

UNITED STATES  
v.  
MILDRED J. TOBIASSEN

IBLA 71-146

Decided May 11, 1973

Appeal from decision of Administrative Law Judge (Sacramento 078518) in which an action against a patent application was dismissed.

Reversed.

Railroad Grant Lands

Pursuant to section 321(b) of the Transportation Act of 1940, 49 U.S.C. § 65(b)(1970), patent may be issued for grant lands sold by the railroad if either (1) the land was not mineral in character between the time of the alleged grant to the railroad and the time of the sale or (2) although the land was mineral in character the purchaser was not, at the time of sale, chargeable with actual or constructive notice of that fact.

Mineral Lands: Determination of Character of -- Railroad Grant Lands -- Rules of Practice: Evidence

To establish the mineral character of railroad grant lands under the Act of July 1, 1862 (12 Stat. 489), as amended, it must be shown that known conditions -- which may include geological conditions, discoveries of minerals in adjacent land and other observable external conditions upon which prudent and experienced men are known to be accustomed to act -- on the critical date are such as reasonably to engender the belief that the land contains mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end.

Mineral Lands: Determination of Character of -- Railroad Grant Lands -- Rules of Practice: Hearings

In a hearing on a patent application filed under the Transportation Act of 1940, 49 U.S.C. § 65(b) (1970), the

Government has the obligation of making a prima facie case of mineral character whereupon the railroad has the burden of establishing nonmineral character by a preponderance of the evidence.

#### Mineral Lands: Determination of Character of -- Railroad Grant Lands

Land included in an application under section 321(b) of the Transportation Act of 1940 is properly determined to be mineral in character at the time of the sale by the railroad where (1) the land was covered by mining claims, (2) mining of the land was recorded in State mineralogical reports, (3) evidence of mining, including two drift tunnels was plainly visible and mining was in progress, (4) evidence of extensive and successful mining on the adjacent and nearby lands was available, and (5) geological data indicated the existence of a valuable ore-bearing channel on the land.

#### Railroad Grant Lands

Where land applied for pursuant to section 321(b) of the Transportation Act of 1940 was mineral in character at the time of the sale by the railroad, and the purchaser from the railroad was chargeable with actual or constructive notice of that fact, the purchaser and successors in interest are not innocent purchasers for value.

APPEARANCES: E. Kendall Clark, Esq., Office of the Solicitor, U.S. Department of the Interior, for contestant; John L. Larue, Esq., of Nevada City, California, for contestee.

#### OPINION BY MR. GOSS

The Bureau of Land Management, through the Regional Solicitor, Sacramento, California, has appealed from a decision dated December 14, 1970, by Administrative Law Judge Rudolph M. Steiner, 1/ which dismissed the Bureau's complaint in an action to reject a patent application filed by the Southern Pacific Company for Lot 8 of the SW 1/4 Sec. 1, T. 16 N., R. 8 E., M.D.M., Nevada County, California, containing approximately 34.04 acres.

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1/ By order of the Civil Service Commission the title "Administrative Law Judge" has replaced that of "Hearing Examiner." 37 F.R. 16787 August 19, 1972). Title 43 CFR has been amended accordingly. 38 F.R. 10939 (May 3, 1973).

The Southern Pacific Company, as successor in interest to the Central Pacific Railroad Company of California, filed an application to patent the land in question May 1, 1964. The application was filed pursuant to section 321(b), Part II, Title III of the Transportation Act of September 18, 1940, 49 U.S.C. § 65(b) (1970), on behalf of the real party in interest, Mildred J. Tobiassen. 2/ Mrs. Tobiassen is the successor in interest to Minerva R. Craig, who originally purchased the land from the Central Pacific Railroad Company of California, May 15, 1891.

Under the Act of July 1, 1862 (12 Stat. 489), as amended by the Act of July 2, 1864 (13 Stat. 356), the Central Pacific Railroad Company of California was granted alternate sections of public land within a belt extending for a designated number of miles on either side of the railroad's line to be built in the future. However, "all mineral lands" were excepted from the operation of these Acts. 3/

The facts of record show that the Central Pacific conveyed its interest in the SW 1/4 SW 1/4 [Lot 8] and Lot 7 of the SW 1/4 Sec. 1, T. 16 N., R. 8 E., M.D.M., (approximately 58.80 acres) to appellant's predecessor, Minerva Craig, for the sum of \$147 on May 15, 1891. Appellant traces her chain of title directly to this conveyance of Lot 8, which she asserts qualifies as a conveyance to an innocent purchaser for value under the savings clause of the Transportation Act of 1940, supra.

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2/ Application by the railroad in behalf of its assignee is in accordance with established practice. Southern Pacific Company, Louis C. Wedekind, 1 IBLA 50, 77 I.D. 177 (1970); Southern Pacific Land Co., 42 L.D. 522 (1913); Santa Fe Pacific Railroad Company, 58 I.D. 591 (1944).

3/ Section 3 of the Act of July 1, 1862, supra, granted appellant's predecessor, the Central Pacific Railroad Company, land described as follows:

"\* \* \* every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States \* \* \* at the time the line of said road is definitely fixed: Provided, That all mineral lands shall be excepted from the operation of this act \* \* \*." 12 Stat. 492.

Section 4 of the Act of July 2, 1864, supra, doubled the amount of land granted and provided additionally that:

"[A]ny lands granted by this act, or the act to which this is an amendment, shall not \* \* \* include any government reservation or mineral lands \* \* \* or any lands returned and denominated as mineral lands \* \* \*." 13 Stat. 358.

Patent to the land had never issued. Section 321(b) of the Transportation Act provided that if any land grant railroad wished to take advantage of charging higher rates for carrying government traffic, it must file a release of any claim it might have against the United States to lands granted to the railroad. It further provided, however, that nothing in section 321(b) should be construed --

\* \* \* to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value \* \* \*.

Departmental regulation 43 CFR Subpart 2631 implements the statute.

Central Pacific filed the required release. The application filed herein under section 321(b) alleges a conveyance of nonmineral land by the Central Pacific Railroad Company of California to an innocent purchaser for value. The Bureau of Land Management contested the railroad's patent application for Lot 8 charging that:

- (1) The land was known to be mineral in character on May 15, 1891, the date of sale by the Central Pacific Railroad Company of California to Minerva R. Craig.
- (2) Minerva R. Craig was not an innocent purchaser for value of the land within the meaning of Section 321(b) of the Transportation Act of September 18, 1940, supra.

The focal point of the hearing was the mineral character of Lot 8 on May 15, 1891. Through expert and layman testimony, affidavits of area residents, maps, pictures, and excerpts from mining journals, the parties attempted to reconstruct the mining activities in the area of Lot 8 in the late 1800's.

The Judge dismissed the Government's contest, concluding, in effect, that the land was nonmineral in character and as such not excepted from the Central Pacific Railway's original grant. He ruled that:

[T]he known conditions of mineralization were not such as would have, at any time, reasonably engendered the belief that the lands embraced by lot eight contained such mineral values as would render extraction profitable and justify expenditures to that end. The subject lands are therefore nonmineral in character.

The Judge did not deem it necessary to consider, thereafter, the Government's second allegation.

On appeal to the Secretary, the Government takes issue with the Judge's ruling and asserts, inter alia, that the Government presented a prima facie case through the testimony of Mr. George Scarfe, Jr. Mr. Scarfe testified that the land involved in this contest was mineral in character at the time the Southern Pacific Company finally located its railroad right-of-way and at the time of the purported transfer of the land in question to Minerva Craig in 1891. The Government contends that a prima facie case having been established, the Southern Pacific Company and Mildred J. Tobiassen did not thereafter discharge their burden of showing by a preponderance of the evidence that the land in question was non-mineral in character during the crucial period. Although the Judge's decision did not consider the question of good faith, appellant contends that the evidence justifies a conclusion that Mrs. Craig was aware of mining operations on Lot 8 from 1862 to 1891 and was, therefore, not a bona fide purchaser from the railroad.

As to the railroad's rights under section 3 of the Act of July 1, 1862, as amended, the grant to the railroad took effect as of the date on which the railroad line was definitely located. As to the rights of an innocent purchaser for value under the savings clause in the Transportation Act of 1940, the Department has ruled that a patent may not be issued for railroad grant lands sold by the railroad if the lands were of known mineral character at any time between the date the railroad line was definitely located and the date of the sale by the railroad, unless the purchaser did not know and should not be held to have known of the mineral character at time of purchase. Southern Pacific Company, Louis C. Wedekind, supra note 2. Therefore, it is not relevant whether the land ceased to be considered mineral in character at some point subsequent to 1891.

