

UNITED STATES
v.
ROBERT L. HAMERSLEY ET AL.

IBLA 84-65

Decided January 28, 1985

Appeal of a decision by Administrative Law Judge John R. Rampton, Jr., dismissing mining claim contest I 18617.

Affirmed.

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

A prima facie case against the validity of a mining claim is established when Government mineral examiners testify that they have examined the claim at issue and found no evidence of mineralization sufficient to support a discovery.

2. Mining Claims: Contests -- Mining Claims: Determination of Validity
-- Mining Claims: Discovery: Generally

The burden upon a contestee in a mining claim contest is to overcome a prima facie case of invalidity by a preponderance of the evidence. The presumptions raised by a prima facie showing of nonmineralization are successfully rebutted where the claimant presents evidence which preponderates on the issue of whether the identified mineral can be mined, removed, and disposed of at a profit.

APPEARANCES: Erol R. Benson, Esq., Office of the General Counsel, Department of Agriculture, Ogden, Utah, for appellant/contestant;
Claude Marcus, Esq., Boise, Idaho, for contestees.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The United States Forest Service (FS), Department of Agriculture, appeals from a decision dated September 1, 1983, by Administrative Law Judge John R. Rampton, Jr., dismissing a contest complaint filed on its behalf, I 18617, alleging the invalidity of the Jumbo placer mining claim located in secs. 26 and 27, T. 6 N., R. 5 E., Boise Meridian, Idaho. The decision was issued after a hearing.

The Jumbo placer mining claim was located on July 25, 1932, in the Boise National Forest on Federal land administered by FS. Robert L. and Ruth Marie Hamersley acquired the unpatented claim by quitclaim deed on December 20, 1959. In 1964, Roger J. Eno, Sr., and his wife, Iola Marie Eno, contracted to purchase the claim, but no deed of conveyance had been executed at the time of contest. Part of the land enclosed by the boundaries of the Jumbo claim was withdrawn from mineral entry on December 19, 1951, and reserved for use by FS as an administrative site by Public Land Order No. (PLO) 773 (Exh. 3).

At the request of FS, the Bureau of Land Management (BLM), issued a contest complaint alleging that the Jumbo claim is invalid because:

a. There are not presently disclosed nor were there disclosed on December 19, 1951, within the boundaries of the placer mining claim, materials of a variety subject to the mining laws, sufficient in quality, quantity, and value to constitute a discovery; and

b. The land embraced within the placer claim is nonmineral in character.

A hearing in the contest was conducted by Judge Rampton on October 7, 1982. A resource forester, a mining engineer, and a geologist, all permanently employed by FS, presented testimony at the hearing for FS. Contestee Roger J. Eno, Sr., and William Palmer, a mining engineer, appeared at the hearing as proponents of the disputed claim's validity.

Donald Fuller, resource forester for FS, testified concerning activities conducted on the claims and the extent of the withdrawal by PLO 773 (Tr. 11-12). Ray Wallace, a FS mining engineer, gave his opinion that the gravel materials on the claim had been either worked or disturbed (Tr. 24-25). He also testified that samples of lake bed deposits taken by him for spectographic analysis indicated an absence of gold on the claim (Tr. 25-26, 33). Robert Sykes testified concerning a map he prepared (Exh. 5) using the claim's monument corners and the official survey plat (Tr. 41-44). Sykes, a FS geologist, also related that he prepared eight samples for assaying (Tr. 45, 48, 50-53). The first four samples were taken from areas which he was directed to by Eno's son (Tr. 45-46). The second set of four samples were obtained in the presence of Roger Eno, Sr. (Tr. 51). The values for these samples were very low according to Sykes, both at gold prices prevailing in 1951 (date of withdrawal) and 1982 (date of hearing) (Tr. 57-60). After estimating projected mining costs at \$ 3.37 per cubic yard of material (Tr. 66), he offered his opinion that "this claim contains placer material that would not allow for a profitable mining operation" (Tr. 63).

