

UNITED STATES
v.
RALPH PAGE ET AL.

IBLA 78-338

Decided October 31, 1979

Appeal from decision of Administrative Law Judge Michael L. Morehouse declaring invalid the Sunshine and Stud Creek Placer Mining Claims situated in Wallowa County, Oregon. OR 13371.

Affirmed.

1. Mining Claims: Discovery: Generally

A discovery of valuable mineral exists where the claim contains mineralization of sufficient quality and quantity to justify further expenditure of labor and means, with a reasonable prospect of success in developing a valuable mine.

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

When the Government contests a mining claim on a charge of lack of discovery, the Government has the burden of proving a prima facie case; the burden then shifts to the mining claimant to prove by a preponderance of the evidence that discovery exists.

3. Mining Claims: Contests -- Mining Claims: Discovery: Generally -- Withdrawals and Reservations: Effect Of -- Withdrawals and Reservations: Power Sites -- Withdrawals and Reservations: Reclamation Withdrawals

When land is withdrawn from mining location after a mining claim has been located thereon, the claimant must show that discovery of a valuable mineral deposit occurred prior to

the withdrawal in order to establish rights against the Government.

APPEARANCES: Harold Banta, Esq., Banta, Silven, and Young, Baker, Oregon, for appellant; Arno Reifenberg and Jim Kauble, Esqs., Office of the General Counsel, United States Department of Agriculture, Portland, Oregon, for appellee.

OPINION BY ADMINISTRATIVE JUDGE GOSS

Ralph Page, Forest O. Garrigus, Jr., Forest O. Garrigus III, and Leona Aslett appealed from a February 27, 1978, decision of Administrative Law Judge Michael L. Morehouse declaring the Sunshine and Stud Creek Placer Mining Claims invalid for failure to demonstrate the existence of a valuable mineral discovery within the limits of the claims. The claims were located in July 1961, in secs. 27 and 33, T. 3 S., R. 49 E., Willamette meridian, within the Wallowa-Whitman National Forest, Wallowa County, Oregon. At the request of the Forest Service, the Bureau of Land Management (BLM) challenged the validity of the claims.

The case was originally considered by the Board in 1975. The date of location was important because of the withdrawals. In the 1975 decision the Board stated as to land status:

The land is within an area which was withdrawn February 12, 1952, under first form reclamation withdrawal for the Hell's Canyon Reclamation Project. A Federal Power Commission order of withdrawal for proposed project 2243 was imposed on these sections on March 31, 1958. The order of February 12, 1952, withdrawing lands for reclamation purposes, was revoked as to the lands in question by Public Land Order 2734 of July 19, 1962. Public Land Order 2734 specified that the lands withdrawn for power purposes are subject to the Act of August 11, 1955, 69 Stat. 682, 30 U.S.C. § 621 (1970), which provides in part for the filing of a notice of location in the appropriate land office.

Ralph Page, 19 IBLA 255, 256 (1975).

The Board then held that a new location was not essential for these claims if the claimants had complied with 30 U.S.C. § 38 (1976). This remedial statute permits mining claimants to substitute proof of possession, based on adverse possession under state law, plus work for the prescribed statute of limitations period for the traditional proof of location, recording, and transfer in order to establish the right to a patent. Cole v. Ralph, 252 U.S. 286, 305 (1919). The statute can only apply where, as here, the land is or becomes open to entry for

the statute of limitations period. United States v. Consolidated Mines and Smelting Co., Ltd., 455 F.2d 432, 448 (9th Cir. 1971). The statute does not dispense with the need to prove discovery. United States v. Haskins, 505 F.2d 246, 250 (9th Cir. 1974). Therefore, the Board remanded the case for hearing.

On remand, BLM made the following charges:

- a. Minerals have not been found within the limits of either of the above listed mining claims in sufficient quantities to constitute a valid discovery.
- b. The land embraced within both of the above-named claims is nonmineral in character.
- c. The claims are not being used for mining and milling purposes in accordance with Public Law 167 (30 U.S.C. 612).

Contestees denied the charges.

A hearing was held before Judge Morehouse. His decision at page 3 summarized the testimony at the hearing:

Mr. Roger Minnich, 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. See Government's Exhibit 1. He took a sluice sample and a bulk sample from each claim at sites chosen by contestees. The samples taken close to the river's edge were higher in value (Stud Creek, \$2.09 per cubic yard; Sunshine, 52.8 cents per cubic yard) than the samples taken further up on the riverbank (Stud Creek 68.2 cents per cubic yard; Sunshine, 22 cents per cubic yard). In his opinion this indicated that the gold values diminish rapidly away from the river and the source of the gold comes from the annual river flooding and not from the debris of the creek canyons. All of the samples, after deduction for 50 percent boulder content, had an average net value of 13.3 cents per cubic yard figured at gold at \$130.00 per ounce. Because of Department of Environmental Quality Standards, location and physical characteristics of the claims, the only feasible mining would be by hand. Mr. Minnich stated that assuming one man could process 5 cubic yards per day and a Federal minimum wage of \$2.30 per hour, it would take values of

\$3.68 per cubic yard just to pay basic labor costs. Based on the above, it was his opinion that a person of ordinary prudence would not expend his time and money in mining these claims.

Mr. Garrigus, successor in interest to Ralph Page, testified that two samples taken from the Stud Creek Claim assayed at \$2.40 and \$6.77 per yard and one sample from the Sunshine Claim assayed at \$4.01 per yard. He felt these were representative values. He estimated there was a minimum of 833,000 yards of gravel on Stud Creek and a like amount on Sunshine and even with a substantial discount for boulders there would be at least 500,000 yards of gravel on each claim. He stated that he would use a giant to break the gravel down and feed it into the sluices and over an amalgamation plate; there would be no great costs involved in setting up the operation and his estimation of mining costs per yard was something less than 50 cents. He felt that the gold values on Stud Creek were between one and three million dollars and on Sunshine approximately two million dollars. He acknowledged that he is an outfitter and a guide on the Snake River and that work is a lot more fun than handling gravel all day. He stated he and Mr. Page took several different samples on both claims but only had three assayed. He admitted that he had absolutely no mining experience other than the sampling performed on the two claims.

On rebuttal, Mr. Minnich testified that Mr. Garrigus showed him some of the holes from which he took samples and that according to his (Minnich's) calculations the black sand from these samples would run approximately 51 pounds per cubic yard. He stated that in his experience he has never seen black sand run over seven or eight pounds per cubic yard and because of this he felt that the Garrigus samples were not representative of the materials present on the claims.

Judge Morehouse then concluded that both claims were invalid due to lack of discovery of a valuable mineral deposit within the context of the mining laws.

On appeal, contestees objected to Judge Morehouse's decision insofar as it sustained the "absence of valid discovery" charge contained in paragraph 5(a), supra, of the Government's complaint.

Contestees argued that: (1) the Government mineral examiner's sampling methods were improper, (2) the Government improperly refused

to commence a new series of samplings in cooperation with contestees, (3) the results of such a future sampling should be accepted as probative of a past discovery, and (4) testimony regarding activity on the claims in the distant past should suffice to prove a present discovery.

Contestees, in the proceeding below, sought to demonstrate discovery largely through the testimony of contestee Forest Garrigus, Jr. Garrigus has done no commercial mining on the claims, and lacks experience in commercial mining. He uses the claims as a base of operations for his commercial outfitting and guide service. Garrigus testified that his sampling activities on the claims have produced several half-ounce "plugs" of gold which he failed to produce at the hearing, saying, "I thought about bringing it in to show to you today and then I didn't do it. It's down there." (Tr. at 83.) Garrigus also produced the assay report, derived from samples taken on the claim. Contestees argue incorrectly that discovery should be implied from these facts alone.

They claim that

[t]he controlling question is not how much, and what kind of evidence the mining claimant had at that time to justify his belief that the claim contained sufficient values to justify holding and working it, but whether, as a physical fact, the ground actually contained sufficient values to satisfy the prudent man rule.

Contestees' Brief, p. 11. Out of this assumption grows their request for additional sampling on the claim. The contestees noted in their brief that Judge Morehouse suggested a joint sampling during the hearing. A discrepancy exists between the data submitted by the parties as that data relates to assay and total volume of gravels. (Tr. at 108, Contestees' Brief at 7, 13.)

The Government responded that there is no evidence that gold had been discovered prior to the second withdrawal of these claims and that contestees' allegations were contradictory. The Government maintained that contestees in effect contended the entire surface of these placer claims constituted discovery, so that Government sampling anywhere on the claims should suffice to validate them. The Government referred to testimony that Mr. Minnich found decreasing gold values farther from the riverbank and to contestees' exhibit R-2, taken from "poorer ground." The Government emphasized the reliance on the testimony of the experienced Government geologist as opposed to the inexperienced claimants. In addition, claimants had notice of the hearings and ample opportunity to gather and present evidence. Claimants had the burden of proving their discovery at the hearing; further testing would only delay the same conclusion.

