

UNITED STATES
v.
SANDRA K. MEMMOTT ET AL.

IBLA 92-332

Decided May 2, 1995

Appeal from a decision by Administrative Law Judge Ramon M. Child declaring placer mining claims null and void. UT 10773.

Affirmed.

1. Mining Claims: Generally--Mining Claims: Contests--Mining Claims: Discovery--Mining Claims: Locatability of Mineral--Mining Claims: Withdrawn Land

A prima facie case that unpatented placer mining claims were invalid was established by expert testimony from BLM geologists that there had been no discovery of a valuable mineral deposit on the claims, neither when the land claimed was withdrawn from mineral entry nor at the time of hearing on the contest complaint filed by BLM.

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

Evidence offered for the first time during appeal from a decision in a mining claim contest could only be reviewed to determine whether another hearing should be ordered; since the offer made did not tend to show there was some likelihood of success on the merits at rehearing and it was not explained why the evidence was not offered at the contest hearing, another hearing was not required.

APPEARANCES: Sandra Kay Memmott, Fillmore, Utah, pro se; David K. Grayson, Esq., Assistant Regional Solicitor, Intermountain Region, Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On March 9, 1992, Administrative Law Judge Ramon M. Child declared null and void 18 unpatented placer mining claims located by one or more of

the following individuals, Ralph C. Memmott, Grace K. Memmott, Sandra Kay Memmott, Carolyn S. Memmott, Merrill G. Memmott, Marie S. Memmott, Jim Bushnell, Sheree Bushnell, Donald Talley, Craig Sanders, Michelle Bushnell, and Pamela G. Memmott, in secs. 3, 4, 8, 9, 10, 11, and 15, T. 22 S., R. 6 W., Salt Lake Meridian, Millard County, Utah. His decision issued after a contest hearing held on November 19, 1991, at Salt Lake City, Utah, where evidence was taken concerning whether there had been a discovery of a valuable mineral deposit on each of 18 claims located on lands subsequently withdrawn from mineral entry; the claims include UMC 102880 through UMC 102885, UMC 110108 through UMC 110114, UMC 125558, UMC 125559, UMC 141115, UMC 141116, UMC 141118, and UMC 141119. Three of the claims, UMC 102883 (Cinder Crater No. 10), UMC 102884 (Cinder Crater No. 11), and UMC 102885 (Cinder Crater No. 12) were located in 1947 for volcanic cinders before the passage of the Act of July 23, 1955, 30 U.S.C. § 611 (1988), governing location of claims for common varieties. The remaining claims were located for gold and other valuable minerals before the land on which the claims were located was withdrawn from mineral entry on June 13, 1980.

Appellants appeared at the November 1991 contest hearing by and through an attorney, but did not personally attend and did not offer any evidence. Two expert witnesses called by the Bureau of Land Management (BLM) testified that all 18 claims were invalid because there was no discovery of a valuable mineral deposit on any of them. At the close of the Government case, counsel for appellants moved to dismiss the contest complaint on the ground that BLM had failed to present a prima facie case of invalidity (Tr. 59). Citing evidence produced by the two BLM geologists concerning each of the unpatented claims at issue, Judge Child found that BLM had proved a prima facie case showing that each of the placer mining claims lacked discovery of a valuable mineral deposit (Decision at 7); he then declared all 18 claims invalid. *Id.* A timely appeal was taken.

With their statement of reasons on appeal (SOR), appellants (who are no longer represented by a lawyer) have now offered documents marked as appendices A through E and G. New evidence concerning discovery offered for the first time on appeal (exclusive of legal authorities and argument) appears in parts of their SOR, in Appendix B (a statement by Ralph Memmott dated January 10, 1991), and in Appendix G (a collection of copies of sales receipts for material sales made by Ralph Memmott, all dated during 1989). Counsel for BLM objects that this evidence offered for the first time on appeal should not now be considered.

Appellants challenge the factual accuracy and reliability of evidence that was produced at hearing by the BLM witnesses (SOR at 26 through 31, 35), while an alternative factual summary of the quantity and quality of mineral deposits claimed to exist on the claims is proposed. *Id.* at 25, 26, and 31. Alleging that they have extracted "cinders, landscape rock and aquarium rock, veneer and gypsum in Township 21" (*id.* at 2), appellants suggest that their failure to show any sales of material from the claims

in sec. 22 that are here at issue is not a fatal defect. Id. at 21. They allege that there was a discovery on each of the 18 claims when they were located, that BLM has failed to show otherwise, and that a contest action may not be maintained against them because appellants have not applied for mineral patents. Id. at 2, 34, 35. They also contend that the Board may take official notice of "matters of official record" appearing in "trade and geologic publications" that serve to establish the validity of their claims under the 1872 Mining Law (id. at 10, 22, 23, and 34 and Appendix A).

[1] The principal issue raised by this appeal is whether appellants discovered a valuable mineral deposit on any or all their claims. See 30 U.S.C. § 22 (1988). There is a discovery of a valuable mineral deposit if circumstances shown to exist on a claim would justify a person of ordinary prudence to expend his labor and means with a reasonable prospect of success in developing a valuable mine. Castle v. Womble, 19 L.D. 455, 457 (1894). Appellants acknowledge that this standard has been supplemented by the marketability test, requiring a showing that the deposit can be profitably extracted, removed, and marketed. United States v. Coleman, 390 U.S. 599, 600, 602 (1968). Marketability must be shown as a present fact. United States v. Crowley, 124 IBLA 374, 375 (1992), and cases cited. For land withdrawn from mineral entry, discovery must be shown to exist both at the time of withdrawal and hearing the contest complaint. Id.

Charles Horsburgh, BLM's district geologist for the Idaho Falls District, Idaho, and Philip Allard, the BLM Salt Lake District geologist, both testified concerning the discovery issue at the 1991 hearing before Judge Child. Horsburgh explained that he conducted a field examination to determine the validity of all 18 claims after the land on which they were located was first withdrawn from mineral entry in 1980. The 77-page report of his examination, dated March 12, 1982, and admitted into evidence as Exhibit G-1, recites that when Ralph Memmott, one of the appellants who was in possession of the claims, refused to cooperate with BLM geologists during their examination of the claims, they were obliged to use their own professional judgment to determine which mineral commodities were likely to occur on the claims (Tr. 21; Exh. G-1 (Mining Claim Improvements and Assessment Work)). The BLM field examination revealed that only five of the claims (UMC 102880, UMC 102883 - UMC 102885, and UMC 110114) showed any sign of mining work. There was no work in progress during the field examination, nor despite the evidence of "workings" on five of the claims, was there any sign there had ever been any production from any of the claims (Tr. 35; Exh. G-1 (Conclusions)). The geologist's report of examination found that there had been no exposure of any valuable mineral on the surface of any of the mining claims (Exh. G-1 (Conclusions)). Horsburgh's professional opinion, based upon his field examination and all available data described by his report and testimony, was that each claim lacked a discovery of a valuable mineral deposit, both at the time the land was

withdrawn from mineral entry and at the time of his examination. See Tr. 36; Exh. G-1 (Recommendations).

To determine whether claims located for volcanic cinders could meet the marketability test, Horsburgh took into consideration the local market for cinder material and building stone. Investigation of the market by Horsburgh revealed, while there was a market for cinders, landscape rock, and veneer stone, the material found on the claims was inferior in quality and quantity to similar material available from other quarries in the vicinity, especially the Red Dome claim group and the Bali Hai claims (the latter also owned by Ralph Memmott). He concluded that the cinder material found on the claims here at issue was not marketable at any time prior to his report. See Exh. G-1 (Sampling Data and Marketability Investigations).

