UNITED STATES
v.
JOHN L. MALEY
AND
JAMES F. PAGEL

IBLA 76-655 Decided March 22, 1977

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer, declaring the Arkansas Gold placer mining claim to be invalid. (C-517.)

Affirmed.

1. Mining Claims: Hearings

Where the government mineral examiner in a mining claim contest concludes that the claim at issue contains no valuable mineral deposit, and his opinion is based on a sampling taken from a point on the claim indicated by one of the contestees, this opinion will suffice to establish a prima facie case of no discovery and thus will shift the burden of proof onto the contestees.

2. Mining Claims: Discovery

High assay reports alone are not evidence of a discovery. The nature of the samples yielding the high values must be considered. Where neither the date of the samples nor the nature of the samples submitted for assay is known, those assays cannot be considered as representative of a valuable mineral deposit within the limits of the mining claim.

3. Mining Claims: Discovery

Reports of substantial mineral discoveries in the general area of contestee's placer

claim some 120 years in the past are of little, if any, significance in establishing the existence of a present discovery on the contested claim.

4. Mining Claims: Hearings

Evidence tendered for the first time on appeal will be considered only for the limited purpose of determining whether a further hearing is indicated and will be received for that limited purpose only where there is a cogent and convincing reason why such evidence was not submitted at the original hearing.

5. Mining Claims: Generally--Withdrawals and Reservations: Effect of--Public Records

The notation on public records of the Bureau of Land Management of a request for withdrawal has a segregative effect on land included in a mining location, so that in a contest proceeding, the claimants must show that they had made a discovery of a valuable mineral deposit before the time of posting of the withdrawal application.

APPEARANCES: Albert V. Witham, Regional Solicitor's Office, Department of the Interior, Denver, Colorado, for contestant; Thomas H. Birch, Esq., Colorado Springs, Colorado, for contestees.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

John Maley and James Pagel appeal from a decision of Administrative Law Judge Harvey C. Sweitzer, dated May 12, 1976, finding contestee's Arkansas Gold placer mining claim null and void for lack of discovery of a valuable mineral deposit.

The claim at issue in these proceedings, the Arkansas Gold Placer, was located January 7, 1966. It is 10 acres in size, encompassing land on both sides of the Arkansas River in sec. 9, T. 12 S., R. 79 W., 6th P.M., Hope Mining District, Chaffee County, Colorado, some 2 miles southeasterly of the town of Granite.

The land occupied by the Arkansas Gold placer mining claim is included in application Colorado 0102703 made by the Bureau of

Reclamation for a First Form withdrawal of the land, which would remove it from all forms of appropriation under the Public Land Laws, including the General Mining Laws. See United States v. Foresyth, 15 IBLA 43, 48 (1974). The application, filed in connection with the Frying Pan-Arkansas Reclamation Project, was noted to the BLM records at 3 p.m., September 9, 1971, and was published at 36 F.R. 19518, October 7, 1971.

The land also is within Power Site Reserve No. 92, established by Executive Order of July 2, 1910. The record does not reflect compliance with the provisions of the Act of August 11, 1955, 30 U.S.C. § 621 et seq. (1970). The claim would be null and void for that reason alone. However, the power site reserve would not preclude a new location subject to the terms and conditions of the 1955 Act if the land was otherwise subject to operation of the mining laws; but, in this case, the noting of the application for the first form reclamation withdrawal segregated the land from operation of the mining laws. 43 CFR 2351.3.

This contest, C-517, was initiated by a complaint issued by the Colorado State Office, Bureau of Land Management (BLM), U.S. Department of the Interior, on behalf of the Bureau of Reclamation of that Department. The complaint alleged that:

a. No valuable mineral deposit had been discovered within the limits of the claim.

b. The claim is located on lands that have been reserved from appropriation under the public land laws since September 10, 1971, and no valuable mineral deposit was discovered within the limits of the claim while the lands were still subject to appropriation.

c. The lands within the limits of the claim are nonmineral in character.

d. The claim has not been maintained by the annual expenditure of $ 100 in labor or improvements for the purpose of developing a valuable mine.

e. The claim is not being held in good faith for mining purposes.

Contestees denied the charges.

The hearing in this matter was held before Administrative Law Judge Sweitzer on December 2, 1974, at Denver, Colorado. All parties were served with proper notice and appeared by counsel. By decision of May 12, 1976, Judge Sweitzer reviewed the evidence and testimony

of both the government and the contestees, and concluded that the Arkansas Gold placer claim was void for the reason that no valuable mineral deposit had been discovered within the limits of the claim. Judge Sweitzer's opinion stated further that, "This holding renders discussion of the other issues unnecessary." We agree with both of these conclusions and, accordingly, we affirm the decision of the Administrative Law Judge.

