

UNITED STATES

v.

REED H. PARKINSON

FEB 1 1960

A-28144

Decided

Mining Claims: Discovery--Mining Claims: Common Varieties of Minerals

To satisfy the requirement of discovery on placer mining claims located for sand and gravel prior to July 23, 1955, it must be shown that the deposits can be extracted, removed and marketed at a profit.

Mining Claims: Discovery

To constitute a valid discovery upon a mining claim there must be a discovery of such a valuable deposit of mineral within the limits of the claim as would warrant a prudent man in the expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

Mining Claims: Determination of Validity

Mining claims are properly declared null and void where the evidence shows that no valuable discovery has been made on the claims.

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

A-28144

United States : Contest Nos. 2738 through  
: 2743 (Nevada).  
v. :  
Reed H. Parkinson : Mining claims declared null  
: and void.  
: Affirmed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This is an appeal to the Secretary of the Interior from a decision of the Acting Director, Bureau of Land Management, dated April 9, 1958, which affirmed a decision of a hearing examiner of the Bureau dated September 15, 1958, holding the appellant's placer mining claims, the Fair Lady Nos. 1, 2, 3, 4, Pay Dirt Butte, and Golden Shaft, situated in sec. 30, T. 18 N., R. 20 E., M. D. M., Nevada, to be null and void for lack of discovery.

On November 27, 1956, Lots 1 and 2 of the NW $\frac{1}{4}$  and the NE $\frac{1}{4}$  of this section were classified as suitable for lease and sale for residence purposes under the Small Tract Act of June 1, 1938 (43 U. S. C., 1958 ed., sec. 682a), by classification Order No. 123 (21 F. R. 9682). It appears that small tract applications have been filed for most or all of the lands covered by the classification order.

On December 23, 1958, charges were filed against the appellant's mining claims by the Bureau. The charges were that the lands embraced therein are nonmineral in character and that mineral had not been found within the limits of the claims in such quantity as to constitute a valid discovery. The appellant filed an answer denying the charges and requesting a hearing. The matter was set for hearing on June 9, 1958.

On May 19, 1958, the appellant filed a motion to postpone the hearing "to a later date." The hearing examiner denied the motion and the appellant appealed to the Director, who denied the appeal. The appellant thereupon appealed to the Secretary of the Interior. On June 23, 1958, the Department affirmed the Director's decision (United States v. Reed H. Parkinson, 65 I. D. 282 (1958)), holding that denial of a motion to postpone a hearing is not an appealable order.

On June 3, 1958, the appellant filed an application for patent, Nevada 048411, for all of the claims involved in the contest.

The hearing took place on June 9, 1958. The appellant and his attorney appeared and made an oral motion that the hearing be continued pending the outcome of the appeal to the Secretary. The hearing examiner denied the motion and thereupon the appellant and his counsel left the hearing room without offering any evidence or examining any witnesses. Several small tract claimants were allowed to intervene. The Government then offered the testimony of the Bureau's mineral examiner and of an intervenor. Following presentation of the Government's case in support of its charges the hearing examiner closed the hearing, but stated that the record would be kept open and the case continued indefinitely until further order either closing the record or allowing the appellant another opportunity to present evidence.

Pursuant to notice dated July 22, 1958, the hearing was reopened on August 4, 1958. Counsel for the appellant appeared and stated that he was unprepared as he did not have his witnesses available for testimony. The hearing examiner offered to continue the hearing until the next day, but the offer was refused. Appellant's counsel likewise declined to cross-examine the Government's witnesses. Counsel for the appellant offered the abstract of title of the claims and all papers submitted in connection with the patent application filed on June 3, 1958. These documents were received in evidence by the hearing examiner.

