

UNITED STATES
v.
CECIL BELL ET AL.

IBLA 82-976

Decided November 22, 1982

Appeal from decision of Administrative Law Judge L. K. Luoma declaring placer mining claim mineral in character. CA 4146.

Affirmed.

1. Administrative Procedure: Burden of Proof -- Evidence: Burden of Proof -- Mining Claims: Contests -- Mining Claims: Placer Claims

When the Government contests the mineral character of a 10-acre portion of a placer mining claim, it assumes 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.

2. Evidence: Sufficiency -- Mineral Lands: Determination of Character of -- Mining Claims: Mineral Lands -- Mining Claims: Placer Claims

Land is mineral in character when known conditions engender the belief that the land contains mineral of such quality and quantity as to render its extraction profitable and justify expenditures to that end. A finding that land is mineral in character may be based wholly on inferential evidence.

APPEARANCES: Wilbur W. Jennings, Esq., United States Department of Agriculture, for appellant; J. Ross Carter, Esq., Redding, California, for claimants.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

This appeal is taken by the Forest Service, Department of Agriculture, from a decision by Administrative Law Judge L. K. Luoma, declaring contested portions of claimants' Prince Albert No. 2 and Keystone No. 2 placer mining claims to be mineral in character.

In January 1981, the Bureau of Land Management, on behalf of the Forest Service, issued contest complaints charging that three 10-acre aliquot portions of the lands which claimants sought to patent are nonmineral in character and should be excluded from the remainder of the claims, which have been clear-listed for patent. ^{1/}

A hearing was held on July 28, 1981, in Sacramento, California. On May 27, 1982, Judge Luoma issued his decision, holding that the lands are mineral in character, in which he sets out the pertinent facts and evidence, the applicable law, and his analysis and conclusion.

In its statement of reasons appellant argues that the evidence submitted by the claimants was insufficient to connect the conditions found with the geology of the subject 10-acre parcels, and that Judge Luoma ignored the qualifications of its expert witnesses despite alleged weaknesses in testimony from claimants' expert witness. Appellant contends that, based on those deficiencies and the strengths of its evidence, claimants have failed to prove by a preponderance of the evidence that the three 10-acre tracts in question are mineral in character. The claimants have filed a reply brief in which they seek to rebut appellant's allegations concerning the quality of the evidence and the weight which should be accorded it.

We have reviewed the record and agree with Judge Luoma's decision dated May 27, 1982. We, therefore, adopt and append it as the decision of this Board.

[1, 2] Appellant argues essentially that claimants have failed to establish by a preponderance of the evidence that the lands are mineral in character and can be operated at a profit. The Judge's concise evaluation of the evidence presented on the issues reflects that appellant established a prima facie case that the subject lands are nonmineral in character. The burden then placed upon the claimants was to show by a preponderance of the evidence that the land is mineral in character. United States v. McCall, 7 IBLA 21, 79 I.D. 457 (1972), aff'd, McCall v. Andrus, 628 F.2d 1185 (9th Cir. 1980). Land is mineral in character when known conditions engender

^{1/} Contestant charges separately and collectively that:

"A. The NW 1/4 NW 1/4 NW 1/4 Sec. 35, T. 38 N., R. 9 W., Mount Diablo Meridian is nonmineral in character and therefore, should be excluded from the Prince Albert Placer Mining Claim No. 2; the NE 1/4 NW 1/4 NW 1/4 and the NW 1/4 NE 1/4 NW 1/4 Sec. 35, T. 38 N., R. 9 W., Mount Diablo Meridian is nonmineral in character and therefore, should be excluded from the Keystone Number Two Placer Mine Claim."

the belief that the land contains minerals of such quality and quantity as to render its extraction profitable and to justify expenditure to that end. Diamond Coal & Coke Co. v. United States, 233 U.S. 236, 240 (1914). A finding that land is mineral in character may be based wholly on inferential evidence, including geological conditions, discoveries of minerals in adjacent lands, and other observable external conditions upon which a prudent and experienced person would rely. Southern Pacific Co., 71 I.D. 224, 233 (1964).

Claimant convinced Judge Luoma through testimony and evidence, that the subject lands could be inferred as mineral in character. The decision shows that he weighed the evidence and testimony presented by appellant against claimants' presentation and determined that appellant's prima facie case had been sufficiently rebutted. Appellant has not persuaded this Board that we should conclude otherwise.

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 and adopted.

Edward W. Stuebing
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

May 27, 1982

UNITED STATES OF AMERICA, Contestant Contest Number CA-4146

v.