At the hearing, it was developed that on May 1 and 2, 1972, the claim was examined by James F. McIntosh, a mining engineer employed by the Colorado State Office, BLM. McIntosh was accompanied part of the time by Bill Frey, a BLM geologist, and was joined on the second day of the examination by contestee John Maley. The record below indicates that, on the second day, Maley pointed out a spot on the claim where the drainage empties into the Arkansas River and suggested that a sample be taken there. McIntosh then shoveled some material from the indicated point and panned the material to settle out whatever gold was contained in the sample. The sample, when panned, however, yielded only black sands, persuading McIntosh to the opinion that any gold content was insignificant and that nothing would be accomplished by having it submitted for assay. Cross-examination brought out that McIntosh spent about an hour on the claim on May 1, and about 3 hours on May 2. It was noted that at the time of his inspections the river was at an intermediate level, and there was water over portions of the stream bed which ordinarily would have been exposed during the summer months.

John L. Maley, testifying on behalf of the contestees, stated that some exploratory placer mining had been done by them with recovery of some flakes of flour gold and a few small nuggets, but they had made no sales of any of the gold. He asserted that the annual assessment work of $ 100 had been done by them each year since they acquired the claim. The anticipated development activities would be limited to between 60 and 80 days yearly, depending upon the depth of the water in the Arkansas River as affected by the run-off and draw down from the upstream reservoirs.

On appeal, appellants argue that the land within their Arkansas Gold placer mining claim has never been withdrawn from appropriation under the United States Mining Laws, and that the government failed to establish a prima facie case of "no discovery." They concede that the Bureau of Reclamation filed an application for withdrawal, that the application was noted to the BLM records and was published in the Federal Register, but they maintain that this action does not withdraw the land from operation of the mining laws. As to the prima facie case of the government, they maintain that the government's examiner performed only a perfunctory or cursory sampling, and that the testimony upon which the government relies was overwhelmingly rebutted by the evidence submitted by contestees at the hearing. They argue that the record reveals that valuable mineral deposits

exist within the limits of the claim, both as date of hearing and as of September 10, 1971, that the land was not withdrawn from appropriation September 10, 1971, and that they have in good faith purchased the claim and have held it in good faith, performing the requisite annual assessment work.

We will begin by considering this former contention, i.e., that the government failed to establish a prima facie case such as would throw upon the contestees the burden of showing, by a preponderance of the evidence, that a valuable mineral discovery had been made on their claim at the time of the contest.

[1] As this Board has frequently held, the government, when it contests a mining claim, has the burden of making a prima facie case that the claim is invalid. E.g., United States v. Arizona Mining & Refining Co., 27 IBLA 99 (1976); United States v. Reynders, 26 IBLA 131 (1976). Such a prima facie case is presented where a government mineral examiner gives his expert opinion that he examined the claim and found insufficient values to support assertion that a valuable mineral deposit has been discovered. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Reynders, supra; United States v. Ramsey, 14 IBLA 152 (1974). In establishing a prima facie case of lack of discovery of a valuable deposit, the government has no obligation to perform discovery work for the benefit of the mining claimant. United States v. Bechthold, 25 IBLA 77 (1976).

Contestees challenge the government's prima facie case, asserting that the sampling and evaluation by McIntosh, the government's expert, was "'perfunctory' or 'cursory' at best." The record below, however, indicates that McIntosh's examination and sampling was both proper and adequate. His opinion, based on a sampling from a point indicated by contestee Maley, is therefore sufficient to establish a prima facie case of no discovery, and to shift the burden of going forward with preponderating evidence to the contestees. United States v. Zweifel, 508 F.2d 1150 (10th Cir. 1975); United States v. Springer, 491 F.2d 239 (9th Cir. 1974). As noted above, the examiner is not required to perform discovery work for the claimants or to explore or sample beyond the claimant's workings. United States v. Bechthold, supra; United States v. Alexander, 17 IBLA 421 (1974).

[2] The government having thus established its prima facie case, the burden devolves upon the contestees to demonstrate, by a preponderance of the evidence, that a valuable mineral deposit was discovered on the claim, Cameron v. United States, 252 U.S. 450, 456 (1920). Contestees, for their part, rely heavily on two assay reports dated June 30, and July 18, 1972, (exhibits F and G, respectively). While the results of these assays appeared to be rather impressive, the Administrative Law Judge below found

them to be of "extremely limited" significance, and set out (at p. 9 of the decision below) two reasons for this determination:

> 1. There is no showing that they constitute a "free gold" assay, that is that they represent gold which could be deemed recoverable (e.g., see Tr. 122-25).
>
> 2. There is no showing that mineral of this quality exists in any significant quantity; specifically any quantity that might be economically mined.

