

UNITED STATES
v.
MARVIN C. RAMSEY ET AL.

IBLA 83-609

Decided November 30, 1984

Appeal from the decision of Administrative Law Judge E. Kendall Clarke, declaring Kentta No. 1 and Kentta No. 2 placer mining claims, Josephine County, Oregon, null and void. OR MC 21027 and OR MC 21028.

Affirmed.

1. Evidence: Weight -- Mining Claims: Discovery: Generally -- Rules of Practice: Evidence

The failure of an expert witness, such as a Government mineral examiner, to remain current with all the literature concerning practices in his field may affect the weight but not the admissibility of his testimony. The trier of fact who presides at a hearing has an opportunity to observe witnesses and is in the best position to judge the weight to be accorded the testimony of the expert.

2. Evidence: Generally -- Evidence: Sufficiency -- Mining Claims: Discovery: Generally

The burden of the mining claimant is to produce a preponderance of credible evidence to overcome the Government's prima facie case against the validity of the claim. The trier of fact is not required to believe or give any weight to testimony which is inherently incredible. Therefore, when there is a gross disparity in the assay results of samples taken from the same points in a mining claim, and the trier of fact gives more weight to the test results which he finds are more credible, and his finding is supported by substantial evidence, the Board will not disturb that finding.

3. Evidence: Presumptions -- Evidence: Sufficiency

A presumption of regularity attends the official acts of public officers and, absent clear evidence to the contrary, it will be presumed that they have properly

discharged their duties. This presumption of regularity is applicable to the official acts of a Government mineral examiner who takes samples from mining claims and sends them to an independent assay company to determine their mineral content for the purpose of establishing whether a valuable mineral deposit has been discovered.

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

There is a clear distinction between "exploration" and "development" as these terms relate to discovery under the mining laws. Prior to the "discovery" of a valuable mineral deposit, mining activities such as mapping a deposit and drilling further to determine the extent and grade of the mineralization, constitute exploration work.

APPEARANCES: W. Dean Fitzwater, Esq., Portland, Oregon, for appellants;
Arno Reifenberg, Esq., Office of General Counsel, U.S. Department of Agriculture, Portland, Oregon, for appellee.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Marvin C. Ramsey, Vesta "Ruth" Ramsey, John Parker, and Roger Ramsey (appellants) appeal the April 11, 1983, decision of Administrative Law Judge E. Kendall Clarke declaring the Kentta No. 1 and Kentta No. 2 placer mining claims null and void for lack of discovery of a valuable mineral deposit on the claims. The Bureau of Land Management (BLM) brought the contest action against the mining claimants based on the March 13, 1981, recommendation of the United States Forest Service. Judge Clarke held an evidentiary hearing in Medford, Oregon, November 18, 1981.

We find Judge Clarke properly evaluated the evidence before him, and we concur in his findings and conclusions. We will address the two points of error appellants have assigned to Judge Clarke's decision. First, however, we will set out those findings made by Judge Clarke that are relevant to appellants' charges.

At the hearing it was established that in 1981, Colver Anderson, as a mining engineer for the United States Forest Service, collected four samples from the Kentta No. 1 and Kentta No. 2 claims to assess the mineral content of the claims. He sent the samples to an independent assay laboratory, which ran a fire assay test and determined their gold content was nominal or nil. Appellants employed two representatives to take samples from the same points sampled by the Government examiner. Walt Freeman, a mining engineer, sent his samples to an independent laboratory that also used fire assay to test the samples. The gold content was reported as nominal. In contrast, samples taken for appellants by John Masero and assayed by a third independent laboratory operated by Masero's father showed extremely high amounts of gold for a placer claim; *i.e.*, 0.67, 0.21, 0.44, 0.69, and 0.32 ounces per ton, respectively. That laboratory used the pan amalgamation method of assay to

test the samples. We note the assayer and owner of that laboratory, Kenneth Masero, was unable to produce any records documenting his assay certificate, such as the date the samples were received and the computations used to reach the final results.

As their first assignment of error, appellants argue Judge Clarke failed to give the weight and import to their witnesses that he gave to the Government witness. Second, they challenge Judge Clarke's conclusion that the claimants have not made a discovery. Appellants contend that at the time of the hearing any mining activities on the Kentta No. 1 and Kentta No. 2 would have been in the nature of "development" not "exploration" of the claims.

In support of their first argument, the mining claimants challenge Anderson's credentials. They state that he is not an assayer and that he is a graduate chemist, not an engineer or geologist. They also state that he admits not keeping up with the "latest techniques." This is apparently a reference to Anderson's testimony wherein he stated he had not read a Bureau of Mines special bulletin on leaching techniques.

[1] Appellants have failed to show that Judge Clarke accorded improper weight to Anderson's testimony. First, contrary to appellants' contentions, Anderson was an assayer from 1940 to 1942. In addition, from 1946 to 1949 he set up an assay office in Grants Pass, Oregon. Even so, Anderson's qualifications as an assayer have little or no bearing on the weight or import given to his testimony in this case because the assay of the samples collected by Anderson was done by an independent assay company, not by Anderson. Furthermore, Anderson is clearly a qualified minerals expert; his graduate work is in mining and geology, and his mining career spans 40 years.

Second, the failure, if any, of an expert witness to remain current with all the literature concerning practices in his field may affect the weight but not the admissibility of his testimony. The trier of fact who presides at a hearing has an opportunity to observe the witness, and is in the best position to judge the weight to be accorded his testimony. United States v. Smith, 54 IBLA 12 (1981).

In addition, appellants argue that the Administrative Law Judge "struggles with the 'startling difference between the results of the samples,' but he fails to apply the uncontested testimony of Mr. Masero, the expert, explaining why the difference." Appellants contend that the disparate results from the assay tests are a function of the method of testing; *i.e.*, pan amalgamation as opposed to fire assay. They state that "due to the impurities and rock nature, fire assay will not give the true result of gold and silver content." Therefore, they conclude, only the results from the pan amalgamation assay accurately reflect the mineral content of the samples, and the mining claims.

Appellants have failed to prove that the vast difference in the assay reports was attributable to the method of assaying the samples. Absent such proof, the disparate assay results cannot be reconciled. We conclude Judge Clarke properly accorded little or no weight to Masero's pan amalgamation assay and greater weight to the fire assays. Our conclusion is based upon four rules of evidence.

When the Government contests a mining claim, it is required to provide sufficient evidence to establish a prima facie case against the validity of the claim, and then the burden of proof shifts to the contestees to overcome this showing by a preponderance of the evidence. United States v. Arbo, 70 IBLA 244 (1983); United States v. Smith, *supra*; United States v. Rukke, 32 IBLA 155 (1977). Appellants have failed to so preponderate. Two independent assay companies, one of which was commissioned by appellants, reported not more than nominal amounts of gold were contained in the samples, whereas only one assayer reported extremely high amounts of gold, and these results were the only evidence produced by appellants to show the "discovery" of a valuable mineral deposit.

[2] The burden of proof of the mining claimant is to produce a preponderance of credible evidence. The trier of fact is not required to believe or give weight to testimony which is inherently incredible. United States v. Melluzzo (On Judicial Remand), 32 IBLA 46 (1977); *aff'd*, Melluzzo v. Watt, 674 F.2d 819 (9th Cir. 1982). Judge Clarke determined that Masero's assays were, in essence, inherently incredible. We will not disturb such a finding where it is supported by substantial evidence. United States v. Smith, *supra*.

[3] Finally, there is a legal presumption of regularity that attends the official acts of public officers. James E. Huff, 69 IBLA 368 (1983). This presumption is applicable to official acts of a Government mineral examiner who collects samples from a mining claim and sends them to an independent laboratory for assay, to determine their mineral content. In the absence of clear evidence to the contrary, courts presume the officers have properly discharged their official duties. United States v. Chemical Foundation, 272 U.S. 1, 14-15 (1926); Legille v. Dann, 544 F.2d 1 (D.C. Cir. 1976); Kephart v. Richardson, 505 F.2d 1085 (3d Cir. 1974); White Rose Corp., 72 IBLA 80 (1983). Rebuttal of such a presumption requires the presentation of substantial countervailing evidence. Stone v. Stone, 136 F.2d 761 (D.C. Cir. 1943); H. S. Rademacher, 58 IBLA 152, 88 I.D. 873 (1981). Appellants failed to present such evidence.

The second point of error raised by appellants introduces upon the "exploration," "development" distinction of mining law. Appellants challenge Judge Clarke's conclusion that they had not made a discovery and that "the additional work for which there had been recommendations are in the nature of discovery work and at the time of the hearing do not contribute to a finding of discovery." The "recommendations" are probably references to the testimony by Freeman, one of appellants' expert witness. Freeman said it was too early to determine the method and cost of mining the claims. He recommended drilling holes to determine the extent and grade of the material, taking additional tests, and mapping the deposit.

Appellants argue that creating an operating plan, based on further testing, mapping, and geophysical analysis of property constitutes development of a discovery. Carrying this one step further, appellants contend that such activities "must be considered as development of the discovery, because such a phase or procedure does not take place until a discovery has taken place." The Government argues that by virtue of his statements, Freeman admits he is still searching for the ore body; that he has not found the valuable mineral deposit; i.e., he is "exploring."

[4] In United States v. Edeline, 39 IBLA 236, 241 (1979), we quoted United States v. Lundy, A-30724 (June 30, 1967), wherein the Department contrasted "exploration" with "development":

There is a clear distinction between "exploration" and "development" as they relate to discovery under the mining laws. The separate stages of mining activity serve as a basis for determining what further mining activity a prudent man would be justified in undertaking. Exploration work includes such activities as geophysical or geochemical prospecting, diamond drilling, sinking an exploratory shaft or driving an exploratory adit. It is that work which is done prior to a discovery in an effort to determine whether the land is valuable for minerals. When inherently valuable minerals are found, it is often necessary to do further exploratory work to determine whether a valuable mineral deposit exists, i.e., whether the minerals exist in such quality and quantity that there is a reasonable prospect of success in developing a paying mine. [Emphasis added.] 1/

However, where there has been a qualifying discovery of mineral of minable quality and quantity; i.e., "ore"; the "blocking out" and mapping of the ore body by drilling and geophysical analysis may properly be regarded as "development." United States v. New Mexico Mines, Inc., 3 IBLA 101 (1971). This is not the case here.

The activities recommended by Freeman, constitute exploration work, not development work. This conclusion necessarily follows Judge Clarke's determination and our affirmation, that appellants have failed to prove they discovered a valuable mineral deposit.

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.

Edward W. Stuebing
Administrative Judge

I concur:

Bruce R. Harris
Administrative Judge

1/ Edeline was overruled on other grounds by the Board in United States v. Feezor, 74 IBLA 56, 90 I.D. 262 (1983).

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While in agreement with the ultimate disposition of the instant appeal, I wish to comment on an aspect of the case which I find troubling. The case turns on the efficacy of the assaying techniques utilized to determine the mineral content of samples which, while not technically joint samples, were clearly taken in such a manner that similar assay results would be expected. Two groups of samples (one taken by the Government mineral examiner and the other taken by an expert hired by the contestees) were fire assayed, while the third group was assayed by pan amalgamation. The majority agrees with Judge Clarke that the results of the pan amalgamation assays (referred to as the Masero assay) were, in essence, inherently incredible. While I do not disagree with this conclusion, I think we should be particularly careful lest our decision be read as an endorsement of the fire assay as the proper method for determining mineral content of placer claims.

I believe such caution is warranted by the fact that, according to BLM's own technical standards, fire assays should not be used to determine the mineral content of placer claims. See Wells, Placer Examination: Principles and Practice (Technical Bulletin 4) at page 91. Thus, Technical Bulletin 4 notes:

[N]o credence should be placed in placer valuations or reports that are based on the results of fire assays. Although this should be common knowledge among mineral examiners, a surprising number seem unaware that fire assaying although accurate per se yields misleading results when applied to placers.

