

UNITED STATES

v.

LEE H. RICE  
GOLDIE E. RICE

IBLA 79-529

Decided May 23, 1983

Appeal from decision of Administrative Law Judge R. M. Steiner declaring lode mining claims null and void in contest Nos. A-463, A-752, A-753, and A-754.

Affirmed.

1. Contests and Protests: Generally -- Mining Claims: Generally -- Mining Claims: Contests -- Mining Claims: Determination of Validity -- Rules of Practice: Government Contests

It is not the function of the Board of Land Appeals to make an inquiry into the motivation of any Government agency which has initiated a contest against mining claims. The fact that such contest challenges the validity of certain mining claims, and not of others in the same general area does not constitute a denial of due process. The Board of Land Appeals cannot abnegate its responsibility to determine the validity of mining claims when that issue is presented upon appeal, and where that issue is so presented, mining claims properly are declared null and void upon a showing of lack of discovery of a valuable mineral deposit upon the claims.

2. Mineral Lands: Determination of Character of -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally

A previous determination by the Department of the Interior in a proceeding different from a mining claim contest that

land was mineral in character is not evidence of a discovery of a valuable mineral deposit in a mining contest.

3. 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.

4. Mining Claims: Contests

When the Government contests the validity of 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.

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

The prudent man test cannot be satisfied by a claimant's assertion that he is willing to accept a meager income from the claim. Determination of the validity of a mining claim can rest only on objective criteria, not subjective considerations.

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

The record established at the hearing in a mining claim contest is the sole basis for determining the validity of a claim.

APPEARANCES: John A. Wasley, Esq., Oracle, Arizona, for appellant; T. Adrian Pedron, Esq., Office of the General Counsel, U.S. Department of Agriculture, Albuquerque, New Mexico, for appellee.

#### OPINION BY ADMINISTRATIVE JUDGE MULLEN

This appeal is taken from a decision dated June 20, 1979, by Administrative Law Judge R. M. Steiner, declaring the Silver Earth, Golden Earth, Good Earth, Calcium Carbonate, Diabase Ridge, Three Sons, New Year No. 1, New Year No. 2, Goldie's Fraction, and Lee's Fraction mining claims null and void for lack of discovery of valuable minerals thereon.

The 10 lode mining claims are located on public lands in the Santa Catalina Ranger District of the Coronado National Forest in Pinal County, Arizona. The contests against these claims were instituted by the Bureau of Land Management (BLM) on behalf of the United States Forest Service, Department of Agriculture.

Following a hearing held in Tucson, Arizona, on December 6, 1967, the claims were declared null and void by decision dated September 3, 1968. That decision was appealed but the appeal was dismissed by the Board, United States v. Rice, 2 IBLA 125 (1971). By order dated February 1, 1974, the United States District Court, District of Arizona (No. Civ. 72-467), remanded the case for a new hearing which was subsequently held in Phoenix, Arizona, on March 22 to 24, 1978, before Judge Steiner.

In his decision the Judge reviewed the evidence including evidence adduced at the earlier hearing. He concluded that the contestant (appellee herein) established a prima facie case of no discovery on any of the claims. He further concluded that contestees (appellants herein) had failed to sustain their burden of proving discovery of valuable minerals within the limits of the claims. Accordingly, he declared the 10 claims null and void.

The appeal to this Board is limited to 6 of the 10 claims: Silver Earth, Golden Earth, New Year No. 2, Calcium Carbonate, Diabase Ridge, and Three Sons. Appellant Lee H. Rice concedes that there were no discoveries on the New Year No. 1, Good Earth, Lee's Fraction, and Goldie's Fraction claims (Tr. 436). See also Appellants' Statement of Reasons at 37, 38.

#### Conspiracy

One of appellants' major arguments is that the contests were brought as a result of a conspiracy within the Forest Service. Appellants allege that they were subjected to discriminatory treatment by that agency, that the contest must be viewed in that light, and that the decision fails to address this issue. The decision does, however, address the issue:

Although the Contestees allege that the USFS has engaged in a conspiracy to violate the laws of the United States, they agree that this case must be resolved on the issue of discovery of a valuable mineral deposit. (Contestee's Answering Brief at 19). The Contestees' arguments concerning the motives of the

Government in bringing this contest are without merit. It has long been recognized that the Department of the Interior has been granted broad plenary powers in the administration of the public lands, and, until the issuance of a patent, legal title to a mining claim remains in the Government, and the Department has the power, after proper notice and upon adequate hearing, to determine the validity of the claims. Cameron v. United States, *supra* [252 U.S. 450 (1920)]; Best v. Humboldt Placer Mining Co., 371 U.S. 334, 83 S. Ct. 379 (1963); cited in United States v. American Fluorspar Group, Inc., 25 IBLA 136 (1976).