Allard, the BLM Salt Lake District geologist, introduced Exhibit G-2, a report of a mineral field examination by other BLM staff geologists of the claims here at issue completed on May 4, 1989, as an addendum to the 1982 study by Horsburgh. The 1989 study confirmed the earlier study of the area where the 18 claims were located, established that conditions on the claims had not changed in the interval, there had been no production reported from the claims, and that market conditions for cinders and related materials reported by Horsburgh in 1982 remained substantially the same (Tr. 53; Exh. G-2 at 3). Samples of material taken from the claims tested for gold, silver, lead, molybdenum, copper, zinc, and nickel showed less than economic values for any of the metals tested, and it was the opinion of the reporting geologist that there had been no discovery of a valuable mineral deposit on any of the claims (Exh. G-2 at 3, 4). The report concluded that the 15 claims located for such minerals were situated in "an unfavorable geologic environment for metallic mineral deposits." Id. at 3. The 1989 investigation confirmed the findings of the 1982 study and concluded there had been no discovery of a valuable mineral deposit shown to exist on any of the claims during the interval between 1982 and 1989. See Exh. G-2 at 4.

Opinions offered by BLM geologists established, therefore, that both at the time of withdrawal from mineral entry and commencement of the contest action there was no evidence of a valuable mineral deposit of any kind on any of the claims and no production of any mineral from any of them. They also concluded that no market existed for the cinder material found there during the BLM field examinations. BLM thereby established a prima facie case showing that appellants had failed to make a discovery of a valuable mineral deposit on any of the claims. See United States v. Alarco, 9 IBLA 1, 3 (1973), and cases cited therein. This evidence was uncontradicted at hearing. Contrary to allegations by appellants that inaccuracies and contradictions were revealed in the testimony by the BLM geologist, there is nothing in the record to impugn their testimony or field work, and their conclusions are consistent with other geologic staff reports offered by appellants. Judge Child therefore ruled correctly when

he denied the motion by appellants to dismiss the contest made at the close of the BLM case at hearing and found the claims were invalid. Id.

[2] Appellants presented no evidence at the 1991 hearing before Judge Child, choosing instead to attack perceived weaknesses in the BLM case in order to oppose the contest of their claims. They have now, however, offered some evidence that was not offered at hearing in support of their contention that each of their 18 claims is supported by a discovery. A statement beginning at page 24 of the SOR describes estimated quantities, qualities, and market values of cinders, gypsum, landscape material, and building stone said to be found on three of the claims at issue. There is, however, no offer of proof that there was a discovery of gold or other precious metals anywhere on any one of the remaining claims here at issue; instead, appellants refer to their answer to the BLM complaint and to Appendix A to support their allegations. While their answer (consistent with statements in the mining location notices) does state that gold and other precious metals were discovered on UMC 12558 and UMC 125559, nothing in Appendix A provides a factual foundation for that conclusion.

Our review of such a belated offer of proof is limited to an inquiry whether it is sufficient to show appellants are entitled to another hearing. See United States v. Smith, 115 IBLA 398, 410 (1990), and cases cited. In order to entitle them to this relief, an offer of the sort here made by appellants must also explain why the offered evidence could not have been given at the time of hearing in 1991. Id.

Enclosures 13 and 14 to Appendix A consist of a BLM mineral character examination dated January 6, 1979, that was prepared for the proposed withdrawal of the lands here at issue from mineral entry and a report of a mineral validity examination dated September 2, 1977, by BLM geologist Hilton Cass. Nothing in these reports, or in other documents in Appendix A, supports the contentions now advanced by appellants. Instead, the 1979 and 1977 reports support the findings made by BLM geologists in Exhibits G-1 and G-2. The 1977 report finds, at page 6, there was no evidence of locatable minerals in the land claimed by appellants. The 1979 report finds, at page 3, that gypsite (a mixture of gypsum, sand, and clay) is the only potentially locatable mineral on the land, but that it is not presently marketable. Excerpts from other unidentified geologic reports are to similar effect. See Enclosures 15 and 16 to Appendix A.