CECIL BELL; EULA BELL;
JAMES D. BELL; and ANNA MARIE BELL,

Contestees

Involving the North one-half of PRINCE ALBERT PLACER MINING CLAIM NO. 2; and
North one-half of KEYSTONE NUMBER TWO PLACER MINE CLAIM, Placer Mining
Claims

DECISION

Appearances: Wilbur W. Jennings, Regional Attorney, Office of the General Counsel, U.S.
Department of Agriculture, San Francisco, California for the Contestant; and J. Ross Carter,
Esq., Redding, California for the Contestees.

Before: Administrative Law Judge Luoma.

This proceeding arises under the General Mining Laws of 1872, as amended, 30 U.S.C. § 22 et
seq., and is conducted in accordance with departmental regulations contained in 43 CFR, Part 4.

On May 16, 1977, contestees filed an application for patent to four placer mining claims
located in the Shasta National Forest in Trinity County, California, and designated as the Prince
Albert Placer Mining Claim, the Prince Albert Placer Mining Claim No. 2, n1 the Keystone
Number One Placer Mine Claim, and the Keystone Number Two Placer Mine Claim. n1 Based
on its mineral examinations the Forest Service recommended to the Bureau of Land Management
that the claims be clear listed for patent, with the exception that the north half of the Prince
Albert No. 2 (consisting of 10 acres) and the north half of the Keystone No. 2 (consisting of 20
acres) be excluded from the patent on the ground that they are nonmineral in character.
Contestees elected not to delete these three 10-acre portions from the application. As a result the
Bureau of
Land Management, on behalf of the Forest Service issued a Complaint on January 12, 1981,
charging that:

1/ For purposes of brevity these two claims will be referred to hereinafter as the Prince Albert
No. 2 and the Keystone No. 2.

The NW 1/4 NW 1/4 NW 1/4 Sec. 35, T. 38 N., R. 9 W., Mount Diablo Meridian is nonmineral in character and therefore, should be excluded from the Prince Albert Placer Mining Claim No. 2; the NE 1/4 NW 1/4 NW 1/4 and the NW 1/4 NE 1/4 NW 1/4 Sec. 35, T. 38 N., R. 9 W., Mount Diablo Meridian is nonmineral in character and therefore, should be excluded from the Keystone Number Two Placer Mine Claim.

Contestees filed a timely Answer denying the charge. A hearing on the Complaint was held on July 28, 1981, in Sacramento, California.

The contestant has determined that a discovery of a valuable mineral has been perfected on each of the two placer claims. While such discovery is sufficient to validate each claim it does not conclusively establish the mineral character of all the land included in the claim, and the question as to the character of the land in each 10-acre subdivision is open to investigation and determination at any time before patent issues. Even though a discovery is perfected on one 10-acre portion of a placer claim, if any other 10-acre part is determined to be nonmineral in character, such part of the claim must be excluded from the patent. 30 U.S.C. § 36 (1976); United States v. Bunkowski, 79 I.D. 43 (1972). To establish the mineral character of each 10-acre subdivision it must be shown that the known conditions are such as to engender the belief that the lands contain minerals of such quality and quantity as to render its extraction profitable and justify expenditure to the end. United States v. McCall, 79 I.D. 457 (1972); affd., McCall v. Andrus, 628 F.2d 1185 (CA 9, 1980).

While the test for establishing mineral character is virtually the same as the test for discovery, there is a significant difference in the proof required to meet the test. This distinction is discussed in United States v. Meyers, 17 IBLA 313 (October 10, 1974):

Unlike in those cases where discovery is an issue, Henault Mining Co. v. Tysk, 419 F.2d 766 (9th Cir. 1970), in a mineral character determination the quantity and quality of mineral on a claim may be established without the physical exposure of the mineral on the claim. A finding that land is mineral in character may be based wholly on inferential evidence: geological conditions; discoveries of minerals in adjacent land; and other observable external conditions upon which a prudent and experienced person would rely. Southern Pacific Co., 71 I.D. 224, 233 (1964);

United States v. Tobiassen, 10 IBLA 379, 383-84 (1973). The acceptance of these kinds of less reliable evidence to support a determination that land is mineral in character distinguishes this test from the discovery standard approved in United States v. Coleman, 390 U.S. 599 (1968).

Simply put, proof of discovery requires a showing of an exposed mineral deposit while mineral in character may be proved by geological inference. McCall v. Andrus, *supra*.

