

UNITED STATES
v.
MICHAEL D. BECKLEY
VIRGINIA R. BECKLEY

IBLA 79-97

Decided August 27, 1982

Appeal from decision of Administrative Law Judge E. Kendall Clarke declaring the Orphan Boy quartz mining claim, the Hunter quartz mining claim, and the Hunter millsite claim null and void. OR 13579 (Wash.)

Affirmed.

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

A discovery of a valuable mineral deposit does not exist where the available evidence is of such a character that a person of ordinary prudence would only be justified in conducting further exploration of the claims before making a commitment to develop a profitable mine. There must be physically exposed within the limits of the claim the vein or lode bearing mineral of such quality and such quantity as to justify the expenditure of money for development of a mine and the extraction of the mineral.

2. Mining Claims: Contests--Mining Claims: Determination of Validity

When the Government contests a mining claim on a charge of lack of discovery, it is required to produce sufficient evidence to establish a prima facie case against the validity of the claim, and the burden of proof then shifts to the contestees to overcome this showing by a preponderance of the evidence. A prima facie case has been made when a Government mineral examiner testifies that he has examined the claims and

found the evidence of mineralization insufficient to support a finding of discovery.

3. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally--Mining Claims: Lands Subject to--Mining Claims: Withdrawn Land

To the extent that a mining claim is situated on land which was withdrawn from entry under the mining laws, the claimant must not only show that the discovery of a valuable mineral deposit presently exists but also that the claim was valid as of the date of the withdrawal. If the claim was not valid at the time of the withdrawal, it was not excepted from the effect of the withdrawal. The claim could not become valid thereafter by any additional exploratory work or through an increase of mineral value due to a change in the market.

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

Lack of development alone may support a finding of invalidity, unless there is direct evidence in the record that the material from the mine is marketable, i.e., that the mineral can be mined, removed, and marketed at a profit.

5. Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Hearings

Even if the Government had failed to make a prima facie case against the validity of the claim, evidence presented by the contestee which shows that a discovery had not been made may support a determination of invalidity, because when a contestee introduces evidence, the determination must be made on the basis of the whole record, not just a part of it.

6. Mining Claims: Determination of Validity--Mining Claims: Discovery: Geological Inference

The validity of a mining claim cannot depend on the inference of richer ore or wider veins than those which are already physically exposed.

7. Mining Claims: Determination of Validity--Mining Claims: Discovery: Marketability--Mining Claims: Marketability

The value of a mineral deposit claimed under the mining laws must be determined by objective rather than subjective criteria. An otherwise invalid mine cannot be bootstrapped into validity because the material may be used in some other profitable business in which a claimant may be engaged.

8. Millsites: Dependent--Millsites: Determination of Validity--Mining Claims: Millsites

Use of a millsite claim as a boat dock does not satisfy the requirements for a valid millsite claim. Even if such a use were qualifying, the lack of production shows that the site is not presently used for shipping ore, and an intent to use the land for millsite purposes in the future is not sufficient for a valid millsite claim. Furthermore, a millsite is properly declared to be invalid if it is used in connection with a mining claim that is held to be invalid.

9. Mining Claims: Contests--Mining Claims: Hearings-- Rules of Practice: Hearings

A continuance of a hearing into the validity of a mining claim will only be granted where the mining claimant presents sufficient reason to justify the grant of an additional opportunity to present his case, i.e., where circumstances have placed a substantial constraint upon his ability to obtain or offer samples or other evidence of a

discovery. Furthermore, it must appear that the claimant is not using the additional time to make the requisite discovery.

APPEARANCES: John E. Phillips, Esq., and Sally H. Clarke, Esq., Seattle, Washington, for appellants; Arno Reifenberg, Esq., and James Kauble, Esq., Office of the General Counsel, U.S. Department of Agriculture, Portland, Oregon, for the United States Forest Service.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Michael D. and Virginia R. Beckley have appealed the decision issued November 6, 1978, by Administrative Law Judge E. Kendall Clarke declaring the Orphan Boy and Hunter Quartz mining claims null and void for lack of discovery of a valuable mineral deposit. The decision also declared the Hunter millsite null and void for the reason that it was not being used for mining or milling purposes. The claims are situated within the Wenatchee National Forest, sec. 12 (unsurveyed), T. 31 N., R. 18 E., Willamette meridian, Chelan County, Washington. Part of the land embraced by the claims was withdrawn in 1925.