It is the opinion of this Board that the Judge's reservations about the significance of these assay reports are well taken. As we have held on many occasions, a discovery exists only where minerals have been found in quantities such 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. E.g., United States v. Arcand, 23 IBLA 226 (1976). This test, the prudent man rule, has been refined to require a showing that the mineral in question can be extracted, removed, and presently marketed at a profit, United States v. Coleman, 390 U.S. 599 (1968); United States v. Beal, supra at 398. Judge Sweitzer's first objection (supra), that there is no showing that the exhibits in question constitute a "free gold" assay, goes directly to the issue of whether the contestees have shown that the gold can be profitably extracted or removed. It is our opinion that they have not made such a showing by a preponderance of the evidence. The Judge's second objection, that there is no showing that mineral of this quality exists in any significant quantity, is equally well taken as the samples assayed were, by the contestee's own admission, concentrated by running them through a sluicebox and, in the case of exhibit F, by extracting the black sands with a hand magnet. As we held in Bechthold, supra, assay samples must be representative of the mineral deposit in order to be meaningful, and not be simply selective showings of the best mineralization. While the Bechthold case involved a lode mining claimant, its reasoning is equally apt where, as here, a placer sample has been concentrated and assayed by means not denominated as a free gold assay. High assay samples alone are not evidence of a discovery. The nature of the samples yielding the high values must be considered. Where neither the date of the samples nor the nature of the samples submitted for assay is known, those assays cannot be considered as representative of a valuable mineral deposit within the limits of a mining claim. United States v. Vaux, 24 IBLA 289 (1976).

[3] Finally, the contestees maintain that the history of the area in which their claim is located is one which would indicate substantial mineral deposits and, contestees argue, this history should be considered in a determination of the mineral character of

their claim. While we are not unmindful of the gold producing history of the general area here at issue, we believe that history is entitled to little weight in the face of the countervailing evidence. In United States v. Meyers, 17 IBLA 313 (1974), we held that reports of mineral discoveries some 30 years ago will be accorded little, if any, weight where conditions on the land have changed significantly. We held further, in that case, that a discovery on one portion of a placer claim will not support an application for patent on a contiguous portion of that same claim. We hold here that the history of gold production on the "Georgia Bar" claim (hearing transcript at p. 57) is far too remote in time (circa. 1858) to have any bearing on contestee's claim and, furthermore, that the history of mineralization on such a nonadjacent claim might well be of no probative value even if it was more recent. A mining claimant's belief in the existence of mineral on a claim is not sufficient to constitute discovery. The prudent man rule imposes an objective standard, and the fact that the claimant may be willing to expend his labor and means is not adequate. United States v. Vaux, supra.

In summary, it is the opinion of this Board that the evidence of the contestees with respect to the history of the area, the purchase price paid for the claim in question, and the contestee's assay reports, establishes, at best, that further exploration may be justified. Evidence of mineralization which may justify further exploration, but no development of actual mining operations, is not sufficient to establish that a discovery of a valuable mineral deposit has been made. United States v. Fichtner, 24 IBLA 128, 130 (1976).

[4] Contestees, by way of an affidavit appended to their Statements and Argument on Appeal, offer to submit affidavits detailing the method of assay used by the persons who made the assays submitted by contestees as Exhibits F and G at the hearing below. Contestees also request the opportunity to submit to the Board the results of an assay of a cubic yard of material taken from the point on their claim which was examined and sampled by the government's mineral examiner. It is well established that evidence submitted on appeal after an initial decision in a mining claim contest may not be considered or relied on in making a final decision, but may only be considered to determine if there should be a further hearing. Such evidence, moreover, will be considered only if accompanied by a cogent explanation of why it was not tendered at the hearing. United States v. MacIver, 20 IBLA 352 (1975); United States v. McKenzie, 20 IBLA 38 (1975). These obstacles to consideration of this newly-tendered evidence are magnified by the fact that, even should another hearing be ordered, sampling activities pursued on the claim after September 10, 1971, may not be considered for any purpose other than to show that valuable deposits of minerals had been discovered within the boundaries of the claim prior to that date. See United States v. Converse,

72 I.D. 141 (1965), aff'd 262 F. Supp. 583 (D. Ore. 1966), aff'd 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); United States v. Gunsight Mining Co., 5 IBLA 62, 64 (1972). It is our opinion no discovery of valuable mineralization has been demonstrated on appellants' claim prior to September 10, 1971. Furthermore, there appears no reason why the evidence sought to be introduced on appeal was not introduced at the hearing, and we believe that no useful purpose will be served by reopening the hearing at this point.

[5] The contention of appellants that posting of an application for withdrawal to the BLM land status records does not temporarily segregate the land from subsequent entry, to the extent that the final withdrawal will so segregate, has no merit. The pertinent regulation, 43 CFR 2091.2-5(a), provides:

> (a) Application. The noting of the receipt of the application under §§ 2351.1 to 2351.6 in the tract books or on the official plats maintained in the proper office shall temporarily segregate such lands from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws, including the mining and the mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal. To that extent, action on all prior applications the allowance of which is discretionary, and on all subsequent applications, respecting such lands will be suspended until final action on the application for withdrawal or reservation has been taken. Such temporary segregation shall not affect the administrative jurisdiction over the segregated lands.

The segregative effect of applications for withdrawal has been effective since the regulation was first published in 43 CFR 295.11(a) in Circular 1982 at 22 F.R. 6614, August 17, 1957. Only minor editorial changes have been effected in the language in subsequent recodifications of Title 43, CFR. See United States v. Foresyth, supra.

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.

Douglas E. Henriques

Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Anne Poindexter Lewis
Administrative Judge