(Decision at 13).

In their statement of reasons, appellants again concede that even though the Forest Service may have engaged in a conspiracy to violate the laws of the United States, this case will be resolved upon the merits of the issue of valid mineral discovery (Statement of Reasons at 21). However, because appellants have argued at some length that the record demonstrates the existence of a conspiracy, we will address this subject before proceeding to the issue of discovery.

Forest Service mineral examiners Jack Pardee and Gilbert Matthews examined the claims at various times in 1962, 1963, 1964, and 1966. On May 27, 1967, they issued a mineral report which stated that the purpose of the examination was to "determine the validity of the subject mining claims, which are located on lands proposed for base in exchange, and because the occupancy by the claimants interferes with management of National Forest Lands" (Exh. B at 2).

Appellants allege that the Forest Service had entered into a "sub rosa" agreement with a local ranching corporation, the 3 C Ranch, which also had unpatented mining claims in the same area. Appellants suggest that the purpose of the agreement was to disregard the 3 C claims but to proceed vigorously against the Rice claims. In support of this thesis, extensive excerpts from the testimony of Matthews and Pardee are quoted. <sup>1/</sup> A review of this testimony and pertinent exhibits shows that appellants' assertions of conspiracy and harassment are unfounded. The testimony of these witnesses and exhibit B indicate that appellants' claims were examined to determine whether or not a discovery existed. Pardee acknowledged that the claims owned by 3 C Ranch had not been examined, explaining that the Forest Service was not concerned with those claims because 3 C Ranch was going to relinquish the claims as part of the land exchange (Tr. 362). Moreover, a series of letters between the Rices and Forest Service officials (Exhs. 41-50) shows that cordial relations existed between the parties with respect to operations on the claims by appellants and parties who, for a period of time, were leasing the property from appellants. The hearing was postponed a number of times to allow the appellants' expert witness to complete his examination of the claims.

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<sup>1/</sup> Tr. 136-39, 357-58, 360-62, 515-16, 518-21.

[1] It is not the function of the Board to inquire into the motivation of any Government agency which has recommended the initiation of a contest against mining claims. Even if questionable motives were established, the Board would adjudicate the validity of the claims. The fact that particular claims, but not others in the same general area, are contested does not constitute a denial of due process. United States v. Howard, 15 IBLA 139 (1974), and cases there cited.

#### The Wilson Report

Appellants refer to an examination of these claims by Forest Service mining engineer Robert E. Wilson on February 12, 1958. Wilson examined three of the claims, the Good Earth, Golden Earth, and Silver Earth claims. His report (Exh. A) states that the mineralization on the claims "is not generally considered to be the type of mineralization from which any appreciable production of valuable minerals can be expected." Wilson took samples from the three claims and had them assayed for gold, silver, and lead. He stated in his conclusions that "[a] valid discovery of minerals has been made on the Golden Earth and Silver Earth Claims," but that no such discovery existed on the Good Earth claim. In his decision the Judge ruled as follows on the Wilson report:

The Contestees' reference to a mineral report (Ex. A) prepared in 1958, finding the Golden Earth and Silver Earth claims to be mineral in character is not controlling in this proceeding. That report was prepared for the purpose of determining surface rights on the claims under the Surface Resources Act, 30 U.S.C. 601. A previous determination in a proceeding different from a mining claim contest that land was mineral in character is not evidence of a discovery of a valuable mineral deposit in a mining contest. United States v. Alex Bechthold, 25 IBLA 77, 91 (1976).

(Decision at 13).

