

UNITED STATES
v.
DONALD L. and DOROTHY E. CLARK

IBLA 89-522

Decided November 15, 1991

Appeal from a decision of Administrative Law Judge Ramon E. Child declaring MS No. 1 millsite valid and ordering the issuance of patent. I-19822.

Affirmed.

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

A decision finding a dependent placer millsite valid will be affirmed on appeal when the evidence demonstrates that the millsite was needed by the proprietor of a placer claim for fuel storage, equipment repair, and a sawmill and millsite, and was used or occupied by the proprietor of the claim for mining, milling, processing, beneficiation, or other operations in connection with the placer claim.

APPEARANCES: Erol R. Benson, Esq., Office of the General Counsel, U.S. Department of Agriculture, Ogden, Utah, for the Forest Service; Barry Marcus, Esq., Boise, Idaho, for Donald L. and Dorothy E. Clark.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The United States Department of Agriculture, Forest Service (Forest Service or FS), has appealed from a portion of Administrative Law Judge Ramon M. Child's May 22, 1989, decision declaring MS No. 1 (MS 1) and MS No. 2 (MS 2) millsites valid, and ordering the issuance of patents to Donald L. and Dorothy E. Clark (the Clarks). Both millsites are situated in sec. 10, T. 22 N., R. 5 E., Boise Meridian, Idaho County, Idaho, within the Payette National Forest. The Forest Service appeals only that part of Judge Child's decision pertaining to MS 1.

Background

In 1967 and 1971 Donald L. Clark's father filed applications for patent to the Echo Group No. 1 (Echo 1) and Echo Group No. 2 (Echo 2) placer mining claims. He later amended the location notice for the Echo 1 claim dropping 7-1/2 acres situated in an old mined out working known as Thorpe diggings (Tr. 116). 1/ On May 23, 1981, the Clarks located MS 1 on 5 acres of the land carved out of the Echo 1 placer (Tr. 131-35; Exhs. C-17, C-18) pursuant to 30 U.S.C. § 42(b) (1988). 2/ On August 9, 1983, patent to Echo 1 issued to Clark's father (C-15). The Clarks succeeded to his father's interest (Tr. 130-31; C-16).

The Clarks filed an application for patent to MS 1 on September 27, 1983 (Exh. C-20). The final certificate for MS 1 was issued by the Bureau of Land Management (BLM) on June 20, 1984, but the case was suspended pending a report of the field examination (Exh. C-20). A field examination was conducted by the Forest Service and, at the request of the Forest Service, BLM issued a contest complaint (Complaint) on March 9, 1988, alleging that MS 1 is "not used or occupied by the claimant for mining, milling, processing or beneficiation [sic] purposes or other operations in connection with patented and unpatented placer mining claims" (Complaint at 2; Decision at 2). The Complaint also alleged that the millsite has "no quartz reduction mill or reduction works thereon." Id.

A hearing was held before Judge Child in Boise, Idaho, on November 29 and 30, 1988, and posthearing briefs were filed. This appeal ensued from Judge Child's May 22, 1989, decision declaring MS 1 valid and ordering the issuance of patent.

The statutory authority for the location and patenting of millsites is 30 U.S.C. § 42(b) (1988), which provides in pertinent part:

§ 42. Patents for nonmineral lands: application, survey, notice, acreage limitation, payment

* * * * *

(b) Placer claim owners eligible

Where nonmineral land is needed by the proprietor of a placer claim for mining, milling, processing, beneficiation, or other operations in connection with such claim, and is used or occupied by the proprietor for such purposes, such land may be included in an application for a patent for such claim, and may be patented

1/ All parties agree that the land embraced by MS 1 is nonmineral in character (Tr. 17, 18, 136; FS-2).

2/ On July 27, 1982, the location notice on Echo 2 was amended dropping 2-1/2 acres for the express purpose of providing one-half of the acreage for MS 2.

therewith subject to the same requirements as to survey and notice as are applicable to placers. No location made of such nonmineral land shall exceed five acres and payment for the same shall be made at the rate applicable to placer claims which do not include a vein or lode.

