

UNITED STATES, CONTESTANT  
v.  
EARL FRISCO AND SANDRA S. YOUNG, CONTESTEES

IBLA 77-123

Decided September 21, 1977

Appeal from decision of Administrative Law Judge Robert W. Mesch, dated January 5, 1977, declaring place mining claims null and void. OREGON 14218.

Affirmed.

1. Mining Claims: Discovery: Generally

A discovery of a valuable mineral deposit has been made where minerals have been found within the limits of a claim and the evidence is such that a person of ordinary prudence would be justified in the further expenditure of his labor and means in a reasonable prospect of success in developing of developing a valuable mine.

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

When the Government contests a mining claim on a charge of no discovery, it has by practice assumed the burden of going forward with sufficient evidence to establish a prima facie case; when it has done so, the burden shifts to the claimant to show by a preponderance of the evidence that a discovery has been made and still exists within the limits of the claim.

3. Administrative Procedure: Hearings--Mining Claims: Hearings

The Government has established a prima facie case when a mineral examiner testifies that

he has examined a mining claim and has found the mineral values insufficient to support a finding of discovery.

4. Mining Claims: Contests--Rules of Practice: Appeals: Service on Adverse Party

When a contestee fails to answer a complaint, the allegations are deemed admitted and the case may be dismissed with prejudice as to that contestee. In addition, in a government contest, the complaint is not deemed to be insufficient or subject to dismissal where the government fails to name all interested parties, or for failure to serve every party who has been named.

5. Mining Claims: Discovery: Generally

A Government mineral examiner in evaluating a mining claim is under no duty to undertake discovery work or to explore beyond the current workings of a claim and it is incumbent upon the mining claimant to keep discovery points available for inspection by a Government mineral examiner.

6. Evidence: Generally--Evidence: Admissibility--Mining Claims: Discovery: Generally

Proposed testimony of a witness as to the procedures that would be followed by a person in private industry in making a complete evaluation of a mining claim is properly excluded as irrelevant because it does not have a logical relation to the type of an examination made by a government mineral examiner to establish the facts on which the validity or invalidity of a mining claim may be determined.

7. Evidence: Generally--Evidence: Admissibility--Rules of Practice: Evidence--Rules of Practice: Witnesses

Where a contestee fails to follow up his initial suggestion at the hearing that a

deposition of a possible witness be taken with a proper request, it is not error for the Administrative Law Judge to decide the case on the record made at the hearing.

APPEARANCES: Harold G. Steiner, (father of contestee Sandra S. Young), Mauston, Wisconsin, for contestees; James Kauble, Esq., Office of the General Counsel, U.S. Department of Agriculture, Portland, Oregon, for contestant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Earl Frisco and Sandra S. Young have appealed from a decision by Administrative Law Judge Robert W. Mesch, dated January 5, 1977, which declared the Gold Bar No. 1 and Gold Bar No. 2 mining claims null and void for lack of discovery of a valuable mineral deposit.

[1-3] The claims are situated within the Wallowa-Whitman National Forest, in section 24, T. 9 S., R. 36 E., Willamette Meridian, Baker County, Oregon. The Judge's decision sets out in detail the evidence and applicable law and his findings and conclusions. We are in agreement with his decision, and therefore, adopt it as the decision of this Board. A copy of it is attached hereto.

[4] We address ourselves to the particular points raised in the appeal. Appellants claim all parties to the action were not properly served with a notice of the complaint, specifically Elaine Jackson.

Elaine Jackson was served with a copy of the complaint on June 3, 1976, as evidenced by her signature on the certified mail, return receipt card contained in the file of this case. Since she was properly served and failed to answer the charges of the complaint, the allegations of the complaint are deemed to be admitted by her and the case may be dismissed with prejudice as to her. See, Ben H. Lyon Estate v. State Director of Idaho, 5 IBLA 327 (1972); 43 CFR 4.474(b). In addition, in a government contest, the complaint is not deemed to be insufficient or subject to dismissal where the government fails to name all interested parties, or for failure to serve every party who has been named. United States v. Conner, 31 IBLA 173 (1977); 43 CFR 4.451-2(b).

