

UNITED STATES
v.
NORTHWEST MINE AND MILLING INC., AND
THOMAS A. BRIDGES

IBLA 72-424

Decided June 27, 1973

Appeal from decision (Oregon Contest No. 5124) of Administrative Law Judge Rudolph M. Steiner declaring the Iron Gulch Nos. 1 and 2 lode mining claims, and the Iron Gulch and Climax Nos. 5, 6 and 7 placer claims null and void, but dismissing the complaint against two mill sites.

Affirmed.

Administrative Procedure: Hearings--Mining Claims: Contests

The Department of the Interior has been granted plenary power in the administration of the public lands. Until the issuance of a patent, legal title to a mining claim remains in the Government, and the Department has power, after proper notice and upon adequate hearing, to determine the validity of the claim. Due process in such a case implies notice and an opportunity for a hearing, but it does not require that the hearing be in the court or forbid an inquiry and determination by the Department.

Mining Claims: Mill Sites

Where a mill site is used for mining and milling purposes in connection with a mining claim that is held to be invalid, and the claimant does not show that the mill site is being used for mining and milling purposes in connection with any other mining claim, the mill site is properly declared to be invalid.

Mining Claims: Contests--Mining Claims: Mill Sites--Rules of Practice: Appeals--Rules of Practice: Government Contests

In a mining contest a matter not charged in the complaint cannot be used as a ground to find a claim invalid unless it has been raised at the hearing and the contestee has not objected.

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APPEARANCES: William B. Murray, Esq., Portland, Oregon, and John Barber, Esq., Eugene, Oregon, for Contestees; Eldon M. Gish, Esq., Office of General Counsel, United States Department of Agriculture, Portland, Oregon, for the Government.

OPINION BY MR. RITVO

Northwest Mine and Milling, Inc., and Thomas A. Bridges have appealed from the decision of the Administrative Law Judge 1/ dated April 11, 1972, insofar as it declared their two lode and four placer claims null and void. The United States has appealed as to that portion of the decision which dismissed the complaint against the two unnamed and unrecorded mill sites.

As grounds for appeal Northwest and Bridges say only that, on the basis of the Judge's findings of fact, they appeal from his holding that the six claims are invalid and they assign as error his failure to make all the findings of fact they requested. To support their appeal they submitted the same brief they had filed with the Judge and rest upon the same issues. Aside from their bare assertions, they do not point out in any particular how the decision appealed from is in error.

We find that the Judge's decision fully sets out the facts and the applicable law. We find his decision that the claims are invalid is correct and affirm it to that extent. A copy of his decision is attached.

However, we note the Judge did not comment upon several arguments presented by contestees in their original brief. They argued that the Forest Service has no standing to prosecute since the contested lands were excluded from the Umpqua National Forest by the Executive Order which established it; that the complaint initiating the contest is fatally defective for failure to allege the law or regulation upon which the Forest Service bases its case; that Contestee's private property cannot be administratively taken or condemned without compensation; and that Contestees have a constitutional right to jury trial since the alleged violation is a criminal offense.

Contestees arguments are not new. As was pointed out in United States v. Converse, 72 I.D. 141, 145 (1965); aff'd Converse v. Udall, 399 F.2d 616 (9th Cir. 1968); cert. denied, 393 U.S. 1025 (1969):

1/ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

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"The Department [of the Interior] has been granted plenary power in the administration of the public lands. Until the issuance of a patent, legal title to a mining claim remains in the Government, and the Department has power, after proper notice and upon adequate hearing, to determine the validity of a mining claim. Due process in such a case implies notice and a hearing but it does not require that the hearing be in the courts, or forbid an inquiry and determination by [the] Department."

See also Cameron v. United States, 252 U.S. 450 (1920); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Davis v. Nelson, 329 F.2d 840 (1964).

The Courts have often recognized the right of the Department to determine the validity of mining claims located upon public land, including lands within national forests, under the same procedures followed in this case. Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971); Converse v. Udall, *supra*. In United States v. Sainberg, 5 IBLA 270 (1972), the Board reviewed and restated the authority for the practice of permitting the Forest Service to request and prosecute contests against claims to land in national forests.

Whether the claims ever were, or still are, excepted from the forest would have no bearing on the legality of the contest. The contest was properly initiated by the Department of the Interior. The appellants have no legitimate concern in whether an employee of the Department of the Interior or the Department of Agriculture represents the United States. In any event, until the validity of the claims is established, the lands are presumptively within the jurisdiction of the Forest Service.

Accordingly, we find these contentions to be without merit.

