

UNITED STATES
v.
WILLIAM DOHERTY

IBLA 90-32

Decided March 16, 1993

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer dismissing contest proceedings brought against mining claim CA MC 49187 to challenge surface uses by the claimant. CA 20673.

Affirmed.

1. Mining Claims: Contests--Mining Claims: Surface Uses

Because BLM failed to show that a mining claim was not used or occupied for purposes reasonably incident to mining, it was proper to find that the Government had not demonstrated any impermissible use contrary to provision of 30 U.S.C. § 612(a) (1988) and contest proceedings against the claim were properly dismissed as a result.

APPEARANCES: Burton J. Stanley, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management; William F. Doherty, Sutter Creek, California, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

A mining contest was brought by the California State Office, Bureau of Land Management (BLM, contestant), pursuant to section 4 of the Multiple Use Mining Act of 1955, 30 U.S.C. § 612 (1988), to challenge the propriety of surface activity by the claimant, William Doherty, on mining claim CA 20673. The complaint charged: "The GOLDEN PHEASANT QUARTZ CLAIM lode mining claim is not being occupied for uses that are reasonably incident to, or necessary for, prospecting operations under the mining laws as provided for by 43 CFR 3712.1 and Section 4(a) of the Act of July 23, 1955." At hearing it was the contention of BLM that a log cabin and well on the claim were not used or occupied for purposes reasonably incident to mining activity on the claim, and consequently their existence was prohibited by law. BLM sought removal of these improvements from the claim and surface rehabilitation within a reasonable time.

The Golden Pheasant Quartz Claim is a lode mining claim originally located in 1938. The locators built a cabin on the claim. It was purchased by Doherty's father in 1945 and declared abandoned and void by BLM in 1968. Doherty relocated the claim in 1973, with the cabin in place.

It is situated in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 8, T. 6 N., R. 13 E., Mount Diablo Meridian, Calaveras County, California. Adjacent to the claim is another lode claim, the Golden Pheasant Extension Claim. A placer claim, the Hazel Lodge, is located over the two lode claims.

A contest hearing before Administrative Law Judge Harvey C. Sweitzer was held on April 17, 1989, in Jackson, California. BLM Realty Specialist Kay Miller and BLM Geologists Larry Vredenburg and Tim Carroll testified that they visited the claim on June 29, 1987, and April 4, 1989, videotaping both trips (Tr. 3-19, 23-25, 27-28, 29-32; Exh. G-3). This videotape was reviewed at the hearing and entered as evidence of the conditions at the claim site (Tr. 17, 34; Exh. G-3). The videotaped inspections disclosed a cabin, a well, and an outhouse (since removed) on the claim. The inspections also revealed three excavation sites where quartz veins were exposed (Tr. 28). Mining tools and equipment were found stored inside the cabin.

The government witnesses testified, referring often to the videotape, that the exposed excavations on the site had not been worked for some time and that the mining and milling equipment scattered around the site was not set up for use (Tr. 30-31). In response to this evidence, Doherty testified that he goes to the claim every month or two and that his sons are there almost every weekend (Tr. 35-36, 44). He admitted that since 1973, he has processed about one-half ton of material from the claim and recovered one to two ounces of gold (Tr. 46, 55). He characterized most of his work as "prospecting," or exploration used to identify "hot spots" to be worked later (Tr. 36-38, 47-48). Doherty acknowledged that he has not filed any notice or plan of operations (Tr. 57). He also testified that another two or three ounces of gold have been recovered from the nearby stream (Tr. 46).

Doherty stated that the cabin is used to store equipment used in mining (Tr. 39). He testified that he does not reside in the cabin and that he does not inhabit it while mining. He explained that he sleeps in a camper on the truck he uses to travel to and from the claim and that he also transports some of his mining equipment and tools in the truck (Tr. 55). He admitted that the cabin has been occupied at times by his sons and an employee, but only when they were working the claims (Tr. 36).

The September 7, 1989, decision observed that while the contestant's evidence suggests "a significant lack of mining activity on the claim" there was no evidence that the claim had been used for any activity except mining (Decision at 5). Judge Sweitzer held that BLM did not show there was any impermissible use or occupancy of the subject claim contrary to statute or regulation and dismissed the contest proceeding (Decision at 6).

On appeal BLM asserts that Doherty cannot justify maintaining equipment on this claim for activities amounting to no more than recreational mining. It is contended that any occupancy, whether by the cabin or outmoded, rusty mining equipment, is proscribed if it is not used for mining purposes. BLM contends that Doherty's occupancy was not reasonably incident to mining because he was not extracting minerals. Doherty answers that BLM did not demonstrate that his use or occupancy of the claim was impermissible in light of his mining activities as proved at the hearing.