Judge Child found that the Clarks used and occupied MS 1 in conjunction with mining operations on their adjacent claims. Specifically, he made the following findings of fact relative to the Clarks' use or occupation of MS 1 millsite and mining and milling operations on the adjacent placer claims:

4. Located on [MS 1] are: * * * three full storage tanks for diesel fuel having a combined capacity of 3,000 gallons, a functional sawmill (the blades and generator for which were stored in the mill building during [FS] visits), an area proposed for heavy equipment repair building and office, roadways and cleared timber. (Tr. 74-75) [3]; Exhibits FS-6, C-7)

5. The mining operating season is generally from May 15 to October 15, and the area receives substantial snowfall in the winter. (Tr. 7[8])

* * * * *

7. Earth work has been performed in order to put MS 1 in a condition where improvements could be placed on it which earth work consisted of clearing of small scrub timber done by the mine operator in 1984 and leveling work which was done in 1984, 1985, 1986 and 1987 to place an access road in so that the sawmill could be placed and so that the fuel dump area could be improved. A D-8 Cat was used to do the earth work and leveling * * *. A culvert and ditching work has been accomplished on MS-1 for drainage. (Tr. 78[-81])

* * * * *

9. Milling operations have occurred in connection with operation of contestees' placer claims in the area of the mill sites including reduction of gravels to heavy concentrates, which then go onto Kundsens bowls which rotate and produce heavy black sands and gold which would then be taken into the mill building where the heavy concentrates were placed in storage bins and from there processed through secondary jigs onto a separating table and then put through an amalgamator where mercury is used to collect the valuable mineral. Such operation cannot occur in the

3/ This testimony is actually found at Tr. 76-77. There is no evidence that the fuel tanks were "full."

open on placer claims but must be contained because the miner is handling a material which could be hazardous and thus a central location where the concentrates can be processed is necessary for the mining operation. That operation began on contestees' claims in 1980 and continued through 1983 during which time the mill building was in full use following its construction. (Tr. 82-84)

* * * * *

14. The land on which MS 1 and MS 2 are situated is nonmineral. (Tr. 17, 18, 13[9]; Exhibits C-19, C-20, FS-2)

15. The sawmill on MS 1 is to provide timbers for buildings planned on the mill sites and for bulwarks and stabilization of gravel banks to assist in the placer mining operations. (Tr. [6-7,] 14)

* * * * *

17. A pilot operation was conducted on the adjoining placer claims Echo Group No. 1 and Golden Rule properties in 1988 to evaluate, resulting in the execution of a letter of intent to conduct mining operations thereon in 1989 which if pursued will require the use of the mill sites in conjunction therewith. (Tr. 166[-]173, 18[8]; Exhibit[s] C-33, C-34)

On appeal the Forest Service maintains that "the use of claim MS 1 was nonexistent until 1988 when a last ditch effort was made to begin some sort of use. Contestee has been attempting to find an operator or a market, and as of the date of the hearing, had nothing but boundless hope and optimism" (FS Statement of Reasons (SOR) at 9). This assertion is not supported by the evidence. Clark's contractor repaired heavy equipment on MS 1 in 1984 and did site preparatory work to install the fuel storage area and sawmill in 1985-88 and installed the sawmill in 1988. Admittedly, since the date of location, MS 1 has not been used as extensively as the adjacent MS 2 millsite. However, the Clarks met the statutory use or occupancy requirement. There is no evidence to suggest that there were no operations [**8] during the crucial period on either the Echo 1 or Echo 2 claims by the Clarks or other parties with a contractual right to conduct mining operations on those claims. In 1980-84 and 1988, gold mining operations were conducted on the Echo 1 and Echo 2 claims (Tr. 85-86, 174-75). In 1988, gold was recovered as a primary product and was recovered as a by-product in a pilot operation to examine the feasibility of recovering rare earth contained in monazite-rich black sand tailings (Tr. 177-86). ^{4/} Clark's contractor, John Carlson filed a plan of operations (notice of intent) on behalf of Clark for 1989, the year of the hearing (Exh. C-33; Tr. 169-73), which proposed to operate the Golden Rule claims, adjacent to the Echo claims, for the recovery of

^{4/} It was estimated that there were 160 million cubic yards of reworkable tailings (Tr. 195).

monazite from mine tailings to be treated and sold to W. R. Grace (Tr. 169-73, 285-86). That "notice of intent" states:

Initial testwork indicates the claims (Golden Rule No. 1 and No. 6) contain commercial quantities of manazite [sic] and other heavy materials. We are completing our evaluation of the deposit to develop a flowsheet for the recovery of the heavy minerals plus gold as a secondary product. Metallurgical testwork [**9] is being conducted under the writer's supervision at Denver Equipment's Test Laboratory in Colorado Springs, Colorado. The process flowsheet will be a conventional gravity circuit maximizing recovery of heavy minerals and precious metals. Secondary recovery concentration will upgrade the heavy minerals and produce a final gold product. Tertiary treatment will produce commercial grades of monazite, ilmenite, and corundum.

(Exh. C-33 at 1).