In his decision of September 15, 1958, the hearing examiner related in detail the testimony presented by the Government to sustain the charges brought against the claims. In summary, the evidence was that the claims were located primarily for their gold content and for the sand and gravel therein; that the numerous samples taken at the various points indicated by the claimant showed a gold content varying from a trace to 5.94 cents per cubic yard; that various samples panned showed no colors, and a fire assay of one sample also failed to reveal any gold; that as to the sand and gravel on the claims it was essentially the same as that in the area extending from the claims 3 miles to the west and approximately 3 miles to the north and is all a part of an alluvial fan accumulation, and there was no evidence that any material from the claims had been sold other than some topsoil removed from the Golden Shaft claim. The mining examiner testified that it was his opinion that the material found on the claims was of poorer quality than that being used in the sand and gravel market by existing producers, and that his investigation indicated that although there was a shortage of good sand and gravel deposits in the area the present operators have adequate reserves to last them from 10 to 40 years at the present rate of depletion.

In his appeal to the Secretary the appellant contends that he has made a discovery of gold on the claims "sufficient to warrant a person of ordinary prudence to continue expenditure of his labor and means in developing the same" and that this is proven by assay reports filed with his mineral patent application Nevada 048411 which show samples valued at \$4.20 to a trace of gold.

It should be noted that although these assay reports, and other statements to be discussed later, were admitted by the hearing examiner without objection by the Government, and are thus a part of the official record, the probative value of such documents is strictly limited because the person who took the samples was not present at the hearing and was not subject to cross-examination, and there is no evidence as to where or how the samples were taken.

The Government's mineral examiner testified that he had gone over the claims with Parkinson, that he took samples from the various discovery pits in Parkinson's presence, that Parkinson had raised no objection to the sampling methods used, that Parkinson had told the examiner that he (Parkinson) had taken his samples by scraping up a coffee can of material, that Parkinson's method was crude and selective, and that the most a sample taken by the mineral examiner assayed was 5.94 cents per cubic yard. (Tr. 31-40.)<sup>1/</sup> The same witness further testified that he had panned a sample from the dumps at which Parkinson had obtained samples yielding high assays, that he observed no colors of gold, that if the gold content had been as high as the assays indicated some colors would have been obtained by even inexperienced panning, that a sample taken from the place where Parkinson's sample assayed \$4.20 a ton indicated only a trace of gold, and that even a fire assay failed to reveal more than a trace of gold. (Tr. 41-43.)

On the basis of this evidence, giving the assays submitted by the appellant all the weight to which they are entitled, I conclude that the hearing examiner correctly concluded that there had been no discovery of a valuable deposit of gold within the limits of any of the claims which would warrant the further expenditure of time and money with a reasonable prospect of success by a prudent man in the effort to develop a valuable mine. United States v. Alonzo A. Adams et al., A-27364 (July 1, 1957).

Turning to the question of the discovery of a valuable deposit of sand and gravel, the Department has held that in order to satisfy the requirement of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, the mineral deposit must not only meet the usual test for discovery but it must be shown that the deposit prior to that date could be extracted, removed, and marketed at a profit and where such a showing is not made the claim is properly declared null and void.<sup>2/</sup> United States v. Everett Foster et al., 65 I. D. 1 (1958),

<sup>1/</sup> The reference is to the transcript of the report of the hearing.

<sup>2/</sup> Section 3 of the act of July 23, 1955 (30 U. S. C., 1958 ed., sec. 611), provides that deposits of common varieties of sand and gravel shall not be deemed valuable mineral deposits within the meaning of the mining laws so as to give effective validity to any mining claim thereafter located under such law. As to claims located for sand and gravel, discovery (including marketability) must be demonstrated prior to the withdrawal from location for common varieties effected by that act. Clear Gravel Enterprises, Inc., The Dredge Corporation, Inc., A-27967, A-27970 (December 29, 1959).

affirmed Foster v. Seaton, 271 F. 2d 836 (D. C. Cir. 1959); United States v. P. D. Proctor et al., A-27899 (May 4, 1959).