As noted above, the United States appealed from so much of the Judge's decision as refused to hold the mill sites invalid. It argues that the Judge erred in dismissing the complaint against the "two unnamed and unrecorded mill sites" because: (1) the hearing does not contain evidence which is sufficient to support the validity of the mill sites; (2) the mill sites are invalid because they are either improperly located or not located at all.

If this were all there were to the case, having declared the claims invalid, the Judge would have erred in not also declaring the two unnamed mill sites invalid. It is not enough that the mill sites are "being used for mining and milling purposes."

As was stated in United States v. Crawford, A-30820 (January 29, 1968):

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Where a millsite is used for mining and milling purposes in connection with a mining claim that is held to be invalid, and the claimant does not show that the millsite is being used for mining and milling purposes in connection with any other mining claim, the millsite is properly declared to be invalid.

See, also, United States v. Larsen 9 IBLA 247 (1973). In United States v. Coston, A-30825 (February 23, 1968) we stated:

The validity of a millsite that is used in connection with mining operation on a vein or lode is necessarily dependent upon the validity of the lode claim to which it is appurtenant.

If this were the only method of acquiring them, contestees' mill sites would perforce be invalid.

However, the pertinent statute, 30 U.S.C. § 42(a) (1970), offers a second method of locating a mill site. It provides:

* * * The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his millsite * * *.

The sole charge brought against the mill sites stated:

The two unrecorded and unnamed millsites are not being used for mining and milling purposes.

The Judge found that a mill has been constructed and actually operated on an experimental basis. He then held that this evidence is sufficient to support a finding that the mill sites are being used for mining and milling purposes and dismissed the complaint against them.

The complaint did not charge that the contestees had not claimed a right to their mill sites under the second method. While the contestant asserts that the evidence does not support a finding that there was a custom mill on the mill sites, in the absence of a proper charge, the contestees were not bound to offer any evidence on such a possibility. A ground not alleged in a complaint cannot be used to find a claim invalid, unless it has been raised at the hearing and the contestee has not objected. United States v. Pierce, 3 IBLA 29 (1971).

Thus, although contestant has established that contestees have not earned a right to their mill sites on the basis raised in the complaint, the failure to charge that the claims were

invalid as custom mill claims inhibits a holding that they are invalid.

Accordingly, for this reason, the Judge's dismissal of the complaint as to the mill sites is affirmed.

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.

Martin Ritvo, Member

We concur:

Douglas E. Henriques, Member

Joseph W. Goss, Member

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April 11, 1972

DECISION

United States of America,	:	<u>Contest No. OR-5124,</u>
	:	Involving the Iron Gulch Nos. 1
Contestant	:	and 2 lode claims, Iron Gulch
	:	placer claim, Climax Nos. 5, 6,
v.	:	and 7 placer claims, and two
	:	unnamed and unrecorded mill Northwest
Mine and Milling,	:	sites, situated in Sec. 20,
Inc., and Thomas A. Bridges,	:	T. 23 S., R. 1 E., W. M., Lane
	:	County, Oregon
Contestees	:	

This is an action brought by the United States Forest Service pursuant to the Hearings and Appeals Procedures of the Department of the Interior 43 C.F.R. Part 4, to determine the validity of the above-named mining claims and two mill sites.

The Contestant filed a Complaint herein on February 24, 1970 alleging, inter alia, as follows:

"a. Minerals have not been found within the limits of the lode and placer mining claims in sufficient quantities to constitute a valid discovery.

"b. The land within the placer mining claims is nonmineral in character.

"c. The two unrecorded and unnamed mill sites are not being used for mining or milling purposes."

The Contestees filed a timely Answer generally denying the foregoing allegations of the Complaint.

A hearing was held before the undersigned examiner in Eugene, Oregon. Elden M. Gish, Esq., Office of the General Counsel, U.S. Department

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of Agriculture, appeared on behalf of the Contestant. William B. Murray, Esq., and John L. Barber, Esq., appeared on behalf of the Contestees.

I.

Zean R. Moore, after having been duly qualified as a mining engineer, testified that he had examined the subject claims eight times, beginning July 20, 1967. The claims are located east of Cottage Grove, Oregon at the southwest edge of the Bohemia Mining District. The terrain is characterized by sharp peaks, narrow ridges, and steep canyons. The geology is characterized by tertiary volcanic rocks, layered in a fairly horizontal position, dipping to the Northeast. The area has been intruded by granodiorite, and cut by andesite dykes, quartz veins. Total mineral production of the Bohemia Mining District as of 1949 has been estimated at approximately one million dollars. The average value of the ore produced was about eleven dollars per ton. The most productive period was from 1891 to 1912.

