

UNITED STATES
v.
THE DREDGE CORPORATION

A-28022

DecidedDEC 18 1959

Mining Claims: Contests--Rules of Practice: Hearings

Small-tract applicants for lands covered by a prior mining claim may be allowed to intervene in a contest brought by the United States against the validity of the mining claim.

Mining Claims: Generally

A small-tract applicant for land covered by a mining claim is not in a category of those who must file an adverse claim against the mining claim during the period of publication of notice of an application for patent to the mining claim.

Mining Claims: Contests

The United States must institute a contest against a mining claim for which an application for patent has been filed where it desires to challenge the claimant's assertion that a valid discovery has been made within the limits of the claim.

Mining Claims: Contests--Rules of Practice: Hearings

In the absence of an extreme emergency, a motion for continuance first made at a hearing is properly denied since the Department's rules of practice require that it be made at least 10 days before the date of the hearing.

Mining Claims: Discovery

To satisfy the requirements of discovery on a placer mining claim located for sand and gravel, it must be shown that the deposit can be extracted, removed and marketed at a profit, and where the evidence is to the contrary, the claim is properly declared null and void.

Mining Claims: Discovery--Mining Claims: Contests

In a contest against the validity of a mining claim, the claimant must show by a preponderance of the evidence that his claim is valid and if he does not, his claim is properly held invalid.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington 25, D. C.

A-28022

United States : Contests Nos. 2730 through 2737
 : (Nevada).
 v. : Sand and gravel placer mining
The Dredge Corporation : claims held null and void.
David Anderson et al.,
Intervenors : Affirmed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Dredge Corporation has appealed to the Secretary of the Interior from a decision dated January 23, 1959, which affirmed a decision of a hearing examiner holding eight placer mining claims null and void.

On January 3, 1955, Dredge filed an application for patent for the mining claims in which it stated that each claim contained valuable sand and gravel deposits. The claims, named Dredge No. 1A, 2A, 3A, 4A, 5A, 6A, 7A, and 8A, were all located on July 21, 1952, by eight locators as association placer claims and encompass 160 acres each, or the the whole of sections 5 and 8, T. 20 S., R 60 E., M. D. M., Nevada. 30 U. S. C., 1958 ed., sec. 36.

On December 18, 1957, the United States instituted adverse proceedings against the validity of each of the claims, alleging:

1. That the land embraced within the claim is non-mineral in character.
2. That minerals have not been found within the limits of the claim in sufficient quantity or quality to constitute a valid discovery.
3. That insufficient work has been done on the claim to conform with the statutory requirements relating to the expenditure of \$500 on each claim.

Dredge duly answered, denying all the charges and stating further that charge 3 is immaterial, and demanded a hearing. On January 31, 1958, a notice of hearing was sent to the parties in which it was stated that the hearing would be held on March 11, 1958, at Las Vegas, Nevada.

At the hearing, which was held on the appointed date, it was agreed to consolidate all the contests for the purpose of the hearing (Transcript of hearing, p. 4).^{1/}

Before the introduction of evidence was begun, the contestee made three motions, each of which the hearing examiner denied. The first asked that none of the contestant's evidence be admitted until Dredge's application for a mineral patent had been adjudicated; the second, that the hearing be continued until the manager of the Bureau of Land Management acted upon Dredge's patent application; and the third, that several small-tract applicants for land covered by the mining claims not be allowed to intervene.

After the hearing examiner had ruled on the motions, contestee's attorney stated that he intended to file an appeal from the denial of his motion for a continuance. He refused to proceed with the case until that question was decided and left the hearing room.^{2/} The hearing then continued in his absence.

In a decision dated May 7, 1958, the hearing examiner held that all the claims were null and void because no discovery of a valuable mineral within the meaning of the mining laws had been made on any of the claims. He also found that insufficient work had been done on each of the claims to conform with the statutory requirement relating to the expenditure of \$500 on each claim.

From the Director's decision affirming the hearing examiner, Dredge has taken its appeal to the Secretary in which it relies upon the same reasons and arguments it made to the Director.