William Palmer, a mining engineer, appearing as an expert witness for the mining claimant, testified concerning his personal examinations of the claim, during which he took 12 samples. His first four samples were weighed for the free-standing gold he separated from the sample material (Tr. 117-18). The remaining eight samples were amalgamated and assayed (Tr. 118). He categorized his samples according to the type of material from which each was obtained: Tailings or reworked gravels, virgin or unworked gravel, and lakebed sedimentary clay (Tr. 123). His tests for the samples from virgin gravel and tailings showed significant gold values while the samples from lakebed

clay showed very little value (Tr. 123). Because the clay material appeared barren or sterile, Palmer examined the extent of the virgin and reworked gravels. He estimated that approximately 35,000 cubic yards of tailings and over 13,000 yards of virgin gravel can be worked to recover \$ 5.34 in gold values per cubic yard on the average (Tr. 124). In his opinion, a small operation could process 100 cubic yards daily at total expenses of less than \$ 100 per day (Tr. 127, 132).

After briefs were submitted by both parties to the contest, Judge Rampton issued his decision on September 1, 1983. He held that FS "unquestionably established a prima facie case" that no discovery had been made. He concluded, however, that the contestees' expert witness showed that there is "presently exposed on the Jumbo placer mining claim a valuable mineral deposit." After accepting the FS map of the location of the claim and the portion withdrawn by PLO 773, he determined that the places sampled in 1982 were available for sampling in 1951 and, therefore, the discovery as now found was in existence prior to withdrawal. Based on his conclusions that the allegations of the complaint were not sustained, Judge Rampton dismissed the complaint.

In its statement of reasons for this appeal, FS concedes that Judge Rampton accurately analyzed the applicable law, but it argues that he misinterpreted the significant facts. Appellant alleges that Palmer's testimony was insufficient to overcome the prima facie case of invalidity because his samples were "hot spot" or "grab" samples rather than systematic sampling.

[1] For a mining claim to be considered valid there must be a discovery of a valuable mineral deposit within the limits of the claim. 30 U.S.C. § 22 (1982). Where land is withdrawn from mineral entry, the claim must be supported by discovery at the date of withdrawal and the date of the contest hearing. Cameron v. United States, 252 U.S. 450 (1920); United States v. Niece, 77 IBLA 205 (1977). There has been a discovery where minerals have been found in sufficient quantity and quality 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. Coleman, 390 U.S. 599, 602 (1968); Castle v. Womble, 19 L.D. 455, 457 (1894). When the Government challenges the validity of a mining claim, it has the burden of presenting sufficient evidence to establish a prima facie case that the claim is invalid. United States v. Springer, 491 F.2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 834 (1974); United States v. Pool, 78 IBLA 215 (1984). Testimony from the FS mineral examiners that their samples, taken from spots allegedly selected by claimant and his son, produced no significant evidence of valuable minerals on the claim established a prima facie case. See Cactus Mines Limited, 79 IBLA 20 (1984); United States v. Walper, 77 IBLA 90 (1983).

[2] With the establishment of a prima facie case that no discovery existed, the burden shifted to contestees as claimants to show by a preponderance of evidence that there is a valuable mineral deposit on the claim. United States v. Springer, supra; United States v. Pool, supra. To prevail in the contest, claimants essentially were obligated to produce evidence of a mineral deposit which is "marketable" in that it can be mined, removed, and

disposed of at a profit. See McCall v. Andrus, 628 F.2d 1185 (9th Cir. 1980); United States v. Kaycee Bentonite Corp., 64 IBLA 183, 89 I.D. 262 (1982).

Palmer explained at the hearing that the significant gold deposits are in the gravel materials located on the claim and, thus, countered the FS mineral examiners' assertion that the claim lacked mineralization by explaining that their samples were representative of a lakebed sedimentary strata which is sterile or void of any precious metals. According to his opinion, only the gravel strata layered above the lakebed sedimentary or clay material contains the extractable gold. He, therefore, examined the claim with deference to his theory and the resulting samples supported his conclusion. Based upon his results, Palmer testified as follows:

Q (By Mr. Marcus) Do you think these were representative samples in determining the value of the workable ground on the claim?

A Well, I would like to state that this was a brief, cursory -- if I was going to buy that property, I'd do a few more days' work on it, but it was certainly a representative of what I saw. Right.

Q * * * Taking all the facts and everything into consideration as a professional man in this field, did you form an opinion as to whether this -- from what you're showing from your tests that you took and your assays, whether it would warrant a prudent man in that area of going ahead and spending money and work and development with a reasonable expectation of making money from working it?

A Right, yes. I believe a prudent man would have a reasonable chance of making a profit.

(Tr. 124-25). Generally, evidence that a claim presents an interesting prospect with some potential for the eventual recovery of gold is insufficient to establish that the claim is valid. United States v. Cook, 71 IBLA 268 (1983). However, Judge Rampton found in his decision that Palmer's examination and samples were very comprehensive, that his expertise was unquestioned, and that he had more mining experience than the Government's experts. Judge Rampton concluded that the contestees presented evidence that the discovery was more than speculation of future profitability. See United States v. Montapert, 63 IBLA 35 (1982).

The primary issue raised by FS concerns the method employed by Palmer to obtain his samples. The FS mineral examiners obtained their samples by channel sampling by cutting a vertical trench down the face of the area to be sampled (Tr. 47-52). FS complains that Palmer's samples were not as representative because he merely sampled the surface materials. However, FS misconstrues the focus or objective of Palmer's investigation. Palmer testified that the gold-bearing material was not the clay in the lake sedimentary strata but the gravel capping. A channel cut into the clay material would create a false impression of the mineral deposit which the claimant is trying to prove because the samples would include sterile or nongold bearing materials which

the claimant does not intend to mine. Judge Rampton correctly recognized Palmer's efforts to delineate the discovery:

I find, however, that the testing and sampling done on the claim by Mr. Palmer was more comprehensive and taken from material likely to contain gold values. Several of the samples taken by the government experts were taken from the clay strata below the capping, where no gold would be expected to be found. Mr. Palmer, who is a qualified geologist and experienced in placer mining, limited his sampling to the surface capping.

(Judge Rampton's Decision at 6). Because he obtained adequate amounts of material for each of his 12 samples in strategic locations, Palmer's method is properly characterized as more than "grab" or "hot-spot" sampling. We agree with Judge Rampton that this sampling method was more suitable for the deposit alleged by contestees than that employed by the Government examiners.

In addition to the issue of sampling methods, the proper method for evaluating the samples was argued at the hearing (Tr. 102, 137). Sykes independently panned the samples he obtained to concentrates and sent them to local assay offices for analysis. Each sample was fire assayed to determine the value for recoverable gold (Tr. 52, 55). Testimony established that fire assaying for gold when applied to placer samples often yields misleading results and little credence would be placed on placer valuations based on the results of fire assaying (Tr. 129-30). Although Sykes panned each sample to a concentrate, such practice does not entirely resolve the question. *Id.* The amalgamation method used by Palmer is the recommended procedure for determining recoverable gold in placer samples (Tr. 110-11). See J. Wells, Placer Examination: Principles and Practice, 91-92 (Bureau of Land Management Technical Bulletin No. 4, 1973). We, therefore, acknowledge that in this respect Palmer's assays were more credible by generally accepted standards than those from Sykes' examination. ^{1/}

A claimant's burden in a mineral contest is to produce sufficient evidence to preponderate in his favor on the issues raised by the prima facie case. We conclude, as did Judge Rampton, that Palmer's evidence indicating the existence of a mineral deposit which can be mined, removed, and disposed of at a profit is sufficient to overcome the prima facie showing by FS of nonmineralization. See McCall v. Andrus, *supra*; Kaycee Bentonite Corp., *supra*. The FS appeal is based on an assertion that the examination of the claim by the contestees' mining engineer was insufficient to establish the existence of a valuable deposit. We find the examination by the contestees' expert witness more probative than the evidence proffered by FS on the issue of whether there is mineralization of such quantity and quality as to justify

^{1/} Our decision herein must be distinguished from our recent determination in United States v. Ramsey, 84 IBLA 66 (1984), which also involved questions concerning the efficacy of evaluating placer ground by means of fire assays. Therein, the acceptability of the fire assay results was established by the reinforcing nature of the sampling and assaying techniques of both parties, which resulted in compatible figures. No such compatibility was shown in the instant case.

a person of ordinary prudence in the expenditure of time and money in anticipation of developing a valuable mine.

We note that the presentations pertaining to discovery in 1951 were extremely limited. Judge Rampton determined that there was discovery in 1951 since "the samples taken by Mr. Palmer were from places available and open for sampling prior to 1951." The proper standard, however, is not whether the values could have been discovered but rather whether they had been discovered. But, in the absence of any evidence by FS as to the lack of a discovery in 1951 and of any other evidence which contradicts the existence of a discovery at that time, we will affirm the Administrative Law Judge's decision in this regard.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed is affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge

