

UNITED STATES
v.
ELBERT GASSAWAY

IBLA 79-167

Decided October 31, 1979

Appeal from decision of Administrative Law Judge Michael L. Morehouse continuing a hearing into the validity of a placer mining claim. CA 5023

Decision set aside, mining claim declared null and void ab initio.

1. Mining Claims: Hearings – Rules of Practice: Hearings

A continuance of a hearing into the validity of a mining claim will only be granted where the mining claimant presents sufficient reason to justify the grant of an additional opportunity to present his case, *i.e.*, where circumstances have placed a substantial constraint upon his ability to obtain or offer samples or other evidence of a discovery. Furthermore, it must appear that the claimant is not using the additional time to make the requisite discovery.

2. Mining Claims Rights Restoration Act – Mining Claims: Power Site – Mining Claims: Withdrawn Lands – Power Site Lands – Withdrawals and Reservations: Power Sites

A mining claim located prior to Aug. 11, 1955, on lands withdrawn for a power site is null and void ab initio. The passage of the Mining Claims Rights Restoration Act of Aug. 11, 1955, 30 U.S.C. § 621 (1976), did not give life to void claims which had been located on withdrawn lands prior to the date of the Act.

3. Administrative Practice – Board of Land Appeals – Rules of Practice: Appeals: Generally

Upon assuming jurisdiction of an appeal, the Board of Land Appeals has full authority to consider the entire record in making a decision, and its review is not limited to the theories of law upon which the parties have proceeded.

APPEARANCES: Charles F. Lawrence, Esq., Office of the General Counsel, U.S. Department of Agriculture, for the Government; J. Ross Carter, Esq., Redding, California, for the appellee.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

This case involves an interlocutory appeal by the Government from a decision of Administrative Law Judge Michael L. Morehouse made at the conclusion of a hearing into the validity of the Black Cat placer mining claim on November 30, 1978, continuing the hearing until July 22, 1979, to allow the contestee-appellee, Elbert Gassaway, additional time to submit evidence of the discovery of a valuable mineral deposit. ^{1/} The claim is situated in W 1/2 NE 1/4 NW 1/4 sec. 32, T. 38 N., R. 8 W., Mount Diablo meridian, Trinity County, California, within the Trinity National Forest. The validity of the claim was challenged pursuant to a contest complaint initiated on April 24, 1978, by the Bureau of Land Management (BLM) on behalf of the Forest Service, U.S. Department of Agriculture.

In its original statement of reasons for appeal, the Government contends that it is entitled to a determination of the validity of the claim based on the evidence which was adduced at the original hearing in conformity with the Memorandum of Understanding between the U.S. Departments of the Interior and Agriculture (VI BLM Manual 3.1 (June 21, 1962)) whereby the former "undertook to determine the validity of mining claims affecting national forest lands." The Memorandum of Understanding provides for the rendering of a decision "as promptly as possible after the hearing" but contains nothing which deals with the manner in which an Administrative Law Judge conducts a hearing, including the granting of continuances. This is left to Departmental regulation. See 43 CFR 4.433. To this extent, the cases cited by the Government, United States v. Bergdal, 74 I.D. 245 (1967), and United States v. Cascade Ornamental Building Stone, Inc., 8 IBLA 447 (1972), are not on point.

^{1/} This interlocutory ruling was certified to the Board by Judge Morehouse pursuant to 43 CFR 4.28.

As we have held on numerous occasions, this Department will order additional hearings where it is deemed necessary to make a more informed determination as to the validity of a mining claim. United States v. Edeline, 24 IBLA 34 (1976), and cases cited therein. Nevertheless, a mining claimant must demonstrate an equitable basis for a further hearing where he has had adequate notice of the pendency of the original hearing. Furthermore, it must appear that the request for a further hearing is not simply for the purpose of making a discovery in the interim. United States v. Johnson, 33 IBLA 121 (1977). We will apply this standard where a mining claimant requests the continuance of a hearing as the underlying rationale is identical.

[1] It is required that a mining claimant make a discovery of a valuable mineral deposit prior to the location of his claim. 30 U.S.C. § 23 (1976). ^{2/} Thus, it is presumed that when the validity of his claim is challenged in a contest proceeding the mining claimant need only come forward with the evidence of the discovery which he has already uncovered. Therefore, where a mining claimant requests a further hearing or the continuance of a hearing of which he has had adequate notice he must posit such "exculpatory factors" as will justify the grant of an additional opportunity to present his case. United States v. Porter, 37 IBLA 313, 316 (1978); United States v. Foresyth, 15 IBLA 43 (1974). Furthermore, it must appear that the mining claimant is not using the additional time to make the requisite discovery.

