

UNITED STATES
v.
KING KOENIG ET AL.

IBLA 86-1174

Decided November 10, 1987

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., declaring certain lode mining claims null and void. Colorado Contest No. 726.

Affirmed as modified.

1. Administrative Procedure: Hearings -- Hearings -- Mining Claims: Contests -- Rules of Practice: Hearings -- Rules of Practice: Government Contests

Where a party fails to appear or participate in a hearing as scheduled, the merits of the case may be reached and decided on the basis of the record completed at the hearing, despite the absence of evidence in support of the party's case.

2. Hearings -- Mining Claims: Contests -- Mining Claims: Hearings -- Rules of Practice: Appeals: Hearings

The Board will not order a further hearing in a mining claim contest where the claimant failed to appear at or participate in the original hearing and, on appeal from a decision declaring his claim null and void for lack of a discovery of a valuable mineral deposit, he has made unsupported allegations but has provided no evidence that a further hearing would produce a different result.

APPEARANCES: King Koenig, pro se, and for Joy Barbara Koenig and Katie Dawn Koenig; Daniel B. Rosenbluth, Esq., Office of General Counsel, U.S. Department of Agriculture, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

King Koenig, Joy Barbara Koenig, and Katie Dawn Koenig have appealed from a decision of Administrative Law Judge John R. Rampton, Jr., dated

April 11, 1986, declaring null and void the Garnet Barite and related lode mining claims located in sec. 20, T. 7 N., R. 73 W., sixth principal meridian, Larimer County, Colorado, within the Roosevelt National Forest.

This case was initiated with the filing of a contest complaint and an amended complaint (Contest No. 726) by the Bureau of Land Management on behalf of the Forest Service, U.S. Department of Agriculture, on December 7, 1984, and August 12, 1985, respectively. The complaints addressed 5 claims: the Garnet Barite; Garnet-Barite-Sulfide lode; Garnet, Barite, Sulfide, Titanium lode; Jaguar El-Tigre No. 1 lode; and Jaguar El-Tigre No. 2 lode mining claims. The complaints charged that no valuable mineral deposit had been discovered within the limits of the claims, the land was nonmineral in character, and the claims were not being held in good faith for mining purposes. The amended complaint also charged that the Garnet Barite claim was null and void for failure to record the claim with the Larimer County recorder "within three months from date of discovery" (Exh. 2 at 3). Finally, the amended complaint charged that the Jaguar El-Tigre Nos. 1 and 2 claims were null and void because they were located at a time when the land was not open to mineral entry or, to the extent they constituted amendments of the Garnet Barite claim, because they included "additional lands." *Id.* The Koenigs filed timely answers to the initial and amended complaints, asserting that the mining claims had originally been located on August 1, 1950, and had been worked continuously since that time. In addition, the Koenigs stated that the claims were "valuable" for gold, silver, and industrial minerals, particularly barite, titanium, and strontium, as supported by "good assay reports" (December 1984 Answer at 3). The Koenigs submitted copies of the referenced assay reports.

On November 20, 1985, Judge Rampton held a hearing in Fort Collins, Colorado, at which the Koenigs, although having been duly notified of the time and place of the hearing, did not appear. 1/ Judge Rampton declared the Koenigs in default, and the Government went forward to present evidence to establish a prima facie case of the invalidity of the mining claims. In his April 1986 decision, Judge Rampton, after reviewing the evidence adduced at the hearing and the applicable law, declared the five mining claims null and void. The Koenigs appeal that decision. 2/

1/ The record indicates that appellants were originally notified of the hearing by order dated Oct. 4, 1985, sent by certified mail and received on Oct. 7, 1985. On Nov. 8, 1985, they received notice of a change in the place of the hearing.

2/ In its answer to appellants' statement of reasons, counsel for the Government moved to dismiss the appeal because appellants failed to comply with 43 CFR 4.413 by serving a copy of their notice of appeal and statement of reasons on the Regional Solicitor having jurisdiction over the State in which the appeal arose. Counsel for the Government does not contend that appellants failed to serve him, and the record indicates he was served. This proceeding, although initiated under the authority of the Secretary of the Interior, was prosecuted by counsel employed by the Department of Agriculture, acting on behalf of the Forest Service, in accordance with a Memorandum of Understanding

This case principally concerns the Garnet Barite lode mining claim and five purported amended locations of that claim. The record indicates that a location certificate for the Garnet Barite claim was initially filed with the Larimer County recorder on August 13, 1970. See Exh. 7. That certificate states that appellant King Koenig had located the claim on August 1, 1970, based on an August 1, 1950, discovery. On August 18, 1970, a location certificate was filed with the Larimer County recorder for the Garnet-Barite-Sulfide claim. See Exh. 9. That certificate states that the claim was an amendment of the Garnet Barite claim, as of August 17, 1970. On January 27, 1978, a location certificate was filed with the Larimer County recorder for the Garnet, Barite, Sulfide, Titanium claim. See Exh. 16. That certificate states that the claim was an amendment of the Garnet Barite claim, as of December 30, 1977. Another location certificate for the Garnet, Barite, Sulfide, Titanium claim was filed with the Larimer County recorder on April 3, 1979, indicating an April 1, 1979, amendment. See Exh. 19. Finally, on June 1 and 14, 1982, location certificates for the Jaguar El-Tigre Nos. 1 and 2 claims (CMC 191157 and CMC 191158) were filed with the Larimer County recorder. See Exhs. 23 and 27. All the appellants are listed on the certificates recorded June 14, 1982, as locators of the claims. The certificates state that they refer to an amended location of the Garnet Barite claim, as of June 1, 1982. As depicted on Exhibits 18, 21, and 31, portions of the April 1, 1979, location of the Garnet, Barite, Sulfide, Titanium lode, and the locations of the Jaguar El-Tigre Nos. 1 and 2 claims encompass private land. See Tr. 26, 37. 3/

The evidence presented by the Government at the hearing was intended to establish a prima facie case of the invalidity of appellants' mining claims based on a lack of discovery. That evidence consisted principally of a "Report of Mineral Examination" (Exh. 32) prepared by Frederic B. Mullin and John S. Dersch, two forest Service geologists, and the testimony of Dersch. The mineral report was based on two examinations of the subject claims on June 8, 1982, and June 14, 1984. At the time of the June 1982 examination, the Forest Service mineral examiners were accompanied by appellant King Koenig. The location of appellants' mining claims was based on monumentation found on the ground, the descriptions in appellants' location certificates, and maps of the claims which were recorded with the location certificates. During the course of the June 1982 examination, the Forest Service mineral examiners took seven samples from old adits and an iron

fn. 2 (continued)

between the agencies. It was proper, therefore, that counsel for the Forest Service be served, rather than counsel for BLM. In addition, even if appellants were required to serve counsel for BLM in this case, counsel for the Forest Service has shown no prejudice by such failure to serve. The motion to dismiss is denied. See United States v. Wirz, 89 IBLA 350, 351 n.1 (1985).

3/ This case does not present any of the issues relating to the validity of lode mining claims located partially on withdrawn or patented land as identified in other Board cases (e.g., James W. Phillips, 92 IBLA 58 (1986); Santa Fe Mining, Inc., 79 IBLA 48 (1984)), because this case involves a contest in which appellants' discovery points on the claims were identified, sampled, and found not to contain the discovery of a valuable mineral deposit.

