

UNITED STATES
v.
WILLIAM J. SMITH, SR., ET AL.

IBLA 79-559

Decided April 6, 1981

Appeal from decision of Administrative Law Judge E. Kendall Clarke, declaring 30 placer mining claims null and void. OR-17318, etc.

Affirmed; decision adopted.

1. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

Where the Board is in agreement with the result reached in an Administrative Law Judge's decision in a mining claim contest and the Administrative Law Judge has correctly summarized the facts and properly evaluated the evidence in light of the applicable law, the Board may adopt the decision.

2. Mining Claims: Discovery: Generally

Government mineral examiners are not required to perform discovery work for mining claimants or to explore beyond a claimant's discovery points. It is incumbent on a mining claimant to keep discovery points available for inspection by a Government mineral examiner.

3. Evidence: Generally--Evidence: Sufficiency

The burden of the proponent is not simply to preponderate in the evidence produced; its burden is to produce a preponderance of credible evidence, and the trier of fact is not required to believe or give

any weight to testimony which is inherently incredible. The trier of fact, having presided at the hearing and observed the witnesses, is in the best position to judge the weight to be accorded testimony.

4. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

Evidence in a mining claim contest showing only that further exploration might be warranted is insufficient to establish the discovery of a valuable mineral deposit.

5. Evidence: Weight--Mining Claims: Discovery: Generally--Rules of Practice: Evidence

Assay reports have limited probative value concerning the existence of a valuable mineral deposit on a mining claim when they are not supported by sufficient evidence to show how and where the samples were taken and how the samples were treated.

APPEARANCES: W. Dean Fitzwater, Esq., Portland, Oregon, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

William J. Smith, Sr., et al., 1/ appeal from the July 20, 1979, decision of Administrative Law Judge E. Kendall Clarke declaring null and void the Blue Mountain Nos. 4-13, Lucky Seven Nos. 1-14, and Big Bear Nos. 1-6 placer mining claims located within the Wallowa-Whitman National Forest in Grant County, Oregon.

On September 14, 1977, the Bureau of Land Management (BLM), on behalf of the United States Forest Service, issued contest complaints charging, inter alia, that the lands embraced by the claims were non-mineral in character and that insufficient quantities of minerals existed within the limits of each claim to constitute a valid discovery.

An evidentiary hearing was held September 18, 1978, in Portland, Oregon. Judge Clarke found from the evidence that the Government established a prima facie case of no discovery, and that the contestees failed to show by a preponderance of the evidence the discovery of a valuable mineral deposit within the limits of any of the contested claims.

1/ William J. Smith, Sr., was locator of all the claims in question with one or more of eight other Smiths as co-locators.

[1] While appellants object to the weight Judge Clarke accorded the Government's testimony and exhibits, relative to the weight assigned their own testimony and exhibits, we find that Judge Clarke properly evaluated the evidence presented at the hearing. We agree with his assessment of the record and adopt his decision as the decision of the Board. A copy of Judge Clarke's decision is attached.

[2] In particular, appellants allege that the Judge erred in the weight he gave to the testimony of the two Government mineral examiners who "made only a cursory attempt to find valuable minerals." Government mineral examiners, however, are not required to perform discovery work for mining claimants. Nor are they required to explore beyond a claimant's discovery points. It is incumbent on a mining claimant to keep discovery points available for inspection by the mineral examiner. United States v. Brunskill, 51 IBLA 199, 202 (1980); United States v. Dietemann, 26 IBLA 356, 363 (1976).

Appellants state that there was a failure to give consideration to the testimony of William J. Smith, Sr., that he was in a "preparatory process of developing refinery procedures, and not in actual production at time of hearing." Such testimony is irrelevant to whether or not there was a discovery of a valuable mineral deposit within the limits of any of the claims in issue. Smith had not developed a method of mining nor did he have sufficient funds to set up a plant.

[3] The Judge did not give any weight to Smith's testimony concerning his "method and procedure to refine valuable minerals" because he found such testimony inherently incredible. We will not disturb such a finding where it is supported by substantial evidence. As we have stated in the past, the trier of fact who presides at a hearing has an opportunity to observe the witnesses, and is in the best position to judge the weight to be accorded testimony. United States v. Melluzzo, 32 IBLA 46, 75 (1977); United States v. Chartrand, 11 IBLA 194, 212, 80 I.D. 408, 417 (1973).