[2] The Wilson report does not answer the question whether minerals existed in sufficient quantity and were of sufficient 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." Castle v. Womble, 19 L.D. 455, 457 (1894). This "prudent man test" has been repeatedly approved by the Supreme Court in Departmental decisions. E.g., Best v. Humboldt, 371 U.S. 334 (1963); Cameron v. United States, 252 U.S. 450 (1920); Chrisman v. Miller, 197 U.S. 313 (1905); United States v. Burns, 38 IBLA 97 (1978); United States v. Becker, 33 IBLA 301 (1978); United States v. Arcand, 23 IBLA 226 (1976). This "prudent man test" is the standard by which the issue of discovery is resolved. While appellants appear to place considerable stock in the Wilson report, they do not demonstrate to what extent, if any, the Judge should have accorded this report more significance in the determination of the existence of discovery on the claim 20 years after the date of the report. We perceive no error in his ruling on this point.

Calcium Carbonate Claim

Raj Daniel, Forest Service mining engineer, testified that he examined the claims in 1976, 1977, and 1978. Daniel took samples from the Diabase, Silver Earth, New Year No. 1, Lee's Fraction, and Golden Earth claims. He examined but did not take samples from the Calcium Carbonate claim. Appellants allege the existence of scheelite (calcium tungstate) on this claim. They assert that Daniel failed to check for tungsten in any part of his examination (Statement of Reasons at 25).

Daniel described the Calcium Carbonate claim as "a shallow pit that did show a quartz lens, but I didn't know it was a lens or vein" (Tr. 108). He stated that his visual examination of the claim and the fact that samples had previously been taken by Matthews and Pardee <sup>2/</sup> persuaded him that it was not worthy of sampling (Tr. 55, 68-69), and that since there was no trenching or exploration work in the pit he did not know what he would have been "taking a sample of" (Tr. 108).

Richard J. Lundin, a mineral exploration consultant and the managing partner of Wallaby Enterprises <sup>3/</sup> examined the 10 claims, took samples, and prepared a mineral report (Exh. F) regarding the claims for the Rices. Exhibit F states as follows with respect to the Calcium Carbonate claim:

Calcium Carbonate

Two structures outcrop on this claim and they have significant and minable amounts of mineral in place. U.S.F.S. sample No. 6727 has a gross value at current prices of \$14.88/tn. The structure that this sample was taken from is poorly exposed and no estimate of minable tonnage in place is possible until further development work is done. Wallaby sample No. LRA-011 was taken over a two foot width across a gently dipping vein that contained significant amounts of wulfenite, galena and pyrite. The gross value of the sample was \$42.55/tn. As the vein can be stripped quite easily of its [sic] overburden and mined via a small open pit operation, it appears that indeed, valuable mineral has been found in place and can return a profit to the Rices if the mineralization is relatively uniform.

Lundin testified that he requested Daniel to take a sample from the Calcium Carbonate claim, but that Daniel declined, opining that the mineralization was insignificant (Tr. 229). Lundin gave his opinion that there was a discovery of valuable minerals on this claim. He based this opinion on the

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<sup>2/</sup> Mineral examiners Matthews and Pardee had taken samples from all 10 claims in their examinations in 1962, 1963, and 1964. Their report (Exh. B) indicates that the samples were assayed for gold, silver, and lead, all the metals claimed by the Rices at those times.

<sup>3/</sup> Lundin explained that his role was not to evaluate mining properties but to advise people how to explore, examine, and evaluate their own mining properties (Tr. 273-74).

Forest Service sample No. 6727 taken by Pardee and Matthews. According to exhibit B (compiled in 1966) this sample assayed 0.075 ounce gold and 0.23 ounce silver per ton, and 0.12 percent lead worth \$2.62, \$0.29, \$0.30, respectively. Lundin stated that the figure in his report (\$14.88 per ton) represented the "gross value at [his] calculations at current prices" for sample No. 6727.

Lee H. Rice testified that he sold about \$900 worth of tungsten from the claims. He kept no records as to what amounts were taken from which claims nor of his production costs (Tr. 447-48).

The Judge evaluated appellants' evidence concerning tungsten as follows:

The fact that the Contestees sold nine hundred dollars worth of tungsten from four of the claims is of little evidentiary value without supporting evidence of the exact mining costs incurred in its recovery and the identification of exposures from which tungsten may presently be removed at a profit. In any event, the recovery of nine hundred dollars would not justify the Contestees' labor and monetary expenditures on the claims.

(Decision at 14).