As to the criteria for land to be considered mineral in character, in Southern Pacific Company, 71 I.D. 224, 233 (1964), the holding of the Supreme Court in United States v. Southern Pacific Co., 251 U.S. 1 (1919), was discussed:

\* \* \* United States v. Southern Pacific Co. \* \* \* sets forth the criteria for determining whether the land is mineral in character. It is not essential that there be an actual discovery of mineral on the land. It is sufficient to show only that known conditions are such as reasonably to engender the belief that the land

contains mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end. Such belief may be predicated upon geological conditions, discoveries of minerals in adjacent land and other observable external conditions upon which prudent and experienced men are shown to be accustomed to act.

See also the recent Departmental decision State of California v. E. O. Rodeffer, 75 I.D. 176, 179-81 (1968).

With respect to the evidence which must be shown to establish mineral character, the first burden falls on the Government -- i.e., to present a prima facie case that the land was mineral in character. Thereupon the burden shifts to the railroad -- to show by a preponderance of the evidence that the land in question was not mineral in character. Southern Pacific Company, supra, at 233 and cases cited therein.

Contestee in his opening argument, page 4 concedes that the Government did, in fact, present a prima facie case through the testimony of George Scarfe:

We feel that the government made a prima facie case, by which we mean we feel that if Mr. Scarfe had testified and no rebuttal was placed against him by the contestee, the government would have been justified in finding the land to be mineral \* \* \*.

We agree that the Government did establish the prima facie case. George O. Scarfe, Jr., testified as to geological conditions in the area of Lot 8, and also as to mining activity in adjacent and nearby lands, and other observable conditions as they existed in 1891.

The record shows that several mining claims were located in the immediate area of Lot 8 at the time of sale. The Knickerbocker and the Herring mining claims covered most of Lot 8 (Tr. 10). The Knickerbocker extension, located in part by Walter Craig in 1885, was also partially located on Lot 8 (Tr. 29, 30). To the south, the Hirschmann mining claim formed the southeast boundary of Lot 8, (Tr. 24).

The Government introduced USGS topographical maps, 1896 editions, (Exh. 3 and 4) which had been prepared by a geologist, Walter Lindgren. The maps depicted the location of these various

claims and inferred location of the Cement Hill Channel traversing Lot 8. Observable developments on these claims included two tunnels, the Phoenix and the Knickerbocker, which had been drifted from points outside Lot 8, and were obviously designed to intercept the channel. Lot 8 is located amidst extensive placer diggings and drift mines in the immediate vicinity of Nevada City. It appears that the railroad attempted to obtain a patent for Lot 7, the companion parcel from the original sale, about 1890 and was unsuccessful. Lot 7 was placed on a list for approval of patent, but was removed from the list when it was classified as mineral (Tr. 30-31).

The Government's expert testified, referring to reports of the State Mineralogist of 1892, that the Cement Hill Channel has the same geological characteristics as the Harmony and the Manzanita Channels which had been drift mined and yielded some of the richest gold mines in California. <sup>4/</sup>

The mining activity on the Knickerbocker Mine itself, had been successful enough to encourage continuing operations prior to the date of the sale to Minerva Craig. The Nevada City report on gold (Exh. 8) indicated that some portion of the Knickerbocker tunnel yielded gravel in small bunches: "Two men make three foot per day \* \* \*. The gold is worth \$17 per ounce." In Lot 8 Cement Hill Channel has not been struck. The adjacent Hirschmann claim has yielded approximately \$100,000 in pay gravel (Tr. 24).

The testimony developed that Walter R. Craig acquired the Knickerbocker extension located on Lot 8 in 1885 (Tr. 27-31). This is the same Walter R. Craig to whom Minerva Craig sold Lot 8 in October of 1892 (Tr. 30). Walter R. Craig also purchased a one-half interest in the Knickerbocker mining claim in 1889. This was referred to as part of an acquisition program of the Knickerbocker Mining Company which consisted of Walter R. Craig, P. C. Craig, Bessy Craig, and others (Tr. 31-32). From this evidence, it is

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<sup>4/</sup> Government's Exhibit 7 is the Eleventh Report of the State Mineralogist for the two years ending in 1892, which gives the history of drift mining operations in the Nevada City area prior to that time. Testimony referring to this exhibit was that the Harmony Drift Gravel Mine and the Manzanita Drift Mine are almost identical in geology and history of formation to the Knickerbocker Mine. The report states that both the Harmony and the Manzanita Channels had a capping of lava and volcanic material and both had been drift mined profitably.

readily apparent that the Knickerbocker Mining Company had spent substantial amounts of time and money to develop the Cement Hill Channel prior to 1891. Further, the testimony developed that at the time of the sale from the railroad to Minerva Craig in 1891, work was being done on the Knickerbocker tunnel (Tr. 37). The Government's evidence as to the geology of the area, the extent of the mining activities that had taken place in and around Lot 8, considered together with what may be characterized as an acquisition program on behalf of the Craig family and the Knickerbocker Mining Company, sufficiently establishes a prima facie case of mineral character at the time of the sale to Minerva Craig under the test of United States v. Southern Pacific Co., *supra*.