[4] Smith admitted that he was still in the exploratory stages of mining. Clearly, evidence in a mining claim contest showing only that further exploration might be warranted is insufficient to establish the discovery of a valuable mineral deposit. United States v. Ubehebe Lead Mines Co., 49 IBLA 1, 4 (1980); United States v. Ax, 43 IBLA 146 (1979).

Appellants also argue that the Judge failed to give consideration to the historical background of the area in which the claims were located. Even if such background information was relevant to a determination of discovery, the evidence of record is not supportive of appellants' position. While the claims are located in an area where gold has been found (Tr. 21), one of the Government mineral examiners testified:

And the logical thing, or at least to my way of thinking, if it [area of the claims] hadn't been mined in the past, it wasn't economical to mine it, or it would have been

mined, certainly, because they've gone to extreme expense and extreme physical labor to placer other ground in that same country where they didn't have any water.

(Tr. 8).

[5] In addition, appellants emphasized that their assay reports entered in evidence at the hearing establish the existence of valuable mineral deposits on the claims. Assay reports lack probative value in the absence of evidence to show how and where each sample was taken so that a factfinder can determine how accurately the assays indicate what remains in the ground. United States v. Burt, 43 IBLA 363, 367 (1979); United States v. Porter, 37 IBLA 313, 315 (1978); United States v. Nicholson, 31 IBLA 224, 233 (1977). Particularly troubling in this case is the lack of information to indicate whether the samples used were raw or concentrated and to what extent samples were concentrated and treated. Without such information, it is difficult to assess whether mineralization occurs in sufficient quality and quantity to warrant further expenditure of time and money in developing a mining operation. Id. Appellants' assays were properly accorded little weight by Judge Clarke.

Appellants requested an oral argument on appeal. Oral argument would serve no useful purpose. The law is clear. Appellants had an opportunity to develop a factual record before Judge Clarke. They were represented by counsel. They failed to show by a preponderance of the evidence the discovery of a valuable mineral deposit within the limits of any of the claims in issue.

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.

Bruce R. Harris
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Gail M. Frazier
Administrative Judge

July 20, 1979

United States of America, : Contest Nos. OR-17318,
 : 17459, 17460, 17461, 17462,
 Contestant : 17463, 17464, 17465, 17466,
 : 17467, 17468, 17469, 17470,
 v. : 17471, 17472, 17473, 17474,
 : 17475, 17476, 17477, 17478,
 William J. Smith, Sr., : 17479, 17480, 17481, 17482,
 et al. : 17955.
 :
 : Involving: The Blue Mountain
 Contestees : Nos. 4 through 13,
 : Lucky Seven Nos. 1 through
 : 14, Big Bear Nos. 1 through
 : 6, located in various sections,
 : T. 7 S. & 8 S.,
 : R. 35-1/2 E. and 36 E.,
 : WM, Grant County, Oregon
 : (w/in Wallowa-Whitman National
 : Forest)

DECISION

Appearances: Albert Wall, Attorney, Office of the General Counsel,
U.S. Department of Agriculture, Portland, Oregon,
for the Contestant.

Dean Fitzwater, Attorney, Fitzwater and Fitzwater,
Portland, Oregon, for the Contestees.

Before: Administrative Law Judge Clarke.

This is an action initiated by the Oregon State Director, Bureau of Land Management (BLM),
Department of the Interior, on behalf of the United States Forest Service (USFS),

Department of Agriculture, challenging the validity of the above-named placer mining claims pursuant to the Hearings and Appeals Procedures applicable thereto, 43 CFR, Part 4.

The contestant filed 27 Complaints on September 14, 1977, all of which charged separately and collectively as follows:

- a. Minerals have not been found within the limits of each claim in sufficient quantities to constitute a valid discovery.
- b. The lands within the above-named placer claims are nonmineral in character.

Other allegations professed that parts of the lands that some of the claims are situated on have been withdrawn from mineral entry either on August 27, 1973 or August 29, 1974, pursuant to a proposed withdrawal for a recreational area and roadside and streamside management zone, OR-11158. As a consequence thereof, the contestant maintains that a valid discovery must have been established as of those dates as to those claims located on withdrawn land.

The contestee filed an Answer on October 26, 1977, denying the contestant's allegations. Subsequently, a hearing was held on September 18, 1978, in Portland, Oregon.