[3] There is no question that the Government mineral examiner who examined the Calcium Carbonate claim took no samples from the claim. In circumstances where the Government fails to make a prima facie case, or where its prima facie case is weak, any evidence presented by the mining claimant which supports the Government's charges may be used against the claimant regardless of the defects in the Government's case. United States v. Beckley, 66 IBLA 357 (1982); United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975). In a mineral contest, the contestee must prevail, if at all, on the strength of his own, not on any weakness of the Government's case. United States v. Noyce, 59 IBLA 268 (1981). In choosing to rebut the Government's case the claimant bears the burden of doing so by a preponderance of the evidence and bears the risk of nonpersuasion if he fails. United States v. Williamson, 45 IBLA 264, 87 I.D. 34 (1980).

The sum of the evidence with respect to tungsten on the Calcium Carbonate claim was the testimony of Lee H. Rice as to the amount sold, and the testimony and report of Lundin. Though that report lists gross dollar values for both samples, it contains significant caveats. One is the judgment that further development work is necessary before an estimate as to minable tonnage in place can be made. The other is that discovery is dependent upon an extent of mineralization which has not yet been ascertained. Lundin estimated that there were 37 tons of ore on this claim and in his professional judgment would not project the ore for more than 1 foot from the exposed face (Tr. 328).

We find that the Judge correctly accorded little weight to Lee H. Rice's vague and unsupported statements concerning amounts of tungsten mined and sold. We conclude further that the evidence of mineralization on the

Calcium Carbonate claim is such as may warrant further exploration or prospecting in an effort to ascertain whether sufficient mineralization might be found to justify mining or development. A valuable mineral deposit has not been discovered because a search for such deposit might be indicated. Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); Henault Mining Co. v. Tysk, 419 F.2d 766 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970).

### Remaining Claims

The remaining claims in issue are the Silver Earth, Golden Earth, Diabase Ridge, Three Sons, and New Year No. 2.

Appellants charge generally that the Judge totally disregarded the testimony advanced by their witnesses, and that the evidence given by Lundin is credible whereas that of Daniel is not. Appellants suggest that it is questionable whether the Government has made a prima facie case on some of the claims, particularly those with scheelite and siliceous flux which were never sampled by the Forest Service. Appellants contend also that the Judge erred in using early 1978 metal prices (gold at \$174 per ounce) when on the date of his decision, June 28, 1979, "representative values in the market place were much higher."

The charge that the Judge disregarded appellants' evidence is without foundation. The decision summarizes the crucial testimony of all witnesses. The evaluation of that testimony in light of applicable mining law appears on pages 12 through 15 of the decision. In view of appellants' challenges, we will summarize the pertinent evidence given by the chief witnesses, Daniel and Lundin, as well as the relevant documentary evidence.

The findings and conclusions Daniel drew from his examinations of the claims are documented in his mineral reports (Exhs. 31, 32). <sup>4/</sup> The assay results referred to therein were obtained from the Arizona Testing Laboratories (Exhs. 18-23). Exhibit 28 is a summary sheet showing the assay values of gold, silver, and tungsten, as well as other metals and minerals. The values in exhibit 28 were calculated using the January 1978 average metal prices obtained from the February 1978 Engineering and Mining Journal.

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<sup>4/</sup> Exhibit 31 discusses the results obtained from four samples taken from the Silver Earth claim. The dollar values for each sample, ranging from \$0.84 to \$5.58 are tabulated in exhibit 11. Exhibit 32 reports the findings on all 10 claims with reference to the assay certificates. The concluding paragraph of exhibit 32 reads:

"Most of the quartz veins found in these 10 claims are narrow, discontinuous stringers, 5 to 12" wide. Occasionally it is not uncommon to find a high gold and silver assay in oxidized, vuggy pockets with galena. Minor crystals of yellow wulfenite does occur to interest specimen collectors rather than a miner. Based on my field examination and from reviewing the mining history and literature, it is my opinion that mineralization present in each of the 10 claims is insufficient in quality and quantity to support a discovery within the meaning of the mining laws."

Exhibit C is a reevaluation by the Forest Service of the sample results which were used at the earlier hearing in 1967. These values were based on the September 1975 metal prices.