stained area at points which Koenig selected (Exh. 32 at 4). The sample points encompassed all five claims due to their overlapping nature. See Tr. 50. The samples were then fire assayed for gold and silver and subjected to spectrographic analysis for 31 elements, "because of the claimants' interest in strategic minerals" (Exh. 32 at 4). In the report, the Forest Service mineral examiners calculated the anticipated return, at June 11, 1982, prices for gold and silver, from a selected mining operation (underground 6 by 8-foot adit blasted at 6-foot intervals). Using the then-current cost of such an operation and the best combined value for gold and silver determined by assay, the mineral examiners concluded that the "cost clearly outweighs the value of the rock." Id. at 5. With respect to the spectrographic analysis, the mineral examiners stated that the results were "not indicative of mineral enrichment beyond normal background." Id. The report indicates that the mineral examiners were aware of appellants' assay results but discounted them because appellants' samples were taken "from dumps only and * * * not from vein material in place." Id. at 6. The mineral examiners concluded that appellants did not have a discovery of a valuable mineral deposit on any of their mining claims. Based on the mineral report and Dersch's testimony in support of it, Judge Rampton concluded that the Government had established that no discovery of a valuable mineral deposit existed on any of appellants' claims (Decision at 4).

In their statement of reasons (SOR) for appeal, appellants contend that their mining claims contain "valuable mineral deposits" (SOR at 2). They assert that a "titanium vein" runs the full length of the claims and is as much as 20 feet in width. Id. They also assert that gold and silver values "will increase at depth." Id. at 3. Appellants criticize the Forest Service's mineral examination on the basis that it was done "in haste." They also allege that the Government assay results were "falsified." Id. at 2. Appellant King Koenig also explains that he was unable to attend the November 1985 hearing because he was ill and a blizzard "was going on at that time." Id. at 8. ^{4/}

[1] It is well established that where a party to a mining claim contest fails to appear at or participate in a hearing regarding the validity of that party's mining claim, the merits of the case may be reached and decided on the basis of the record as completed at the hearing, despite the absence of evidence in support of the party's case. United States v. Orme, 57 IBLA 373, 376 (1981), and cases cited therein.

We agree with Judge Rampton that the Government established a prima facie case of the lack of discovery of a valuable mineral deposit on appellants' mining claims based on the mineral report and the testimony of the Forest Service mineral examiner, which case, when un rebutted by appellant, was sufficient to establish their invalidity. See United States v. Franklin, 45 IBLA 54, 58 (1980).

^{4/} We note that appellant King Koenig, who is apparently the appellant most knowledgeable about the mining claims, did not request a postponement of the hearing, in accordance with 43 CFR 4.452-3.

[2] We have said that evidence submitted for the first time on appeal following a hearing and a decision by an Administrative Law Judge may not be relied upon in making a final decision, but may only be considered for the purpose of determining "if there should be a further hearing." United States v. Edeline, 24 IBLA 34, 37 (1976). This is equally true where the claimant failed to appear at or participate in the original hearing. United States v. Franklin, *supra*. At a minimum, there must be evidence offered on appeal "which suggests that another hearing would produce a different result." United States v. Syndbad, 42 IBLA 313, 322 (1979), *aff'd*, No. 80-203 PHX-CLH (D. Ariz.), *aff'd*, No. 82-5324 (9th Cir. Apr. 6, 1983).

In this case, appellants have offered nothing more on appeal than the generalized statements in their SOR and certain attached documents indicating the importance of strategic minerals to the United States. Appellants present no specific evidence to contradict the findings and conclusions of the Forest Service mineral report. Appellants' accusation of falsification of Government assay reports is totally unsupported by the record. The record shows that the Forest Service mineral examiners sampled those discovery points selected by appellant King Koenig, the samples were taken across a minable width, and the samples were properly assayed and analyzed by a company qualified in exploration geochemistry. *See* Tr. 41, 43-45, 59; Exh. 32 at Exh. 4-1. The case record, including the statements made in appellants' answers to the complaints and the assay reports submitted by appellants prior to the hearing provide absolutely no justification for granting a further hearing. *5/ See United States v. Murdock*, 65 IBLA 239, 243 (1982); United States v. Speckert, 55 IBLA 340 (1981). Judge Rampton's decision, to the extent it declared appellants' claims null and void for lack of a discovery of a valuable mineral deposit, is affirmed.

In his April 1986 decision, Judge Rampton also concluded that the Garnet Barite mining claim was void because the location certificate for the claim was recorded with the Larimer County recorder on August 13, 1970, more than 3 months after the "claimed date of discovery," in violation of Colorado law (Decision at 4). The record is unclear, however, regarding the actual claimed date of discovery. As pointed out by counsel for the Forest Service in a prehearing brief, the location certificate for the Garnet, Barite, Sulfide, Tatanium lode claim, recorded in Larimer County on April 3, 1979, indicates that the date of discovery for the Garnet Barite mining claim should have been August 1, 1970, not August 1, 1950 (Prehearing Brief at 1). Thus, the evidence in the record regarding the date of discovery is conflicting. For that reason, we do not find that the record supports

5/ Appellants' assay reports included samples indicating silver values from nil to 4.70 ounces per ton and gold values of a trace to 0.08 ounce per ton. At the June 11, 1982, prices quoted in the mineral report (\$325.25 per ounce for gold and \$5.95 per ounce for silver) (Exh. 32 at 3), the best samples had a value of \$26.02 per ton for gold and \$27.97 per ton for silver. The assay sheets indicate the samples were grab samples taken from surface dump sites (Tr. 55). It is not clear whether those dump sites were even on the claims in question.

Judge Rampton's additional ground for finding the Garnet Barite claim void. We modify his decision accordingly.

Judge Rampton found it necessary to address whether the Jaguar El-Tigre Nos. 1 and 2 mining claims could be considered amended locations or relocations of the original Garnet Barite mining claim. We do not. It is clear, however, that each of those claims included lands embraced by earlier locations, as well as lands not encompassed by the earlier locations. Regardless of whether they are amended locations, relocations, or new locations, they are null and void for lack of discovery of a valuable mineral deposit.

Judge Rampton further ruled in his April 1986 decision, at page 6, that certain claims were "invalid" because appellants had, subsequent to 1979, failed to make annual filings as required by section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1982). ^{6/} That would, indeed, be an independent basis for declaring the claims null and void. See Grace P. Crocker, 73 IBLA 78, 81 (1983). We note that Exhibit 22, which is a September 9, 1985, print-out of a BLM "Geographic Index," refers to "Latest Assmt-Yr" for three claims, the Garnet Barite, and the Jaguar El-Tigre Nos. 1 and 2 claims. ^{7/} That document refers to 1984 as the latest assessment year for the Garnet Barite and the Jaguar El-Tigre No. 1 claims and 1982 for the Jaguar El-Tigre No. 2 claim. The document, thus, suggests that annual filings had not been made for 1983 and 1984 for the latter claim. Although filings were apparently made for the other two claims in 1984, it is not clear from that document alone whether filings were made for each of the previous years.

We also note that the index fails to indicate any filings for either of the other two claims at issue. Nevertheless, without more evidence concerning FLPMA filings regarding the claims, we find it is premature to make any ruling thereon. Moreover, it is unnecessary given the fact that the claims are null and void for lack of a discovery. The Judge's decision is modified accordingly.

^{6/} Judge Rampton stated as follows:

"The Jaguar El-Tigre No. 1 is reflected as a separate claim on the BLM printout of Mining Claim (Ex. 22) recordings under Section 314 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743 (FLPMA). The BLM printout dated September 9, 1985, shows the Garnet Barite Sulfide Titanium claim as being recorded in Book 1940 at page 449 (BLM Serial No. CMC 77181). Section 314 of FLPMA requires recording within 3 years following October 31, [sic] 1976, and annually thereafter prior to December 31 of each year. Subsequent to 1979, contestee has failed to file annually as required by FLPMA, and they must be and are declared to be invalid for this reason alone."

Judge Rampton did not identify with particularity the claims to which he was referring when he used the word "they." Moreover, the Garnet, Barite, Sulfide, Titanium claim is not recorded at Book 1940, page 449. Rather, the Garnet Barite claim is, and it has BLM Serial No. CMC 77181.

^{7/} Even though Exhibit 22 identifies CMC 77181 as the "Garnite, Barite, Sulfide," it is clear from the "County Book; Page" and "Location Date" columns of that exhibit that the reference is to the Garnite Barite claim.

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 as modified.

Bruce R. Harris
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Will A. Irwin
Administrative Judge

