

UNITED STATES
v.
JACK R. AND RUTH V. NIECE

IBLA 82-1094

Decided November 22, 1983

Appeal from decision of Administrative Law Judge Robert W. Mesch declaring the Shorty Nos. 1 through 3 and 5 through 15 lode mining claims null and void. Contest No. Idaho 17561.

Affirmed.

1. Administrative Procedure: Administrative Review--Mining Claims: Contests

Where the facts and the law are properly set forth and applied in an Administrative Law Judge's decision holding a placer mining claim null and void for lack of discovery of a valuable mineral deposit, and appellant has made no showing that the decision is in error, the decision may be adopted by the Board of Land Appeals and affirmed.

2. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally--Mining Claims: Withdrawn Land

When land is withdrawn from location under the mining law subsequent to the location of a mining claim, the claim must be supported by discovery at the date of withdrawal.

APPEARANCES: Stephen W. Boller, Esq., of Haley, Idaho, for appellants; Erol R. Benson, Esq., Office of General Counsel, U.S. Department of Agriculture, Ogden, Utah, for the Government.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Jack R. and Ruth V. Niece have appealed from a June 16, 1982, decision of Administrative Law Judge Robert W. Mesch declaring the Shorty Nos. 1 through 3 and 5 through 15 lode mining claims null and void for lack of discovery of valuable minerals on the claims. The claims are located in secs. 16, 17, 20, and 21, T. 11 N., R. 12 E., Boise meridian, within the

Sawtooth National Recreation Area, Challis National Forest, Ouster County, Idaho. 1/

The Idaho State Office, Bureau of Land Management (BLM), initiated contest Idaho 17561 June 23, 1981, on behalf of the Forest Service, U.S. Department of Agriculture, charging, among other things, that each of the Shorty mining claims is invalid because it was not timely perfected prior to the inclusion of these lands in the Sawtooth National Recreation Area (NRA) established by the Act of August 22, 1972, 16 U.S.C. § 466aa (1976), and that each claim is not supported by the discovery of a valuable mineral deposit.

After the contestees filed a timely answer and denied the charges in the complaint, a hearing was held before Judge Mesch on March 16, 1982, at Twin Falls, Idaho. The Judge concluded from the evidence at the hearing that the testimony of the contestant's expert witness constituted a prima facie case in support of the allegation that each of the contested mining claims is invalid because it was not timely perfected and is not presently supported by a discovery of a valuable mineral deposit. He found that the contestees did not meet their burden of showing by a preponderance of the evidence that valuable minerals have been found within the claims, *i.e.*, in this case that the graphite or the gold and silver found within any one of these claims had a present value for mining purposes, and that a person of ordinary prudence would, at the time of the withdrawal and at the time of the hearing, have been justified in the expenditure of time and money in developing the property and extracting the graphite or the gold and silver. Therefore, he declared these 14 lode mining claims to be invalid.

[1] We have thoroughly reviewed the record of this case and the arguments advanced by appellants. The Judge's decision sets out a full summary of the testimony, the relevant evidence, and applicable law. 2/ We agree with

1/ The record shows that appellants filed a notice of appeal with Judge Mesch on July 23, 1982. While this notice of appeal was received 2 days late, it appears from the record that it was transmitted prior to the due date and, therefore, may be accepted under the grace provision. See 43 CFR 4.401(a). This filing was followed by a timely filing of statement of reasons Aug. 23, 1982. However, appellants initially neglected to serve a copy of the statement of reasons on the adverse party, the General Counsel, U.S. Department of Agriculture. The General Counsel filed a motion for dismissal with the Board Nov. 22, 1982, for failure to serve a copy of the statement of reasons citing the regulations 43 CFR 4.402 and 4.413. Subsequently, appellants responded to that motion admitting that counsel for appellants had erred in neglecting service and that a copy of the statement of reasons had been mailed to the General Counsel Dec. 3, 1982. Since a copy of the statement of reasons has been transmitted to the General Counsel and there has been no apparent prejudice in this matter, the motion for dismissal is hereby denied and we proceed to adjudicate this case on the merits.

2/ In one instance, however, the decision below did not correctly state the applicable law. Judge Mesch stated: "If a prima facie case is presented, the mining claimant then has the burden of showing by a preponderance of the evidence that the claim is valid" (Decision at 2). This is not true. If the Government presents evidence to establish that inefficient mineralization is

the Judge's findings and conclusions and adopt his decision as the decision of the Board. A copy of the Judge's decision is attached hereto.

Appellants contend that the Judge has erred in declaring the Shorty claims invalid because the preponderance of the evidence substantiated a valid mineral discovery and conversely the Government's case is "shallow prima facie." They further allege that their evidence "shows the presence on the claims of a valuable and critical mineral graphite, as well as marketable quantities of gold and silver."

These contentions on appeal raise primarily the same issues and allude to several excerpts of the testimony previously considered by Judge Mesch. We find the Judge fully considered these matters, responded specifically to these points in the decision, and properly concluded there was no discovery of valuable minerals on the claims. Appellants have not demonstrated any specific error in the Judge's conclusions.

Appellants have also contended on appeal that "[t]he suppressing effect of the Forest Service regulations (36 CFR 292.17 et. seq.) render nugatory a mining claim in the Sawtooth National Recreation Area because of the impossibility of using adequate exploration techniques to determine the full subsurface extent of valuable surface minerals." We must here point out that appellants' allegations that they were unable to take any equipment onto the claims for the last 10 years and, therefore, had no commercial production (Tr. 10-12) does not explain or justify their inability to show that a discovery existed prior to the establishment of the Sawtooth NRA.

The making of a discovery is a prerequisite to the location of a valid claim. 30 U.S.C. § 23 (1976). While we recognize that it is a common practice to locate a claim during what is more properly considered the prospecting rather than the development stage, such a location, at best, only affords a pedis possessio protection. Where the Government subsequently withdraws the land from mineral entry and location, permission to prospect is thereby revoked and only claims then supported by a discovery are protected from the withdrawal. See R. Gail Tibbetts, 43 IBLA 210, 218-19, 86 I.D. 538, 542-43 (1979). Since appellants must show that a discovery pre-existed the withdrawal, postwithdrawal restrictions are simply not germane. 3/

fn. 2 (continued)

present, a prima facie case of no discovery of a valuable mineral deposit has been presented. A claimant then has the burden of overcoming this showing by a preponderance of the evidence. While this may require, in any given case, that the claimant establish the existence of a discovery, it does not require him to prove the validity of the claim, of which discovery is but one element. See United States v. Hooker, 48 IBLA 22 (1980); United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975). Insofar as the instant case is concerned, however, Judge Mesch's decision clearly establishes the failure of appellants to preponderate on any relevant issue.

3/ There is, of course, one notable situation in which postwithdrawal restrictions may become relevant. Thus, where a claimant is effectively prevented from proving that a discovery pre-existed the withdrawal because of the severity of restrictions placed upon the claim, the Board may require an easing of the restrictions in order to permit a claimant a fair opportunity

[2] It is, of course, axiomatic that when land is closed to location under the mining laws subsequent to the location of a mining claim, as in the present case, the claim must be supported by discovery at the time of the withdrawal. Cameron v. United States, 252 U.S. 450 (1920); Clear Gravel Enterprises v. Keil, 505 F.2d 180 (9th Cir. 1974); United States v. Netherlin, 38 IBLA 86 (1977). Thus, the inability of appellants to perform development work on the claims after August 22, 1972, has little impact on the validity of their claims or the outcome of their appeal as discovery of a valuable mineral must be shown to have existed as of August 22, 1972. This Board has emphasized in similar situations that if the claimants needed time after the date of withdrawal to make a discovery, their claim is, of necessity, invalid. United States v. Montapert, 63 IBLA 35 (1982).

Contestees also object to the failure of Judge Mesch to "rule upon each proposed finding and conclusion submitted by the parties" as required by 43 CFR 4.452-8(b). However, both this Board and the courts have long held that where an Administrative Law Judge rules, in a single sentence, on the proposed findings and conclusions submitted by a contestee and the ruling on each finding and conclusion is clear, it is not necessary for the Judge to make a separate ruling on each finding and conclusion. See National Labor Relations Board v. Sharples Chemicals, Inc., 209 F.2d 645, 652 (5th Cir. 1954); United States v. Zweifel, 11 IBLA 53, 99-100, 88 I.D. 323, 344 (1973), aff'd sub nom. Roberts v. Morton, 549 F.2d 158 (10th Cir. 1977); United States v. Driear, 70 I.D. 10, 11 (1963).

In the instant case, Judge Mesch stated: "Except to the extent that they have been expressly or impliedly affirmed in this decision, the contestees' proposed findings and conclusions are rejected because they are not correct or are not relevant." The applicable regulations require no more.

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.

James L. Burski
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Gail M. Frazier
Administrative Judge

fn. 3 (continued)
to make this case. See United States v. Foresyth, 15 IBLA 43 (1974). This type of problem is not presented in the instant case.

