

UNITED STATES

v.

CLIFFORD L. AND MARY A. WILLIAMS

IBLA 81-265

Decided July 16, 1982

Appeal from decision of Administrative Law Judge E. Kendall Clarke dismissing contest against the Log Cabin placer mining claim CA-6102.

Affirmed.

1. Mining Claims: Determination of Validity -- Mining Claims: Discovery: Marketability -- Mining Claims: Marketability -- Mining Claims: Specific Mineral(s) Involved: Gold

For a mining claim to be valid there must be a discovery of a valuable mineral deposit within the limits of the claim. There has been a discovery where minerals have been found in sufficient quantity and of sufficient quality 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.

2. Mining Claims: Determination of Validity -- Mining Claims: Discovery: Marketability Mining Claims: Marketability -- Mining Claims: Specific Mineral(s) Involved: Gold

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

invalidity has been established and the burden shifts to the claimants to show by a preponderance of the evidence that a discovery has been made.

3. Mining Claims: Determination of Validity -- Mining Claims: Discovery: Marketability Mining Claims: Marketability -- Mining Claims: Specific Mineral(s) Involved: Gold

Where contestees present uncontroverted evidence showing that, over a period of 4 years, they and a partner have extracted 26 or 27 ounces of gold from their claim using a suction dredge, and where the Government has made no showing that suction dredge mining would be insufficient to support a valid claim, the contest is properly dismissed without prejudice to the initiation of another contest complaint.

APPEARANCES: Wilbur W. Jennings, Esq., Office of General Counsel, Department of Agriculture, for the Forest Service. 1/

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

The United States has appealed from the decision of Administrative Law Judge E. Kendall Clarke, dated December 15, 1980, dismissing a contest complaint against the Log Cabin placer mining claim, located on the Trinity River in California (CA-6102). The complaint, dated April 18, 1979, was initiated by the Bureau of Land Management (BLM), on behalf of the Forest Service (FS), U.S. Department of Agriculture, and charged 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; and (b) that the land embraced within the claim is nonmineral in character. The complaint named Clifford L. Williams as the sole contestee.

1/ Neither Clifford L. nor Mary A. Williams has appeared in this appeal. On Feb. 18, 1981, Clifford Williams wrote to Wilbur W. Jennings, Esq., attorney for the Forest Service (FS), to notify him that he and his wife had sold this claim to Peter Miller. Jennings forwarded copies of this communication to Judge Clarke and to this Board. On Feb. 20, 1981, Jennings also served Miller with copies of FS's notice of appeal and statement of reasons, but Miller did not answer within 30 days of his receipt of service as required by 43 CFR 4.414. On May 18, 1981, 87 days after service, Miller requested additional time in which to file an answer. This request is denied. Accordingly, Miller is not a party to this appeal.

Williams filed an answer on May 29, 1979, and requested a hearing on the validity of the claim. A hearing was held before Administrative Law Judge Clarke on April 15, 1980, in Sacramento, California, at which time the complaint was amended to add Williams' wife, Mary A. Williams, co-owner of the claim with him, as a contestee (Tr. 6). Williams and his wife both appeared, and Williams presented their case; FS was represented by counsel. On December 15, 1980, Judge Clarke issued his decision holding that, although FS had established a prima facie case of a lack of discovery, contestees had rebutted it. Therefore, he dismissed the complaint, and FS appealed. We affirm.

[1] A mining claimant must make a discovery of a valuable mineral deposit within the limits of a mining claim as a prerequisite to a valid location. A discovery exists where minerals have been found on the claim which 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 valuable mine. This prudent person test has been refined to require a claimant to show that the mineral is "marketable," that is, that it can be extracted, removed, and marketed at a profit. United States v. Coleman, 390 U.S. 599 (1968); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).

[2] When the Government contests a mining claim on a charge of no discovery, it assumes the burden of going forward with sufficient evidence to establish a prima facie case of invalidity. Then the burden shifts to the claimant to overcome the Government's showing by a preponderance of evidence, and the claimant bears the risk of nonpersuasion. United States v. Zweifel, 508 F.2d 1105 (10th Cir. 1975), cert. denied, 423 U.S. 829, rehearing denied, 423 U.S. 1008 (1976); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Bechthold, 25 IBLA 77, 82 (1976).

