

UNITED STATES  
v.  
BLANCH P. DAY  
WILMA JEAN KENDALL

IBLA 80-775

Decided July 29, 1981

Appeal from the decision of Administrative Law Judge Dean F. Ratzman declaring the Glacier Bar Extension placer mining claim invalid for lack of discovery. Contest No. CA-6099.

Affirmed.

1. Mining Claims: Discovery: Generally -- Mining Claims: Discovery: Marketability

A discovery of valuable minerals under Federal mining laws exists only where the minerals found are of such a character that a person of ordinary prudence would be justified in the further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine. Discovery requires a showing that the mineral can be presently extracted, removed, and marketed at a profit.

2. Administrative Procedure: Burden of Proof -- Mining Claims: Contests -- Mining Claims: Discovery: Generally

When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to overcome that showing by a preponderance of the evidence.

3. Administrative Procedure: Burden of Proof -- Mining Claims:  
Discovery: Generally

Where a Government mineral examiner testifies that he has examined a claim and found the mineral value insufficient to support a finding of discovery, a prima facie case of invalidity has been established.

APPEARANCES: Jane Skanderup, Esq., for appellants; Charles F. Lawrence, Esq., Office of General Counsel, U.S. Department of Agriculture.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Blanch P. Day and Wilma Jean Kendall have appealed the decision of Administrative Law Judge Dean F. Ratzman declaring the Glacier Bar Extension placer mining claim null and void for lack of discovery of valuable minerals on the claim. The claim is located in a portion of the NW 1/4 sec. 26, T. 7 N., R. 7 E., Humboldt meridian, Trinity County, California.

The proceeding, Contest No. CA-6099, was instituted on April 19, 1979, by the California State Office, Bureau of Land Management (BLM), on behalf of the Forest Service, U.S. Department of Agriculture. The Government's complaint charged: "A. There are not presently disclosed within the boundaries of the mining claim minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery"; and "B. The land embraced within the claim is nonmineral in character." The contestees denied the allegations and, on March 5, 1980, a hearing was held before Judge Ratzman. The Government presented one witness, George O. Scarfe, Jr., a registered geologist and mining engineer, who is experienced in mineral evaluation. Kendall and Paul H. Travis, a mining engineer with experience in developing and operating placer mines, testified for the contestees.

We have reviewed the record in this case and the arguments advanced by the parties. Judge Ratzman's decision sets out a summary of the testimony, the relevant evidence, and applicable law. We agree with the Judge's findings and conclusions, and adopt his decision as the decision of the Board. A copy of Judge Ratzman's decision is attached as Appendix A.

In their statement of reasons, appellants make three arguments. They urge that the Government did not establish a prima facie case because its testimony as to quantity and sampling procedures was insufficient; that their expert witness established reliable estimates of quality and quantity; and that mineralization sufficient to justify further development is sufficient to establish a valuable mineral deposit.

[1] A discovery of a valuable mineral deposit is essential to the validity of a mining claim located on public lands of the United States because the mere staking of a claim conveys no rights to the claimant until there is also shown to be discovery of a valuable mineral deposit within the limits of the claim. 30 U.S.C. § 23 (1976). Under the "prudent man test," a discovery of valuable minerals under Federal mining laws exists only where the minerals found are of such a character that a person of ordinary prudence would be justified in the further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine. United States v. Coleman, 390 U.S. 599 (1968); Chrisman v. Miller, 197 U.S. 313 (1905); Castle v. Womble, 19 L.D. 455, 457 (1894). This prudent man test has been complemented by the "marketability test" requiring a showing of marketability, that is, a showing that the mineral in question can be presently extracted, removed, and marketed at a profit. United States v. Coleman, *supra*; Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969).

Mineralization that only warrants further prospecting or exploration in an effort to ascertain whether sufficient mineralization might be found to justify mining or development does not constitute a valuable mineral deposit. A valuable mineral has not been found simply because the facts might warrant a search for such a deposit. Barton v. Morton 498 F.2d 288 (9th Cir. 1974); United States v. Porter, 37 IBLA 313 (1978). In order to have a valid mining claim, valuable minerals must be exposed in sufficient quantities to justify development of the claim through actual mining operations. United States v. Marion, 37 IBLA 68 (1978).