[1] The statute at issue here, the Multiple Use Act of 1955, 30 U.S.C. § 612(a) (1988), provides pertinently that: "Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto." Before the statute was enacted in 1955, exclusive possession and use by a mining claimant was recognized by the United States so long as it was incident to prospecting and mining. United States v. Curtis-Nevada Mines, Inc., 611 F.2d 1277, 1281 (9th Cir. 1980). Congress did not intend to change the basic principles of the mining law when it enacted the Multiple Use Act, but intended to clarify the law to eliminate abuses. Id. at 1282. The objective of the Act was to "prohibit the use of any hereafter located unpatented mining claim for any purpose other than prospecting, mining, and related activities [and] to limit the rights of a holder of an unpatented mining claim hereafter located to the use of the surface and surface resources." Id. at 1280, quoting from H.R. Rep. No. 730, 84th Cong., 1st Sess. The abuses and problems that the legislation was designed to correct were detailed in House Report 730:

The mining laws are sometimes used to obtain claim or title to valuable timber actually located within the claim boundaries. Frequently, whether or not the locator so intends, such claims have the effect of blocking access-road development to adjacent tracts of merchantable Federal timber, or to generally increase costs of administration and management of adjacent lands. The fraudulent locator in national forest, in addition to obstructing orderly management and the competitive sale of timber, obtains for himself high-value, publicly owned, surface resources bearing no relationship to legitimate mining activity.

* * * * *

The effect of nonmining activity under color of existing mining law should be clear to all: a waste of valuable resources of the surface on lands embraced within claims which might satisfy the basic requirements of mineral discovery, but which were, in fact, made for a purpose other than mining; for lands adjacent to such locations, timber, water, forage, fish and wildlife, and recreational values wasted or destroyed because of increased costs of management, difficulty of administration, or inaccessibility; the activities of a relatively few pseudominers reflecting unfairly on the legitimate mining industry.

Id. at 1282, quoting H.R. Rep. No. 730. The purpose of this statute was not to significantly alter mining but to limit misuse of surface resources by mining claimants prior to issuance of patent. Converse v. Udall, 262 F. Supp. 583 (D. Ore. 1966), aff'd, 399 F.2d 616 (9th Cir. 1968), cert. denied 393 U.S. 1025 (1969).

If, therefore, a person locates a mining claim or continues to occupy a mining claim for any purpose other than mining of valuable mineral deposits, that occupancy frustrates the purposes of the multiple use and mining laws.

In such case the claim is not held in good faith for mining purposes. Whenever the Government makes a charge of bad faith, the Government bears the ultimate burden of proof on that issue. United States v. McMullin, 102 IBLA 276, 282 (1988).

There is no issue raised in the instant case about whether there is a valid discovery on the subject claim. Nor is there any allegation that the structures found on the claim constitute unnecessary or undue degradation of the lands involved. Rather, BLM urges that, because there are no substantial mining activities evident on the claim, the cabin and other structures unreasonably burden the public lands and are not incident to mining. In response to this position, Judge Sweitzer found the Multiple Use Act "does not require actual mining; prospecting and assessment work, for example, are mining activities that will support reasonably incidental use and occupancy" (Decision at 5).

BLM asserts Judge Sweitzer erred when he distinguished the case in McMullin, supra, from the instant situation. In McMullin, a claim was contested for lack of discovery and failure to hold the claim in good faith for mining purposes. 102 IBLA at 276-77. The Board affirmed a finding that the claimants' occupancy of the cabin was not reasonably incident to mining activities because there was no evidence of mining, the cabin was apparently constructed prior to location and had not been used during its 50-year existence for anything related to mining activities, and there was no evidence that any mineralization within the mining claim had been found during the claim's 50-year existence. 102 IBLA 282-84.

Judge Sweitzer recognized two distinctions between the McMullin case and this one: "First, there is no evidence or assertion that Mr. Doherty has failed to make a qualifying discovery. Second, there is no evidence that the cabin on Mr. Doherty's claim has been used as a residence for other than purposes related to mining during times of mining activity" (Decision at 5). A contest to occupancy or use of a mining claim is only successful upon a demonstration that the occupancy is not reasonably associated with the mining activities of the claimant. Judge Sweitzer found that BLM had failed to prove that "the claim has been used for any non-mining recreational purposes. Clearly the storage of mining tools and equipment is incident to mining." But see United States v. Peterson, 125 IBLA 72 (1993) (a case reaching a different result on facts indicating occupancy was not reasonably incident to mining).

On appeal to this Board, an appellant must show error in the decision appealed from; in the absence of such a showing, the decision will be affirmed. B.K. Lowndes, 113 IBLA 321, 325 (1990). In this case BLM is the appellant; it has not challenged Doherty's right to occupy the land for mining purposes. Rather, BLM argues that maintenance of the cabin and other structures are not necessary or reasonable for the amount and type of mining conducted by Doherty. On the issue raised for our review, we must affirm Judge Sweitzer's conclusion that: "Contestee's use and occupancy of the claim is reasonably incident to his mining activities" (Decision at 6).

Unlike those situations in cases cited by BLM such as United States v. Nogueira, 403 F.2d 816 (9th Cir. 1968) and Bruce W. Crawford, 86 IBLA 350, 92 I.D. 108 (1985), Doherty's occupancy and use of structures on the claim, particularly the cabin in question, are shown by the record before us to relate entirely to mining activity. Although his mining efforts may be sporadic or minimal, they are all mining-directed nonetheless. If BLM questions whether there exists sufficient mineralization for Doherty to work the claim and justify his occupancy, then it should bring a contest challenging his discovery. Comparing his use of the claimed land with the objectives of the statute, we are unable to identify any use by him which Congress intended to curb. The record before us shows that Doherty has not prevented others from using the surface for other purposes and he has not used the surface of his claim for any purpose other than mining. We therefore affirm Judge Sweitzer's determination that appellant has not demonstrated any use or occupancy in violation of 30 U.S.C. § 612 (1988).

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. Arness
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge