

ERNEST HIGBEE ET AL.
(ON RECONSIDERATION)

IBLA 81-485

Decided March 27, 1984

Petition for reconsideration of Ernest Higbee, 60 IBLA 267 (1981); review of recommended findings of Administrative Law Judge John R. Rampton, Jr., that the Gravel Pit No. 5 placer mining claim was not worked so as to meet the requirements of 30 U.S.C. § 38 (1976).

Decision reaffirmed.

1. Mining Claims: Possessory Right

Under the provisions of 30 U.S.C. § 38 (1976), the holding and working of a claim for the period of time equal to the State's statute of limitations is the legal equivalent of proofs of acts of location, recording, and transfer. Where, following a hearing, the record does not support a finding that the claimants had held and worked the claim for the 2 years required under Nevada law between 1948 and 1953 when the land was open to the operation of the mining laws, the application for patent is properly rejected and the mining claim declared invalid.

APPEARANCES: John L. Thorndal, Esq., and Paul F. Eisinger, Esq., Las Vegas, Nevada, for petitioners; Burton J. Stanley, Esq., Office of the Regional Solicitor, Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

By decision styled Ernest Higbee, 60 IBLA 267 (1981), this Board affirmed the decision of the Nevada State Office, Bureau of Land Management (BLM), dated March 2, 1981, declaring the Gravel Pit No. 5 placer mining claim null and void ab initio and rejecting the related mineral patent application. ^{1/} The Board first held that BLM had properly declared the claim null and void ab initio because on the date of location of the claim, February 13, 1929, the

^{1/} The mining claim encompasses two parcels of land in Clark County, Nevada. The W 1/2 SE 1/4 NW 1/4 sec. 21, T. 21 S., R. 60 E., Mount Diablo meridian, is included in mineral patent application N 20320. A supplemental mineral patent application covers E 1/2 NE 1/4 SE 1/4 NW 1/4 sec. 21, of the same township.

land embraced by the claim was subject to oil and gas permit CC 015633 and, therefore, was not open to location.

The Board also found that the requirements of 30 U.S.C. § 38 (1976), had not been met. That statute provides that where claims have been held and worked for the period of time prescribed by the applicable statute of limitations of the State where the claims are situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent for the claims. The pertinent Nevada statute, Nev. Rev. Stat. § 11.060 (1979), establishes 2 years for the occupation and adverse possession of a mining claim. The Board stated its position that the period of adverse possession must occur at a time when the land is open to mining location and found that there was no evidence in the record to show that the claimants had held and worked the Gravel Pit No. 5 claim during the only period exceeding 2 years when the land was open to the operation of the mining laws, February 10, 1948, to October 22, 1953. 2/

On July 13, 1982, the heirs of Ernest Higbee petitioned for reconsideration of the Board's decision, asserting that they had discovered new evidence, not known at the time of the earlier Departmental proceedings, showing that the claim locator, I. W. Higbee, had actively worked the claim from February 1949 to January 1952. 3/ They submitted the affidavit of Elmer J. Bingham of Alamo, Nevada, which stated:

2/ In Ernest Higbee, supra at 273-74, the Board described the history of the status of the land at issue as follows:

"The serial register page for CC 015633 discloses that the application for an oil permit under the Act of February 25, 1920, was filed March 18, 1927, by Sara E. Schofield * * *. The permit was issued June 15, 1928, for SW 1/4 sec. 16, S 1/2 sec. 17, NW 1/4 sec. 21, SW 1/4 sec. 22, T. 21 S., R. 60 E., and lands in T. 22 S., R. 61 E., for a total of 2,400 acres. In December 1939, the permittee filed an application to exchange the permit for a lease, which was issued January 1, 1940. The lessee filed a relinquishment of the lease November 29, 1941, * * * and the lease [was] cancelled December 24, 1941, with posting of the cancellation occurring February 23, 1942. At that time, the land embraced in the Gravel Pit No. 5 claim thus came open to mining location.

"The historical index indicates that sec. 21, T. 21 S., R. 60 E., was later included in oil and gas lease CC 021568. The serial register shows that Myron Andrews filed application CC 021568 for this oil and gas lease on August 6, 1943, thereby removing the land from operation of the mining laws. A lease was issued July 1, 1944, and remained in effect until cancelled February 10, 1948, with the status records being noted March 19, 1948. At that time, the land again was open to mining location.

"Thereafter, on October 2, 1953, all of sec. 21, T. 21 S., R. 60 E., was classified for disposal under the Small Tract Act, by Small Tract Classification Order No. 95. This action segregated the land from all appropriation, including under the mining laws, except as provided in the notice of classification. This classification is still in effect for the N 1/2 sec. 21."