Appellants argue that no production of material from the Cinder Crater claims is required to be shown because the marketability of that material is proved by the BLM reports and other studies furnished in Appendix A. Concerning the cinders and veneer stone found on the claims, however, the 1977 report (enclosure 13 to Appendix A) indicates, at pages 6 and 12 that this material was not subject to mineral location, consisting as it did of small quantities of common varieties of relatively poor material that had not been commercially produced from the claims. The 1979 BLM report

(enclosure 14 to Appendix A) is consistent with the earlier report (see pages 3 and 4). Other published articles appearing in Appendix A do not deal directly with any of the claims here at issue. If appellants seek to raise a geologic inference of some sort by offering these reference materials, then their offer lacks sufficient foundation, since the law does not permit such an inference to be substituted for a showing there is a valuable mineral deposit on the land in question. See United States v. Hines Gilbert Gold Mines Co., 1 IBLA 296, 298 (1971). While expert testimony using such inferences is admissible in mining contest cases, there must be some showing that it is relevant to the particular claims at issue. Id. In this case, no such showing has been made and none is apparent.

The argument that production of material from the three Cinder Crater claims need not be shown ignores the fact that, in order to avoid limitations imposed upon such claims by the Act of July 23, 1955, a claimant of a common variety of cinders must be able to prove there was a discovery before the Act took effect; this showing must include a showing that the material could have been profitably mined and marketed on that date. See United States v. Coleman, *supra*. The documents produced by appellants do not suggest that they will be able to make such a showing, but tend rather to indicate a contrary conclusion. Moreover, there is nothing in the offered information to explain why these proofs were not offered to Judge Child for consideration at the 1991 hearing. The only explanation for the belated offer of evidence made by appellants appears in their Appendix B, a copy of an explanation for a pro se appearance made by appellants when they filed their proposed findings of fact with Judge Child in 1992. Appendix B explains that appellants had by then discharged the lawyer hired to represent them at the 1991 hearing and would thenceforth represent themselves on appeal. Acceptance of this fact does not, however, account for their failure to present evidence that was available to them in 1991 at the time of the hearing before Judge Child.

Moreover, neither the SOR nor Appendix B explains why appellants have offered the copies of 1989 sales receipts labeled Appendix G, and no apparent reason for the delayed submission of these documents is apparent. Appellants do not contend that these documents represent sales from any of the claims here at issue, nor have they suggested what relevance sales of the material described in the receipts might have to this appeal. Further, they have not explained why the 1989 receipts, if they had any relevance to the contested claims, were not presented at their hearing in 1991.

It is concluded that none of the evidence offered tends to suggest that a different result might be obtained if another hearing were to be convened in this matter. Nor have appellants explained why they waited until after their hearing was concluded to offer to submit factual evidence concerning the discovery question presented in this case. Under these circumstances, a rehearing is not required. See United States v. Smith, *supra*.

Appellants have also raised several arguments directed against the authority of the Department to inquire into the validity of their claims that are without merit; arguments that BLM lacks authority to contest claims for which patent has not been sought, that the complaint was not in a proper form or on a form in current use, that the complaint issued without attachment to it of a required regulation, and that other actions were pending are all unsupported on the record and must be rejected. The authority of the Department to determine whether claims are valid is not so limited as these arguments suggest; it is the duty of BLM to identify invalid claims and to contest them. See Cameron v. United States, 252 U.S. 450, 460 (1920); United States v. Bradlaner Enterprises, Inc., 13 IBLA 184, 188 (1973).

As Judge Child found, the single issue in this case concerns whether there was a discovery on each claim. The record establishes that a hearing was held on a complaint that identified the issue, as to each claim contested, to be whether a discovery of a valuable mineral deposit had been made. Appellants exercised their right to a hearing on the question and chose to appear and defend their claims without disclosing whether there was a factual foundation for their claims. The hearing was conducted with all due formality; no error in the decision finding the contested claims null and void has been shown.

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 from is affirmed.

Franklin D. Amess
Administrative Judge

I concur.

Bruce R. Harris
Deputy Chief Administrative Judge