Id. In view of this rather clear admonition, questions might properly be raised as to how the Board can justify reliance on fire assays to the detriment of pan amalgamation assays in the instant case.

The key to understanding this problem relates to the reasons why Technical Bulletin 4 eschews fire assaying of placer deposits. Two separate factors weigh in the Technical Bulletin's disallowance of fire assaying. The first relates to the possibility of distortion due to the small size of the sample which is fire assayed. Since the usual sample taken for a crucible charge is one assay-ton (29.1667 grams), inclusion of a small gold particle could well cause a marked distortion in value on the up-side. A similar problem could exist on the down-side since it is possible that the sample assayed might not contain a representative amount of gold particles.

Secondly, the Technical Bulletin notes that a fire assay will detect all gold in a sample, some of which may not be recoverable by normal placer mining techniques. It is in light of both of these possibilities that Technical Bulletin 4 concludes "experience has shown that fire assay results applied to placers usually results in a substantial over-valuation of the ground." Id.

Thus, there is the likelihood that the fire assay results over-valuated the property (based on both the small size of the assay sample and the recovery of all gold) versus the possibility that the fire assay undervalued the land (also owing to the small size of the assay sample). On the other hand,

we have assay results from the pan amalgamation method which not only show values so variant from the fire assay results that it is hard to believe that they were taken from the same ground, but which suffer from the inability of the assayer to provide any records beyond the assay results, themselves, relating to his computations.

We are, therefore, faced with a classic conflict of evidence. The question is which assay results are the more credible. In this regard, I would suggest that the marked correlation between the two sets of fire assays, sent to two different assaying companies, make it statistically unlikely that all nine of these samples erred on the down-side. Thus, Colver F. Anderson, the Government mineral examiner, cut four samples. Of these, two showed a trace of gold per ton and two showed none. The highest silver content was sample A81-3 which indicated 0.4 ounce per ton. See Exh. 4. Walt Freeman, the contestees' expert, testified that his five assays showed merely a trace of gold in all of his samples (Tr. 89). Both experts testified that the samples taken were representatives of the deposit (Tr. 24, 89). The possibility that all nine of these assays distorted the gold content on the down-side is statistically infinitesimal.

When the results of the Masero assays, all of which showed extremely high gold content for placer ground, are analyzed in conjunction with the fire assays, it is clear that the dissimilarity in the results cannot be justified on the possibility that all nine fire assayed samples missed enrichment while all five pan amalgamation samples encountered true values. Something beyond the actual samples assayed must account for the deviations in value.

Thus, the difference can only be accounted for either by the possibility that the samples were not amenable to fire assay or that an error, either computational or otherwise, distorted the Masero assay results. Appellants' argument that the deposit was not amenable to fire assaying proceeds not from any analysis of the type of deposit involved which might lead to erroneous fire assays results, but rather from the assumption that the Masero results are correct. This, of course, is post facto reasoning as it assumes as its predicate the answer to the very question being asked.

More critical, to my mind, is the inability of Masero to provide records relating to the assaying of the samples. It may be that in the average case the Department has tended not to look behind the assay results reported from reputable firms. But, where the mode of assaying becomes the critical issue, it is incumbent upon the parties to provide an evidentiary basis upon which to judge the efficacy of the assay results. On the basis of the record before this Board, appellants have not successfully shown that the Masero assay results are properly accorded weight over those obtained both by the Government mineral examiner and their own expert.

This being said, I think that Government assayers should be put on notice that fire assaying of placer deposits might not, in some future case, be a sufficient basis upon which to prevail before this Board. The instant case involved a fortuitous circumstance where two samples were taken from most areas and both were subject to a fire assay, the results of which were mutually reinforcing. Future situations may arise in which such results do

not obtain. In such future cases, it may well be that the assay results obtained through a fire assay will not be accorded the same weight as assay results which are derived from procedures more likely to fairly value placer ground. Against this eventuality, mineral examiners should clearly be on guard.

However, for the reasons set forth above, I concur with the denial of the instant appeal.

James L. Burski
Administrative Judge.

