

UNITED STATES
v.
JOHN McDOWELL

IBLA 80-901

Decided March 24, 1981

Appeal from the decision of Administrative Law Judge R. M. Steiner declaring the Charley Day placer mining claim null and void. Contest CA 6095.

Affirmed.

1. Mining Claims: Discovery: Generally -- Mining Claims: Discovery: Marketability

A discovery of a valuable mineral deposit exists under the Federal mining laws where the minerals found are 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. Discovery requires a showing that the mineral can be presently extracted, removed, and marketed at a profit.

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

Where a Government mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery, a prima facie case of invalidity has been established.

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

Where the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to overcome that showing by a preponderance of the evidence. Where the opinion of contestee's expert that discovery of gold was made is not supported by clear evidence that the claim holds sufficient quantities of gold to make mining profitable, the Board will affirm an Administrative Law Judge's finding of invalidity.

APPEARANCES: James A. Miller, Esq., for contestee; Charles F. Lawrence, Esq., Office of the General Counsel, Department of Agriculture, for contestant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

John McDowell has appealed the July 21, 1980, decision of Administrative Law Judge R. M. Steiner declaring the Charley Day placer mining claim null and void for lack of discovery of a valuable mineral deposit within the limits of the claim.

The Charley Day placer claim was located on February 10, 1976, within the Shasta-Trinity National Forest in sec. 7, T. 8 N., R. 8 E., Humboldt meridian, Trinity County, California. The California State Office, Bureau of Land Management (BLM), initiated this proceeding, contest CA 6095, at the request of the Forest Service, U.S. Department of Agriculture. The contest complaint charged in principal part that: "A. There are not presently disclosed within the boundaries of the mining claim minerals of a variety subject to the mining laws, sufficient in quantity, and value to constitute a discovery," and "B. The land embraced within the claim is nonmineral in character." ^{1/} Contestee denied the allegations, and the matter came before Judge Steiner for a hearing on November 6, 1979, in Sacramento, California.

^{1/} The decision below does not reach the allegation raised by part B of the complaint and thus the only issue on appeal is whether the record before us warrants the finding that the Government sustained its allegations that contestee failed to make a valuable mineral discovery on the Charley Day claim.

Judge Steiner concluded that the testimony of the Forest Service's expert witness established a prima facie case that there had been no discovery of a valuable mineral deposit within the limits of the Charley Day claim. He found that the results of the sampling performed by contestee's expert witness were inconsequential, there was no evidence of past production, and the claim had not been adequately prospected. Since there was no single deposit identified on the claim bearing sufficient gold values to warrant development he concluded that contestee had failed to sustain his burden of proving the existence of a discovery on the claim.

On appeal, contestee charges that Judge Steiner's decision was based on a selective reading of the record and a misunderstanding of the evidence presented, is not supported by the evidence, and improperly applies the law to the facts in this case. He urges that the conclusion that further exploration rather than development is warranted is contradicted by the record and that the Judge misconstrued the significance of the flood gold found on the claim and his expert's reconnaissance panning. Contestee argues that lack of evidence of past production does not necessarily establish a lack of production. He further asserts that Judge Steiner should not have relied on the legal proposition that isolated showings of high values, or high values determined without proper regard for the quantity of material processed, will not support a claim of a valuable discovery. Finally, contestee suggests that the Government's mineral examiner did not properly apprise contestee of what he should be shown on the claim for sampling purposes.

At the hearing, the Government's only witness was Forest Service mining engineer, George O. Scarfe, Jr. His testimony revealed that he had previously been employed for 20 years as a mineral examiner for BLM, for which he had examined several hundred gold placer mining claims. He has an undergraduate degree in mining engineering and did post-graduate work in mining geology. Except for those periods of time when he was in the Navy, Scarfe worked for various mining companies in gold mines until joining BLM in 1957. We find that he is fully qualified as an expert for the purposes of this proceeding.

The decision below summarizes Scarfe's testimony as follows:

On July 15, 1978, he examined the Charley Day placer mining claim along with the mining claimant and other USFS personnel. (Tr. 11). From information supplied by the claimant, he was able to locate the claim. The claimant pointed out several areas to sample but never revealed his discovery point. Sample CD-1 was taken from a bank near bedrock a few feet from the location monument. (Tr. 14).