The Prince Albert No. 2 claim contains 20 acres in a rectangular configuration of two 10-acre squares north and south of each other. The Keystone No. 2 claim contains 40 acres in a square configuration abutting the eastern boundary of the Prince Albert No. 2. Immediately to the east of the Keystone No. 2 lies the Keystone Number One claim, its western boundary being common to the eastern boundary of the Keystone No. 2. To the west of the Prince Albert No. 2 claim is the Prince Albert, again sharing common boundaries. The entire group of claims forms a long rectangle with a uniform north-south depth of two 10-acre squares. Coffee Creek runs east-west through the group with parts of its stream bed and gravels lying in both north and south halves of the Prince Albert claim on the west and the Keystone Number One on the east. However, through the middle portion of the group, the Prince Albert No. 2 and the Keystone No. 2 claims, the stream bed lies in the south half only. It is because the stream bed gravels do not extend into the north halves of these two claims that the charge of nonmineral in character was brought against the three 10-acre portions. Conversely, because the gravels do extend into both north and south halves of the Prince Albert and Keystone Number One claims and the gravels were found to contain valuable gold deposits those two claims were clear listed for patent in their entirety.

Initially both parties regarded the critical issue to be the correct location of the line dividing the north and south halves of the claims. Contestees ran a survey and flagged a line which they considered accurate. Contestant subsequently ran a survey which shows the center line to be some 70 feet north of contestees' line on the west side of the Prince Albert No. 2 and slightly south of contestees on the eastern boundary of the Keystone No. 2. While considerable testimony was presented on the accuracy of the two lines it developed through later testimony that the issue of mineral character of the north halves can be determined without reference to the discrepancy between the two lines. Contestees concede in their post-hearing brief that there are not any naturally exposed gravels or river washed gravels on the north side of the two claims. Accordingly it is not necessary to make a finding on the precise location of the center line of the claims. This permits the undisputed finding that the stream bed gravels of Coffee Creek do not extend into the north halves of the two claims.

Contestant presented the testimony of two mineral examiners who made a visual inspection of the land adjacent to and immediately to the north of the center line of the two claims. They each gave the opinion that the lands north of the center line are nonmineral in character. Their opinions are based upon the observation that the lands (1) contain none of the Coffee Creek stream bed gravels (Tr. 14, 24, 25, 27, 36, 48-51, 74, 95, 102-104, and Exs. C and E), and (2) are composed of basic igneous intrusive material, mostly rock in place with a lot of float material or talus but no placer-type material (Tr. 24-25, 40, 102-103).

This evidence is sufficient to support a prima facie case of nonmineral in character and places the burden upon contestees to show by a preponderance of the evidence that the lands are mineral in character. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); Humboldt Placer Mining Co. v. Secretary of the Interior, 549 F.2d 622 (9th Cir.) cert. denied, 434 U.S. 836 (1977).

Contestees concede that there are no naturally exposed washed gravels of Coffee Creek on the north half of the claims. It is their contention that such gravels, as are found on the south halves, are no basis for geologically inferring that the north halves are mineral in character. Rather, it is their contention that ancient rivers left pleistocene tertiary channels, exposed by vertical erosion through action of Coffee Creek and by pits on the south halves of the claims, extend into the north halves of the claims. While the tertiary channels are not visibly exposed on the north halves, contestees contend that it is proper to geologically infer their existence from exposures on the south halves. It is these tertiary channels, according to contestees, which form the basis for finding the north halves of the claims to be mineral in character.

Contestees' position was advanced chiefly through the testimony of a consulting geologist with impressive credentials. 2/

2/ Mr. Mark Latker is a licensed geologist in the State of California, with a Bachelor's degree in 1951 and a Master's degree in 1953, both in geology from Stanford University. Following school he was an oil exploration geologist for nine years, a hydrology geologist for the next seven years, and from 1969 a mining geology consultant involving both lode and placer deposits, for such companies as Homestake, Placer AMX, Atkinson Company and the mineral or oil divisions of several of the largest oil companies. It should be noted that Mr. Latker's background is detailed here for the purpose of showing his qualifications for expressing opinions on inferred geology. It is not for the purpose of attributing to him superior qualifications over contestant's witnesses, namely Mr. Emmett Ball, Jr., who is a well qualified mining engineer and Mr. Rich Harty, who is a well qualified geologist.

Mr. Latker examined the area of the claims and described the general geology as follows:

(T)he area of Coffee Creek and Trinity Alps in general many hundreds of thousands of years ago was plained [sic] relatively flatly. And at that time, there was quite an extensive river system running more or less, at right angles to today's river system. And the remnants of this can be seen on the top of the ridges * * * right out of Coffee Creek.

As an example, on the Prince Albert claim, a remnant of one of these ancient drainages is "exposed right at the very top of the hill, or maybe I shouldn't say right at the very top, but quite a way up that hill."

He went on to say that subsequent to the ancient times:

(D)uring the Ice Ages when the climate was much wetter than it is today, there was much of what we see - the topography of what we see today - was actually created at time, particularly at the end of the Ice Age when a lot of water, melt water, and just a lot of rainfall - it created most of the present-day drainage canyons that you see.

