

UNITED STATES
v.
EUGENE BOWYER ET AL.

IBLA 80-560

Decided April 30, 1982

Appeal from decision of Administrative Law Judge R. M. Steiner, declaring the Ajax and the Ajax Nos. 2 through 7 lode mining claims invalid. Contest No. CA-5253.

Affirmed.

1. Administrative Procedure: Burden of Proof--Mining Claims: Contests--Mining Claims: Discovery: Generally

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. Once a prima facie case is established, the burden shifts to the claimant to overcome that showing by a preponderance of the evidence.

2. Administrative Procedure: Burden of Proof--Mining Claims: Discovery: Generally

Where a Government mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery, a prima facie case of invalidity has been established.

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

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. This generally requires a showing of marketability -- that the deposit in question can be extracted, removed, and marketed at a profit at present.

APPEARANCES: Terrance D. Gough, Esq., Eugene, Oregon, for appellants; John W. Burke III, Esq., Office of the Solicitor, U.S. Department of the Interior, San Francisco, California, for the Government.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal is from a decision by Administrative Law Judge R. M. Steiner declaring the Ajax and Ajax Nos. 2 through 7 mining claims invalid. The claims are situated within the Death Valley National Monument. The lands within the Monument were withdrawn from mineral entry on September 28, 1976, by statute. Act of September 28, 1976, P.L. 94-429, § 3, 90 Stat. 1342. 1/

On October 24, 1978, the Bureau of Land Management (BLM), on behalf of the National Park Service, issued a contest complaint charging that there were not presently disclosed within the boundaries of the mining claims minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery.

A hearing on the contest was conducted on June 20, 1979, in Wallace, Idaho, before Judge Steiner. His decision rendering the claims invalid was issued on March 10, 1980. Judge Steiner concluded therein that contestant had presented a prima facie case of no discovery, and that the contestees had not sustained their burden of proving a discovery of a valuable mineral deposit within the limits of the claim.

The statement of reasons for appeal submitted by counsel for contestees consists of a review of the testimony at the hearing which is alleged to support a finding that a discovery was made. Appellants point out the interest which different companies expressed in the claims at different times. Counsel further cites the report of Dr. Ralph Pray in which he concludes that a talc mine could be operated on the claims at a substantial profit.

[1] When the United States contests a mining claim, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case of no discovery; the burden then shifts to the contestee to establish, by a preponderance of the evidence, that the

1/ The other sections of the Act of September 28, 1976, have been codified at 16 U.S.C. §§ 1901-1912 (1976).

claim is valid. Hallenbeck v. Kleppe, 590 F.2d 852 (10th Cir. 1979); United States v. Springer, 491 F.2d 239 (9th Cir. 1974), cert. denied, 419 U.S. 834 (1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Earl F. Fox, 53 IBLA 333 (1981); United States v. Hooker, 48 IBLA 22 (1980).

[2] 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. Earl F. Fox, supra; United States v. Taylor, 25 IBLA 21 (1976).

[3] The discovery of a valuable mineral deposit within the limits of a mining claim is the sine qua non for a valid location. 30 U.S.C. §§ 22, 23, 35 (1976). A discovery exists "where minerals have been found and the evidence is of such a character 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 test, known as the "prudent man test" has been refined to require a showing that the mineral in question can be extracted, removed, and presently marketed at a profit, the so-called "marketability test." United States v. Coleman, 390 U.S. 599 (1968); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); United States v. W. G. Nickol, 47 IBLA 183 (1980).

Upon review of the record it must be concluded that the decision of the Administrative Law Judge is supported by substantial evidence. Charles Weiler, a mining engineer who examined the claims, testified that there is an insufficient quantity of talc to warrant development -- that a unique feature of nonmetallic mineral marketing is that material of consistent quality and composition is required and, accordingly, a large body of talc must be found to justify development (Tr. 18-19, 21). He testified that a prudent person would not be justified in further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine upon the claims (Tr. 23). The problem posed by faulting in the geologic strata for any mining operation on contestee's claims was cited by Weiler (Tr. 48) and L. S. Zentner, who is also a mining engineer (Tr. 43-44). Zentner testified that exploration is difficult in such a highly faulted area (Tr. 74) and that the extensive faulting casts doubt on the existence of any significant quantity of talc (Tr. 100).

Zentner also testified that there was an insufficient quantity of talc established on the claims (Tr. 79-81). He stated that the claims were explored in a search for a quantity of talc which would support a mining operation, but that the search was given up (Tr. 79-80) and that further exploration was required to establish such a quantity (Tr. 87-89).

Weiler testified that talc does not have an open market -- that a buyer or market must be established before operations are undertaken (Tr. 44). Zentner stated that the market is difficult to break into because companies that operate mines control a large share of the market and because customers are reluctant to change from one producer to another (Tr. 78). Dr. Ralph Pray, a metallurgical engineer, testified for contestees that there was a market for the talc on the claims and that Pfizer, Inc., a producer and marketer of talc, was interested in the talc (Tr. 153-54). He conceded, however, that the Pfizer representative did not offer to buy the talc (Tr. 163, 166-67).

The evidence supports the finding of Judge Steiner that contestees have failed to establish the marketability of the talc deposits on the claims. Establishing the marketability of a mineral deposit requires demonstration of a present and continuing demand for the output of the mine -- it is not sufficient to show that attempts are being made to explore potential markets or to promote utilization of the mineral. United States v. Michael Slater, 34 IBLA 31 (1978).

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.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Edward W. Stuebing
Administrative Judge