The terrain on the claim is mountainous. The rocks are metamorphosed from the paleozoic to mesozoic era. Up Sherwood Creek there are some old lode mines. The gravel in Sherwood Creek is sparse because of the steepness of the

terrain. There are very little bench gravels. (Tr. 16). Large boulders are in the stream. Running water is present year around.

Sample CD-1 was taken from a bank four feet high. Pan samples were taken at one foot intervals. (Tr. 17). There were stream gravels and boulders present. The 92-pound sample was placed in a sack, taken to Denny, and run through a Denver Gold Saver. Sample CD-2 was taken from the west bank of Battle Creek. It contained gravels from exposed bedrock. Two pans were taken and they were also processed through the Denver Gold Saver. (Tr. 18). Sample CD-3 was taken from the southern part of the claim below the fork of Battle Creek and Sherwood Creek. The sample was taken from the bank. Sample CD-4 was taken from a small gravel bar 20 feet upstream from Sample CD-3. Sample CD-4 was a three-pan sample. These latter samples were also concentrated in the Denver Gold Saver. (Tr. 19).

Mr. Scarfe took the concentrates, recovered the gold, and weighed them. (Tr. 21). He extracted the larger pieces of gold and used mercury to collect the fine gold. Sample CD-1 contained one small gold color and weighed .1 milligram. CD-2 contained 1.8 milligrams of gold. Sample CD-3 had 7.4 milligrams of gold. CD-4 had a total of 15.3 milligrams of gold. (Tr. 22). At a value of \$200 an ounce, Sample CD-1 computed a value of 1.4 cents per cubic yard. At the price of gold on the date of the hearing, \$381.25 per ounce, the value of CD-1 would be 2.7 cents per cubic yard. (Tr. 24). Mr. Scarfe accounted for the boulders in his samples which were 20% of the material. Sample CD-2 had a value of \$1.08 per cubic yard at current gold prices. Sample CD-3 computed to \$2.57 per yard and Sample CD-4, \$4.77 per yard. (Tr. 25). Although there are stream gravels on the claim, it would not be economic to mine them at such low values. (Tr. 26). The deposits found were also too small. Since the area is so remote it would be difficult to bring in mining equipment. The volume of minable gravel is so low it would not justify bringing in the equipment. Only a small scale mining venture is feasible. There are a lot of roots in the banks impeding mining. (Tr. 27). Mining costs exceed \$50 a day while, at the most, three yards of gravel can be processed. Mr. Scarfe did not see any recent mining work on the claim. (Tr. 28).

Based on his examination of the claim, Mr. Scarfe determined that a prudent man would not be justified in developing the Charley Day claim with a reasonable prospect of success. (Tr. 30). There is an insufficient amount of gravel available.

On cross-examination, Mr. Scarfe stated he examined the claim to determine its validity. (Tr. 35). None of the areas sampled revealed any valuable gold deposits. (Tr. 36). When he arrived at the claim he asked Mr. McDowell to point out areas to be sampled (Tr. 37). The bedrock in Sample CD-1 is hard schist. (Tr. 47). Any loose bedrock was also collected and added to his sample. Mr. Scarfe also believes the land is nonmineral in character. (Tr. 54). Although there have been producing gold mines in the vicinity, he restricted his analysis to the subject claim. He believes the claim must be judged on its own merits not on those of surrounding lands. The most practical way of mining the claim material is to set up a sluice box, run water through it, and shovel material into the sluice box by hand. (Tr. 67). Overburden must be removed to reach bedrock. (Tr. 68).

After a careful reading of the record below, we conclude that the above summary is a fair and accurate representation of Scarfe's testimony regarding the Charley Day claim.

The sole witness for contestee was Mr. Paul Travis who examined the contested claim on October 13-14, 1979. Travis has a degree in mining and metallurgy from the University of California and extensive experience in commercial mining development and operations beginning in the 1930's. Currently he provides consulting services in the mining field and has examined over a hundred mining claims. Before undertaking the examination of the claim he reviewed the mineral history of the region where the claim is located.

Travis identified three independent terraces or gravel bars on contestee's claim. Terrace 1 corresponds to the site of the Government's sample CD-1. Terrace 2 relates to the site of sample CD-2. Terrace 3 encompasses the area of samples CD-3 and CD-4. Travis began his examination by doing reconnaissance panning which he uses as an exploratory tool to find indications of the presence of gold (Tr. 114). He took six pans rather rapidly and obtained only nominal values (Tr. 116). On terrace 1 he only found one extremely fine color of gold. On terrace 2 he found one or two colors in each pan. On terrace 3 he had one pan with two colors and a second with one color. During this panning he did not get down to bedrock (Tr. 83-85).