The claims are located within the Wallowa-Whitman National Forest on and near the North Fork of the John Day River in T. 7 S. & 8 S., R. 35-1/2 E. and 36 E., Willamette Meridian, Grant County, Oregon.

Roger Minnich, a geologist and mining engineer for the USFS who has over 15 years in mining, stated he examined the subject claims initially in July of 1975. He made further inspections in the summers of 1976 and 1977. (Tr. 5). He asserted that Mr. Smith has over 90 claims staked out for several miles along the North Fork of the John Day River. (Tr. 6). The claims are situated in a glacial till, which is a heterogeneous deposit of unsorted boulders. It is comprised of fine sands intermixed with boulders up to 8 feet in diameter. Movement of these large boulders add to the mining costs since large equipment is needed.

Mr. Minnich believes all the subject claims are within a withdrawn area on the John Day River. He further testified that the North Fork Valley is quite large and has a good access road to it. The surrounding country around the North Fork has been heavily placer mined. The French Diggings

Mine is north of the North Fork. Old geology reports indicate that most of the gold was found in the first 6 feet of gravel and the gold value found was low. The gravel deposits were over 60 feet deep with large boulders intermixed. (Tr. 7). The North Fork of the John Day River has never been mined in the past. Mr. Minnich believes it was not economical to mine there. (Tr. 8).

From his examinations of the claims, Mr. Minnich concluded that there was no valuable mineral deposit exposed there. Although Mr. Smith set up a trommel and dug some settling ponds, (See Ex. 1 & 9) he never ran any substantial amount of gravel. He took pan samples of the black sands there but found very little gold. In his opinion, no discovery has been revealed. Mr. Minnich attested:

I've never seen any gold at all in the pans and I've never seen any gold that Mr. Smith has shown me, and I knew of none that he has sold. And as far as the work I have done, I have never seen enough gold that I would even attempt to mine it. (Tr. 15).

An assay report prepared by the Union Assay Office, Inc., of Salt Lake City, Utah, from samples taken from a road cut pointed out by Mr. Smith in July, 1975, from one of the claims disclosed no platinum, a trace of zinc, no silver and .005 oz./ton gold. (Ex. 11, Tr. 18). Mr. Minnich reaffirmed his earlier determination that there are no valuable minerals on the claims. Moreover, he asserts the cost of extraction of any material would be more than what you could receive for it. (Tr. 19).

On cross-examination, Mr. Minnich conceded that the claims are in an area historically known as the best area for placer gold deposits. (Tr. 21). He took several pan samples of placer material and concentrated it down to black sand. However, he did not find any gold whatsoever.

Mr. Milvoy Suchy, a mining engineer for the USFS, examined the claims in 1975 in the company of Mr. Minnich and Mr. Smith. (Tr. 30). Mr. Smith pointed out a road cut on the claims where samples were taken. Further gold panning was done. (Tr. 31). He found that the claims consist of a glacial, morained deposit that lacks any water sorting or stratification of the black sands. He found one tiny gold color during his gold panning. (Tr. 32). An assay report

dated September 14, 1978, from the Union Assay Office, Inc., disclosed a trace of gold, .10 oz./ton silver and no platinum from materials taken from the claims (Tr. 34, Ex. 12). Mr. Suchy took these samples from large barrels that were transported to Portland, Oregon. (Tr. 34). He took samples on September 7, 1978 from 7 barrels which contained what appeared to be clay. (Tr. 34). Mr. Suchy considered the claims not worthy of development. He contended, "it doesn't represent a valuable mineral deposit that, in no way, in my -- based on my experience, could ever be worked." (Tr. 36).

William J. Smith, a contestee, stated he became involved with the claims in 1967. Prior to that, he had been hard rock mining in the Mt. Hood area in the Cascade Mountains in 1959. (Tr. 41). He contends he found considerable amounts of free gold along the John Day River. He also was interested in a silver-gray powder material that recovered when he panned for gold. (Tr. 42).

During the hearing, Mr. Smith produced an 8 ounce plastic squeeze bottle of yellowish fluid. (Ex. L). The words "Emission Control Catalyst" (ECC) was inscribed on the bottle. Mr. Smith alleged the liquid consists of a metal complex of platinum, gold, silver and other rare earths compounded by nature. (Tr. 48). He further contended this liquid mixture, if added to an automobile's gasoline will eliminate all of the carbon monoxide and hydro carbons normally produced in automobile exhaust. (Tr. 49). He states the liquid ECC is a mixture of materials from the claims (Ex. K) and methyl alcohol. (Tr. 50). He has been selling ECC since 1970. (Tr. 51). A total of \$ 3,320.75 of ECC has been sold since then. (Tr. 52).