June 16, 1982

UNITED STATES OF AMERICA,	:	IDAHO 17561
	:	
Contestant	:	Involving the Shorty Nos.
	:	1, 2, 3, 5, 6, 7, 8, 9,
v.	:	10, 11, 12, 13, 14 and 15
	:	lode mining claims situate
JACK R. NIECE and RUTH V. NIECE,	:	in Secs. 16, 17, 20 and 21,
	:	T. 11 N., R. 12 E., Boise
Contestees	:	Meridian, Custer County,
	:	Idaho.

DECISION

Appearances: Erol R. Benson, Office of the General Counsel, Department of Agriculture, Ogden, Utah, for contestant;

Stephen W. Boller, Hailey, Idaho, for contestees.

Before: Administrative Law Judge Mesch.

This is a proceeding involving the validity of 14 lode mining claims located under the Mining Law of 1872, as amended, 30 U.S.C. § 22, et seq. The proceeding was initiated by the Idaho State Office, Bureau of Land Management, at the request and on behalf of the Forest Service.

Pursuant to 43 CFR 4.451, the Bureau of Land Management issued a complaint on June 23 1981, charging, among other things, that each of the subject mining claims is invalid because it was not timely perfected and it is not presently supported by the discovery of a valuable mineral deposit. The contestees filed a timely answer and denied the charges in the complaint. A hearing was held on March 16, 1982, at Twin Falls, Idaho.

The mining claims are within the Sawtooth National Recreation Area which was established by an Act of August 22, 1972, 16 U.S.C. § 460aa, et seq. Section 10 of the Act withdrew, subject to valid existing rights, all Federal lands in the area from all forms of

location, entry, and patent under the mining laws. Section 12 of the Act extinguished the right to proceed to patent with respect to pre-existing claims. The Act did not, however, interfere with the right to work and use valid existing claims. See Freese v. United States, 639 F.2d 754 (Ct. Cl. 1981). The contested claims were located prior to the 1972 withdrawal.

The Department of the Interior and the Courts have consistently held that (1) a mining claim does not create any rights against the United States and cannot be recognized as valid unless a valuable mineral deposit has been discovered within the limits of the claim; (2) a valuable mineral deposit is an occurrence of mineralization of such quality and quantity as to warrant a person of ordinary prudence in the expenditure of time and money in the development of a mine and the extraction of the mineral, i.e., the mineral deposit that has been found must have a present value for mining purposes; and (3) mineralization that only warrants further prospecting or exploration in an effort to ascertain whether sufficient mineralization might be found to justify mining or development does not constitute a valuable mineral deposit, i.e., a valuable mineral deposit has not been found simply because the facts might warrant a continued search for such a deposit. Chrisman v. Miller, 197 U.S. 313 (1905); United States v. Coleman, 390 U.S. 599 (1968); Hallenbeck v. Kleppe, 590 F.2d 852 (10th Cir. 1979); Barton v. Morton, 498 F.2d 288 (9th Cir. 1974); United States v. Porter, 37 IBLA 313 (1978); United States v. Marion, 37 IBLA 68 (1978).

In addition, when the land covered by a mining claim is withdrawn from location and entry under the mining laws subsequent to the location of the claim (as was done in this case in 1972), the claim cannot be recognized as valid unless (1) it was perfected by the discovery of a valuable mineral deposit at the time of the withdrawal, and (2) it is presently, i.e., at the time of the hearing, supported by the discovery of a valuable mineral deposit. Cameron v. United States, 252 U.S. 450 (1919); Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963); United States v. Clemans, 45 IBLA 64 (1980); United States v. McDowell, 53 IBLA 270 (1981).

When the Government contests the validity of a mining claim it bears only the burden of going forward with sufficient evidence to establish a prima facie case. A prima facie case is made when a qualified mineral examiner testifies that he has examined the claim and found no mineralization sufficient to warrant exploitation. If a prima facie case is presented, the mining claimant then has the burden of showing by a preponderance of the evidence that the claim is valid, i.e., that he has actually found a mineral deposit of sufficient quantity and quality to justify the development of a mine. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Springer, 491 F.2d 239 (9th Cir. 1974); Hallenbeck v.

Kleppe, supra; United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975).

The sole function of a Government mineral examiner in examining a mining claim is to verify whether the mining claimant has, in fact, found a valuable mineral deposit. He has no obligation to explore or sample beyond those areas which have been exposed by the claimant or to perform discovery work for the claimant. The purpose of such an examination is to determine whether the claimant has found mineralization, and, if so, whether it constitutes a valuable mineral deposit. The examination is not intended to determine whether other unexposed mineralization might be found somewhere within the limits of the claim that might constitute a valuable mineral deposit. Hallenbeck v. Kleppe, supra; United States v. Porter, supra.

The contestant presented the testimony of a consulting geologist who had inspected the claims while employed as a mineral examiner by the Forest Service. He testified that he took samples from eight of the claims at places indicated by the mining claimants. He did not take any samples from six of the claims, i.e., the Shorty Nos. 2, 8, 10, 12, 14 and 15, because he found nothing exposed on the claims that was worthy of sampling. All of the samples were assayed for gold and silver and three of the samples were analyzed for graphite. These are the minerals for which the mining claimants believe the claims are valuable. The testing of the samples showed insignificant mineral values. This witness expressed the opinion that the mineralization he found within the claims was not of sufficient value to warrant a prudent person, either at the time of the withdrawal in 1972 or at the time of the hearing, in the expenditure of his labor and means with a reasonable prospect of success in developing a paying mine.

The testimony of the contestant's expert witness constituted a prima facie case in support of the allegation that each of the contested mining claims is invalid because it was not timely perfected and it is not presently supported by the discovery of a valuable mineral deposit.

The contestees presented the testimony of a mining engineer who has been familiar with the area of the claims since 1934. He testified that he participated in a study of graphite in the area in 1971. As a result of that study, it was determined by the participants that no attempt should be made to develop a graphite mining operation because such an operation could not, at that time, have successfully competed with graphite being imported from foreign sources. Because of the conclusions reached concerning the profitability of a graphite operation, an option agreement to purchase the contested claims was not exercised. The witness did not provide any information concerning the economics or the profitability of a graphite mining operation as of the present time.

With respect to gold and silver, the contestees' witness testified that in the 1930's there was a small operation mining and milling gold and silver from a vein in a tunnel on the Shorty No. 1 claim; the operation closed down prior to 1939 and he believes it was because of the onset of World War II; he saw some of the early assays of the ore from the mining operation and, as he recalls, it was exceedingly good ore and could have been profitably mined at the time of the withdrawal and at the time of the hearing; and the mining claimants have been attempting to open up or gain access to the old tunnel from which the ore was extracted prior to 1939.

The contestees' evidence does not show that a valuable mineral deposit had been found within the limits of any one of the contested claims either at the time of the withdrawal in 1972 or at the time of the hearing. The contestees did not present any evidence that indicates in any way that the graphite or the gold and silver within any one of the claims had a present value for mining purposes and that a person of ordinary prudence would, at the time of the withdrawal and at the time of the hearing, have been justified in the expenditure of time and money in developing the property and extracting the graphite or the gold and silver.

With respect to graphite, the contestees' evidence, at best, simply shows that graphite can be found in the area of the claims, and if it exists in sufficient quantity within any one claim, and if it is of the quality shown by preliminary sampling in the area in 1971, then someone might have felt justified, at the two crucial periods of time, in holding the claim with a hope that it might, at some unknown time in the future, be valuable for mining purposes. This is not sufficient to meet the requirements of the mining laws. A valuable mineral deposit is a deposit that has a present value for mining purposes.

With respect to gold and silver, the contestees' evidence, at best, simply shows that there was a vein in a tunnel on one of the 14 claims that according to present recollection produced exceedingly good ore prior to 1939, and if access can be gained to the old tunnel, and if the vein is still in existence in the tunnel, and if the vein, in fact, contains gold and silver mineralization of sufficient value and in sufficient quantity, then a person of ordinary prudence would be justified in developing the claim and extracting the mineralization. This is not sufficient to meet the requirements of the mining laws as to the one claim containing the old tunnel, i.e., the Shorty No. 1, and certainly not sufficient as to the remaining 13 claims. Until the "ifs" are satisfactorily answered, no one could conclude that a valuable mineral deposit does, in fact, exist and has, in fact, been found within the Shorty No. 1 claim.

It must be concluded that the contestees did not satisfy their burden of showing that any one of the contested claims is valid in that it was timely perfected and it is presently supported by the discovery of a valuable mineral deposit.

Except to the extent that they have been expressly or impliedly affirmed in this decision, the contestees' proposed findings and conclusions are rejected because they are not correct or are not relevant. See United States v. Zweifel, 80 I.D. 323 (1973).

For the reasons stated, the 14 lode mining claims that are the subject of this proceeding are found to be invalid.

Robert W. Mesch
Administrative Law Judge

APPEAL INFORMATION

The contestees, as the parties adversely affected by this decision, have the right of appeal to the Interior Board of Land Appeals. The appeal must be in strict compliance with the regulations in 43 CFR Part 4. (See enclosed information pertaining to appeals procedures.)

If an appeal is taken, the adverse party must be served by service upon its attorney at the address listed below.

In addition, the Field Solicitor must be served at the following address:

Field Solicitor
U. S. Department of the Interior
550 West Fort St., Box 020
Boise, ID 83724

Enclosure: Information Pertaining to Appeals Procedures