As reason for his lack of preparation at the original hearing appellee contends that he was induced by the Forest Service to expend time and money on the purchase of a patented mining claim with the promise that he could exchange it for title to the Black Cat placer mining claim and was therefore not able to develop his claim (Tr. 54-61). Appellee offers two documents dated July 19, 1974, and August 23, 1976, wherein L. Dean Price, Acting District Ranger and later Resource Officer for the Weaverville Ranger District, Forest

^{2/} In this regard we note the statement of the Administrative Law Judge: "As you are well aware there are two steps that have to be properly gone through to get land patented, and the first is to file, go through the proper steps of filing a claim, and then he has to make a discovery" (Tr. 80). There is an apparent misstatement of the well-recognized principle that upon completion of all of the requirements of the mining law, the Department, in the absence of intervening rights, will not examine the order in which the various requirements of the law were met. See Creede and Cripple Creek Mining and Milling Co. v. Uinta Tunnel Mining and Transportation Co., 196 U.S. 337 (1905). Existence of a discovery, however, is essential to the validity of a location, and the validity of a location necessarily dates from the making of a discovery, relating back to the date of location only in the absence of intervening rights. Id. at 347-51.

Service, discusses a proposed "land exchange" with appellee. In addition, between the time of initiation of the contest and the date of the hearing appellant contends that he was unable to get someone to develop his claim and when he did the developer was delayed by a "snowstorm" and the "holidays" (Tr. 61).

The reasons offered by appellee are not sufficient to justify the grant of an additional opportunity to appellee to present his case. See United States v. Foresyth, supra (restraining order obtained by Forest Service prevented taking of samples and other evidence of a discovery – sufficient to justify further hearing). They do not point to a substantial constraint upon appellee's ability to obtain or offer samples or other evidence as proof of a discovery on the subject claim.

Overall, the record indicates that appellee may use the additional time to make the requisite discovery. Thus, the following exchange between the Judge, appellee, and counsel for the Government, transpired:

THE COURT: Just have you made any tests before these tests [those subsequent to initiation of the contest] were made?

A No. Well, no, outside of my own mining.

MR. LAWRENCE: Q Then it's your feeling that the claim should be tested at this time; is that correct?

A Yes.

THE COURT: You said outside of your own mining. Have you done mining on your own?

A Well, assessment work, yes. My – a fellow and I tried to mine there, yes. We have done some, but he has died and we didn't do too good.

(Tr. 64).

Any testing must be made of preexisting exposures of a valuable mineral deposit. United States v. Foresyth, supra at 48-49. Documents submitted to the Board by appellee July 13, 1979, and August 21, 1979, indicate that appellee, with the aid of Mark Latker, a consulting geologist, is engaged in sampling and testing newly dug pits. Finally, we point out that the Judge characterized any future sampling as "exploratory work" (Tr. 82).

We note that this Board has, in the past, approved actions of Administrative Law Judges in ordering joint sampling, and in reopening a hearing after the case has been submitted. Those cases, however, have involved various considerations which are not presented herein. Thus, in a number of cases, the marked divergence in results between samples obtained by the Government and the contestants compelled the Judge to require joint sampling of the claims. In United States v. Edeline, *supra*, the Judge permitted the hearing to be reopened because of the likelihood that the hearing would educe further evidence proving a preexisting discovery.

In the instant case, however, it seems clear that the Administrative Law Judge's actions were not predicated on a correct theory of law. In his submission to the Board, Judge Morehouse stated:

Regarding my failure to declare the claim invalid for want of discovery, it does appear that based on this record no discovery has been made, at least up to the present time. It is the contestee's contention, supported by the record, that his discovery activity was postponed due to actions of the Forest Service. The record is clear that contestee was induced by the Forest Service to buy another patented mining claim in the national forest with the expectation that if he deeded this other claim to the Forest Service they would in turn give him a patent to the claim being contested.

While actions of the Forest Service may have dissuaded contestant from obtaining the evidence necessary to prove a discovery, *see United States v. Foresyth*, *supra*, the discovery, itself, must have existed prior to any action by the Forest Service. Inasmuch as the making of a discovery is the sine qua non of a valid location, actions of the Forest Service, years subsequent to location, could not have prevented contestee and his predecessors in interest from making a discovery.

Similarly, the Judge's observation that "the land encompassed by the present claim has not been withdrawn from mineral entry and it was felt that to declare the claim invalid for want of discovery under the present circumstances would merely encourage filing, require another contest complaint and another hearing," even if true, is nevertheless an irrelevancy. ^{3/} Any such subsequent claim must itself be supported by a discovery.

While prospectors are protected in their search for valuable mineral deposits, from the law's perspective no prospector has a right to locate a claim prior to making a discovery of the mineral. Upon

^{3/} The discussion, *infra*, will show that while the Judge assumed, based on Forest Service assertions, that there was no withdrawal involved herein, the Forest Service has subsequently informed this Board that the land was withdrawn at the time of the location of the claim.

locating a claim, contestee's predecessors in interest formally represented to the world that a discovery existed such as would give the claimants clear title to the land embraced by the claim. When contestee purchased this claim he assumed the original locators' status as the proponent of the claim's validity. The right of the United States to examine the nature of his claim, at any time, cannot be controverted. See Cameron v. United States, 252 U.S. 450 (1920). While this Department may afford a mineral claimant great leeway in proving a discovery, no claimant has a right to require that the Department permit him or her to make a discovery after the initiation of the contest procedures. This is essentially what was done here. We hold it was clear error for the Judge to agree to the continuance under the factual situation presented by this case.

