

UNITED STATES
v.
JAMES M. ZUBER AND EMILY T. ZUBER

IBLA 73-138

Decided October 3, 1973

Appeal from decision (S-3686) by Administrative Law Judge Rudolph M. Steiner declaring mining claim null and void.

Affirmed.

Mining Claims: Discovery: Generally

The mere presence of slight amounts of gold on a placer mining claim does not satisfy the requirement of a discovery of a valuable mineral deposit under the mining laws where it is shown that the amount of gold present is extremely limited and would not warrant a man of ordinary prudence in the further expenditure of his time and money with a reasonable prospect of success in developing a paying mine.

Mining Claims: Contests! ! Mining Claims: Discovery: Generally

It is the duty of a mining claimant whose claim is being contested to keep discovery points available for inspection by government mineral examiners. Mineral examiners have no affirmative duty to search for indications of a discovery on a mining claim; nor do they have a duty to go beyond examining the discovery points of a claimant. Their function is to examine the discovery points made available by a claimant and to verify, if possible, the claimed discovery.

APPEARANCES: William H. Spruance, Esq., of Minasian, Minasian, Minasian and Spruance, Oroville, California, for appellants; Charles F. Lawrence, Esq., Office of the General Counsel, U.S. Department of Agriculture, San Francisco, California, for appellee.

OPINION BY MR. FISHMAN

James M. Zuber and his wife, Emily P. Zuber, have appealed from a decision, dated September 11, 1972, by Administrative Law Judge Rudolph M. Steiner which declared the Hollyhock placer mining claim to be null and void for lack of a discovery of a valuable mineral deposit.

The Hollyhock claim is located on Yellow Creek, near Belden, in the Plumas National Forest, Plumas County, California. The claim was purchased by James M. Zuber in 1964 from the original locator. Upon recommendation of the Forest Service, a contest was initiated on June 3, 1970. The complaint charged that there was 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. At the close of contestant's case, counsel for contestees moved to dismiss the complaint on the ground that contestant failed to establish a prima facie case. The motion was denied.

Appellants contend that the Judge erred in failing to grant the motion. In support of their argument, they assert that the mineral examiner who testified on behalf of contestant failed to sufficiently sample the claim and misapplied the prudent man test.

Henry W. Jones, the mineral examiner who testified on behalf of contestant, examined the claim on nine separate occasions between September of 1969 and August of 1971. Jones testified that he sampled all the discovery points which were pointed out to him by Zuber, and that he took additional samples from other areas on the claim. The assay results of the samples taken by Jones showed only negligible values of gold. Based upon the sampling and the results of the assay, Jones concluded that a prudent man would not be justified in expending further time and effort on the claim in the expectation of developing a valuable mine.

In our view the mineral examiner sufficiently sampled the claim. It is the duty of a mining claimant, whose claim is being contested, to keep discovery points available for inspection by government mineral examiners. Mineral examiners have no affirmative duty to search for indications of a discovery on a mining claim; nor do they have a duty to go beyond examining the discovery

points of a claimant. Their function is to examine the discovery points made available by a claimant and to verify, if possible, the claimed discovery. United States v. Stevens, 76 I.D. 56 (1969); United States v. Humboldt Placer Mining Company, 8 IBLA 407 (1972); United States v. Mullin, 2 IBLA 133 (1971).

As stated in United States v. Winters, 2 IBLA 329, 335, 78 I.D. 193, 195 (1971):

Where a Government mineral examiner offers his expert opinion that discovery of a valuable mineral deposit has not been made within the boundaries of a contested claim, a prima facie case of invalidity has been made, provided that such opinion is formed on the basis of probative evidence of the character, quality and extent of the mineralization allegedly discovered by the claimant. Mere unfounded surmise or conjecture will not suffice, regardless of the expert qualifications of the witnesses. But an expert's opinion which is premised on his belief or hypothetical assumption of the existence of certain relevant conditions, if evidence is presented that those conditions do exist, is sufficient to establish a prima facie case and to shift the burden of evidence to the contestee.

The assay reports and the testimony of the mineral examiner in the case at bar were sufficient to establish a prima facie case.

Appellants' argument that the prudent man test was misapplied by the mineral examiner has no merit. Their argument is based upon the mineral examiner's failure on cross! examination to articulate the prudent man test. The fallacy of this argument lies in its premise. The prudent man test is a legal test to be applied by the Judge and not by the mineral examiner. Our review of the record discloses no error by the Judge in the application of the test to the facts in the case.

Appellants next contend that the Judge erred in concluding that they failed to establish the validity of their claim. We have carefully reviewed the record and are satisfied that the Judge reached the proper conclusion.

In determining whether a mining claimant has discovered a valuable mineral deposit within the meaning of 30 U.S.C. § 22 (1970), the Department has traditionally employed, with judicial approval, the prudent man test. Under this test, 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." Castle v. Womble, 19 L.D. 455, 457 (1894); United States v. Coleman, 390 U.S. 599, 602 (1968).