Daniel described the claims as having occasional narrow but discontinuous quartz stringers (veins) which would be uneconomical to mine (Tr. 29, 86-92). Daniel described his own sampling in detail and said that he had thoroughly familiarized himself with the literature and the earlier samples. He could not make a definite projection of ore reserves without further exploration and drilling (Tr. 104). He also challenged the sampling technique and the values obtained by Lundin, who didn't weigh his samples. Weighing, according to Daniel, is "a primary criteria in grade control and in making a profit" (Tr. 554). He concluded that the values of gold and silver found would not warrant a prudent man to expend his labor and means in developing any of the claims (Tr. 29).

#### Silver Earth Claim

Lundin's examination of the claims is tabulated in exhibit F. Although he took his own samples, he relied in his appraisal upon the Forest Service samples whose values he recalculated to update them. On the Silver Earth claim, he took the 4 highest of the 14 Government samples and excluded the rest. He did not weigh the samples, stating that there was no reason to do so (Tr. 293). Although he felt that a discovery existed on the Silver Earth claim, his evaluation of the mineralization on that claim was not conclusive. Of the two structures he observed on the claim, he stated:

If the mineralization is continuous and relatively uniformly consistent from the exposure in the shaft to the point some 57 ft. away where a similar vein was encountered in a water well, (the vein was intersected at 83.0 ft. and is on strike with the vein outcropping in the shaft) then some indicated reserves could be said to exist in this system. \* \* \*

The other mineralized structure on the claim has a lesser potential but still could be worked selectively. \* \* \* It would appear that the mineralization in this structure is spotty but does have minable values if care was used in the mining process so as to strip off most of the overburden before selective mining of the mineralized structure.

It is readily apparent that mineral discovery has been made on this claim and that further development is definitely warranted so as to block out additional ore reserves. From the ten foot intercept in the water well and the exposure in the shaft an estimate of 1,500 tns. of indicated material with a value of \$15.70/tn. is not unreasonable. If this is the case then the potential profit from such an orebody might be in the vicinity of \$3,000.00 (assuming a total mining and milling cost to the Rices of around \$13-\$14/tn.)

Exhibit F (not paginated).

We note one "error" in Judge Steiner's decision. A correction of this "error" does not overturn his decision but, in fact reinforces it. On page 6 of his opinion he noted charges for shipments containing 20 tons or less. This penalty for a small lot is not an important factor to be considered in making a determination of whether a product can be shipped to the ASARCO smelter at Hayden, Arizona, at a profit. In noting this provision Judge Steiner overlooked the most significant provisions of the ASARCO settlement sheet (Exh. 30). The ASARCO silicious fluxing ore settlement sheet, reflecting settlement rates in effect at the time of the hearing, deducts 0.02 ounce gold and 0.5 ounce silver per ton from the assay grade and pays for the regainer at a rate of 92.5 percent of the London Spot Quote for the succeeding week and 95 percent of the Handy and Harman Quote for the succeeding week. In addition, a \$3 per ton smelter charge is assessed. Applying the smelter rates to the values used by Lundin in exhibit F the maximum smelter return would be no higher than \$11.86 per ton, using silver and gold values on the date of the hearing. 5/ Lundin estimated the cost of mining and milling to be \$13 per ton (Tr. 209).

### Golden Earth Claim

Lundin testified that a valid discovery existed on the Golden Earth claim (Tr. 235). He used his own samples and samples taken by the Forest Service to draw this conclusion (Tr. 235). As a further basis he used a report filed with the U.S. Bureau of Mines showing that five tons of ore were shipped from the claims in 1934-35. He presented no evidence that these shipments were from the Golden Earth claim and did not demonstrate that this ore was a direct shipment. Based on assays presented we would conclude that these small shipments represented carefully selected hand picked material shipped during the height of the depression. Applying the assays used by Lundin to the ASARCO smelter schedule (Exh. 30), the smelter returns from ASARCO's Hayden Smelter would not pay the shipping costs, let alone the mining and milling costs. 6/

5/ The value is calculated as follows: Because of the deductions of 0.02 ounce gold per ton and 0.50 ounce silver per ton the maximum return would be if all values were either gold or silver. The \$15.70 per ton value used by Lundin was equated to 0.09 ounce gold per ton or 3.49 ounce silver per ton using the \$175 per ounce gold value and \$4.50 per ounce silver used by Lundin (e.g.,  $15.70/4.50 = 3.4888$ ). The quoted price of gold on Mar. 21, 1978, was \$177.65 per ounce. The quoted price for silver on that same date was \$5.23 per ounce. ASARCO smelter payments would be as follows:

	Market	Grade	Settlement	Settlement	Value before		
<u>Product</u>	<u>Value/oz.</u>	<u>oz./ton</u>	<u>Grade oz./ton</u>	<u>Rate/oz.</u>	<u>Charges</u>	<u>Charges</u>	<u>Net</u>
Au	\$177.65	0.09	0.07	\$164.33	\$11.50	\$3.00	\$ 8.50
Ag	\$ 5.23	3.49	2.99	\$ 4.96	\$14.86	\$3.00	\$11.86

6/ Using the values in note 5 above, the net smelter return would be as follows:

<u>Assay No.</u>	<u>Gold Payment</u>	<u>Silver Payment</u>	<u>Smelter Charge</u>	<u>Net Loss</u>
LRA 008	0	\$1.31	\$3.00	(\$1.70)
LRA 007	0	\$2.46	\$3.00	(\$0.57)

### Diabase Ridge Claim

Lundin testified that the Diabase Ridge claim contained two mineralized structures which were 600 and 200 feet long (Tr. 246). He based a conclusion that there was a discovery on a section of these structures 50 feet long (Tr. 249). Lundin referred to his report in making this determination (Tr. 249). He noted in this report that "this structure will have to undergo selective mining of particular ore shoots that are rich in tungsten" (Exh. F.) Exhibit F contains assay reports regarding the assays he took on the Diabase Ridge claims including the two assays used in determining the reserves he quoted. In all seven assays were taken. The highest assay indicated 0.09 percent WO<sub>3</sub>. The highest assay presented contained \$1.80 in tungsten values, using \$7 per pound for tungsten Lundin stated that \$7 per pound was the market value at the time of the hearing (Tr. 198).

### Three Sons Claim

Lundin concluded that there was valuable mineral on the Three Sons claim but that "not enough work has been done on the claim to block out tonnage or prove one way or another whether there's an ore reserve there that can be mined at a profit at this time" (Tr. 250). He also stated the following with respect to this claim: "Something has been found out there. I ascribe no tonnage to it. I don't know whether it can be mined at a profit" (Tr. 326).

### New Year No. 2 Claim

Lundin testified that samples from the New Year No. 2 represented rich ore shoots and a continuous and fairly thick vein (Tr. 254). He later testified that if "you had a good strong structure, intercepting structures its not terribly difficult" to project ore shoots, but that he could not project the ore shoots on the New Year No. 2 claim (Tr. 336-37). He also admitted that the reserves were "very spotty" (Tr. 255). In his report he stated that any reserves represented by the samples he and the Forest Service had taken have to be small and that the most that can be inferred was 900 tons averaging \$20.28 per ton.

### Profitability

Much of the testimony presented was in an attempt to prove that there was a discovery if the property were mined by appellants. In the statement of reasons presented on behalf of appellants, a lengthy argument was presented that the Judge erred in applying "institutional or large scale operations" to a small mine as it would be operated by the Rices (Statement of Reasons at 35). Evidence was presented that except for diesel fuel, the appellants had all of the equipment and supplies necessary to conduct mining and milling operations on the property. Lundin concluded that mining operations would cost approximately \$10 per ton and that milling operations would cost about \$3 per ton if appellants' equipment and supplies were used (Tr. 242). Shipping costs were estimated to be \$3 per ton (Tr. 403). Lundin testified that \$6 per hour was used in calculating labor costs (Tr. 316).

Lundin did not balance maximum life of the Rices' mining equipment against any of the anticipated ore reserves. Nor did he consider depreciation because the Rices owned all their equipment outright (Tr. 315-16). Lundin's approach to evaluating these claims is illustrated by the following testimony:

A We took into effect and into account two things. First of all, we did not do this analysis -- we did this analysis for Lee and Goldie. We wanted to find out whether they could make a go of their own little mine and make a living off of it. Essentially, just not try to sell it, not try to lease it, not try to go through a big company, but just like a family mine.

And I knew they had three things going for them. First of all, they had all the equipment necessary for the mine and supplies. They've got enough equipment supplies for three years of uninterrupted mining except for diesel.

Q Diesel fuel?

A Right.

And number two, they have the experience. Lee has been working for mines, he's worked this mine; one son is a champion driller. And he's a small miner and prospector. And I thought he had the know-how to make it on a shoestring.