Contestee provided no substantial evidence to refute the Government's case. Contestee's expert, G. R. Beechel, offered inadequate evidence as to the lack of mining in the area as of 1891. He testified that he examined the surface of the property on March 20, 1970, the tunnels no longer being open, and that he regarded the land to be worthless as mining property (Tr. 49, 54). He based his conclusion on the fact that there was no current indication of valuable minerals and expressed his doubts that any mining operation has been operated at a profit in and around Lot 8 (Tr. 54).

While Beechel's testimony does indicate there is now no discovery on the land, it does not show whether known mineral conditions were such as to reasonably engender the belief in 1891 that the land contained minerals of such quality and quantity to render extraction profitable and justify expenditures to that end.

Testimony of Elmo Goering, Elton and David Tobiassen, and the affidavits of Fannie Eden and Louis Kelly do not refute the facts taken from the early mineral reports submitted by the Government. Their testimony along with other affidavits submitted by the contestee was directed toward the conclusion that the lands have been used for agricultural purposes within the period of their knowledge. Some of the statements were to the effect that no mining has ever been done on the property -- which statements are clearly in error. The development of the Phoenix and Knickerbocker tunnels cannot be denied. Those who constructed and worked the tunnels must have believed the land justified further exploration and expenditures.

Considering the case as a whole, we can only find that the contestee failed to meet her burden to provide the preponderance of the evidence that the land was nonmineral in character at the time of the transfer. From the summary of evidence referred to

herein one could reasonably infer that in 1891 the land in question contained minerals of such quantity as to render its extraction profitable and justified expenditures to that end. Accordingly, we find that Lot 8 was mineral in character when the lot was conveyed by the railroad to Minerva Craig on May 15, 1891.

We turn next to the question of whether Minerva Craig was an innocent purchaser for value within the meaning of section 321(b) of the Act. Although the Administrative Law Judge did not rule on this issue, the issue was presented by the pleadings and evidence was presented thereon. Both parties argued the question in their appeal. Sufficient evidence on the question is set forth in the record, and the issue does not involve credibility of the witnesses. It would not be in the interest of the parties to remand the matter for further consideration. The Board, acting for the Secretary, can make all findings of fact and law based upon the record in order to decide a case as if making the decision in the first instance. United States v. T. C. Middleswart, 67 I.D. 232, 234 (1960).

The criteria used in determining whether a buyer is an innocent purchaser for value were set forth in Southern Pacific Company, Louis C. Wedekind, *supra*, at 180:

Generally, for a purchaser not to be bona fide the facts must show that he knew or should have known that the lands were mineral in character as of the date of his purchase or were of such character so as to have been excluded when the railroad line was definitely located or at any time prior to this purchase. \* \* \* As was said in United States v. Central Pacific Railroad Co., 84 Fed. 218, 221 (Cir. Ct. N.D. Cal. 1898): "\* \* \* The status of a bona fide purchaser is made up of three essential elements: (1) a valuable consideration; (2) absence of notice; and (3) the presence of good faith. \* \* \*"

The history of Lot 8 would clearly indicate that Minerva Craig knew or should have known of the mining in this area. The record is replete with evidence of mining activity on the adjacent and nearby lands, which must also have been known at the time of the purchase. The record discloses that Minerva Craig lived with her husband, R. R. Craig, to the south of Lot 8 from at least 1862 (Exh. 5, Tr. 64), and that some of the Craig family operated the Knickerbocker Mining Company which in fact did explore Lot 8 in an attempt to intersect the Cement Hill Channel. There is no probative evidence in the record to indicate that Minerva Craig did not have knowledge of such activity.

The applicant or her predecessors have delayed since 1891 in applying for the patent. As to the difficulty in presenting evidence of the situation as of 1891, the applicant must bear the consequences of the delay; the delay should not operate to prejudice the Government.

We therefore find that the elements of lack of notice and presence of good faith are lacking in the Craig purchase from the railroad in 1891, and that Minerva Craig was not an innocent purchaser for value under section 321(b).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is reversed.

Joseph W. Goss, Member

We concur:

Douglas E. Henriques, Member

Martin Ritvo, Member.