The lands embraced by the Iron Gulch No. 1 were originally located as the Star Extension claim. The lands embraced by the Iron Gulch No. 2 were originally located as the Golden Star claim. The original claims were located in 1887, surveyed for patent in 1905-1906, and subsequently clearlisted (Exhibit 8). Several thousand dollars worth of gold was removed from pockets in a tunnel on the Golden Star claim. The claims were dormant for several years, then worked in the 1920s and 1930s. The Iron Gulch claims were located in 1958, as were the subject placer claims. He knew of no production from these claims.

On his first examination, he was advised by Mr. Leabo that the workings were not "open" that time, and directed to the old discovery on the No. 1 claim which showed some new work. He returned in September, 1967 and observed no additional work. Mr. Leabo directed him to an adit on the No. 2 claim exposing brecciated altered andesite, some iron stain, vuggy quartz. A sample taken over a twelve inch width contained .08 ounces of vuggy gold per ton, and no silver (Exhibit O). A second sample, taken over an eighteen inch width, contained .06 ounces of gold per ton and no silver.

On his examinations of March 27, 1968 and May 20, 1969, he observed that a mill had been constructed. There had been no excavation work done on the two lode claims. In September 1970, he took two samples from the same improvement, with a similar exposure, on the No. 2 claim. Mr. Leabo had recovered some high grade gold at this point. However, he observed no structure or other indication of the presence of gold. One sample contained .01 ounces of gold and .04 ounces of silver per ton, the other, .22 ounces of gold and .01 ounces of silver per ton (Exhibit Q). Another sample taken from the cut at the discovery on the No. 1 claim

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contained .04 ounces of gold and .5 ounces of silver per ton. On May 18, 1971, he observed a new adit on the No. 1 claim driven in brecciated andesite bearing "a little iron pyrite," and exposing two short faults, two little seams of gouge. Two samples were taken in the adit. One contained a trace of gold and the other, .02 ounces of gold per ton. He observed no structures which would indicate the presence of an ore body exposed in the discovery cut or in the new adit. This adit was the only new work that he had observed on the claims. Several thousand dollars in high grade gold was reportedly recovered from the No. 2 tunnel on the No. 2 claim; however, the condition of that working had not changed since the time of his original examination.

In October, 1967, he took a sample consisting of six pans, one cubic foot, of placer material on the Climax No. 5 placer mining claim. He "had to scratch around the large boulders for material in the bottom of the creek to obtain enough material to pan." The concentrates of this sample contained 51 milligrams of gold (Exhibit P). The material in place had gold values of approximately \$1.35 per yard. He stated that the topography was such that "there is just not any placer gravel available." Only small remnants of gravel are found around the boulders.

He panned six pans of material from the Climax No. 7 placer mining claim and found "a few colors." There is an overlap of the Climax Placer No. 7 and the Iron Gulch Placer. The creek is right on bedrock and there is no gravel material available in that small area. He found the remains of an old stamp mill on the Climax No. 7 Placer.

He stated that conditions on the No. 6 claim were not favorable for a placer deposit. There has been a little placer gold recovered around the rocks in the bottom of the creek. He found a gold washing plant on the Climax No. 3 claim at a point where the creek widens out. That claim has not been contested.

He stated that the banks of Puddin Rock Creek are steep and rocky, heavy with brush. Various individuals have, from time to time, gone to the creek with little rockers and sluice boxes recovering some gold from the natural traps in the bedrock. It was his opinion that, "there is no placer gravel on this creek that would encourage anybody to spend any time or money in working it."

He stated that the present claimants are still in the prospecting stages. Several thousand dollars worth of free milling gold was recovered from the original claims after they were located in 1887. By 1906, the claims were inactive, the mill had been removed, and the workings were caved. He had seen "nothing on the claims that would indicate that anything new has been produced or shown."

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Clifford A. Everett, after having been duly qualified as a geologist, testified that he examined the subject claims in October, 1970. He took samples from the lode claims which contained gold values ranging from .04 to .10 ounces of gold per ton. He stated, "this district or this area has already produced significant quantities, so literature indicates, and as was also indicated, those faces sampled do not show minerals; but that is why the previous miners stopped, is because they ran out of ore * * * so breaking new ground and finding perhaps \$10.00 ore on a narrow working such as this, with the hope of coming to a vein intersection or a change in dip, this is the history of the district * * *."

Guy Leabo testified that he has been working in the Bohemia District for twenty-five years. A grab sample of table concentrates taken on the No. 2 claim contained 20.32 ounces of gold per ton. Two grab samples, one from an exposure in a new adit, and one from tailings contained .01 ounces of gold per ton and a trace of gold (Exhibit 16).