As a result of the reconnaissance panning, Travis decided to sample from terrace 3 (Tr. 83) because bedrock was available and approximately 28 yards of excavation had recently been done there (Tr. 85). Travis' sampling on terrace 3 and evaluation of the claim are described in the decision below as follows:

He then took apart a sluice box Mr. McDowell had been using and cleaned it out. He took a sample 12 inches wide and 12 inches deep and 5 feet high in this gravel bank near Sample

CD-3. (Tr. 112). The material weighed 550 pounds. (Tr. 89). The boulder content was 10% to 20%. (Tr. 87). He reached bedrock. Initially, no colors were detected but as the samples were taken at greater depth a few colors were recovered in the sluice box. (Tr. 89). Mr. Travis believes 90% of the gold is within one foot of bedrock. (Tr. 92).

Four hundred milligrams of gold were recovered from the bank. On the basis of \$385 an ounce for gold, the value of the material sampled was \$28.80 a yard. The gold must be selectively mined. The surface layer of material must be removed and discarded. Since it is not practical to get excavating machinery to the claim, the surface should be blasted with dynamite. Thereafter, pick and shovel must be used to mine the gold-bearing material near bedrock. Approximately, three yards of material can be removed by a single miner each day. (Tr. 96). A recovery of \$50 to \$75 a day can be attained. Another partner is needed. (Tr. 97). It is Mr. Travis' opinion that a paying mine can be developed on this claim, and that the gravel bar should be worked with a dredge. He believes there are 2,200 yards of gravel in the area where he sampled. (Tr. 101). It was his opinion that the land is mineral in character. (Tr. 102).

* * * * *

The only area that Mr. Travis found gold in worthwhile quantities is an area he refers to as terrace 3, his third sample point. (Tr. 124). He did not calculate the fineness of the gold recovered because he believes the value of the gold will be enhanced by its usefulness in jewelry. (Tr. 127). The value placed on the gold recovered was magnified by 20%. It is realistic to assume one miner could process 1-1/2 yards of material per day. (Tr. 138). The cost of employing a single miner would be \$44 per day. He has not considered the environmental cost of operating a mine on the claim. Since the quantity of gravel is relatively small, he believed it unnecessary to take more than one sample. (Tr. 144). One sample is sufficient to recommend starting a small mining operation. He stated, "Well, the best sample that you have is after the thing is mined out." (Tr. 154). His analysis was limited to direct mining costs. He did not calculate the cost of excavating more ditches or moving boulders from the mined area. (Tr. 155).

We would add that Travis found the bedrock on terrace 3 to be sloping down and away from the river, and as a result, suggested that his sample values were low or average for the whole bar (Tr. 105, 154). In addition, he disagreed with Scarfe as to the estimate of volume for this

area. He estimated the volume of material in terrace 3 as 2,200 cubic yards (Tr. 101), whereas Scarfe had concluded that sample CD-3 was on one gravel bar of 50 cubic yards and CD-4 on another of 33 cubic yards (Tr. 26).

[1] As this Board has often ruled, a discovery exists only where minerals have been found in quantities such 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. United States v. R. H. MacLaughlin, 50 IBLA 176 (1980); United States v. Richard H. Kingdon, 36 IBLA 11 (1978). This rule, known as the "prudent man test" was first enunciated in Castle v. Womble, 19 L.D. 455, 457 (1894), approved by the Supreme Court in Chrisman v. Miller, 197 U.S. 313 (1905), and followed consistently thereafter. Accord, United States v. Coleman, 390 U.S. 599 (1968); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963). The prudent man test has been complemented by the "marketability test" requiring that a claimant show that the mineral can be extracted, removed, and marketed at a profit. United States v. Coleman, *supra*; Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969).

[2] The Government, in a mining claim contest, carries the burden of going forward with a prima facie showing that no valuable discovery has been made. Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959). Such a prima facie case is established when a Government mineral examiner samples and evaluates a claim and gives his expert opinion that there are no values on the claim which might constitute a discovery under the prudent man test. United States v. Richard H. Kingdon, *supra*; United States v. Bechthold, 25 IBLA 77 (1976). In the case before us, the opinion of Government mining engineer, George Scarfe, that contestee had failed to make a valuable discovery of gold on the Charley Day placer claim, was sufficient to establish contestant's prima facie case.

[3] When the Government has made a prima facie case of no discovery, the burden of going forward with the evidence shifts to the contestee, who must show by a preponderance of the evidence the existence of a valuable mineral deposit sufficient to support discovery. Foster v. Seaton, *supra*. Thus, contestee held the ultimate burden of proving discovery. United States v. Springer, 491 F.2d 239, 242 (9th Cir. 1974).

In light of the charges made by contestee on appeal, we have thoroughly reviewed the entire record of this case *de novo* and find that Mr. Travis' testimony is insufficient to preponderate over the Government's prima facie case of no discovery established at the hearing by mineral examiner Scarfe.

There was no evidence in the record as to any mining activity on the claim except Travis' reference to observing some apparent recent excavation. The nominal results of the reconnaissance panning indicate at most that further exploration is warranted to evaluate this claim.

Thus, we must focus on the sampling performed by the two examiners. If we take the highest value obtained by Scarfe, \$4.47 of gold per cubic yard of material mined, and consider the amount of material which both witnesses projected could be mined at an absolute maximum by one miner in a day, 3 cubic yards, and compare it to the \$50 cost of direct mining for a day estimated by Scarfe, we find a clear disparity in the costs of mining the Charley Day claim vis-a-vis the estimated returns. The estimated value of Travis' one sample, \$28.80 of gold per cubic yard, is considerably higher than the highest Scarfe estimate and his expense estimate is somewhat lower, \$44 per day. However, we conclude from the record that a direct comparison of the two values cannot be made because Travis' estimate did not include a factor for the fineness of the gold as did the Scarfe value and Travis also considered the asserted extra value to be attributed to jewelry weight gold he had found. We note as well that Travis testified that the more realistic daily production for a single miner is 1-1/2 cubic yards of material (Tr. 137). Our review of the record also suggests that both the \$50 and \$44 cost figure must be considered minimums as they reflect only the estimated flat rate wage of one miner per day. Other expenses have not been factored into either estimate: Employee food (Tr. 28, 138), the cabin (Tr. 150), equipment costs (Tr. 149), necessary activities other than direct mining (Tr. 154-55).

In this case, we have the conflicting opinions of two qualified experts. We are unable to find that the opinion of contestee's expert, that there is gold in such quantity that a discovery of a valuable mineral has been made is so well substantiated that the evidence presented preponderates over the Government's showing of invalidity. The evidence offered does not support a finding that the gold can be extracted, removed, and marketed at a profit.

The estimated values of the gold samples discussed herein were based on the prevailing cost of gold per ounce at the time of the hearing, November 1979. In his statement of reasons, contestee notes that by the time Judge Steiner issued his decision in July 1980 the price of gold had risen dramatically and urges that a realistic assessment of the value of claim must take such rise into consideration. This Board recognizes that the increasing and decreasing market values of minerals affects the worth of any claim and if the rise or fall appeared to reflect a permanent trend would have little hesitation in factoring in the effect of such change. Every case must be examined individually, however. At the present time, the price of gold is higher than it was at the time of the hearing but considerably less than the prices quoted by contestee in his statement of reasons. The Board must choose some point in time at which to evaluate the claim and in this case we believe that time to be the date of the hearing. Otherwise, with a fluctuating market, we would be faced with rehearing the case based on new values at every point in the decisionmaking process. We note as well that the passage of time has affected not only the price of gold but also the various cost estimates. If we chose to recompute one, we

would have to recompute the other. We believe that a realistic assessment of the values and costs can be made based on the data produced at the hearing.

Finally contestee has suggested that Scarfe did not make the nature of his examination of the claim clear and thus contestee did not direct him to the best locations on the claim for sampling. Regardless of what occurred during Scarfe's examination, contestee had the burden of proof in this case and had the opportunity at the hearing to present his best evidence as to a discovery on the Charley Day claim. Since contestee's expert sampled from almost the same location as did Scarfe, we assume that location was the best that contestee had to show and that he was not prejudiced by any lack of understanding during Scarfe's examination.

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 Administrative Law Judge Steiner is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

James L. Burski
Administrative Judge