[2] When the United States contests a mining claim, it assumes only the burden of going forward with sufficient evidence to establish a prima facie case supporting the charges in the contest complaint; the burden then shifts to the contestee to refute the Government's case by a preponderance of the evidence. Hallenbeck v. Kleppe, 590 F.2d 852 (10th Cir. 1979); United States v. Springer, 491 F.2d 239 (9th Cir. 1974), *cert. denied*, 419 U.S. 834 (1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. MacLaughlin, 50 IBLA 176 (1980).

[3] The United States has established a prima facie case of the invalidity of a mining claim when a qualified Government mining engineer testifies that he has examined the claim and found the mineral values insufficient to support the discovery of a valuable mineral deposit. United States v. MacLaughlin, *supra*; United States v. Taylor, 25 IBLA 21 (1976).

The testimony provided by the Government's expert witness, Scarfe, established a prima facie case that there are no mineral deposits exposed on appellants' mining claim sufficient to justify a person of ordinary prudence in the further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine. The record reflects that mining activities of one kind or another occurring

on the claim for many years have produced negligible amounts of gold. The samples taken by Scarfe indicated low values of gold on the claim. After comparing the expense of the mining operation on this claim with these low values, Scarfe concluded that there has been no discovery of a valuable mineral deposit on the claim. Although appellants' expert witness, Travis, indicated that he had found somewhat higher values of gold on the claim and that the cost of operating the claim would be lower than Scarfe contended, we agree with Judge Ratzman's conclusion that the evidence is not so convincing as to preponderate over the Government's showing. The Judge correctly held that there has been no discovery of a valuable mineral deposit within the limits of the contested claim.

Therefore, 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.

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James L. Burski  
Administrative Judge

We concur:

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Bernard V. Parrette  
Chief Administrative Judge

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Douglas E. Henriques  
Administrative Judge

June 16, 1980

United States of America,	:	<u>Contest No. CA-6099</u>
	:	
Contestant	:	Involving the GLACIER BAR
	:	EXTENTION PLACER CLAIM,
v.	:	formerly known as GLACIER
	:	BAR PLACER MINING CLAIM,
Blanch P. Day; and	:	and GLACIER BAR Placer
	:	Mining Claim situated in
Wilma Jean Kendall	:	a portion of the NW ¼
	:	Sec. 26, T. 7 N., R. 7
Contestees	:	E Humboldt Meridian,
	:	Trinity County, California

DECISION

Appearances: Charles Lawrence, Attorney at  
Agriculture, San Francisco, Contestant  
Law, Office of the General  
Counsel, U.S. Department of  
California, for the

Jane Skanderup, Attorney at  
Law, Auburn, California for  
the Contestees

Before: Administrative Law Judge Ratzman

This is a contest brought by the Bureau of Land Management, United States Department of the Interior, on behalf of the United States Forest Service (USFS), Department of Agriculture, pursuant to the Hearings and Appeals Procedures, 43 CFR part 4, to determine the validity of the above-named placer mining claim.

On April 19, 1979, the Government filed a complaint herein, alleging that:

- A. There are not presently disclosed within the boundaries of the mining claim minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery.
- B. The land embraced within the claims is nonmineral in character.

These allegations were denied in an answer filed by the contestees on May 16, 1979.

A hearing was held on March 5, 1980, in Chico, California. Documents submitted at that time show that the contested claim is situated near the confluence of the New River and Devils Canyon Creek in the Salmon-Trinity Alps Primitive Area, Trinity National Forest, Trinity County, California.

The contestant called Mr. George O. Scarfe, Jr., a registered geologist and mining engineer, to testify. He has worked as a gold miner, and has made mineral evaluation examinations for more than 20 years. He examined the Glacier Bar Extension Placer Claim on July 12, 1978. Tr. 7. Contestees Blanche Day and Jean Kendall were present at that time. Tr. 8. Mr. Scarfe took a sample on a gravel bar near the discovery monument near the northwestern boundary of the claim. Tr. 9. According to Ms. Kendall the discovery was at another point, along the bank of Devils Canyon Creek. Tr. 10. Two samples were taken along that stream. Tr. 12.

