

UNITED STATES  
v.  
ROBERT B. KELTY

IBLA 73-125

Decided May 24, 1973

Appeal from the decision of Administrative Law Judge Graydon E. Holt (Contest S-4713) declaring the Gravel Patch and Harvest Moon placer mining claims null and void.

Affirmed.

Mining Claims: Determination of Validity-- Administrative Procedure: Burden of Proof

When the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid.

Mining Claims: Discovery: Generally: Mining Claims: Determination of Validity--Administrative Procedure: Burden of Proof

The Government is not obligated to prove affirmatively in a mining contest either that the land claimed is nonmineral in character or that no discovery of a valuable mineral deposit within the limits of a mining claim has been made, and the Government's mineral examiners are under no obligation either to rehabilitate discovery points or to explore beyond the current workings of a mining claimant in attempting to verify a claim discovery; where a government mineral examiner testifies that he has sampled the exposed workings on a claim without finding sufficient mineral values and that he observed no other mineralization to sample, a prima facie case of nondiscovery has been made, and the burden is thereafter upon the mining claimant to show by a preponderance of the evidence a discovery has been made.

Mining Claims: Discovery: Generally

Evidence of mineralization which would justify further exploration but not development of a mine does not satisfy the prudent man test.

Mining Claims: Determination of Validity-- Administrative Procedure: Adjudication

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.

APPEARANCES: Fred W. Burton, Esq., Yreka, California for Contestee; Albert R. Wall, Esq., Office of the General Counsel, U.S. Department of Agriculture, Portland, Oregon, for the Government.

OPINION BY MR. RITVO

Robert B. Kelty has appealed from a decision of the Administrative Law Judge, 1/ Graydon E. Holt, dated August 18, 1972, which declared the Gravel Patch 2/ and Harvest Moon Placer mining claims null and void.

The proceeding was initiated by the filing of a complaint dated September 7, 1971, by the Bureau of Land Management, U.S. Department of Interior, at the request of the U.S. Forest Service, which, among others, charged that minerals had not been found within the limits of the claims in sufficient quantities to constitute a valid discovery and that the land was nonmineral in character. A timely answer was filed by contestee and alleged as an affirmative defense that due process was being denied contestee.

The claims are located within the Rogue River National Forest, southwest of Medford, Oregon.

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1/ The title of "Hearing Examiner" has been changed to "Administrative Law Judge" 37 FR 16787, 38 F.R. 10939-40.

2/ The original complaint and the Judge's "Decision" listed the name of the placer claim as Grave Patch. All other documents appear to have listed the name as Gravel Patch. We have adopted the latter as the correct title.

After proper notice, a hearing was held on May 9, 1972, in Medford, Oregon. Although counsel had filed an answer to the complaint and appealed on behalf of contestee, Kelty appeared pro se, at the hearing. 3/ The sole witness for the government was Colver Anderson, mining engineer for the U.S. Forest Service.

Anderson testified that he first examined the claims in 1966. He panned a cubic foot of material from the gravel on the bedrock of the Gravel Patch claim. "The concentrate from that was a black sand which was nearly all magma type with numerous very fine cinnabar colors, and there were very fine gold colors. They were too small to weigh even on a gold balance." Tr. 6.

He also took a cubic foot sample from the Harvest Moon claim.

I got no colors and no heavy black sand out of this location. That was the only place that I could find anything that resembled working of that claim \* \* \*.

Then I went back again in 1969 and sampled again \* \* \*. I dug back into the bank to make sure that I got gravel that hadn't been worked before, and took a half cubic foot sample this time. I found one small color and three very tiny ones. The three were similar to what I had found before, some very black sand, of course, and the cinnabar colors. In this case, the gold I could weigh was 1 milligram, and this represents just a few cents a yard as a gold value, and that is not nearly enough to establish a discovery. Tr. 7.

Anderson specifically asked contestee whether there were better places to sample; Kelty did not know of any on the claims at issue. Tr. 8.

When asked if a valuable mineral discovery had been made, Anderson replied: "Well, it certainly is my opinion that there is not a valuable mineral discovery on either of these claims." Tr. 8.

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3/ He was accompanied at the hearing by his wife, who is jointly listed on the location notices for the claims. Although she did not appear as a witness or cross-examine the government witness she answered a question of the Judge's "from the floor." In his answer Kelty asserted that he is the only party in interest.

Mr. Kelty appearing on his own behalf was asked a series of questions by Judge Holt.

Judge Holt: Is gold the mineral you are interested in?

Mr. Kelty: Well, not necessarily, no.

Mr. Holt: What minerals are you interested in?