The Forest Service's allegation that Clark "has been attempting to find an operator or a market and as of the date of the hearing had nothing but boundless hope and optimism" (FS SOR at 9) is clearly refuted. Clark has an operator, a plan, and a purchaser who will purchase concentrates meeting required specifications. ^{5/} Clark testified that the proposed operation would require the use of the fuel storage area, sawmill, and an equipment repair building to be constructed on MS 1 (Tr. 171-72, 186-88).

Citing United States v. Skidmore, 10 IBLA 322 (1973), and United States v. Cuneo, 81 I.D. 262 (1974), the Forest Service insists that a previously valid millsite can lose its validity, contending that if the millsite was ever used for mining and milling after location, it has not been used for that purpose for many years. The statutory language requires that the land embraced by MS 1 be used or occupied for mining, milling, processing, beneficiation, or other operations in connection with a valid claim. The Forest Service characterizations of Clark's use of MS 1 are unsupported by the evidence limned above. The Cuneo and Skidmore cases are inapposite.

Similarly, in Cuneo, the only structure or improvement on the millsite was an old mill that had not been used for a decade, startup costs were substantial, and the sources of ore or mill feed were questionable. In Skidmore, there had been no production from the mine for many years, there were no present plans to begin production and development, and work had been nominal or nonexistent for 8 years. In Skidmore, we recognized that if land was not currently being used for mining and milling purposes, the applicant must show occupation by improvement or other evidence of a good faith intent to use the land for mining and milling purposes. We

^{5/} The Forest Service offered no evidence that W. R. Grace's specifications could not be met and declined (on cross) to permit Clark to explain why he was sure he could meet those specifications (see Tr. 193-94).

concluded in Skidmore that the patent applicant had not shown "a current need or good faith intentions of improving the mill sites." The same cannot be said of the Clarks. Their plan of operation and the testimony adduced at the hearing established a current need and an ongoing good faith intent.

Referring again to Cuneo and to United States v. Wedertz, 71 I.D. 368 (1964), the Forest Service notes that planned future use is not sufficient, even though improvements may be on the site, when the millsite is presently being used to support prospecting activities. The Forest Service avers that Clark "has nothing but plans coupled with prospecting for a marketable commodity." We agree with Judge Child that Wedertz is not helpful. It involved a millsite application dependent to a lode mining claim on which no discovery existed. In this case the mineral claim was examined, and found to be valid. BLM issued a patent to Echo 1 and has been ordered by the Federal district court to proceed with issuance of patent to Echo 2. Evidence presented at the hearing established further that the profitable gold deposit supporting the placer claims at the time of the mineral report remains on the claims (Tr. 292). We hold that Judge Child's conclusion that MS 1 is "used or occupied by [Clark] for mining, milling, processing, beneficiation, or other operations in connection with placer claims of [Clark's]" is supported by the evidence adduced at the hearing.

The Forest Service contends also that MS 1 is not needed for mining, milling, processing, beneficiation, or other operations in connection with such claim. It notes the principal difference between the section 42(b) language providing for millsites with lode claims and millsites with placers "is the addition of the word needed." The Forest Service reasons "the logic is clear. Most quartz or lode claims are in rugged terrain not suited as a millsite. Placer claims, on the other hand, are usually in gentle or flat terrain, and so within themselves, contain areas suitable for processing, beneficiation and milling" (FS SOR at 7). The Forest Service states that Carol Thurmond, the Forest Service geologist, and Robert Bryan, Minerals Program Manager for the Payette National Forest, testified in substance that there was no present need for MS 1. Noting that Clark indicated use of the claim to be primarily as a fuel storage area and possibly lumber milling, FS insists that "these needs exist only when and if [Clark] ever starts to mine" (SOR at 9).

In its prima facie case the Forest Service through Carol Thurmond testified that the millsites were not needed:

I do know that Mr. Clark used area on his placer claims for the processing of material which he was mining and for some office facilities or cook shack. He did have some structures on those claims. And considering the availability of space on his patented and his unpatented mining claims, I see no need for either of those mill sites (Tr. 37).

Robert Bryan, the Forest Service's other witness, offered no testimony on the "needed" issue (Tr. 48-65).

The Judge concluded MS 1 was "needed." In support of this conclusion he made the following findings of fact:

It is important for the fuel storage area to be placed off of placer mining claims since spillage will hinder ore recovery (Tr. 185, 259). The fuel storage area has been placed in its location as a recommendation of the Mine Safety and Health Administration because fuel should be removed from other mining activity. The area where the fuel storage exists on MS 1 is clay and is the type of soil needed for a fuel dump in case of spill because the clay would contain any spilled oil.