The contest was initiated April 29, 1976, by the Oregon State Office, Bureau of Land Management (BLM), on behalf of the Forest Service, United States Department of Agriculture. The complaint charged:

- a. On or before August 25, 1925, at which time part of the area was included within the power withdrawal, FPC Project 637, minerals had not been found within the limits of the above-listed mining claims in sufficient quantities to constitute a valid discovery, nor has a discovery been made since that time.
- b. On or before August 25, 1925, at which time part of the area was included within the power withdrawal, FPC Project 637, the above listed millsite had not been used for mining purposes at the present time.

Contestees filed an answer specifically denying each allegation, and a hearing was held on August 2, 1977, before Judge Clarke. Colver F. Anderson, a mining engineer and geologist experienced in examining and evaluating mining properties, testified on behalf of the Government. Virginia Beckley, Michael Beckley, and Frank Blair, a certified geologist, testified for the contestees.

The claimants, Michael D. and Virginia R. Beckley, have appealed the rulings of Judge E. Kendall Clarke declaring their claims null and void and denying their motion for a continuance to permit them additional time to prove a valid discovery.

[1] The validity of a mining claim depends on the discovery of a valuable mineral deposit. See 30 U.S.C. § 22 (1976). Such 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 profitable mine." Castle v. Womble, 19 L.D. 455, 457 (1894), approved, Chrisman v. Miller, 197 U.S. 313 (1905). Conversely, a valid discovery does not exist where the available evidence is of such a character that a person of ordinary prudence would only be justified in conducting further exploration of the claims before making a commitment to develop a profitable mine. See Barton v. Morton, 498 F.2d 288 (9th Cir.), cert. denied, 419 U.S. 1021 (1974); United States v. Edeline, 39 IBLA 236 (1979). As stated in Thomas v. Morton, 408 F. Supp. 1361, 1371 (D. Ariz. 1976), aff'd, 552 F.2d 871 (9th Cir. 1977): "There must be physically exposed within the limits of the claim the vein or lode bearing mineral of such quality and quantity as to justify the expenditure of money for the development of a mine and the extraction of the mineral."

[2] When the Government contests a mining claim, it is required to produce sufficient evidence to establish a prima facie case against the validity of the claim, and the burden of proof then shifts to the contestees to overcome this showing by a preponderance of the evidence. United States v. Springer, 491 F.2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 834 (1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). A prima facie case has been made when a Government mineral examiner testifies that he has examined the claims and found the evidence of mineralization insufficient to support a finding of discovery. United States v. Knecht, 39 IBLA 8 (1979); United States v. Bechthold, 25 IBLA 77 (1976).

[3] The claims are on land which was withdrawn from entry under the mining laws; therefore, the contestees must show that the discovery of a valuable mineral deposit presently exists, and also that it existed as of the date of the withdrawal. United States v. Chappell, 42 IBLA 74 (1979); Andrew J. Van Derpoel, 33 IBLA 248 (1978); United States v. Rodgers, 32 IBLA 77 (1977); United States v. Arcand, 23 IBLA 226 (1976); United States v. Fleming, 20 IBLA 83 (1979). If the claims were not valid at the time of the withdrawal, they were not excepted from the effect of the withdrawal, and the claims could not become valid thereafter by any additional exploratory work or through an increase of mineral value due to a change in the market. Id. When asked to show what portions of the claims were included in the withdrawal, Colver Anderson, the Government mineral examiner, penciled a line on the map on Government exhibit 5 (Tr. 33). According to this map, the Orphan Boy claim and the Hunter millsite claim lie completely within this withdrawal. The withdrawal, however, includes only part of the Hunter quartz claim.

The claims at issue were originally located by Mrs. Beckley's greatgrandfather and the claims were conveyed through the family during subsequent years (Tr. 57-59, 120). The present claimants have learned

to cast metal and seek to use ore from the mine as a source of silver to make jewelry (Tr. 64). Michael Beckley testified that such jewelry may be profitably sold in retail stores appealing primarily to tourists (Tr. 133-34).