In the case at bar, the samples taken by the mineral examiner showed negligible values of gold. For example, three crevices were pointed out to the mineral examiner by appellants. In two of the crevices no gold was recovered. In the remaining crevice, sixty! one milligrams of gold, valued at six cents, was recovered. The mineral examiner also dug a channel fourteen feet in length. He recovered gold in only one of the samples which contained three "fair! sized" nuggets. The examiner deepened the channel and took ten more samples, none of which contained any gold.

Appellants submitted the assay results of only one sample. The sample, which weighed 139.8535 grams, contained fine gold as well as course gold nuggets which were taken from sluice box concentrates. The total gold value per pound of concentrate was \$ 5.769.

James M. Zuber testified that he mined the claim in the summertime using both a suction dredge and a sluice box. He had an arrangement with another man, Dallas Mosher, who mined the claim for three years. Mosher and Zuber apparently agreed to share equally in whatever gold they found. They testified that they recovered several ounces of gold, but they neither weighed the gold, nor kept records of their recoveries.

Alois Tretter, who holds a mining claim below the Hollyhock, and Kitty O'Brien, who holds a mining claim above the Hollyhock, both testified that they found nuggets on their claims. Gordon Wiczorek testified that he mined the Yellow Creek area and sold gold found there "anywhere from \$ 60 to \$ 350 an ounce." In connection with the Hollyhock claim, he stated that he recovered about an ounce and a half, which Zuber let him keep without charge.

Appellants' final witness was Chester Hymer, a mining engineer. He testified that the tertiary streams in the Yellow Creek area are reconcentrations of ancient channels and that the deposits were so spotted that pan sampling was not a proper method of testing the claim.

In our view, the testimony of these witnesses was not sufficient to meet appellants' burden of proof. At most, the testimony shows that only slight amounts of gold were found on the claim, and that it could be inferred from the geology of the area that isolated pockets of gold are found there. The validity of a mining claim is determined by the discovery of a valuable mineral deposit within its limits. United States v. Overton, A-30822 (February 16, 1968). While geological inference may be relied upon to establish the extent

and potential value of a particular mineral deposit, it may not be relied upon as a substitute for the actual finding of a valuable mineral deposit. United States v. Relyea, A-30909 (June 25, 1968).

In the case at bar, there was only evidence of isolated, small pockets of gold which were characterized by the Judge as "spotty." Where the quantity of gold on a claim is only found in such slight amounts, the requirements of a discovery of a valuable mineral deposit have not been met.

Appellants finally assert that the Forest Service maintains a policy whereby it challenges mining claims upon which claimants construct improvements, such as cabins, while claims without such improvements are not challenged. Appellants contend that this policy constitutes a denial of due process, in the form of unequal and discriminatory enforcement of the mining laws. The essence of appellants' position, as they state in their brief, "is that valid laws and regulations are being enforced in invalid and discriminatory ways."

The only case relied on by appellants is Yick Wo v. Hopkins, 118 U.S. 356 (1886). Yick Wo, however, is distinguishable. In Yick Wo, a San Francisco ordinance vested discretion in a board of supervisors to grant or withhold their assent to the use of wooden buildings as laundries to protect the public from the dangers of fire. The supervisors withheld their assent from Yick Wo and 200 others of Chinese ancestry, but permitted non-Chinese to carry on the same business under similar conditions. The Supreme Court concluded that the ordinance was constitutional on its face, but unconstitutional in its application since it was applied on the basis of racial discrimination. The Supreme Court pointed out that the petitioners in Yick Wo, "have complied with every requisite, deemed by the law or the public officers charged with its administration, necessary to the protection of neighboring property from fire * * *."

In the case at bar, no such discrimination exists. Under the mining laws, a mining claim is invalid if not supported by a discovery of a valuable mineral deposit. In the absence of a discovery, upon challenge by the United States by contest, no mining claimant is entitled to a determination that his claim is valid. Unlike the petitioners in Yick Wo, appellants have failed to comply with the requisites of the law.

Where the Forest Service recommends the initiation of a contest to determine the validity of a mining claim, once it is determined that the elements of a contest are present, it is not the function of the Department of the Interior to inquire into the reasons or the justifications for the initiation of such

a proceeding by the Forest Service. United States v. Bergdal, 74 I.D. 245 (1967). 1/ Although we do not condone questionable practices, which appellants assert the Forest Service applied in the case at bar, these practices, even if proven, would not afford a sufficient basis for this Board to abnegate its responsibility to determine the validity of mining claims.

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.

Frederick Fishman
Member

We concur:

Anne Poindexter Lewis
Member

Edward W. Stuebing
Member

1/ However, where another federal agency recommends that a mining contest be initiated, this Department has not only the authority, but the affirmative duty to review the proposed charges to be incorporated in the contest complaint to assure that a proper basis for the initiation of a contest has been advanced.