A piece of float found on a hillside on the No. 1 claim contained 2.54 ounces of gold per ton. A chip sample taken from a five-foot vein contained .015 ounces of gold per ton (Exhibit 17). He took two samples of weathered tuff breccia (No. P-23713 and P-23714) from a hanging wall exposed in a stope. One sample contained .60 ounces and the other .74 ounces of gold per ton (Exhibit 18).

Two samples of concentrates taken from the No. 2 claim contained 40.60 and 13.52 ounces of gold of 141 and 14.40 ounces of silver per ton (Exhibit 19). A sample taken from a riffle of a concentrating table reflected gold values of \$383.95 per ton (Exhibit 20). A sample of the tails from the table contained .16 ounces of gold per ton.

He stated that the discovery has already been made and that some development was justified, "especially some deep development." He had spent some time on the claims with one Mr. Maddox who "was able to make a living there."

He stated that the placer ground is two to five feet deep and contains average gold values of two dollars per yard, six dollars at bedrock.

On cross examination he stated that the claims were not purchased, but were given to him. He recovered "somewhere in the neighborhood of probably sixteen hundred dollars" in gold from placer mining operations conducted during the months of December, January, and February over a two year period. He sold the gold, including one nine ounce nugget, to collectors.

He stated that, "the Star vein is an extremely hard vein to sample, in the traditional manner, due to the high grade nature of the shoots of ore that occur along the vein." "It's difficult, because in spots it is very rich, and in spots it's not as rich."

Jens C. Nielsen, a building contractor, testified that he had been on the claims during the past five years. He had constructed a mill building. The mill has already been used to conduct bulk sampling. Custom milling for others is planned. From a 232 pound sample (No. 7405) taken from the No. 2 claim, he recovered 32 pounds of concentrates. The assay report on these concentrates shows 5 ounces of gold and 2.60 ounces of silver per ton (Exhibit 22), approximate in-place value, \$40 per ton. A 615 pound sample (No. 7406) milled down to 66 pounds of concentrates containing 23.54 ounces of gold and 15.90 ounces of silver per ton, showing an in-place value of 89.05 per ton.

A mill sample of one pound of concentrates taken from 250 pounds of "Iron Gulch ore" contained 29.20 ounces of gold and 13 ounces of silver per ton (Exhibit 24). A sample of gouge, iron-stained silicified tuff breccia with disseminated pyrite taken from the new adit on the No. 1 claim, contained .29 ounces of gold and .35 ounces of silver per ton (Exhibit 23). A concentrate taken from an unknown quantity of ore contained 2.60 ounces of gold and 2.30 ounces of silver per ton (Exhibit 23).

William B. Shuko testified that he had mined placer ground in creeks near the subject claims. He displayed an assortment of fine, medium, and coarse pieces of gold, some of them as large as a quarter, the total weight of which was about twelve ounces. Searching for gold was simply a weekend hobby. He had made no sales.

Ivan Hoyer described a film shown at the hearing. The film, taken by a Portland television station, depicted actual milling operations on the subject millsites.

Zeal Moore then testified on rebuttal that several of his samples were taken in the presence of Mr. Leabo. The samples were quartered, Mr. Leabo taking a choice of the opposite quarters. The assay report of the seven samples retained by the Contestant (Exhibit Q) shows gold values ranging from .01 ounces to .22 ounces of gold per ton. The value of the samples retained by the Contestees has not been shown.

The improvements on Millsite No. 3 consisted of a pipeline, a dam on the creek, and a dam at an adit. On the other millsite were the mill building and five cabins.

Asked to explain the discrepancy in the assay values shown by the parties, he stated, "The only explanation I can give is that they assayed the concentrates from a large volume of material, which would throw off the values of the original material. This is not a normal procedure in determining the mineral content of ore or veins in place. You assay the material

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that you take from the vein. You don't concentrate it down and then have (assay) the concentrates, because the assayer is going to relate that to a 2,000-pound assay. Five ounces of gold would indicate five ounces to a ton of concentrate, not to a ton of the ore that came out of the hill. * * * the value of an ore body is determined by the * * * value * * * of the material that has been sampled in place, not of the concentrates that have been hauled out."

II.

Under the mining laws of the United States (30 U.S.C. 1964 ed., sec. 22 et seq.), the discovery of a valuable mineral deposit is essential to a valid claim. The Department, in Jefferson-Montana Copper Mines Co., 41 L.D. 320 (1912), outlined the requirements necessary to establish a valid discovery on a lode mining claim as follows: (1) There must be a vein or lode of quartz or other rock in place; (2) The quartz or other rock in place must carry gold or some other valuable mineral deposit; and (3) The two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in an effort to develop a valuable mine. To constitute a valid discovery on a lode mining claim, there must be actually and physically exposed within the limits thereof a vein or lode of mineral-bearing rock in place, possessing in and of itself, a present or prospective value for mining purposes. East Tintic Consolidated Mining Claim, 40 L.D. 271 (1911).