[1] The sole issue here is whether or not there has been a discovery of valuable minerals within the limits of these claims at the appropriate time. Discovery, as defined in the context of the mining laws, refers not to the existence of any mineralization, but to mineralization of sufficient quality and quantity to justify "further expenditure of labor and means, with a reasonable prospect of success, in developing a valuable mine * * *." United States v. Coleman, 390 U.S. 599 (1968); quoting Castle v. Womble, 19 L.D. 455, 457 (1894). This definition requires that the material may be mined, removed, and marketed at a profit. Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).

[2] When the Government contests a mining claim charging lack of discovery, the Government must meet the initial burden of proving a prima facie case. United States v. Bechthold, 25 IBLA 77 (1976). Once this prima facie case is established, the burden shifts to the mining claimant to show by a preponderance of the evidence that a discovery has been made within the limits of the claims. Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959); United States v. Ross, 40 IBLA 169 (1969).

Contestees' objections to the Government's sampling techniques do not relieve them of the burden of overcoming the Government's prima facie case. In a mining contest, the Government establishes its prima facie case when its mineral examiner samples and evaluates a claim and offers his expert opinion that no minerals have been discovered on the claim which would justify, to a man of ordinary prudence, the expenditure of further labor and means for the development of a profitable mine on the claims (the prudent man rule). United States v. Coleman, supra; United States v. Maley, 29 IBLA 201 (1977); United States v. Arcand, 23 IBLA 226 (1976). A Government mineral examiner is not required to sample beyond a claimant's workings or to perform discovery work for a claimant. Contestees' assertions regarding the special techniques allegedly needed to recover "Snake River Flour Gold" are not relevant to the sufficiency of the Government's prima facie case, although such techniques can be considered in deciding whether the contestees have successfully proved their own case. United States v. Frisco, 32 IBLA 248 (1977).

[3] When land is withdrawn from mining location after a mining claimant asserts rights in it, the claimant must show that discovery of a valuable mineral deposit occurred prior to the withdrawal in order to establish rights against the Government and retain possession of the claim. United States v. Foresyth, 15 IBLA 43, 48 (1974); United States v. Martin, 9 IBLA 236, 238, n.2 (1973).

The land herein was restored to entry on July 12, 1962, and remained open until withdrawn again on August 10, 1973. Claimant contends that joint sampling would prove a prior discovery. Only if joint sampling proves a prior discovery, rather than a new discovery, would future sampling be relevant. United States v. Chappell, 42 IBLA 74, 81 (1979). United States v. Foresyth, *supra*; United States v. Gunsight Mining Co., 5 IBLA 62 (1972). Converse v. Udall, *supra*, states the rule to be applied in a dispute over the existence of discovery as of a certain date. There, the date of exposure of the sample, rather than the date the sample was taken, determined whether or not the sample was proper evidence.

The purpose of the hearing was determination of such fact issues as whether there was exposed a mineral of sufficient value and quantity to establish a discovery. The contestees had ample opportunity prior to the hearing to uncover and present gold deposits as proof of discovery. United States v. Winters, 2 IBLA 329, 78 I.D. 193 (1971). They submitted analyses of an amalgam of samples from one claim in an effort to average values. As the Administrative Law Judge noted, the analysis indicated substantial values for gold but it did not properly estimate the volume of gravel that must be processed to obtain that quantity of gold.

The Government geologist estimated that far more gravel would have to be processed to garner the amount of black sand used. Even assuming the high gold values appellants claim, isolated showings of such high values determined without proper regard for the quantity of material processed and concentrated will not support a claim of discovery. United States v. Russell, 40 IBLA 309 (1979); United States v. Kingdon, 36 IBLA 11, 28 (1978). We agree the evidence presented did not show sufficient quality and quantity to warrant an additional sampling.

The record below supports Judge Morehouse's conclusion that contestees have not met the burden of going forward with a preponderance of the evidence in order to demonstrate that they have made a valuable mineral discovery on the claims. Therefore, the claims should be declared invalid. United States v. Springer, 491 F.2d 239, 242 (9th Cir. 1974).

Accordingly, 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.

Joseph W. Goss
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Joan B. Thompson
Administrative Judge