3/ Appellants Lila Crane, Zelda Allen, and P. Land Co., listed in our previous decision, 60 IBLA at 268, n.1, have no interest in this proceeding (Recommended Findings at 3).

I was in the trucking business in Southern Nevada from 1948 thru 1963, primarily hauling sand and gravel and subletting my trucks to contractors.

In February, 1949, I entered into a verbal contract with I. W. Higbee of Alamo, Nevada, to remove approximately 20,000 cubic yards of gravel from gravel claims he owned. They were located on West Flamingo Road. The gravel pit I hauled out of was more particularly described by Mr. Higbee as claim #5. The terms of the contract was that I would pay .05 [cents sign] a cubic yard and this was paid on December 31, and June 30 of each year. I hauled 16,500 cubic yards from Claim #5 from February 1949 until January 12, 1952. I paid Mr. Higbee \$825.00 for said gravel.

On January, 1952 I moved my trucks to the Nevada Test Site under lease to Joe Wells Construction and turned the contracts and gravel pit over to Mel Perkins with Mr. Higbee's approval.

On the basis of this evidence, on August 27, 1982, the Board granted the petition for reconsideration and ordered a hearing. The hearing was held on February 17, 1983, before Administrative Law Judge John R. Rampton, Jr., in Las Vegas, Nevada. He issued recommended findings on November 18, 1983, concluding that:

The contestees' new evidence, standing alone, would be sufficient to establish that the claim was worked during the critical period. However, the new evidence submitted by the Government, the aerial photos, conclusively show that witnesses did not remove the material from within the confines of the claim boundaries. That area remained undisturbed by man until some time after 1956. More probably, gravel was taken from a nearby active large wash or flood plain area. Eight contiguous 160-acre placer claims, including the claim in issue, were located by legal subdivision in the wash area in 1929 by I. W. Higbee, and no corner posts were placed. It is a reasonable assumption that in 1948-1953 even Mr. Higbee would have been hard-pressed to go on the land and point out with any preciseness the boundaries of any particular claim. Even though he did tell Mr. Bingham and Mr. Hitchcock that they were to remove gravel from the No. 5 claim, and did point out where he perceived the claim to be, no gravel was removed from within the claim boundaries prior to the date of the 1956 photo.

In summary, I find that contestees' evidence, standing alone, is believable but that the evidence in the photos is incontrovertible. My recommended finding is that the Gravel Pit No. 5 placer mining claim was not actively worked, and no gravel was removed during the period February 10, 1948 through October 2, 1953.

Recommended Findings at 6-7.

Before this Board, petitioners argue that their eyewitness testimony should be afforded greater weight than "mere speculation and opinion based

on a distorted photograph taken from an unknown high altitude." They assert that flooding would have eliminated any signs of surface disturbance from the claims by the time the 1956 photograph was taken because in the late 1940's and early 1950's, haulers merely skimmed the surface with a blade in order to obtain the needed gravel creating only a few inches drop in elevation. They question that the 1956 photograph even shows the correct area.

In response the Government contends that the great majority of petitioners' probative evidence was hearsay as contained in Elmer Bingham's affidavit since Bingham was unable to presently defend the facts set forth in the affidavit. The Government points out that no objection was made to the admission of the photograph at the time of its submission into evidence (Tr. 95-96).

We have thoroughly reviewed the transcript of the hearing and Judge Rampton's recommended findings. Although we agree with the result reached by the Judge, we find that petitioners' evidence does not clearly establish that gravel was removed from the Gravel Pit No. 5 claim between 1948 and 1953, and that the Government's photographic evidence simply confirms that fact.

Petitioners' first witness at the hearing was Elmer Bingham, who was then 72 years old. He initially verified his signature on the affidavit, as well as the accuracy of the statements contained therein (Tr. 17). However, on the day of the hearing he had no independent recollection of the specific facts presented in the affidavit, only a general recollection of his activities during the relevant time period. See Tr. 22-23, 30, 33.

To support Elmer Bingham's testimony, petitioners also called his nephew Clark Bingham, whom he had raised and who, as a certified public accountant, has handled his uncle's financial affairs for years. Clark Bingham prepared the affidavit from information given to him by his uncle and from the tax records of his uncle's gravel business. See Tr. 36-39. He testified that Elmer Bingham had suffered two serious accidents and there are times when his memory may be good or poor, but that on particular days his uncle can remember details with amazing accuracy (Tr. 40-41). He stated, "I remember specifically when this affidavit was drawn up we spent probably an hour or two going over his records and his history, and he had a remarkable memory on that particular day" (Tr. 41). He added that his uncle remembered the oral contract with Ike Higbee for 20,000 cubic yards of "dirt," and that he did not haul the full amount (Tr. 50). The \$825 figure paid to Higbee was arrived at by multiplying the estimated 16,500 cubic yards of "dirt" at the customary "per yard" rate of \$0.05 per yard (Tr. 46).

There is no question that Elmer Bingham hauled gravel purchased from Higbee during the critical time. The issue, however, is where the gravel came from. Bingham's affidavit states that the gravel pit he "hailed out of was more particularly described by Mr. Higbee as claim #5." Clark Bingham testified that his uncle told him that Higbee had shown him claim No. 5 and that that was here he was to get his gravel (Tr. 50). However, we find that the best evidence of where Bingham actually removed gravel is his own testimony at the hearing. On cross-examination, he testified:

Can you testify that this 16,500 yards was taken from claim number 5?

A Not exactly.

Q Well, how do you know where claim number 5 is?

A Well, it is out in this direction, out here towards Flamingo Road and beyond Spring Mountain Road. That is all I know.

Q If I showed you a map, an aerial photograph, which was taken in 1956 by the Corps of Engineers, [Exhibit A] do you think you would recognize the area that you mined?

* * * * *

A This is what is called Las Vegas out here.

Q You are referring to the pit which is immediately to the west of the area that has been marked on the overlay, is that right?

A Yes.

Q And what is that called again? This pit?

A Well, I do not see the roads here, but there was a pit here that Wells Cargo had and some that Higbee owned there and some different ones going around here, in all the mountainous vicinity.

Q Is this Flamingo wash -- this wash that is running crosswise across the bottom of Exhibit A?

A Looks like it is.

Q Can you orient yourself as to where you hauled gravel from Mr. Higbee in 1949 through 1952 from this?

A This looks like a big photograph. Must have taken in a lot of territory there. I could not swear as to right exactly where I hauled. It was out in this vicinity.

Q Well, can you be more specific? This map is a pretty big map. Can you be more specific on this map where you hauled for Mr. Higbee?

A I generally hauled out of the wash for good, clean gravel.

Q Okay. That would have been the wash which is at the bottom of Exhibit A? Is that the wash we are talking about?

A All I know is I hauled good clean gravel out of all over this country out here. This wash.

Q Well, now, when you say "this wash", you see, the court reporter is going to have to take this down and somebody else is going to have to read this later. And talking about "this wash" is not going to have any real meaning to somebody just reading a cold transcript.

A I see.

Q So are we talking about the wash that is at the bottom of Exhibit A?

A Yes.

Q And primarily to the right-hand side as you look at Exhibit A? This wash up here?

A Yes.

MR. THORNDAL: Your Honor, I would request that Mr. Stanley, number one, reorient Mr. Bingham as to the directions on this photograph. And I would also like to have him identify -- if that is the case, if it is true that that is Flamingo wash --

THE WITNESS: I can just see a wash there, but I do not know if this is Flamingo wash or whether it is another wash or not.

MR. STANLEY: I think your point is well taken, counsel.

BY MR. STANLEY:

Q Did you haul the gravel that you hauled from I. W. Higbee out of Flamingo wash?

A I think that is where I hauled it from.

Q Whether or not this is Flamingo wash, it is your impression that you hauled the gravel that you are talking about out of Flamingo wash?

A Yes.

(Tr. 28-31). Thus, Elmer Bingham's testimony is that he removed gravel from the wash. The aerial photograph (Exh. A) shows, and Judge Rampton so found, that Gravel Pit No. 5 is not within an active wash area (Recommended Findings at 6).

Pete Hitchcock, a 66-year-old trucker who has resided in Clark County, Nevada, since 1942, also appeared as a witness for the petitioners. He began trucking in 1946 and retired in 1963 (Tr. 55-56). He testified that he paid

Higbee once a month for gravel removed at the customary rate of \$0.05 per yard (Tr. 68-69) and that he removed approximately \$100 per year from 1946 through 1949 or 1950 (Tr. 88-89). At the time he did not know from what claim the gravel was being removed; he recalls removing material from a certain "old pit" (Tr. 80-84). Based on the location of claim No. 5 having been identified for him just prior to the hearing, he believes he hauled gravel from the claim (Tr. 84). He also testified, however, that:

Q Have you ever heard of gravel pit number 5?

A No, not at that time. During the time we are talking about.

Q How did you identify the claim of Mr. Higbee's? How did you know you were taking from his?

A Well, the other independents that were hauling out of there, I would get that information from them. "Where are we at?" You know. "Who do we owe here? Who do we have to pay?"

Q Weren't there any signs, any markings, of any kind?

A I did not see anything. I just got right in with the rest of the chickens.

(Tr. 70). Although Hitchcock now believes he worked on claim No. 5, it appears that he hauled from the same area as other truckers. If that area was the wash area that Bingham hauled from, then it was not the Gravel Pit No. 5 claim. Hitchcock's testimony does not support a conclusion that the claim at issue was held and worked for the required 2 years.

Judge Rampton summarized the Government's case as follows:

Brent Bestrom, a government mining engineer, searched the county records and found that during the years 1947 through 1953 no statements of assessment work had been filed for record for the Gravel Pit No. 5 claim. [Tr. 98.] But the lack of filing, alone, will not sustain a challenge by the Government to invalidate a mining claim. If, in fact, material had been removed and sold from the claim in the amount as testified to by Mr. Bingham and Mr. Hitchcock, the requirement of 30 U.S.C. § 28 that a mining claimant perform at least one hundred dollars of assessment work each year for the benefit of the claim has been met.

* * * * *

Using the legal description taken from the notice of location, Mr. Bestrom superimposed by overlay the exact claim boundaries. His positioning of the claim was not challenged and is accepted as being correct. [Tr. 93, 95.]

Several aerial photos (Exh. B through G) taken at later dates were also introduced to show the progression of excavations made on the claim up to April 1982.

Mr. Webb, a government mining engineer, testified that the 1956 aerial photo shows the land within the claim boundary to be in its pristine state, unmarred by man-made excavations. [Tr. 100.] In his opinion, the removal of 16,500 cubic yards of gravel would leave a pit at least one foot deep over 10 acres, or a pit 10 feet deep over one acre, and excavations of this magnitude would be clearly visible in the aerial photo. [Tr. 109.]

* * * * *

Mr. Webb did admit that heavy rainfall can, indeed, mask the removal of one foot of gravel, but only in active large washes in flood plains where new material is deposited by flooding. However, the aerial photo shows that the Gravel Pit No. 5 is not within an active major wash area where the early truckers commonly removed gravel. Rather, the aerial photos show the claim to be on higher ground with only shallow, small washes, none of which could mask the removal of any amount of gravel, much less 16,500 plus cubic yards. [Tr. 114-15.] A comparison between the 1956 photo and a photo taken in 1974 (Exh. B) reveals no significant change in the natural drainage or wash features on the claim. The 1974 photo clearly shows bulldozer pits and even very shallow scrapings made by man sometime between 1956 and 1974.

Recommended Findings at 5-6.

The Government witnesses had visited the Gravel Pit No. 5 claim the day before the hearing. A comparison of the 1956, 1974, and 1982 aerial photographs and the overlays of the claim prepared by Bestrom shows clearly that each depicts the same area. We note that the same two jeep trails going through the claim appear clearly in both the 1956 and 1974 photographs. We find petitioners' challenge to the 1956 photograph to be without merit.

Furthermore, we agree that the 1956 photograph shows the area of the claims to have been untouched by man but for the two jeep trails. We are unpersuaded that flooding would have wiped out all traces of any diggings in the area in view of Webb's testimony. Hitchcock testified that he removed gravel from the "old pit" and that in 1949 the pits from which the gravel was removed "were only about two and a-half, three foot deep. As far as our machinery could dig at that stage" (Tr. 89). If the areas from which gravel was taken were 2-1/2 to 3 feet deep, then the Government's 1956 photograph is even stronger evidence that such removal was not from the claim at issue.

Performance of required assessment work is a necessary prerequisite to a finding that petitioners' predecessor had "worked" the claim within the meaning of 30 U.S.C. § 38 (1976). See United States v. Haskins, 59 IBLA 1, 52-53, 88 I.D. 925, 951-52 (1981). While it is true that the failure to record proof of assessment work does not conclusively establish that the assessment work was not performed, we have noted that the failure to record properly gives rise to a presumption that the work was not performed. See United States v. Haskins, supra at 102, 88 I.D. at 976. Thus, it was petitioners' burden to establish that the required work had been accomplished. Since they have been unable to show that Bingham removed material from the

Gravel Pit No. 5, they have necessarily failed to carry their burden of showing that the assessment work was in fact accomplished. Since petitioners have been unable to show that the claim was "worked" it is clear that their 30 U.S.C. § 38 (1976) claim must fail. ^{4/}

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision Ernest Higbee, 60 IBLA 267 (1981), is reaffirmed.

Wm. Philip Horton
Chief Administrative Judge

We concur:

James L. Burski
Administrative Judge

Bruce R. Harris
Administrative Judge

^{4/} In light of our disposition, we do not reach the question as to whether the claim was "held" within the meaning of 30 U.S.C. § 38 (1976). It is, however, open to question whether the sporadic use of Gravel Pit No. 5, even were we to assume that Bingham had removed 16,500 tons therefrom, would constitute "holding" under applicable court decisions. See generally United States v. Haskins, supra at 54-55, 88 I.D. at 952, and cases cited.

