of a valuable mineral deposit, the ultimate burden of proof is upon the mining claimant. The Government, however, bears the initial burden of going forward with sufficient evidence to establish a prima facie case that no valuable mineral discovery has been made. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Bechthold, 25 IBLA 77 (1976); United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975). The Government has established a prima facie case when a mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery. United States v. Knecht, 39 IBLA 8 (1979); United States v. Bechthold, supra. Even if the Government merely shows that one essential criterion of the discovery test was not met, it has established a prima facie case as to that criterion. See United States v. Hooker, 48 IBLA 22 (1980); United States v. Taylor, supra at 28, 82 I.D. at 75.

Once the Government has established a prima facie case that the claim is not supported by discovery, the burden of going forward then shifts to the contestee to overcome the Government's showing by a preponderance of the evidence. Humboldt Placer Mining Co. v. Secretary of the Interior, 549 F.2d 622 (9th Cir.), cert. denied, 434 U.S. 836 (1977); United States v. Springer,

491 F.2d 239 (9th Cir.), cert. denied 419 U.S. 834 (1974); Foster v. Seaton, supra; United States v. Harris, 38 IBLA 137 (1978).

In their statement of reasons, appellants argue that Judge Steiner's decision is contrary to the substantial and uncontradicted evidence in the record. They contend that Judge Steiner failed to consider that the claimants were prevented by the Park Service from starting any development work and production of perlite from the claim. In addition, they challenge the qualifications of the Government's expert witnesses to give opinions on the status of the claim.

[4] We find, as did Judge Steiner, that the Government's showing was sufficient to constitute a prima facie case of no discovery. Thus, as noted above, it devolved upon appellants to show a reasonable prospect that the minerals on the claim could have been extracted, removed, and marketed at a profit at the time of the withdrawal of Death Valley National Monument from further mineral location. We conclude that, although appellants asserted that at a certain level of production the claim could be profitable, they provided no substantiation for the cost data utilized and, further, presented no evidence of a demand sufficient to support the level of production needed for a profitable operation. Appellant Montapert suggested that he would establish a mill at Ludlow, California, rather than at the mine site (Tr. 134). Ludlow, however, is 115 miles from the mining claim. Such an operation would entail a considerable expense in transportation costs, since Montapert intended to transport not only the crude perlite but the overburden as well (Tr. 134). Moreover, appellants' assertion that the overburden would average from "a foot to two and-a-half feet" (Tr. 137) was contradicted not only by Zentner, who indicated that the overburden would add \$5 a ton to the cost of moving (Tr. 29), but also by the Woodward-Clyde report which clearly showed overburden ranging up to 100 feet over the deposit (see Figures 2 and 3 of the report). Montapert argued that perlite purchasers normally pay transportation costs, but such costs are f.o.b. mill site, and, thus, appellants would have to pay the transportation costs from the mine to Ludlow, and such costs would include not only the perlite, but the overburden as well.

There is no basis in the record to conclude otherwise than that in 1976 appellants could at best only speculate as to the possibility of a future profitable operation given certain assumptions. Such speculation, though it may be sufficient to justify further exploration or investigation, is not sufficient to support a finding of discovery. Barrows v. Hickel, 447 F.2d 80, 83 (9th Cir. 1971); United States v. Beal, 23 IBLA 378, 398 (1976). The record supports the result reached in the decision of Administrative Law Judge Steiner, and we affirm it.

As to appellants' allegation that the National Park Service prevented them from developing the claim, we have several observations. Mining activities were prohibited for a 4-year period following enactment of the mining in the Parks Act, supra. However, as we noted in a different context, evidence obtained after a withdrawal can be submitted when it is probative of a preexisting discovery. See United States v. Foresyth, 15 IBLA 43 (1974). Indeed, appellants were permitted to submit chemical reports obtained long after the withdrawal. Thus, the inability of appellants to perform development work on the claim after September 28, 1976, has little impact on the validity of their claim or the outcome of their appeal as discovery of a

valuable mineral must be shown to have existed as of September 28, 1976. If appellants needed time after September 28, 1976, to make a discovery, their claim is, of necessity, invalid.

Finally, we turn to appellants' challenge to the qualifications of the Government's expert witnesses. Appellants assert that the experts were inexperienced with respect to perlite, and that their opinions were based on conjecture, as they failed to perform any tests as to the quantity and quality of the perlite on the claim and did not thoroughly investigate the economics of perlite mining.

The qualifications of the Government's witnesses are well established in the record. Mr. Zentner was Chief of the Division of Mining and Minerals of the National Park Service. He has a mineral exploration engineering degree and has worked in private industry as well as for the Government. Although this was the first time he had conducted a validity examination for a perlite claim (Tr. 26-27), he had examined a wide variety of mineral claims over the years (Tr. 7) and was, therefore, experienced in applying the requirements of the law. Charles Weiler was a supervisory mining engineer for the National Park Service holding a mining engineer degree and having completed graduate work in mineral economics. He had examined and analyzed numerous perlite deposits in several states during his career (Tr. 68-74). We have no hesitation in finding these witnesses qualified to offer an opinion as to the validity of the claim at issue after appropriate examination. See United States v. Rigg, 16 IBLA 385, 391 (1974). Appropriate examination is the key to this matter. The Government's burden was not to conclusively establish that there was no discovery, but rather to establish a prima facie case and put appellants to their proof. We note in this context that the Government called appellant Montapert as an adverse witness, and his testimony concerning the marketability of perlite substantially bolstered the Government's prima facie case of lack of discovery. It was appellants' obligation to overcome that showing by their own evidence. This they did not do.

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.

James L. Burski
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Bruce R. Harris
Administrative Judge