[2] By supplemental brief received on September 17, 1979, attorney for the Government informed the Board that the land embraced by the Black Cat placer claim had been withdrawn as a power site under Power Site Classification No. 85, effective November 5, 1924. Accordingly, the Government contends that the Black Cat placer mining claim is null and void ab initio.

Contestee's attorney has filed an objection to consideration of this matter by the Board, since he has not had an opportunity to research the records concerning the withdrawal. This Board, however, has obtained a copy of the Historical Index (HI) for T. 38 N., R. 8 W., Mount Diablo meridian. This is a public record of the Department of the Interior, and as such the Board may take official notice of what it contains. See 43 CFR 4.24(b). The HI indicates that, pursuant to Power Site Classification No. 85, the following lands in sec. 32 were withdrawn on November 5, 1924: S 1/2 NE 1/4, NE 1/4 NW 1/4, and N 1/2 NE 1/4 SE 1/4. On February 28, 1956, the lands in the W 1/2 SW 1/4 SW 1/4 NE 1/4 were restored to the public domain subject to section 24 of the Federal Power Act, 41 Stat. 1077, as amended, 16 U.S.C. §§ 791a-823 (1976). None of the land embraced by the Black Cat placer mining claim has been so restored.

As this Board has noted, under the provisions of the Federal Power Act of June 10, 1920, 41 Stat. 1077, as amended, 16 U.S.C. §§ 791a-823 (1976), lands embraced within a power site classification are not open to mineral entry, unless the land has been restored to such entry in accordance with section 24 of the Federal Power Act, or the location of the claim has been made in accordance with the Mining Claims Rights Restoration Act of August 11, 1955, 30 U.S.C. § 621 (1976). See Henry Stagnaro, 31 IBLA 357 (1977).

In the instant case, the Black Cat placer mining claim was located on July 1, 1943, at which time the land was withdrawn from mineral location. The claim was thus a nullity at the time of its inception. Henry Stagnaro, supra. While the Mining Claims Rights

Restoration Act, *supra*, opened certain lands within power site withdrawals to mineral entry, it did not give life to void claims which had been located on withdrawn lands prior to the date of the Act. David Loring Gamble, 26 IBLA 249 (1976); Mickey G. Shaulis, 11 IBLA 116, 118 (1973). Thus, the mining claim herein must be declared null and void ab initio.

[3] We are aware that the contest complaint did not advert to the withdrawn status of the land. While we have noted in the past that it is improper to invalidate a mining claim on a ground not alleged in the complaint, see United States v. McElwaine, 26 IBLA 20 (1976), it must be recognized that where the validity of a claim turns on the legal effect to be given facts of record which show the status of the land when the claim was located, no hearing is required. United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 444 (9th Cir. 1971); David Loring Gamble, *supra*. Moreover, this Board has full authority to consider the entire record when it makes a decision, and it is not constrained by the theories of law upon which the parties have heretofore proceeded. Irving B. Brick, 36 IBLA 235 (1978), *aff'd*, Brick v. Andrus, Civil No. 78-1814 (D.D.C. June 7, 1979) (appeal pending); El Paso Products Co., 10 IBLA 116 (1973). It would serve no useful purpose to remand this case to Judge Morehouse, as he would be required, under the principles of law set out above, to find the claim null and void ab initio, regardless of what the record developed at the hearing relating to discovery might show. Accordingly, it is the Board's decision that the Black Cat placer mining claim must be, and hereby is, declared null and void ab initio.

We would be remiss in our duty, however, if we did not comment upon the fact that it was not until the mineral claimant had gone to the expense and trouble of one hearing, and subsequently caused further funds to be expended in the hopes of making a discovery, that the Government discovered that the land embraced by the mining claim had been withdrawn. The attorney for the Government stated in the letter of September 12, 1979:

A word of explanation is in order as to why this defect was not alleged in the initial complaint. The answer is found in Forest Service policy.

The land where the Black Cat lies is now open to mineral location should the claimant elect to file a new claim. 16 U.S. Code 621. As it is pointless to contest a claim for a mere technical defect which can be instantly corrected the Forest Service does not normally challenge claims except on the merits – for defects which can not be remedied, such as, for example, lack of a discovery.

This justification is totally nonresponsive to the problem.

Once the Forest Service has decided to challenge a claim, it seems elementary that the first matter into which it would inquire is the land status. Failure to allege a basic invalidity, particularly one which is a matter of record, is inexcusable. The contest and hearing procedures of the Department of the Interior are not to be invoked needlessly, with the high economic costs attendant both to mining claimant and the Government, merely because the Forest Service does not choose to allege a defect which is manifest to it. Indeed, the fact that the Forest Service has chosen this late date to raise the issue of withdrawal contradicts the stated rationale. In short, we can find no justification for the actions occurring herein.

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 set aside and the Black Cat placer mining claim is declared null and void ab initio.

James L. Burski
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

Douglas E. Henriques
Administrative Judge