Mr. Kelty: Well, there's some iron, and just like Mr. Anderson was saying, there is iron and \* \* \* well, anything that is in the ground I am interested in.

Mr. Holt: Well, what deposit do you feel is valuable on the claims.

Mr. Kelty: Well, I think that's \* \* \* we never know. Every day they're discovering new things and it might be there. Gold when I first got going was the most important thing, but now we \* \* \* I can't tell. Like Mr. Anderson looking into the ground, you can't tell with your naked eyes what is under there or how deep it is.

Judge Holt: How much gold did you recover from the pit \* \* \*.

Mr. Kelty: Well, I can't actually tell you, because we went in there about three different times, and I do have some, I have given some of it away, and truthfully I can't tell you. (Tr. 15, 16)

Kelty works for the telephone company, and spends some weekends, holidays and vacations on the claims. He expects to spend more time working the claims when he retires in a few years. Tr. 16.

The Judge found that the contestant established a prima facie case that there was not then exposed on either claim a deposit of sufficient value to justify development. "The mere willingness of a contestee to continue prospecting with the hope of eventually discovering a valuable deposit does not satisfy the mining law." Decision p. 2. He, therefore, declared the two claims null and void for lack of discovery and the land in the claims is nonmineral in character. We agree.

From Judge Holt's adverse decision, Contestee appeals on the basis: (1) That the decision was "illegally made," in that appellant was denied due process; (2) that the mineral examiner's opinion of no discovery was based on insufficient evidence, and that, therefore, the government did not present a prima facie case.

As to appellant's last contention, in United States v. Altman, 68 I.D. 235, 238 (1961) it was stated:

[W]hen the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case. [T]he burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid. \* \* \*

Accord Foster v. Seaton, 271 F.2d 836 (1959); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969). See also, United States v. Gray, 8 IBLA 96 (1972).

In United States v. Gould, A-30990 (May 7, 1969), concerning the establishment of a prima facie case, it was stated (syllabus):

The Government is not obligated to prove affirmatively in a mining contest either that the land claimed is nonmineral in character or that no discovery of a valuable mineral deposit within the limits of a mining claim has been made, and the Government's mineral examiners are under no obligation either to rehabilitate discovery points or to explore beyond the current workings of a mining claimant in attempting to verify a claim discovery; where a government mineral examiner testifies that he has sampled the exposed workings on a claim without finding sufficient mineral values and that he observed no other mineralization to sample, a prima facie case of no discovery has been made, and the burden is thereafter upon the mining claimant to show by a preponderance of the evidence a discovery has been made.

The evidence presented here clearly falls within the standard required to establish a prima facie case. Anderson not only inspected and sampled the claims originally, but returned to do the same. It appears clear from the record that the reason for the failure of Anderson to conduct a more extensive sampling of the claim is because in his opinion there was nothing exposed that seemed worthy of closer examination; nor did Kelty disclose further mineralization to Anderson.

When the Government institutes a mining contest it must make a prima facie case of lack of discovery. United States v. Mellos, 10 IBLA 261 (1973). Having made a prima facie case by the testimony of Anderson and exhibits introduced by him, the burden of proof then rested on Kelty to show, by a preponderance of evidence that the claims were valid by reason of discovery. United States v. Avgeris, 8 IBLA 316 (1972).

It is well established that a discovery exists "where minerals have been found and the 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. United States v. Coleman, 390 U.S. 599 (1968); United States v. McKay, 8 IBLA 42 (1972).

Evidence of mineralization which would justify further exploration but not development of a mine does not satisfy the prudent man test. Converse v. Udall, *supra*, United States v. Gray, *supra*.

Kelty's own testimony was extremely vague as to specific mineral values obtained from the claims; apparently he had never had samples assayed. Even when the evidence indicates that further exploration or prospecting might be warranted to determine whether mining developments should be undertaken, the requirements of the prudent man test have not been met. United States v. Ozanich, 7 IBLA 144 (1972); Barrows v. Hickel, 447 F.2d 80 (1971); Converse v. Udall, *supra*; United States v. Gray, *supra*. Contestee's evidence falls far short of this; at most, it indicates a willingness to continue prospecting. As the Judge, held, this is not sufficient.

The contention that due process has been denied appellant is not a new argument and is without merit. 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. Dummar, 9 IBLA 308 (1973); United States v. Miller, 2 IBLA 133 (1971).

Therefore, pursuant to the authority vested in the Board of Land Appeals by the Secretary of Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is affirmed.

Martin Ritvo, Member

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We concur:

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Anne Poindexter Lewis, Member

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Edward W. Stuebing, Member