The delineation of the boundary between the Orphan Boy and Hunter quartz claims on the map in Government exhibit 5, establishes that the only working on the Orphan Boy claim is a caved adit near lake level (designated as improvement 1 on Govt. Exh. 5) which was inspected neither by the Government nor by the contestees. ^{1/} An open cut, a shaft, and a drift are situated further up from the lake on the Hunter claim. An upper trench on the Hunter claim appears to expose the same vein structure as that exposed in the drift, shaft, and open cut. The claimants' witnesses believe that these workings expose a mineralized structure extending 1,000 feet. They point to old reports that the claims once had a vein having 140 ounces of silver per ton and hypothesize that this vein exists in the flooded adit. Claimants' expert witness, however, admitted that it is as likely as not that this mineral has already been mined out (Tr. 115). The only samples showing high values were taken from the shaft on the Orphan Boy claim and the Hunter Drift on the Hunter claim. These values were taken from narrow veins. Some samples showed little silver mineralization, others showed values ranging between 8 ounces per ton to 29 ounces per ton in one high-graded sample.

Judge Clarke found that the Government had made a prima facie case of lack of discovery based on the testimony of Colver F. Anderson. Anderson first examined the claims in 1963, and took five samples. The assay report (Exhs. 1, 2) showed silver values ranging from 1 ounce to 18 ounces per ton. Anderson considered these "pretty good values," but said they did not represent wide areas, and did not seem to be consistent (Tr. 12). He further testified that "although the claims had these values, mineralization in narrow veins and obtaining a volume which someone could mine and make a profit just isn't there" (Tr. 12). He examined the claims again in 1974, and took a sample which included two little veins and material in between. The assay results indicated that the material between the two veins was very low in value, and he testified that there is no practical way of mining the two veins on either side of the barren area (Tr. 21). He expressed the view that the two

^{1/} The Government exhibits and those of the contestees differ as to the placement of the boundary between the Orphan Boy and Hunter claims. Exhibit D, figure 1, shows the Hunter claim as being further up from the lake, so that it is entirely on unwithdrawn land. Exhibit 5, on the other hand, shows the Hunter claim closer to the lake so that it includes all of the workings from which samples were taken. There appears to be no disagreement, however, as to the relationship of the actual workings, the level of the lake, and the area subject to the withdrawal.

veins did not have sufficient volume to make it worthwhile to pay for the labor and the cost of drilling, shooting, and shipping the material to the smelter (Tr. 21).

[4] Anderson further testified that the value of silver in 1925 would not have paid for the costs of mining at that time. He further testified that there had been no production from the mine, a point on which the claimants' expert witness agreed. Lack of development alone may support a finding of invalidity, unless there is direct evidence in the record that the material from the mine is marketable, i.e., that the material can be mined, removed, and marketed at a profit. See Humboldt Placer Mining Co. v. Secretary of the Interior, 549 F.2d 622 (9th Cir.), cert. denied, 434 U.S. 836 (1977); Melluzzo v. Morton, 534 F.2d 860 (9th Cir. 1976); United States v. Zweifel, 508 F.2d 1150, 1156 n.5 (10th Cir.), cert. denied sub nom. Roberts v. United States, 423 U.S. 829 (1975). See also United States v. Wichner, 35 IBLA 240 (1978).

[5] Anderson's testimony, which was based upon his examination and sampling of minerals on the claim, as well as the inference that may be drawn from the lack of production from the mine, established a prima facie case that there had been no discovery in 1925 nor at the time of his examination. Appellants' argument to the contrary is without merit. Even if the Government had failed to make a prima facie case against the validity of the claim in 1925, evidence presented by the contestee which shows that a discovery has not yet been made may support a determination of invalidity, because when a contestee introduces evidence, the determination must be made on the basis of the whole record, not just a part of it. See United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975). The following conclusions by Frank Blair, the contestees' expert witness, set forth the brightest prospects that could have been anticipated:

The Hunter-Orphan Boy structure can be traced by observation and inference for at least 1,000 feet. This east-trending structure contains significant silver assays with subordinate lead, zinc, and gold values. The exploration and development work completed to date has neither proved or disproved the potential of the property to support a mining venture. Silver values as high as 140 ounces per ton have been reported from sampling along the structure. Variations in sample results from the sample sites collected by different individuals indicate a definitive sampling program is justified. It would be unrealistic to assume that the entire structure is amenable to small scale mining. However, there is the possibility of locating a high-grade section similar to the Sunday Morning Mine where handcobbled, sacked ore reportedly assayed 2,005 ounces of silver and 3.58 ounces of gold per ton. A review of the Meadow Creek Mining District and observations on the subject claims indicate there is a possibility of locating such a highgrade section. [Emphasis added.]

(Exh. D at 11).

