

UNITED STATES OF AMERICA

v.

RAYMOND BASS  
BETTY YECK et al.

IBLA 70-543A

Decided June 5, 1972

Appeal from decision by Rudolph M. Steiner, Departmental hearing examiner in Contest No. S-1786 holding mining claim null and void.

Affirmed.

Practice before the Department: Persons Qualified to Practice

Question of authority for Department of Agriculture attorney to appear before Departmental hearing examiner in a national forest mining claims contest is one of practice to be raised by motion and is not an issue in the action.

Practice before the Department: Persons Qualified to Practice -- Rules of Practice: Hearings

Objection as to want of authority of Department of Agriculture attorney to appear before department hearing examiner in a national forest mining claim contest should be raised promptly before the hearing examiner.

Practice before the Department: Persons Qualified to Practice -- Cooperative Agreements -- Mining Claims: Hearings

In a mining contest hearing relating to lands within a national forest, the Office of the General Counsel, Department of Agriculture, may properly appear in behalf of the Government pursuant to agreement between the Director, Bureau of Land Management and the Chief, Forest Service.

Administrative Procedure: Hearings -- Constitutional Law

In an administrative proceeding to determine the validity of a mining claim, the requirements of due process are satisfied

when notice and opportunity for impartial hearing are provided in accordance with the Administrative Procedure Act. 5 U.S.C. §§ 551 et seq. (1970).

Administrative Procedure: Burden of Proof -- Mining Claims:

Discovery: Generally

A Government mineral examiner in determining the validity of a mining claim need only examine the claim to verify whether the claimants have made a discovery and is not required to perform discovery work, to explore or sample beyond the claimants' workings, or to rehabilitate alleged discovery cuts to establish the Government's prima facie case.

Mining Claims: Discovery: Generally

Testimony by a government mineral examiner that he examined a mining claim and the workings thereon, but found no evidence of a valuable mineral deposit is sufficient to establish a prima facie case by the Government of lack of discovery.

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

In a government mining contest, where the contestant made a prima facie showing of lack of discovery, the burden of producing preponderating evidence of the existence of a valuable mineral deposit sufficient to support a discovery is upon the claimants.

Mining Claims: Discovery: Generally

Where the value of the gold disclosed exclusively by fire assay could only be recovered through smelting and the cost of the smelting, together with mining and sluicing costs, would exceed the value of the gold recovered, there has not been a valid discovery within the meaning of the mining laws. 30 U.S.C. §§ 22, 35 (1970).

APPEARANCES: George W. Nilsson, Esq., for appellants. William L. Anderson, Regional Attorney and Charles F. Lawrence, Esq. Office of the General Counsel, Department of Agriculture, for the United States.

## OPINION BY MR. GOSS

Raymond Bass and Betty Yeck have appealed to the Director, Bureau of Land Management <sup>1/</sup> from the decision of a hearing examiner dated March 24, 1970. Appellants' Nigger Bar placer mining claim, Plumas County, California, was held null and void for lack of discovery of a valuable mineral deposit. The record including the transcript of testimony was transmitted by the hearing examiner on May 4, 1970.

Appellants contend on appeal:

1. That the contest was illegally and unconstitutionally filed by the Department of Agriculture and was prosecuted illegally by that Department. Appellant cites Art. I, Sec. 1 and Art. IV, Sec. 3, Clause 2 of the Constitution and 16 U.S.C. §§ 472, 478, 482 and 524 (1970).
2. The contestees were denied due process of law and thus deprived of their constitutional rights under the Constitution and the Fifth and Fourteenth Amendments thereof.
3. The United States as contestant failed to prove the charges in its complaint. Appellant cites 5 U.S.C. § 556(d) (1970).
4. The contestees proved a discovery and overcame any prima facie case which the United States may have made at the hearing.
5. The decision of the hearing examiner is contrary to the Constitution and laws of the United States and the Administrative Procedure Act and is contrary to the evidence taken.
6. There is a general plan among Forest Service employees to destroy all mining claims within the national forests.

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<sup>1/</sup> The Secretary of the Interior, in the exercise of his supervisory authority, transferred jurisdiction over all appeals pending before the Director, Bureau of Land Management, to the Board of Land Appeals, effective July 1, 1970, Circular 2273, 35 F. R. 10009, 10012.

We have reviewed the record and considered the decision of the hearing examiner and find that his discussion and conclusions of the law are correct and hereby adopt his decision which is attached hereto. In response to further points raised by appellants, the following is added.