(Tr. 77; Decision at 9, Finding 6). He also noted that the sawmill on MS 1 is to provide timbers for buildings planned on the millsites and for bulwarks and stabilization of gravel banks to assist in placer operations (Tr. 143; Decision at 10, Finding 15).

A pilot operation was concluded on the adjoining placer claims Echo 1 and Golden Rule properties in 1988, resulting in the execution of a letter of intent to conduct mining operations in 1989 which would require use of the millsites (Tr. 166-68, 173, 182; Exhs. C-33, C-34; Decision at 10, Finding 17).

Based on the foregoing factual findings, Judge Child found MS 1 was "needed to * * * repair equipment, to store fuel and supplies and to cut timber" (Tr. 77, 143, 166-68, 182; Decision at 11, Finding 18).

In addition to the testimony detailed by Judge Child, Clark testified that he needs timbers produced at the sawmill to build support buildings and to create stable equipment foundations for pumps, etc. (Tr. 146-47). Clark and Lyle Talbott, Clark's expert mining consultant, testified that equipment repair and maintenance should not be conducted on or near the mineral deposit because oil and grease associated with repair and maintenance has a deleterious effect on mineral recovery (Tr. 189, 265). Talbott noted that storage of oil and spills were strictly regulated by the Mine Safety and Health Administration, EPA, and the State of Idaho by the Water Quality Control Division of Environment. He discussed the need to build impoundments around fuel storage areas to contain spills and the inability to bury fuel tanks (Tr. 261). Talbott testified that when he visited the mining claims and millsites in August 1988 he observed ongoing site work including construction of access roads on the millsite. The area where he camped had been cleared, fire pits had been installed with borders made of logs, fuel storage tanks had been moved to a site away from other facilities, and a sawmill was present (Tr. 279-80). Talbott also noted that when facilities are placed over an ore body they cannot be permanently placed without losing the ability to mine the underlying ore body (Tr. 266). It was also his opinion that any mining venture using mechanized equipment and people must have a millsite (Tr. 265). Placer operations, he opines, require additional beneficiation of the material at some place other than on the ore (Tr. 282).

While aware of placer operations in Secesh Meadow predating 1982, he did not know where the beneficiation operations were conducted in those operations, i.e., on or off the mining claims (Tr. 282-83).

[1] Although we are unwilling to go as far as Talbott and hold that all placer operations require a millsite, Clark has nonetheless demonstrated a need to locate his fuel storage area, sawmill, and repair equipment in an area central to but removed from mining and milling of the ore. Present use or occupation has not been shown for any use other than these. Conceding that it is conceivable for Clark to place these facilities elsewhere, the law does not require that he do so, so long as his use and occupancy meet the statutory requirements.

Our conclusion that Clark has demonstrated need, in addition to use or occupation of MS 1, however, does not answer the question of whether Clark has established a need for the entire 5 acres for which patent is sought. BLM's complaint charges that the land embraced by the millsite is excessive. However, the Forest Service offered no evidence in support of such an assertion in its prima facie case. On the other hand, Talbott testified that "the MS 1 was not excessive in size," and Talbott's conclusion, is supported by the record. The map identifying the structures that Clark has erected and the additional structures he proposes to situate on MS 1 (C-7, C-20, and C-22) show the millsite to be the site of the fuel storage area, the fuel spill sump, the equipment maintenance area, and the site of the sawmill. In addition the site has been designated as the campsite to be used during the summer months when operations are being conducted on the mining claims. ^{6/}

The facts in this case differ from those in United States v. Swanson, 93 IBLA 1, 93 I.D. 288 (1986), where only a portion of five millsites "was actually used for millsite purposes." In Swanson, we held "where the United States is examining millsites for the purpose of ascertaining whether all of the land within the millsite is either used or needed for mining and milling purposes, such scrutiny should properly be limited to each 2-1/2 acre aliquot part." Id. at 35, 93 I.D. at 307 (emphasis in original). Continuing our review of the extent of the use or occupancy to consideration of whether each 2-1/2-acre portion of the 5-acre millsite has shown the element of either use or occupancy, we conclude that there is sufficient evidence to support Judge Child's conclusion that Clark has demonstrated a need for the entire 5 acres sought in his patent application.