And as the flow of water tapered off, those streams that were carrying relatively coarse gravel - you see those monstrous boulders and so forth in Coffee Creek - most of those were carried down at that time. But as it tapered off, then that ancient or ancestral stream - ancestral to the present-day stream - deposited gravels and sands and silts and some clays wherever it could.

I mean deposited it in those areas that weren't near vertical. In other words, the creek, itself, cut a very steep canyon. But in some places it had cut, swung in and created little embayments, shall we say.

And, wherever it had a chance to deposit, it did deposit. And so all these little embayments have a certain amount of gravel or sand, sedimentary rock. And then at the -- in recent times, there's been a little uplift of that Trinity Alps area. And the recent stream then has eroded through those older placed deposits. And the older deposits, what we call terraces, and that's what we see, they're only remnants of them exposed on the Bell property.

Basically, that's where the mining is going on today, or has been going on. The gravel in the present-day Coffee Creek is very thin. And that really doesn't comprise much of a gold reserve. Most of the reserves we know it is in these more ancient or older - they're not terribly old, maybe 12,000 years old. But that's where the mine is. That's where your volume of gravel is (Tr. 155-157).

These older deposits, sometimes called the ancient gravels or terraces, were sampled by contestees for their gold values. Excavations identified as Pits 4 and 5 were made in the south half of the Keystone No. 2 claim. Both are north and above the level of Coffee Creek in a gently rolling area covered with eight feet of soil and a heavy growth of timber (Exs. 1, A- 1; Tr. 159). Pit No. 4 was to a depth of 28 feet, still without reaching bedrock. This exposed 20 feet of the ancient gravels underlying eight feet of overburden. This material was sampled and assayed and found to contain gold values of \$7.00 per cubic yard based upon a gold value of \$250 per ounce (Ex. G). At the date of the hearing the price of gold was quoted as being \$408.75 per ounce which would place the value of the gold in Pit No. 4 at \$11.42 per cubic yard and at Pit No. 5 at approximately \$9.80 per cubic yard. At this writing the price of gold is quoted by Hardy and Harman as being \$330.25 per ounce. According to Mr. Latker it is proper to geologically infer an extension of these gold bearing ancient gravels north "on the order of hundreds of feet", well into the north portions of the Keystone No. 2 claim (Tr. 169, 180). He said he found no geologic change or scarp which would cut off such extension (Tr. 169, 180).

There is also an excavation, described as a trench cut by a bulldozer and identified as Pit No. 8, near the western boundary of the Prince Albert No. 2 claim (Ex. 1). The trench is cut at or near the center line of the claim and from the evidence presented it is impossible to conclude as to whether it is actually located partially in both halves or wholly in the south half. The critical question, however, is whether the material from the trench which was sampled and assayed can be geologically inferred to extend any distance into the north half.

Mr. Ball for contestant sampled the trench and obtained an assay showing a gold value of slightly over \$4.00 per cubic yard based on a gold value of \$408.75 per ounce. He described the sampled material as highly weathered, lots of clay, soft, landslide type material. It was not a part of the Coffee Creek gravels (Tr. 26, 35, 40).

He estimated that there were perhaps 5,000 yards of this slump or landslide material north of the center line of the claim. Mr. Latker testified that if the slump material were purely slump of local derivation he would have expected to see nothing but the ultrabasic rock which outcrops farther north on the crest of the claim. Rather, he described the slump as being a heterogeneous mixture with some foreign type rocks, a lot of sand and silt, and a crude bedding, which could have come down in mass but nonetheless is water laid material. He said there was lots of room there for a piece of ancient drainage to go through (Tr. 174-177). In response to a request for his opinion on whether the northern half of the Prince Albert No. 2 is mineral or nonmineral in character Mr. Latker said that a finding of \$4.00 gold in the trench rules out the land being nonmineral and that it might well be commercial (Tr. 177-178).

Since the south halves of the two claims had been clear listed for patent, no evidence was specifically focused on the gold values found therein nor on the mining costs involved. In his brief counsel for contestees represents that the monetary value of the samples taken north of Coffee Creek is almost double the value of the pit samples taken south of Coffee Creek. From examining Exhibits 1 and 4 it does appear that the samples from the trench (Pit No. 8) and Pits 4 and 5, north of the river, do compare very favorably value-wise with those taken south of Coffee Creek. It also appears that Mr. Ball, in making his validity determinations, did rely chiefly on the value of the gravels he found to exist south of Coffee Creek (Tr. 48).

From all the evidence presented I must conclude that the deposits of ancient gravels containing gold values have been shown by geological inference to extend into the north halves of both the Prince Albert No. 2 and Keystone No. 2 claims in such quantities and values as to meet the test of their being mineral in character.

Order

The Complaint is dismissed.

L. K. Luoma
Administrative Law Judge