And three, the values were there. If one was selective, if one knew what he was doing, one could mine these small pockets. One could mine these structures out and make a profit in my estimation.

(Tr. 199). The final paragraph of his report (Exh. F) states in part:

I feel that the Rices are prudent people and are well justified in expending time and labor in the development of these claims. As they have the necessary equipment, supplies and know-how of how to operate a small mine on a "shoe-string", I feel that they will make a go of the operation if they stick to the operating plan that I have worked out for them.

Lundin stated that the viability of the property depended on the Rices working the property themselves (Tr. 347). He also testified that two smelters were considered as possible purchasers of siliceous flux material. The first was Phelps Dodge which would purchase material for \$6 per ton (Tr. 252). With a \$10 per ton mining cost and \$3 shipping cost, it is obvious that it would be unprofitable to ship material to Phelps Dodge. The second would be ASARCO. As discussed above, the deductions and smelting charges at the ASARCO smelter would make mining of direct shipping ore unprofitable. In order to recover any tungsten values, appellants would be required to mill their ore. Appellant Lee H. Rice testified that his mill would process 1 ton of ore per 10-hour shift (Tr. 419). At \$6 per hour, the rock processed would have to contain more than \$60 per ton in recoverable values in order to justify milling.

Therefore, none of the reserves calculated by Lundin would support milling costs.

We do not find it necessary to comment on application of "institutional or large-scale operations" to the appellants' property. Appellants' calculations as to gross value of the mineral in place and costs of production do not support a conclusion that a prudent man would have a reasonable prospect of developing a paying mine.

[4] 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).

We conclude that the Government produced ample evidence to establish a prima facie case against the validity of the five claims. The next question for determination is whether the evidence adduced by appellant preponderated over the showing made by the Government. We find that it did not.

Discovery is not established for a lode claim where there are only isolated mineral values rather than an exposed vein or lode of mineral-bearing rock in place, possessing in and of itself a present or prospective value for mining purposes. United States v. Jones, 67 IBLA 225 (1982); United States v. Melluzzo, 38 IBLA 214, 85 I.D. 441 (1978). The descriptions of the mineralization on the claims in the Lundin report (Exh. F) do not meet this criterion. Where further development or exploration is required, where the extent of mineralization awaits ascertainment, where no definitive conclusions can be reached concerning amounts of minerals in place, a valuable mineral deposit has not been discovered.

[5] Lundin's evaluation of the appellants as prudent people who could make a go of the operation on a "shoestring" if they followed his recommendations cannot avail to establish a discovery, because determination of the validity of a mining claim can rest only on objective criteria, not subjective considerations.

Appellants urge this Board to consider the fact that appellants are willing to accept a very meager return. From the record we believe that, based upon the evidence presented by appellants, the property would not show a meager return but would show a loss. The fact that appellants may be willing to accept a return which is relatively meager does not satisfy the prudent man test, as a prudent man would not invest his labor and means if his only expectations were meager profits at best. United States v. Becker, 33 IBLA 301 (1978); United States v. Reynders, 26 IBLA 131 (1976); United States v. Heard, 18 IBLA 43 (1974). The prudent man test is objective, and subjective considerations, such as willingness to work for little or no

return, have no place in the calculus of prudence. United States v. Reynders, *supra*; United States v. Arcand, 23 IBLA 226 (1976). See United States v. Edwards, 9 IBLA 197 (1973), *aff'd*, Edwards v. Kleppe, 588 F.2d 671 (9th Cir. 1978).

[6] Finally, we see no error in the values for metals used by the Judge in his decision. Those were the values established at the hearing. The record established at a hearing in a mining contest is the sole basis for determining the validity of the claim. Any additional evidence tendered on appeal can be considered only to determine if a further hearing is warranted. United States v. Mattox, 36 IBLA 17 (1978); United States v. Taylor, 25 IBLA 21 (1976). Generally to warrant a further hearing, an appellant must show a sufficient equitable basis for holding a hearing and make an evidentiary tender of proof of discovery to be presented at such a further hearing. Appellants have tendered no new evidence on appeal.

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. W. Mullen  
Administrative Judge

We concur:

Edward W. Stuebing  
Administrative Judge

Anne Poindexter Lewis  
Administrative Judge