The Forest Service also contends that Judge Child committed an error of law in accepting the argument advanced by Clark that the Forest Service had no authority to inquire into anything except statutory expenditure and mineral character of the land when he found "[c]learly BLM had exercised

^{6/} Shortly before the patent application was filed, the Forest Service insisted upon the removal of the structures from a campsite located on the mining claims (Tr. 94, 215, 309). It also refused permission to construct the proposed campsite "until the time the patent application is settled" (Tr. 76, 168).

its discretion to issue patent for the millsites if field investigation verified the land to be nonmineral in character."

The Forest Service states its opinion that Judge Child's characterization of Thurmond's analysis of her duty to verify that the lands were being used and occupied for millsite purposes as a "misconception of the law," implies that Judge Child thought the mineral examiner had no authority to check anything but the mineral character of the land. This argument is interesting in light of the Forest Service concession that "we do not believe [the Judge] intended to so state, in view of his subsequent discussion of use and need." Notwithstanding its having recognized the fallacy of its initial argument the Forest Service insists that, if this is his view of the law, "his view is in error and cannot be left unchallenged" (SOR at 8). Citing United States v. Webb, 1 IBLA 67 (1970), the Forest Service notes that the Government may always inquire into the legitimacy of occupancy at anytime prior to patent.

The Forest Service correctly asserts that the issuance of a final certificate does not bar a subsequent challenge to issuance of a patent on the grounds that the applicant has not satisfied the statutory requirements be it proof of need, use, or occupancy in the case of a dependent placer millsite, or proof of discovery in the case of a placer or lode mining claim. A final certificate typically contains a statement that "[t]he case is suspended pending the report of field examination" conducted for the purpose of determining compliance with statutory requirements, whether the land be administered by BLM or the Forest Service. In this case the Forest Service conducted the field examination and, on the basis of its findings, it sought issuance of a contest complaint seeking to prevent issuance of patents. To the extent that Judge Child's decision can be construed to indicate that he momentarily labored under a contrary interpretation of the law, we find the error to be harmless. His subsequent discussion of need, use, or occupancy leaves no doubt that he critically reached the issues at the heart of this case, and we find no error in his findings of fact and conclusions of law on the dispositive issues. ^{7/}

^{7/} Judge Child's characterization of "Thurmond's analysis of her duty" (SOR at 8) as a "misconception of the law" (Decision at 6), the record reflects, was not made, as contended by the Forest Service, with reference to Thurmond's duty to examine solely the mineral character of the land. Judge Child's statement was made in response to Thurmond's apparent misconception that the law required that the millsite be "used and occupied" (Decision at 6) rather than "used or occupied for the purposes intended." Id. at 7 (emphasis added); 30 U.S.C. § 42(b) (1988). Thurmond's misconception, Judge Child noted, was revealed in her mineral report which he then quoted emphasizing the word "and": "The lands and structures have not been used and are not presently being used and occupied for mining and milling purposes in connection with the claimant's patented and unpatented placer claims" (Decision at 6 (emphasis in original)).

The Forest Service challenges Judge Child's No. 16 finding of fact, claiming it to be inaccurate. In this finding of fact Judge Child states:

16. The Forest Service has obstructed and interfered with contestees' reasonable efforts to develop the mill sites, including: filling low spots in road with gravel, installation of culverts, ground leveling, repair of broken water line and has interfered with contestees' approved point of water diversion from the Secesh River. (Tr. 147, 149-162, 163, 248)

(Decision at 10).

The Forest Service asserts on appeal that Judge Child "gave no weight to [Clark's] admitted failure to keep a valid security bond in effect, as required by the plan of operations" and "instead * * * found the Forest Service at fault for enforcing the requirements of 36 CFR part 228" (SOR at 8). Finding No. 16 is no doubt a reaction to what Judge Child perceived as arbitrary action on the part of the Forest Service when it: (1) blocked a diversion ditch which supplied water to Clark's claims, and (2) denied Clark's proposed plans of operations and letters of intent to develop his claims in the years 1985 through 1988 (Tr. 150-69; Exh. C-24 - C-32). However, we do not find that either the Forest Service's actions or Judge Child's No. 16 finding has any bearing on the outcome of this case, and we express no opinion regarding whether any of the Forest Service actions were arbitrary or inconsistent with applicable Forest Service regulations. Suffice it to say that if the claimant deems it appropriate to seek redress, that redress must be sought with the Department of Agriculture and not with this Board or with the Department of the Interior.

In summary, we find sufficient evidence in the record to affirm Judge Child's findings that Clark used or occupied MS 1, that MS 1 was needed in support of Clark's mining operations, and that the lands embraced by MS 1 are not excessive, and that the patent applicant is entitled to patent for MS 1.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Child's May 22, 1989, decision declaring MS 1 valid is affirmed.

R. W. Mullan
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