Furthermore, Mrs. Jackson does not appear to have an interest in the claim as the following colloquy reveals:

THE COURT: What interest, if you know, did Elaine Jackson have in the two claims?

MR. STEINER: Did who?

THE COURT: Elaine Jackson.

MR. STEINER: No interest. Mr. Frisco bought her out some years ago, so it's only between Earl Frisco and Sandra Sue Young that have any vested interest in it or any ownership in it.

(Tr. 49). Therefore this point raised on appeal is spurious.

Next contestees assert the government is questioning the validity of the mining laws, not merely questioning the validity of a mining claim in this contest. There is no explanation for this contention. Since the decision has properly stated and construed the mining law, the point is without merit.

[5] The next three points raised on appeal by the contestees may be summarized and discussed together. Succinctly stated, contestees complain the government mineral examiner took samples from the surface and did not take samples from the point where their workings ended. In addition, the contestees assert they should have been allowed time to reopen a caved-in tunnel in order to facilitate the taking of samples from the tunnel. Contestees assert their workings in the tunnel have been assayed and shown to have high values.

It is assumed a mining claimant will direct the government mineral examiner to the most advantageous points for sampling.

Government mineral examiners are not required to perform discovery work, to explore or sample beyond a claimant's workings, or to conduct drilling programs for the benefit of a claimant. Henault Mining Co. v. Tysk, 419 F.2d 786 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970). United States v. Reynders, 26 IBLA 131 (1976); United States v. Griggs, 8 IBLA 331, 343, 79 I.D. 682, 688 (1972). Further, it is incumbent upon the mining claimant to keep discovery points available for inspection by mineral examiners. United States v. Dietemann, 26 IBLA 356 (1976); United States v. Blomquist, 7 IBLA 351 (1972); United States v. Houston, 66 I.D. 161 (1959). The government mineral examiner examined the claim thoroughly, and having found no workings evident, he sampled carefully from the surface. In addition the appellants have offered no evidence of any values being found. See United States v. Winters, 2 IBLA 329, 342; 78 I.D. 193, 199 (1971).

[6] Next contestees assert the trial judge erred in refusing to allow one of their witnesses, Mr. Hugh Lancaster to testify. Mr. Lancaster, who had not examined the claims, was going to testify concerning the method of making a complete evaluation of a mining

claim, as would be done in private industry. The Government stipulated the Forest Service mining engineer did not make a complete evaluation of the claim (Tr. 150).

Administrative Law Judge Mesch's decision not to allow Mr. Lancaster to testify is not based on whether or not the witness is qualified as an expert, but is based on other grounds. The mining laws do not require a government mineral examiner to make a complete evaluation of a mining claim, but merely to take samples from the claim and to have those samples evaluated. Mr. Lancaster's proposed testimony concerning the proper method to evaluate a mining claim would have been irrelevant to the issues at hand. As stated in 29 Am. Jur. 2d, Evidence, § 251:

Irrelevant facts and circumstances--that is, those which do not throw any light upon, or have any logical relation to, the fact in issue which must be established by one party or disproved by the other or which are too remote--are not properly admissible in evidence and upon proper objection must be excluded. In other words, where there is nothing in the issues presented to warrant the proof offered, it is properly excluded.

This is what Judge Mesch has done.

[7] Finally, contestees complain of error due to the judge's denial of their request for a delay in the hearing to allow Mr. Robert Douglas to testify. Alternatively the contestees requested time to depose the witness and have the deposition entered into the record. Mr. Douglas was unavailable because he was serving as a guide for a hunting party.

Contestee's request to allow time to depose Mr. Douglas was made during the first day of the hearing. At that time the Judge said they would take up the matter on the next day. During the second day of the hearing, Mr. Steiner did not bring up for discussion the matter of having Mr. Douglas deposed; nor did Mr. Steiner take the opportunity to file a posthearing brief in which he could have described the probable testimony of Mr. Douglas.

Contestees could have compelled the attendance of their witness by requesting the Administrative Law Judge to issue a subpoena under authority granted by 43 CFR 4.26.

In addition, the regulations authorize the taking of depositions for evidentiary purposes, upon a showing that the witness will be unavailable at the hearing. 43 CFR 4.423 and 4.433. Depositions will not ordinarily be received in evidence if the deponent is present

and can testify personally at the hearing. See Carl W. Olson and Sons Co., 6 IBLA 138 (1973). Appellant, having failed to pursue his original suggestion or to avail himself of other methods of obtaining Douglas' testimony, cannot now complain.

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

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Martin Ritvo  
Administrative Judge

We concur:

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Edward W. Stuebing  
Administrative Judge

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Anne Poindexder Lewis  
Administrative Judge

January 5, 1977

UNITED STATES OF AMERICA,	:	OREGON 14218
	:	
Contestant	:	Involving the Gold Bar No. 1
	:	and Gold Bar No. 2 placer
v.	:	mining claims situated in
	:	Sec. 24, T. 9 S., R. 36 E.,
EARL FRISCO and	:	Willamette Meridian (within
SANDRA S. YOUNG,	:	the Wallowa-Whitman National
	:	Forest), Baker County, Oregon.
Contestees	:	

DECISION

Appearances: Jim Kauble, Esq., Office of the General Counsel,  
Department of Agriculture, Portland, Oregon,  
for contestant;

Harold G. Steiner, Mauston, Wisconsin, for  
contestees.

Before: Administrative Law Judge Mesch.

This is a proceeding involving the validity of two mining claims located under the General Mining Laws of 1872, as amended, 30 U.S.C. § 22 et seq. The proceeding was initiated by the Oregon State Office, Bureau of Land Management, Department of the Interior, at the request of the Forest Service, Department of Agriculture.

Pursuant to 43 CFR 4.451, the Bureau of Land Management issued a complaint charging, among other things, that the subject mining claims are invalid because they have not been perfected by the discovery of a valuable mineral deposit. The complaint named Earl Frisco and Elaine Jackson as contestees. A timely

answer was filed by Earl Frisco denying the allegations of the complaint. No answer was filed by Elaine Jackson. 1/

A hearing was held on September 13 and 14, 1976, at Baker, Oregon. At the hearing Sandra S. Young was recognized as a contestee upon the representation of her father, Harold G. Steiner, that she had recently obtained an interest in the mining claims by reason of an assignment from Earl Frisco. Earl Frisco reportedly retained a percentage interest in any production from the claims.

While it is not clear, the contestees apparently take the position that the Government, and in particular the Forest Service, has no right to question the validity of the mining claims. It is a fundamental proposition of public land law that the Secretary of the Interior, acting through subordinate officials, has the power and authority to initiate contests challenging the validity of mining claims. See Best v. Humbolt Placer Mining Company, 371 U.S. 334 (1963). Such authority is not dependent upon the assertion by the Government of some need or use for the lands. The establishment of clear title to public lands is sufficient justification for the initiation of a contest. See Davis v. Nelson, 329 F.2d 840 (9th Cir. 1964). Where the Forest Service recommends the initiation of a contest to determine the validity of mining claims in a national forest, the Department of the Interior will not inquire into the reasons or the justification for the proceedings. See United States v. Bergdal, 74 I.D. 245 (1967).

The Department of the Interior and the courts have repeatedly held that (1) a mining claim does not create any rights against the United States and cannot be recognized as valid unless a valuable mineral deposit has been discovered within the limits of the claim; (2) a valuable mineral deposit is an occurrence of mineralization of such quality and quantity as to warrant a person of ordinary prudence in the expenditure of time and money in the development of a mine and the extraction of the

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1/ I do not have sufficient information (and it is not properly my function) to determine whether the non-answering contestee was properly served with the complaint. If the contestant deems it necessary, the Oregon State Office, Bureau of Land Management, can make this determination and, if appropriate, issue a decision under 43 CFR 4.450-7(a).

mineral, i.e., the mineral deposit that has been found must have a present value for mining purposes; and (3) mineralization that only warrants further prospecting or exploration in an effort to ascertain whether sufficient mineralization might be found to justify mining or development does not constitute a valuable mineral deposit, i.e., a valuable mineral deposit has not been found simply because the facts might warrant a continued search for such a deposit. See Chrisman v. Miller, 197 U.S. 313 (1905); United States v. Coleman, 390 U.S. 599 (1968); Barton v. Morton, 498 F.2d 288 (9th Cir. 1974); United States v. Winegar, 16 IBLA 112, 81 I.D. 370 (1974).

When the Government contests the validity of a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case. The ultimate burden is on the mining claimant to affirmatively establish that the claim has been perfected by the discovery of a valuable mineral deposit. See Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Springer, 491 F.2d 239 (9th Cir. 1974); United States v. Ramsey, 14 IBLA 152 (1974). In Foster v. Seaton, *supra*, the court said:

. . . Were the rule otherwise, anyone could enter upon the public domain and ultimately obtain title unless the Government undertook the affirmative burden of proving that no valuable deposit existed. We do not think that Congress intended to place this burden on the Secretary. (p. 838)

A qualified mining geologist employed by the Forest Service presented evidence with respect to the mining history of the area, the geology of the mining claims, his field examinations of the claims, the values of samples taken from the claims, the method of mining the claims, the costs of mining, and his findings and conclusions concerning the value of the claims for mining purposes. He expressed the opinion that the mineralization he found within the claims was not sufficient to warrant the expenditure of time and money in an attempt to develop a paying mine. The samples taken by the geologist revealed insignificant gold values per cubic yard of material when compared with the estimated costs of mining the material.

The contestees assert that the testimony of the Forest Service geologist is not entitled to any consideration because (1) he conceded that if he was employed by a mining company which

was willing to underwrite the expense, a much more accurate and comprehensive evaluation of the property could be made; and (2) the samples he relied upon were taken from material that is not, according to the contestees, representative of the mineral values within the claims.

The answer to the first contention is found in United States v. Ramsey, supra, where the Interior Board of Land Appeals stated:

. . . Government mineral examiners determining the validity of a mining claim need only examine the claim to verify whether the claimant has made a discovery; they are not required to perform discovery work, to explore or sample beyond the claimant's workings, or to conduct drilling programs for the benefit of the claimants. United States v. Wells, 11 IBLA 253 (1973). For that reason, the contestant's mineral examiner was properly responsive in stating that he would have made a more thorough examination if employed by a private company, and the statement cannot be construed to evince either prejudice on the part of the examiner or an improper performance of his examination of the claims. (p. 154)

Insofar as the second contention is concerned, the evidence does not establish that the samples were improperly taken and are, in effect, meaningless. There is no basis for concluding that the samples considered by the Forest Service geologist are not representative of the mineral values in the exposed and readily accessible gravel areas within the two mining claims.

In examining a mining claim, a Government mineral examiner has no duty or obligation to perform sufficient work to reach a definite conclusion as to whether a valuable mineral deposit does or does not exist somewhere within the limits of the mining claim. If a valuable mineral deposit exists, it is incumbent upon the claimant to discover it. The function of the Government mineral examiner is simply to verify, if possible, whether the claimant has, in fact, found a valuable mineral deposit. In United States v. Arizona Mining and Refining Company, Inc., 27 IBLA 99 (1976), the Board stated:

. . . Indeed a prima facia case of invalidity may be established by the Government without any sampling at all where a qualified mineral examiner testifies that it is his expert opinion, based upon an inspection of the land within the claim, that there is insufficient exposed or accessible mineralization thereon to warrant taking of samples. (p. 107)

I find that the Forest Service presented a prima facie case in support of the allegation that the mining claims are invalid because a valuable mineral deposit has not been discovered within the limits of the mining claims.

The contestees presented evidence that Earl Frisco conducted a sluicing operation on the claims up until about six or seven years ago when his health prevented any further work; that he recovered an unknown quantity of gold, some of which he sold for jewelry and keepsake purposes; and that other individuals obtained high values in gold and platinum from samples taken in a tunnel that is now caved in.

The contestees' interpretation of their evidence and their position with respect to whether a valuable mineral deposit has been found is aptly illustrated by the following statements and testimony of their representative, Harold G. Steiner:

. . . If there's nothing mineable in there, we will gladly invalidate. But we sure as hell want to go in there and see what there is. (Tr. 82, 83)

\* \* \*

And so we have taken this assignment on this claim with the thought in mind that we would like to go in there and shore that tunnel up or dig back into that pit far enough to set a diamond drill . . . and take some kind of an evaluation out of that thing. (Tr. 99)

\* \* \*

. . . And we requested that you withhold this, because there was no valid reason for trying to invalidate this thing until at least after we went in there, cleaned out this pit, and went in there and made an assessment of what there is in this . . . blue gravel. (Tr. 136)

\* \* \*

. . . If it is not [invalidated], we will go in there and finish the evaluation work. And if it doesn't pay to open the mine up and take the ore out of there, we will be the first ones to say, "Well, go ahead. Invalidate it. We don't want it if there's no value there." (Tr. 137)

The contestees did not meet their burden of proof by showing that the mining claims are presently supported by the discovery of a valuable mineral deposit. They did not present any evidence from which any conclusions might be drawn as to (1) the amount of mineralization that might be available for extraction, (2) the value of the mineralization that might be extracted, or (3) the costs of extracting and marketing the mineralization. Without some information relating to these three factors no one could conclude that a mineral deposit has been found that has a present value for mining purposes. At best, the contestees' evidence simply shows that the mining claims might warrant the expenditure of time and money in an effort to ascertain whether a valuable mineral deposit might be found within the claims. It does not establish that a valuable mineral deposit has been found.

I have no alternative under the law and the evidence other than to conclude that the Gold Bar Nos. 1 and 2 placer mining claims are invalid because they have not been perfected by the discovery of a valuable mineral deposit as required by the mining laws.

The contestees argue that they should have additional time and the opportunity to evaluate the mining claims and make an assessment of the mineralization. I have no authority to permit a mining claimant to hold a mining claim that is invalid. Even if I could grant the contestees the opportunity to conduct further exploration work, it would serve no purpose if, as the contestant asserts, the lands were withdrawn from the operation of the mining laws on August 6, 1973. In United States v. Coston, A-30835 (February 23, 1968), the Department stated:

. . . Since a mining claimant acquires no rights against the United States prior to making a discovery, he cannot be heard to complain if the United States removes the land from further operation of the mining laws before he makes a discovery. What appellant is arguing, in effect, is that although a mining claimant has made no discovery prior to removal of the land from operation of the mining laws and consequently has no rights as against the United States, he nonetheless has the right to continue to endeavor to make a discovery and thus acquire rights as against the United States. This leads to the absurd result that once a paper location has been made on land, the United States is powerless to devote the land to some other use because the locator has a right to continue efforts to make a discovery and thus acquire rights to the land as against the United States. To state the proposition is to reject it, and there is absolutely no authority for it. (pp. 6, 7)

Pursuant to the prayer of the complaint, the Gold Bar Nos. 1 and 2 placer mining claims are declared invalid because they have not been perfected by the discovery of a valuable mineral deposit.

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Robert W. Mesch  
Administrative Law Judge

#### APPEAL INFORMATION

The contestees, as the parties adversely affected by this decision, have the right of appeal to the Interior Board of Land Appeals. The appeal must be in strict compliance with the regulations in 43 CFR Part 4. (See enclosed information pertaining to appeals procedures.)

If an appeal is taken the adverse party, the Forest Service, can be served by service upon the Office of the General Counsel at the address listed below.

Enclosure: Information Pertaining to Appeals Procedures

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