It is not until minerals have been found on a lode or placer claim 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, that the requirements of the law have been met. Castle v. Womble, 19 L.D. 455 (1894); Chrisman v. Miller, 197 U.S. 313 (1905); Best v. Humboldt Placer Mining Company et al., 371 U.S. 334 (1963); United States v. Coleman, 390 U.S. 599 (1968).

Neither the fact that a claim may have been successfully worked in the past nor the possibility that, under different conditions it may become workable at some future date, is sufficient to demonstrate a present discovery on a claim. United States v. Ruby LaRose Green, A-31031 (March 25, 1970).

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. 3d 836.

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Testimony by a Government mineral examiner that he has examined mining claims and the workings thereon but found no evidence of a valuable mineral deposit is sufficient to establish a prima facie case by the Government as to the invalidity of the claims. United States v. Ruby LaRose Green, (supra); United States v. A. P. Jones, IBLA 70-69 (April 8, 1971).

III.

The testimony of the Contestant's expert witness that he had examined each of the lode claims and found no evidence of valuable mineralization, is sufficient to establish, prima facie, that no valuable mineral deposit is presently exposed thereon.

The Contestees presented evidence of mineral values of five samples taken on the No. 1 lode claim. The values shown in the two samples of concentrates and float do not reflect the value of rock in place. A chip sample and a sample of "country rock" contained only negligible values similar to those found by the contestant. The "chip" sample taken from the new adit, while assayed at \$10.65 per ton, has not been shown to reflect the value of any specific deposit. The Contestees have failed to identify on the No. 1 claim any significant deposit of mineralized rock in place bearing, in and of itself, sufficient mineral values to constitute a valuable mineral deposit.

With respect to the No. 2 claim, the testimony of the Contestees' expert witness, Everett, that the faces sampled do not show minerals, appears to confirm the testimony of the Contestant's expert witness.

Two samples, P-23713 and P-23714, taken by Leabo on the No. 2 claim in 1958, show significant values. (The assay certificate, Exhibit 18, indicates that the samples were taken from the No. 1 claim, however, Leabo's testimony clearly indicates that those samples came from the No. 2 claim). The samples are described as "weathered tuff breccia," and "material on hanging wall." There is insufficient probative evidence in the record to establish that these samples are representative of any significant deposit presently exposed.

The bulk samples, 7405 and 7406, likewise reveal very high values, many times greater than those reflected by the various chip samples which have been taken. However, there is insufficient probative evidence in the record to establish that the material sampled occurs to such an extent and bears such consistently high mineral values as to be presently valuable for mining purposes.

It is concluded that there has been no discovery of a vein or lode of

mineralized rock in place of such 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 on either of the subject lode mining claims.

Accordingly, the Iron Gulch No. 1 and Iron Gulch No. 2 lode mining claims are hereby declared null and void.

The Contestant's expert witness found no significant gravel deposits on any of the four contested placer mining claims, and expressed the opinion that conditions were not favorable for a placer deposit. His testimony, sufficient to constitute a prima facie case of lack of discovery, has not been refuted.

The Contestees had the burden of showing that a valuable mineral deposit is presently exposed on each placer claim. Leabo's testimony that he recovered placer gold in Puddin Rock Creek does not indicate the exact location of his placer mining operations. There is no probative evidence in the record of the existence of a specific gold-bearing gravel deposit on any of the placer claims occurring in such volume, and bearing sufficient gold values as to 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.

Accordingly, the Climax No. 5, Climax No. 6, Climax No. 7 and the Iron Gulch placer mining claims are hereby declared null and void.

The sole ground advanced by the Contestant in support of its prayer for invalidation of the subject mill sites is that they are not being used for mining or milling purposes.

The evidence clearly shows that a mill has recently been constructed and actually operated on an experimental basis. This evidence is sufficient to support a finding that the mill sites are being used for mining and milling purposes.

Accordingly, the complaint against the "two unnamed and unrecorded mill sites" is dismissed.

The right of appeal to the Board of Land Appeals, Office of the Secretary, is allowed in accordance with the regulations in 43 CFR Part 4. However, if an appeal is to be taken, the notice of appeal must be filed in this office (not the Board) so that the case file can be transmitted to the Board. To avoid summary dismissal of the appeal there must be strict compliance with the regulations.

Rudolph M. Steiner
Hearing Examiner

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