With regard to the role of the Department of Agriculture herein, it is noted that the contestant is the United States of America and the complaint was filed by the Bureau of Land Management, Department of the Interior. In this respect, the first paragraph of the hearing examiner's decision is hereby modified.

As to prosecution of the contest by an Agriculture attorney, the authority for an attorney to appear should be called into question by a motion made directly for that purpose. Institute of Educational Travel v. Binkerd, 153 N.Y.S. 427, 90 Misc. 325 (1915). It would have been proper practice to raise before the hearing examiner any question as to an attorney's authority. The question is one of practice and is not an issue in the action. Cf. People v. Lamb, 32 N.Y.S. 584, 85 Hun. 171, 173 (1895). The hearing in which the alleged wrongful appearance was entered is the proper tribunal to pass on the question of authority. Cf. Sullivan v. Dunne, 244 P. 343, 198 Cal. 183 (1926). Ordinarily, an objection based on want of authority of an attorney should be made promptly. Otherwise, the adverse party waives the want of authority and consents to the appearance of the attorney. Cf. In re Miller's Estate, 229 P. 851, 71 Mont. 330 (1924).

Even if a timely objection had been made to appearance of Department of Agriculture counsel, appellants have not shown wherein the appearance violates Constitution or statute. The procedure is in accordance with statutory authority and responsibilities of the Secretaries of Agriculture and Interior. 16 U.S.C. § 551, 43 U.S.C. §§ 2, 1363 (1970). United States v. Robert B. Sainberg, 5 IBLA 270, 273 (1972). The appearance was pursuant to Part D and Part A, section 11 of the Memorandum of Understanding between the Bureau of Land Management and the Forest Service, 1957:

#### D. ADVERSE PROCEEDING UNDER BASIC MINING LAWS

##### 1. Applicable procedures

When the Forest Service desires to recommend adverse proceedings against an unpatented mining claim on lands within a national forest under authority of the basic mining laws of 1872, it will do so by filing with the appropriate land office a recommendation for initiation of Government contest. The filing of such recommendation,

form and content thereof, and all other matters relating to scheduling and conduct of a hearing and decision thereon will follow the procedures in Part A, section 4 to 14 inclusive, of the Memorandum of Understanding.

A. APPLICATIONS FOR ENTRY OR PATENT

11. Officer to represent Government at hearing.

In all hearings relating to applications for entry of or patent to lands within a national forest, the appropriate attorney in charge, Office of the General Counsel, Department of Agriculture, will be entered of record as appearing in behalf of the Government, and will be responsible for conducting the Government's side of the case.

Under Section 7, Part A of the Memorandum of Understanding the Forest Service is deemed a party to the contest. See also 43 CFR § 1862.4 (1972), which was promulgated under authority of 43 U.S.C. § 1201 (1964) and Subsections 1.2(e) and 2.2(d) of Bureau of Land Management Order No. 701, 29 F.R. 10526 (July 23, 1964).

As to the second ground for appeal, appellants have not shown wherein they were denied due process or wherein the Constitution was violated. In an administrative hearing to determine the validity of a mining claim, the requirements of due process are satisfied when notice and opportunity for an impartial hearing is provided in accordance with the Administrative Procedure Act. 5 U.S.C. §§ 551 et seq. (1970). The procedure followed herein in the initiation, prosecution, and deciding of mining contest cases was in compliance with the Act. United States v. William A. McCall and R. J. Kaltenborn, 1 IBLA 115 (1970).

The reasons for denying appellants' grounds for appeal 3, 4 and 5 are set forth in the hearing examiner's decision. Further, a government mineral examiner determining the validity of a mining claim need only examine the claim to verify whether the claimant has made a discovery; he is not required to perform discovery work, to explore or sample beyond the claimant's workings, or to rehabilitate alleged discovery cuts to establish the Government's prima facie case. It is the duty of the claimants to keep such discovery points available for inspection. United States v. Jimmie (Juanita) P. Laing, 3 IBLA 108, 112, (1971). Testimony by a government mineral examiner that he examined a mining claim and the workings thereon but found no evidence of

a valuable mineral deposit is sufficient to establish a prima facie case by the government of lack of discovery. United States v. L. B. McGuire, 4 IBLA 307 (1972).

Where the contestant has made a prima facie showing of lack of discovery, the burden of producing preponderating evidence of the existence of a valuable mineral deposit sufficient to support a discovery is upon the claimants. United States v. L. B. McGuire, supra.

Appellants have not produced evidence to overcome the testimony of mining engineer Henry Jones that any values disclosed exclusively by fire assay could only be recovered through smelting and that the cost of smelting, together with mining and sluicing costs, would exceed the value of the gold recovered. Such a mere indication or presence of gold or silver is not sufficient for discovery. United States v. San Juan Exploration Co., A-30965 (March 27, 1969). The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral. Chrisman v. Miller, 197 U.S. 313, 322 (1905).

The question to be answered is, "Wherein does the evidence of record show that a man of ordinary prudence would be justified in the further expenditure of his resources in attempting to develop a valuable mine on the claim?" United States v. San Juan Exploration Company, supra.

As to the appellants' sixth allegation - that there is a general Forest Service plan to destroy all mining claims within national forests - the record affords a sufficient basis for determining the invalidity of the claim on objective criteria. No evidence has been submitted in the record to substantiate the charge of impropriety on the part of the Forest Service employees.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the motion to dismiss is denied and the decision of the hearing examiner is affirmed as modified.

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Joseph W. Goss, Member

We concur:

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Frederick Fishman, Member

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Martin Ritvo, Member

March 24, 1970

DECISION

United States of America,	:	<u>Contest No. S-1786,</u>
	:	Involving the NIGGER BAR
Contestant	:	Placer Mining Claim, Situated
v.	:	in Secs. 21 and 22, T. 25 N.,
	:	R. 7 E., M.D.M., Plumas County,
Raymond Bass, :	:	California
Betty Yeck, et al.,	:	
	:	
Contestees	:	

PLACER MINING CLAIM HELD NULL AND VOID

This is an action brought by the United States Forest Service, pursuant to the Hearing Procedures of the Department of the Interior, 43 C.F.R. Part 1850, to determine the validity of the above-named placer mining claim.

The Contestant filed a Complaint herein on December 3, 1968, alleging, inter alia, as follows:

- "5. (a) There is not disclosed within the boundaries of the claim mineral materials of a variety subject to the mining laws sufficient in quantity, quality, and value to constitute a discovery.
- (b) The land within the claim is nonmineral in character."

The Contestees filed a timely answer generally denying the foregoing allegations of the complaint and alleging affirmatively that "a deposit of valuable mineral in sufficient quantity to constitute a valid discovery has been found within the boundaries of the Nigger Bar Placer Claim and that the land within said location is mineral in character."

A hearing was held before the undersigned examiner in Sacramento, California on December 2, 1969. Charles F. Lawrence, Esq., Office of the General Counsel, U.S. Department of Agriculture, appeared on behalf of the Contestant. The Contestees appeared without counsel.

I.

Henry W. Jones, after having been duly qualified as a mining engineer, testified that he examined the claim in November 1967. The claim is located on the North Fork of the Feather River near Rich Bar. Along the river, he found indications of placer operations which were probably conducted in 1848 or 1849. The flat planes along the river had been "stripped through the bedrock" and he could find no placer material to sample. He found an old tunnel with tracks and a railroad car. The tunnel was filled in and caved to the extent that it was extremely dangerous to enter. He took a series of pans near the tunnel and did not obtain any significant gold values. A pan sample taken off bedrock at the tunnel revealed only one very fine color of gold, too small to weigh. He found no evidence of any placer operations on this particular segment of the river. One area revealed gold values that "might run twenty-five cents a yard."

He stated that there is no gravel remaining on the claim that has not been worked by old time mining operations. He found no gravel that could be sampled. It was his opinion that the gold values would not justify the expenditure of additional time and effort in the hope of developing a paying mine.

Herbert Yeck testified that he was the general manager of the Evergreen Mining Company which recently purchased the claim. He entered the tunnel in 1965 and "found evidence that there was a very good possibility of having rich runnings for a mineral effort." He dug a shaft, measuring out each cubic foot," and it ran eighty-seven cents from the surface."

In November 1969, he dug an open trench, removing twenty-seven cubic feet of placer material. The material was run through a sluice box yielding two hundred pounds of concentrates. The fire assay report on the concentrates, exhibit A, shows gold values of \$3.39 and silver values of 1.9 cents per cubic yard of material "at site."

He stated "this is the over-burden that we are going down to. We expect when we hit bedrock the value of that area will be quite rich and we find that is virgin territory. It has not been dug by any man. There have been some tunnels which go in and they have pot-holed it, but taken

as a whole, they have not touched the virgin ground there. Any man that knows mining can go in there and see that it has never been touched, and I have been there and I swear that's true."

On cross examination, he testified that gold flakes were recovered on a blanket placed in the bottom of the sluice box. Those flakes were then combined with the concentrates. "I think if a yard is worth \$3.41, as is indicated, then I think it has further possibilities of exploration. And that's what we are trying to tell you here, that we are not guaranteeing you that this is not going to be a bonanza, but we are guaranteeing that it warrants further exploration."

Raymond Bass testified that he had assisted in the taking of the one yard sample. "I myself have seen flakes of gold in the rug that we had on the bottom of the sluice box."

Henry Jones testified on rebuttal that the recovery of gold from concentrates would require values of twenty-five to thirty dollars per yard before it would be feasible to recover those values by smelting. It would be profitable to mine material bearing gold values of three dollars per yard if those values were in free gold. The best method of evaluating gold samples is "to weigh the free gold out and then if there is any additional gold locked up on the black sand \* \* \* then the fire assay will represent the gold that is locked in the black sand and is not recoverable by ordinary methods."

## II.

Under the mining laws of the United States (30 U.S.C. 1964 ed., secs. 22, 35) a valid location of a placer mining claim requires discovery of a valuable mineral deposit within the limits of the claim. The rule as to what constitutes a valid discovery has been stated as follows:

"\* \* \* Where minerals have been found and evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. \* \* \*." Castle v. Womble, 19 L.D. 455, 457 (1894); Chrisman v. Miller, 197 U.S. 313 (1905).

Where the value of the gold found is so slight that a person of ordinary prudence would not be justified in the further expenditure of labor and

means with a reasonable prospect of success in developing a valuable mine, there has not been a valid discovery within the meaning of the mining laws. United States v. Eric North, 27963 (July 1, 1959); United States v. Robert W. Carnes, A-28178 (May 23, 1960); United States v. Richard L. and Nellie V. Effenbeck, A-29113 (January 15, 1963); United States v. Robert G. and Orpha B. McMillan, A-29456 (July 26, 1963); Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335-336 (1963).

When adverse proceedings are brought against a mining claim, the Government has the burden of establishing a prima facie case that no valid discovery has been made. However, once a prima facie case is established by the Government, the burden is then upon the claimant to prove a valid discovery. Foster v. Seaton, 271 F.2d 836.

### III.

The Contestant has shown, by the testimony of its expert witness, that the gold values which could be recovered by normal placer methods of recovery are not significant and that the volume of exposed gravel which has not been worked heretofore is extremely limited. The Contestant has thus established, prima facie, that the negligible gold values found on the claim would not justify a person of ordinary prudence in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

While the assay report submitted by the Contestees shows gold values in excess of three dollars per yard, those values, determined by fire assay, would be recoverable only by smelting the cost of which, together with mining and sluicing costs, would exceed the value of the gold recovered. There is no probative evidence in the record of the gold values which may be borne by the so-called virgin gravels assertedly exposed on the claim. Nor is there reliable evidence of any significant amount of free gold recoverable by normal placer mining methods. The Contestees have failed to identify any specific deposit bearing sufficient mineral values to justify the development thereof.

It is therefore concluded that there has been no discovery of a valuable mineral deposit within the limits of the claim.

Accordingly, the NIGGER BAR placer mining claim is hereby declared null and void.

This decision becomes final thirty (30) days from its receipt unless an appeal to the Director, Bureau of Land Management, is filed. There

must be strict compliance with the regulations in 43 CFR, Part 1840. See enclosed Form 2137. If an appeal is taken, it must be filed in the Office of the Hearing Examiners, Room W-2426, 2800 Cottage Way, Sacramento, California, 95825. The amount of the filing fee will be \$5.00. The adverse party to be served with a copy of the appeal is: Mr. Charles F. Lawrence, Attorney, Office of the General Counsel, U.S. Department of Agriculture, 630 Sansome Street, San Francisco, California, 94111.

Rudolph M. Steiner  
Hearing Examiner

Distribution:

Raymond Bass, Box 952, Imperial Beach, California 92032 (Cert.)

Betty E. Yeck, Box 952, Imperial Beach, California 92032 (Cert.)

W. A. Jacks, Box 178, Quincy, California 95971 (Cert.)

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Charles F. Lawrence, Attorney, Office of the General Counsel (Cert.)

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