Mr. Scarfe was assisted by two mineral examiners and a forester. The sample area on the gravel bar near the New River was from a clean face one or two feet below the surface. Ex. 7B, Tr. 14. Sample GB #1 contained five pans of material taken at intervals of one pan per vertical foot. Tr. 14. Sample GB #2 and Sample GB #3 were taken along the side of Devils Canyon Creek. Tr. 16. A boulder factor of 50% was taken into account. Tr. 17. For Sample GB #1, a 40% boulder factor was used. Bedrock was not exposed at any of the sample areas. Tr. 18. A small inoperable suction dredge was found near Sample Point #2. The mining claimant indicated she was interested in mining the stream bed in Devils Canyon Creek. The Scarfe samples were processed through a Denver Gold Saver, and the concentrates were collected and analyzed. Tr. 19. He recovered fine gold. Tr. 20. The following gold values were recovered:

Sample GB #1	\$4.37/cubic yard at \$633.75/ounce
Sample GB #2	\$2.02/cubic yard at \$633.75/ounce
Sample GB #3	\$1.45/cubic yard at \$633.75/ounce

The percentage of boulders in the sample material was accounted for. Tr. 22. At the gravel bar at Sample Point GB #1, Mr. Scarfe estimated there are 740 yards of gravel. Tr. 24. He found only small quantities of gravel in the other areas. In Mr. Scarfe's opinion the contested property is not worth developing since there are insufficient quantities of minerals on the claim. Tr. 31. The cost of extraction would exceed the value of any recoverable amounts of gold. Tr. 32. He referred to work along the creek as "sniping" and said that a person would be lucky to run a yard a day along the banks. Tr. 24.

Upon further questioning, Mr. Scarfe stated that he did not sample the bedrock and had not determined that the boulders go down to bedrock. Tr. 33. There was no exposed bedrock to sample.

Mining claimant Wilma Jean Kendall acknowledged that she pointed out several areas on the claim where she had been working. She has dredged "everywhere on [the] claim where there was bedrock and dredging available." Tr. 38. She has been involved with the mining claim since the 1930's. Tr. 39. Her grandfather originally owned the claim. Most of her mining efforts were confined to the last six years. Tr. 42. Approximately 48 days a year are spent mining. Tr. 44. She has dredged workable areas in the creek and at points where there is access to the New River. Tr. 47. The discovery point is on a high bar near Sample Point GB #1, and at the time of the hearing she intended to work that bar. Tr. 48, 53. She has been mining for flood gold, and has recovered approximately two ounces of gold since she began mining. Tr. 52.

Mr. Paul Travis, a graduate mining engineer with experience in developing and operating placer mines, was called to testify on behalf of the mining claimant. Tr. 61. He has set up drilling programs and pilot plants for placer projects. He disagrees with Mr. Scarfe's estimate that there are only 800 yards of gravel on the claim. Tr. 64. His examination was made on September 29, 1979. He located the northern boundaries of the claim but was unable to find the southern claim corners. Tr. 66. He stated that his yardage calculation had been overestimated by about 20% because he

included an area which is not within the boundaries of the claim. Mr. Travis took a sample at the lower bar near Sample GB #1 in a five foot cut. Tr. 67. He indicated that there are two different types of gravel in the bar. There are a lot of boulders in the bar along the New River.

To obtain his sample Mr. Travis dug into a bar just at the northern edge of the old cut. Ex. 6, Tr. 69. In this terrace-like area, he estimated the boulder content to be a maximum of 20%. He did not reach bedrock. He took 12 buckets of material which he estimated to weigh a total of 300 pounds and washed it through a sluice box. Tr. 70. This material was taken from a five foot high vertical groove. He recovered four or five coarse flakes from the material washed through the sluice box. Tr. 71. He also panned down some material from a bank and found three to four small colors. He believes larger samples produce more representative mineral content. Tr. 72. In addition, he contends that the most promising mineral areas are next to bedrock. Because he has not taken any samples from bedrock he has concluded that he was not in the most productive zone. He did sample what he called an intermediate zone which is 12 feet below the top of the bar to perhaps three feet above bedrock. Tr. 73. According to Mr. Travis the real values are in the Devils Canyon terrace. He estimated, making an adjustment for boulders, that there is a gold value of \$5.19 per cubic yard at a price of \$645.50 an ounce. Tr. 74. From observations of squirrel holes, ditches and excavations near buildings on the claims, made when he criss-crossed the higher bar, he estimated that 148,000 cubic yards of material can be mined. Tr. 71, 75.

According to Mr. Travis the most practical way to mine the claim is to construct a pond to store water up the canyon which can be utilized to ground sluice the area. Tr. 75. He testified that approximately 100 yards of material per day can be processed using this method. In his opinion a prudent person should begin developing this claim without further exploration since the initial investment is low for a single claim. Tr. 76. Mr. Travis discussed costs that would be associated with excavating material and running it through a sluice box. He estimated that an older trommel can be purchased for \$1500. An HD-6 loader, which can move 350 yards a day, rents for \$30 an hour. In his view a profit could be made even with \$4 a yard material. Tr. 76.

On cross-examination, Mr. Travis acknowledged that he projected the values in a large deposit of gravel on the basis of the sampling in the five foot cut. On the Glacier Bar

claim he has not encountered the higher values which he assumes will be found at bedrock. The colors that he obtained in pan sampling indicate that the gravel is gold bearing. Tr. 84. These pan samples were taken from an old cut on a bank. Ex. 6. Mr. Travis "would have felt better" about a more extensive examination. Tr. 85. He has not made a complete study as to the cost of restoring the land after a ground sluice method is used to mine. Tr. 95. He was informed that a ground sluicing operation had been conducted on the claim in the 1930s. Tr. 99. He revised his earlier estimate of twelve acres and stated that there are about seven acres in the "flat area" containing gravel on the claim. Tr. 104.

Mr. Scarfe calculated that there are approximately two acres in the flat area on the claim. Tr. 106. Mining gravels to the east of the creek would require dropping materials into the stream, or use of a flume. The bar along Devils Canyon Creek could not provide much room for gravels and tailings anticipated from a mining operation of Mr. Travis' scale. Tr. 107.

A mineral report (Ex. A) on the Glacier Bar Extension claim prepared by Mr. Travis, contended that gold bearing deposits are in Devils Canyon Creek gravels. The report states that mining can be conducted at a cost of under \$2.00 per cubic yard.

#### Summary of Applicable Law

A mining claimant must discover a valuable mineral deposit before he may receive title to a mining claim located on public land. A discovery of valuable minerals under Federal mining laws exists only where the minerals found are of such a character that a person of ordinary prudence would be justified in further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. United States v. Coleman, 390 U.S. 599 (1968); Chrisman v. Miller, 197 U.S. 313 (1905); Castle v. Womble, 19 L.D. 455, 457 (1894).

The Government bears the initial burden of going forward with sufficient evidence to establish a prima facie case that no valuable mineral discovery has been made. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Clare Williamson, et al., 45 IBLA 264 (1980). The burden then shifts to the claimant to show by a preponderance of

the evidence that the claim is valid. Humboldt Placer Mining Co. v. Secretary of the Interior, 549 F.2d 622 (9th Cir.) cert. denied, 434 U.S. 836 (1977); United States v. Springer, 491 F.2d 239 (9th Cir.), cert. denied, 419 U.S. 834 (1974).

A prima facie case that a discovery of a valuable mineral deposit is lacking is established when a Government mineral examiner gives his expert opinion that he examined a claim and found insufficient values to support a finding of discovery. United States v. Alex Bechthold, 25 IBLA 77, 82 (1976); United States v. Fisher, 37 IBLA 80 (1978). A finding of mineralization may suggest the possibility of minerals of sufficient value to justify further exploration, but it does not establish a discovery. Chrisman v. Miller, 197 U.S. 313 (1905); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969). A discovery is not shown when further exploration is necessary before the feasibility of development can be demonstrated. United States v. Theresa B. Robinson, 21 IBLA 363 (1975). The quantity as well as the quality of available ore should be taken into account when the estimate of the value of a mineral deposit is made. United States v. Hines Gilbert Gold Mines Company, 1 IBLA 296 (1971). Samples and assays without data as to extent in at least two, if not three dimensions of the ore bodies sampled can mean little or nothing of evidentiary value. United States v. Nor. Pacific Railway Co., 1 Fed. 2d 53, 57 (Mont. 1924).

United States v. Zweifel, 502 F.2d 1150, 1156, (10th Cir. 1975) discusses the decisions of the Department of the Interior, spanning eighty years, which conclude that if a mining claimant has held a claim for several years and has attempted little or no development or operations, a presumption is raised that he has failed to discover valuable mineral deposits or that the market value of existing minerals was not sufficient to justify the costs of extraction.

#### Determination

A prima facie showing that the Glacier Bar Extension placer claim does not contain mineral deposits sufficient in quantity and quality to support a discovery has been established through the testimony of the Government's expert witness. His samples disclose there are low gold values. In his view those values would produce a return lower than the cost of mining and extraction. In examining the claim and taking samples he was assisted by two mineral examiners and an employee of the Forest Service. He found a quantity of

material that would not be sufficient to induce a prudent person to expend money to develop this claim. He concluded that even at a gold value in excess of \$600 an ounce (currently the value of gold is not that high) the 800 cubic yard bar would not encourage one to invest in equipment and expend further effort.

The mining claimants have failed to produce sufficient evidence to rebut the Government's charges. Ms. Kendall acknowledges she has recovered only two ounces of gold from the claim since she began mining it. Her grandfather owned it many years ago, and several of her uncles have engaged in mining activities on the claim. She has been going to the area of the claim for about 40 years, and has prospected at many locations on the claim during the 1970s, using both a sluice box and a dredge. In the 1930s or prior to that period, a ditch system was constructed and sluicing operations were carried out. Against this backdrop the estimate of Scarfe (a bar of 800 cubic yards which would be mined at a loss of about \$20 per day) must be compared with that of Travis (a bar of 148,000 cubic yards, mineable at a profit which would exceed \$1.00 per cubic yard).

Because a laborer who had been hired to help Mr. Travis failed to make an appearance, it was necessary for the latter to carry out all phases of his mineral examination with no assistance. A comparison of the sketch maps of the claims (Plate one of Exhibit A [Travis] and Exhibit G [Scarfe]) reveals that Mr. Scarfe's work is more accurate and reliable. When he became aware of the actual boundaries of the claim Mr. Travis made a substantial reduction in the size of the Devils Canyon Creek bar.

To make a ruling favorable to the mining claimants in this contest I would be required to find that the testimony of Mr. Travis preponderates over that of Mr. Scarfe. I am unable to reach such a conclusion. Although he panned and inspected colors at another location, the sampling/assaying activity of Mr. Travis was confined to one location. After following a scientific approach at only that one cut, and crisscrossing the claim looking at such surface indications as squirrel holes he concluded that there is a sizeable bar with gold bearing gravel about twenty feet deep. I do not accept either his estimate of volume or his assumption that high gold values will be found throughout the bar. Mining a bar by sluicing or with the use of a trommel are methods which have been available for many decades. It is

not reasonable to assume that a large bar with high values would have been ignored by the old miners. The opportunity of Ms. Kendall's grandfather and uncles to inspect the Glacier Bar claim over a period of many years has been mentioned. She excavated material from cuts and ran it through a sluice box, and tested the sides and workable areas of the river and creek by means of a small dredge. All of the time that Ms. Kendall and her relatives have spent on the claim should have allowed an opportunity for thorough testing of the dimensions and depth of the Devils Canyon Creek bar. The estimate of Mr. Travis with respect to the volume of material in that bar is not sustainable. He simply did not do enough work at the site to be able to say that there are seven to twelve acres of gravel with an average depth of twenty feet.

Because it has not been shown that a discovery of valuable minerals exists on the Glacier Bar Extension Placer Claim, that claim is hereby declared null and void.

Dean F. Ratzman  
Administrative Law Judge

#### Appeal Information

An appeal from this decision may be taken to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations in 43 CFR Part 4 (revised as of October, 1978). Special rules applicable to public land hearings and appeals are contained in Subpart E. If an appeal is taken, the notice of appeal must be filed in this office (not with the Board) in order to facilitate transmittal of the case file to the Board. If the procedures set forth in the regulations are not followed, an appeal is subject to dismissal. The adverse party to be served with a copy of the notice of appeal and other documents is the attorney for the United States Department of the Interior whose name and address appear below. Additionally, rules that became effective February 25, 1980 state that the Associate Solicitor of the Division of Energy and Resources must be served with a copy of the notice of appeal and any statement of reasons, written arguments, or briefs. (Address: Office of the Solicitor, U.S. Department of the Interior, Washington, D.C. 20240.)

Enclosure: Additional information concerning appeals.