The evidence in regard to the sand and gravel deposits presented with the appellant's patent application, which he contends shows a valid discovery, consists of a report of Vincent P. Gianella, a statement by David B. Slemmons, geologist, that he concurs with the Gianella report, and a letter by L. M. Little, assistant to the Nevada State Highway Engineer, plus a report of test results of the examination of gravel from various pits on the appellant's claims, and a suggested stage study and development of a gravel deposit on one of the claims (the location is not indicated) by Charles R. Beese, apparently an engineer. In addition, on October 23, 1959, the appellant filed in the land office a report prepared by S. L. Evans concerning the sand and gravel features of all of the claims. This document was likewise submitted in support of the appellant's patent application and was forwarded to the Secretary at the request of the appellant. There is nothing in the record to indicate that a copy of the document was served upon the Field Solicitor, Department of the Interior, in Reno, who was designated as the adverse party in the Acting Director's decision.

Although, as previously stated, the probative value of these documents is limited because the parties making the statements therein were not available for cross-examination as to the basis of their statements or the reliability of their opinions, the most that can be said of this evidence is that it indicates the presence of gravel on the claims, which the Government does not deny. It does not contradict the statements made by the mineral examiner that no gravel was sold from the claims prior to July 23, 1955, nor does it establish that the sand and gravel are marketable and can be sold at a profit.

In the recent decision of the United States Court of Appeals for the District of Columbia in Foster v. Seaton, *supra*, the court said:

"Appellants' third allegation of error is that the Secretary failed to hold the Government to the standard of proof required by the Administrative Procedure Act, which states that 'the proponent of a rule or order shall have the burden of proof'. 60 Stat. 241 (1946), 5 U. S. C. A. sec. 1006. The Secretary ruled that, when the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case, and that the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid.<sup>2/</sup>

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<sup>2/</sup> This is the standard which the Department of Interior has applied for a number of years. See United States v. Strauss, 59 I. D. 129 (1945).

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The short answer to appellants' objection is that they, and not the Government, are the true proponents of a rule or order;

namely, a ruling that they have complied with the applicable mining laws. One who has located a claim upon the public domain has, prior to the discovery of valuable minerals, only 'taken the initial steps in seeking a gratuity from the Government.' Ickes v. Underwood, 78 U. S. App. D. C. 396, 399, 141 F. 2d 546, certiorari denied 1944, 323 U. S. 713, 65 S. Ct. 39, 89 L. Ed. 574; Rev. Stat. § 2319 (1875), 30 U. S. C. A. § 23. Until he has fully met the statutory requirements, title to the land remains in the United States. Teller v. United States, 8 Cir., 1901, 113 F. 273, 281. Were the rule otherwise, anyone could enter upon the public domain and ultimately obtain title unless the Government undertook the affirmative burden of proving that no valuable deposit existed. We do not think that Congress intended to place this burden on the Secretary." (271 F. 2d 837-38.)

The court also cited and approved the Department's ruling in Layman v. Ellis, 54 I. D. 294 (1933), and Estate of Victor E. Hanny, 63 I. D. 369 (1956), that with respect to widespread nonmetallic minerals, such as sand and gravel, the mining claimant, to justify his possession, must show that by reason of accessibility, bona fides in development, proximity to market, existence of a present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit.

Furthermore, as of July 23, 1955, the contestee had done nothing to prepare the sand and gravel on his claims for market. He had not established the quantity of gravel on the claims; he had no equipment to remove the deposits and to process them. The test for discovery stated in Layman v. Ellis (supra) and United States v. Foster (supra) and approved by the court in Foster v. Seaton (supra) requires not only a present demand, but also bona fides in development. The contestee had not met this requirement on the day the land covered by his claims was withdrawn from mineral development.

Thus, even giving the statements submitted along with his patent application their face value, the appellant has failed to sustain the burden imposed upon him to show by a preponderance of the evidence that his claims are valid.

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 Acting Director, Bureau of Land Management, is affirmed.

(Sgd) Edmund T. Fritz  
Deputy Solicitor