First, it argues that it was an error to allow the small-tract applicants to intervene. In United States v. Everett Foster et al., 65 I. D. 1, 12 (1958), the Department held that it was proper to allow small-tract applicants to intervene in a contest against mining claims covering the land for which they had applied. Upon review, the United States Court of Appeals for the District of Columbia held that the small-tract applicants were interested parties and that there was no basis for disturbing the Department's action. Everett Foster et al. v. Fred A. Seaton, C. A. D. C., October 22, 1959 (No. 14953). Dredge also contends that if the small-tract applicants desired to proceed against its claims, they should have

^{1/} Hereafter the references to the transcript of the hearing will be designated as Tr. ____.

^{2/} There is no indication in the record that Dredge filed any appeal from the hearing examiner's ruling.

filed a timely adverse claim and instituted proceedings in the State court as adverse claimants. However, the statute (30 U. S. C., 1958 ed., sec. 30) relating to adverse suits applies only to adverse mineral claimants. Union Oil Co., et al., 65 I. D. 245, 248 (1958), and cases cited.^{3/}

The appellant also contends that its patent application must be disposed of administratively before any contest may be brought against it so that it may have a right of appeal. In the first place, it may appeal from a hearing examiner's decision as well as a manager's, and in either case the initial decision follows the same channel of review, that is, first to the Director and then to the Secretary.

In the second place, there is no requirement that the manager pass on the validity of a mineral application in which there is a factual issue without a hearing. On the contrary, as the Director pointed out, a mining claim cannot be declared invalid on such a ground without a hearing and the hearing must be held before a hearing examiner. United States v. O'Leary et al., 63 I. D. 341 (1956).

The appellant further asserts that the hearing examiner improperly denied his motion for a continuance pending a decision on its patent application. There is no merit to this contention. The pertinent regulation requires that a motion for postponement, except in extreme emergency, cannot be granted unless it is filed at least 10 days prior to the date of the hearing. 43 CFR, 1958 Supp., 221.71. Furthermore, the hearing examiner's ruling was proper because Dredge cannot take an appeal from a denial of a motion for a continuance. United States v. Parkinson, 65 I. D. 282 (1958).

Dredge also urges that the examiner erred in holding the claims null and void on the evidence presented. The testimony is well summarized in the hearing examiner's decision and need not be repeated here.

In Foster v. Seaton, *supra*, which also involved sand and gravel claims near Las Vegas, Nevada, the court said:

"The statute says simply that the mineral deposit must be 'valuable.' Rev. Stat., § 2319, 30 U. S. C. § 22. Where the mineral in question is of limited occurrence, the Department, with judicial approval, has long adhered to the definition of value laid down in Castle v. Womble, 19 I. D. 455, 457 (1894):

^{3/} United States v. R. B. Borders et al., A-27493 (May 16, 1958), which Dredge cites, involved a conflict between two mining claimants.

Where minerals have been found and the evidence is of such a character 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, the requirements of the statute have been met.

With respect to widespread non-metallic minerals such as sand and gravel, however, the Department has stressed the additional requirement of present marketability in order to prevent the misappropriation of lands containing these materials by persons seeking to acquire such lands for purposes other than mining. Thus, such a 'mineral locator or applicant, to justify his possession, must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit.' Layman v. Ellis, 54 I. D. 294, 296 (1933), emphasis supplied. See also Estate of Victor E. Hanny, 63 I. D. 369, 370-72 (1956). Particularly in view of the circumstances of this case, we find no basis for disturbing the Secretary's ruling. The Government's expert witness testified that Las Vegas valley is almost entirely composed of sand and gravel of similar grade and quality. To allow such land to be removed from the public domain because unforeseeable developments might some day make the deposit commercially feasible can hardly implement the congressional purpose in encouraging mineral development.

"Thus the case really comes down to a question whether the Secretary's finding was supported by substantial evidence on the record as a whole. We think it was. There may have been substantial evidence the other way also, but we do not weigh the evidence. The testimony of Shafer and his colleagues in support of the Government was clearly substantial and most certainly was not destroyed. He was an experienced man, knew sand and gravel, knew the Las Vegas area, and his testimony was clear, succinct and convincing." (Slip copy, pp. 4-5.)

Finally, Dredge contends that the United States had the burden of proving that the claims were invalid. Although there is no doubt that the United States met that test, the burden of proof is not upon it, but upon the mineral claimant. Foster v. Seaton, *supra*.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F. R. 1348), the decision of the Director of the Bureau of Land Management is affirmed.

(Sgd) Edmund T. Fritz
Deputy Solicitor