Mr. Smith argued that he is currently setting up electrolytic equipment that will extract the gold out of the material on the claims. His method will recover gold where fire assays won't. (Tr. 59).

A sample of bank material from the claims (See Ex. J) was pulverized and processed through a magnetic separator and sent to Whirry Laboratory in Los Angeles, California. (Ex. B). The results from an assay report from Whirry Laboratory dated September 21, 1970, found 2.34 oz. of gold per ton of concentrate, 20.08 oz. of platinum per ton, 27.11 oz. of palladium per ton. An assay certificate from the United

States Smelting Refining and Mining Company produced 1097.8 oz. of silver per ton of concentrate. (Tr. 61, Ex. C). Mr. Smith explained why such high silver values were recovered. He explained:

In order to those that are familiar and know about the arts, that if you add silver to the sample, it will act as a collector and you'll recover more silver from the sample than if you just sent the sample and had it -- so, there was 6 -- at the rate of 600 ounces per ton of silver -- it was in a powder, it could have been nitrite or nitrate, I don't know what silver -- anyway, it was added to the sample, and it was sent to the United States Smelting and Refining Company. (Tr. 61).

The procedure of adding silver to the samples assayed was repeated for the samples sent to the Union Assay Office. (Tr. 62, Ex. D). An assay report dated July 11, 1972 from the Engineers Testing Laboratory, Inc., from Arizona disclosed there is 2.92 troy oz. of platinum per ton, 4.79 troy ounces of gold per ton, .47 troy oz. of silver per ton. This assay was made from a reddish brownish concentrate (Ex. K) from the claims. (Tr. 63). An assay report from Penniman & Browne, Inc., Baltimore, Maryland, dated August 20, 1976 was made on bank material similar to that in Ex. J. The report disclosed there is 32.08 troy oz. per ton gold, 11.37 troy oz. platinum per ton and 1.46 troy oz. of palladium per ton. (Ex. 6). An assay report prepared by Robert E. Craig of Sun Valley, California (Ex. F). was made on concentrated materials submitted by Mr. Smith. Mercury was added to the material. This report found 19.313 oz. of gold per ton, 9.07 oz. of silver per ton, 1.983 oz. of platinum per ton and .911 oz. of palladium per ton. (Tr. 64, Ex. F). Mr. Smith used 450 pounds of head ore to produce 418 gams of concentrate which he sent to the Robert E. Craig Assayers. (Tr. 65).

A vial containing over an ounce of free gold recovered from 3 cubic yards of material was submitted into the record. (Tr. 72, Ex. Q). A cubic yard of material would weigh 3500 pounds (Tr. 73). Mr. Smith used a Panomatic recovery machine to recover the gold. Another vial containing 9 grams of gold was recovered from 35 pounds of black sand by amalgamation (Tr. 28-29). Both vials of gold were from material from the Lucky Seven No. 1 claim. (Tr. 77).

On cross-examination, Mr. Smith stated he began mining in 1959. (Tr. 105). He contends he has developed an electrolysis method and a cyanide process to recover gold. (Tr. 108). He has not recovered any worthwhile amounts of gold from fire assays made on his material recovered from the claims. (Tr. 111). He insisted that he has recovered gold only by his own processes. Another process he has employed to recover platinum is called "Aqua-Regia" which uses hydrochloric and nitric acid. (Tr. 109). When asked why his methods recover gold while a fire assay will not, Mr. Smith answered:

The fire assay will burn up -- it cannot melt ions. Ions are not in a metallic state, and the only thing that the fire assay or a fire can do, it can reduce a metallic into a fluid condition; like you burn steel, it goes into a molten state -- everything goes into a molten state. But the ion is not a metallic gold, so it cannot come out by fire, see? (Tr. 110).

Mr. Smith concedes his secret processes are not known to the scientific community. (Tr. 111). He also believes that by adding minerals to a sample, the minerals will act as a collecting agent and recover minerals normally not recoverable by conventional assaying methods. (Tr. 115).