The underscored language shows that prospects of developing a valuable mine depended on the discovery of richer or wider deposits of silver than have been shown here. The report established that there was not sufficient information on which to base a reasonable prospect of success in developing a valuable mine; only that information at the time of the hearing justified further exploratory work to expose the deposits on which a reasonable prospect of success depends. Blair recommended further exploratory work, estimated to cost around \$30,000 (Exh. D), but the Government's mineral examiner did not believe that the showing on the claim would justify further exploratory work or an attempt to develop a mine (Tr. 34). The fact that any prospect of success depended on the exposure of deposits of greater value than those already exposed impels a finding that a discovery had not yet been made and that the claims are therefore invalid. See United States v. Edeline, supra.

Even if we did give Blair's samples greater weight than Anderson's, as appellants claim that we should, Blair's testimony would only establish that the claims were worth exploring further at the time of the hearing.

[6] Appellants assert that we should apply a different standard of discovery to a placer claim where all the mineralization is exposed to the surface than to a lode claim where the length and width of the veins must be determined by inference. They point out that these mines are in an area where there are producing mines, and they point to Blair's testimony that the mineral structure can be traced for at least 1,000 feet. They further stress that some of the major discovery locations have been overlain by water because of the raising of the level of Lake Chelan, thus making it difficult for the claimants to take samples from the best locations. The law, however, is clear that the validity of a mining claim cannot depend on the inference of richer ore or wider veins than those which are already physically exposed. See United States v. Edeline, supra.

Claimants assert that they have established by preponderance of the evidence 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. However, as we have stated above, a closer reading of the expert testimony of the claimants' witnesses reveals that the only prudent course would have been further exploration before the claimants would have enough information to know whether a profitable mine could be developed.

[7] In arguing that they have met the marketability test for the discovery of a valuable mineral deposit, the claimants argue that we should take into account the fact that they wish to use the silver from the claim to make jewelry which they will market locally. They contend that the marketability test should have been applied to the entire venture rather than just to the mining operation. Although the entire business operation of a claimant may be viewed as creating a market

where none would otherwise exist, there would be a market for appellants' silver if it could be economically mined regardless of their jewelry casting business. The issue is whether it is economically worthwhile to produce silver from these claims, and the claimants did not meet their burden in proving this. The claimants have not established that the silver from the claims is more valuable than established that the silver from the claims is more valuable than any other silver which can be bought on the market. The value of the deposit must be determined by objective rather than subjective criteria. United States v. Reynolds, 26 IBLA 131 (1976). An otherwise invalid mine cannot be bootstrapped into validity because of the profitability of some other business in which a claimant may be engaged.

[8] Judge Clarke declared the claimants' millsite invalid, stating that, "The only use being made of it is for a boat dock" (Decision at 7). The claimants contend that the use of the millsite as a boat dock is an integral part of the removal, handling, or treatment of ore from the mine because the silver must be shipped down the lake as a first step on its way to the smelter. Even if this use were qualifying, the lack of production from the mine shows that the use of the land for shipping ore is not a present fact but a matter of future intent. The intent to use the land for millsite purposes is not sufficient for a valid millsite claim. See United States v. Silver Chief Mining Co., Inc., 40 IBLA 244 (1979). Furthermore, a millsite is properly declared to be invalid if it is used in connection with a mining claim that is held to be invalid. United States v. Mellos, 10 IBLA 261 (1973).

[9] Appellants' last argument is that they should have been entitled to a continuance of the hearing to allow them additional time to prove a valid discovery. In United States v. Gassaway, 43 IBLA 382, 384 (1979), we rejected this contention, reasoning as follows:

It is required that a mining claimant make a discovery of a valuable mineral deposit prior to the location of his claim. 30 U.S.C. § 23 (1976) * * *. Thus, it is presumed that when the validity of his claim is challenged in a contest proceeding the mining claimant need only come forward with the evidence of the discovery which he has already uncovered. Therefore, where a mining claimant requests a further hearing or the continuance of a hearing of which he has had adequate notice he must posit such "exculpatory factors" as will justify the grant of an additional opportunity to present his case. United States v. Porter, 37 IBLA 313, 316 (1978); United States v. Foresyth, 15 IBLA 43 (1974). Furthermore, it must appear that the mining claimant is not using the additional time to make the requisite discovery. [Footnote omitted.]

Appellants have not presented the requisite "exculpatory factors" to warrant the additional opportunity to present their case.

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.

Gail M. Frazier
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Douglas E. Henriques
Administrative Judge