Although Mr. Smith contends he has recovered free gold from the claims, he has not sold any appreciable amounts yet. (Tr. 121). He has not developed a method of mining. He has insufficient funds to set up a plant. (Tr. 122). Likewise, he has not been able to find a processor that will purchase his ore above the cost of transporting it. (Tr. 124). Most of the work he has done on the claims has been to develop a process to extract the gold from the raw material. (Tr. 126).

Applicable Law

In this proceeding, the contestant is required to produce sufficient evidence to establish a prima facie case in support of its contention that a discovery does not exist on the contested claims. Thereafter, the contestee must show by a preponderance of the evidence that the claims are valid, Foster v. Seaton, 271 F.2d 836 (D.C., C.A., 1959).

It has been held in a long list of cases beginning in 1896 that 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 profitable mine" Castle v. Womble, 19 L.D. 455, 457 (1894).

In the Supreme Court case of Chrisman v. Miller, 197 U.S. 313 (1905), the Court approved the earlier definition by the Department that a mineral found on a claim such as gold or silver must exist in quantities sufficient to justify the expenditure of money for the development of the claim and extraction of the mineral.

The Supreme Court has further held that it is the intent of the mining laws to reward the discovery of minerals which are valuable in an economic sense, and that the minerals which would not be extracted by a prudent man because there is no demand for them for a price higher than the extraction and transportation costs are not economically valuable. United States v. Coleman, 390 U.S. 599 (1968).

Where a Government Mineral examiner testified 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. United States v. Joseph Larsen and Ferris Larsen, 36 IBLA 130 (1978); United States v. Florence J. Mattox, 36 IBLA 171 (1978); United States v. Becker, 33 IBLA 301 (1978).

Assay reports have limited probative value as to the existence of a valuable mineral deposit on a mining claim when they are not supported by evidence as to how and where the samples were taken. United States v. Porter, 37 IBLA 313 (1978); United States v. Nicholson, et al., 31 IBLA 224 (1977). High assay reports alone are not evidence of a discovery. Isolated showings of high values or high values determined without proper regard for the quantity of material processed and concentrated will not support a claim of a valuable discovery. Nonrepresentative mineral samples cannot prove the existence of a valuable discovery. E. g., United States v. Kingdon, 36 IBLA 11 (1978).

Determination

Based upon the testimony of the two USFS mining engineers the contestant has established a prima facie case that there are no mineral deposits exposed on any of the mining claims which would justify a person of ordinary prudence in the further expenditure of his labor and means, with a reasonable prospect of successfully developing a valuable mine. Both mining engineers have examined the claims and have found no valuable deposits of minerals. They have taken samples which have revealed negligible amounts of gold, silver or other valuable minerals.

The contestee has not demonstrated by a preponderance of evidence that a discovery of valuable minerals has been made. Although he has submitted several assay reports containing high values for gold, silver and platinum, the manner in which these samples were taken and the assaying processes utilized were not made according to acceptable mining practices. I do not believe that by adding minerals to a sample it will produce accurate assay results of such minerals. Furthermore, he has not sufficiently documented the quantity of material processed and concentrated which were sent for assay. Therefore, his assay reports are not truly representative of the mineral values on the claims. Besides, Mr. Smith admits he is still in the exploration stage of mining and is still attempting to develop a processing method. Likewise, he has not sold any minerals from his claim yet. I need not consider contestee's allegations concerning his "secret" extraction processes that will be utilized to recover minerals heretofore unrecoverable by other mining methods. I will not give any weight to such testimony that is inherently incredible. United States v. Melluzzo, 32 IBLA 40, 75 (1977).

Accordingly, the Big Bears Nos. 1 through 6, Blue Mountain Nos. 4 through 13, Lucky Seven Nos. 1 through 14 placer mining claims are hereby declared null and void.

E. Kendall Clarke
Administrative Law Judge

Appeal Information

An appeal from this decision may be taken to the Board of Land Appeals, Office of the Secretary, in accordance with

the regulations in 43 CFR Part 4 (revised as of October, 1978). Special rules applicable to public land hearings and appeals are contained in Subpart E. If an appeal is taken, the notice of appeal must be filed in this office (not with the Board) in order to facilitate transmittal of the case file to the Board. If the procedures set forth in the regulations are not followed, an appeal is subject to dismissal. The adverse party to be served with a copy of the notice of appeal and other documents is the attorney for the United States Department of Agriculture whose name and address appear below.

Enclosure: Additional Information Pertaining to Appeals Procedures.

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