The Government's prima facie case of invalidity consisted of testimony by Emmett B. Ball, Jr., a mining engineer, and Ronald E. Bassett, Jr., a lands officer, both of FS, and of documentation of assay analyses of mineral samples taken by them from the bank of the Trinity River on the claim. Ball and Bassett visited the claim three times, on August 31, 1976, May 11, 1978, and in March 1980.

On May 11, 1978, Ball and Bassett went to the claim to sample it. They met Williams and his wife there and talked with them (Tr. 35). Williams did not want to cooperate and refused to show them anything (Tr. 36, 40-41), so they took a three-pan sample from a hole on the river bank and concentrated it (Tr. 36-37). A free gold determination by amalgamation of the concentrated sample revealed a gold content of only .460 milligrams (Govt. Exh. 5; Tr. 38). The original unconcentrated sample was approximately 0.02 cubic yards, so that the analysis showed only 23 milligrams of gold per cubic yard (Tr. 38). Taking into account the high percentage of unminable boulders on

the claim (at least 40 percent), the value of the material on the claim was calculated at only "slightly less than twenty-one cents per yard," using a value of \$525 per ounce (Tr. 38-39). 2/

Ball and Bassett went back to the claim in March 1980 to see what additional work had been done on it since the 1978 visit (Tr. 41-42). Williams was not present at the claim (Tr. 42). Ball found a hole that was not there in 1978 and took a two-pan sample from it that was concentrated and analyzed as described above (Tr. 43-44). It was found to have a value of "just under 80 cents per cubic yard" (Tr. 44).

Ball testified that the cost of labor and fuel needed to mine the claim would be "better than two dollars a yard," even using the most efficient and economical method of mining (Tr. 44-45), and he estimated the cost of mining by pick and shovel at "over \$10 a yard" (Tr. 47-48). These estimates did not include substantial additional costs for equipment and a settling pond (Tr. 45-48). Ball concluded that a person of ordinary prudence would not be justified in further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine (Tr. 49).

We find that this evidence established a prima facie case of invalidity.

[3] Contestees' presentation consisted chiefly of Clifford Williams' testimony, which is summarized as follows. Williams and his wife acquired the Log Cabin placer mining claim on July 15, 1976 (Govt. Exh. 4; Tr. 113, 121). Williams did not own a suction dredge at that time and had to order one (Tr. 113). During 1976, Williams arranged to work the claim together with his friend Orville Blevins, using Blevins' dredge and gasoline and dividing the proceeds evenly between them (Tr. 113-14). Williams and Blevins worked the riverbed itself, especially a bar that is exposed during low water (Tr. 108-09). Williams' wife helped by panning what was removed (Tr. 105-06, 114). Blevins "was sick half the time," so they "didn't get the full summer in" (Tr. 114). Nevertheless, he testified that they worked 6 hours a day or "maybe a little more," and did not leave the claim until November (Tr. 114). They recovered "something around six ounces" of gold in 1976 (Tr. 114), and Williams sold some in 1976 for approximately \$150 to \$200, evidently per ounce (Tr. 115).

Blevins did not work with Williams after 1976 (Tr. 116), and Williams returned to work the claim at the end of May 1977 (Tr. 115) probably using his own 6-inch dredge, which cost "close to \$1,500 to put in the water" (Tr. 105). He worked with his wife, who did some shoveling and sluicing, but mostly she panned what was removed from the riverbed (Tr. 116). He worked 6 hours a day, 6 days a week until "about October" (Tr. 116). Although he had not "weighed it up," Williams estimated that they recovered 7 ounces in 1977 (Tr. 117).

2/ The value would be even less, using the \$497.50 per ounce value in effect on Apr. 15, 1980.

In 1978, Williams and his wife worked the claim in a similar manner from "around in May" to "around October," working 6-hour days (Tr. 118). They derived only about 2 to 3 ounces of gold in 1978 because Williams contracted pneumonia and lost "close to 2 months" of the summer, although he continued to work 6 hours a day, 6 days a week, when he did work (Tr. 118-19, 121). ^{3/}

In 1979, Williams and his wife recovered 10 ounces of gold, working "something like" 6-hour days, 6 days a week (Tr. 120). He did not specify how long he worked in 1979.

Throughout 1976 to 1979, Williams' wife aided him by panning the material that he removed from the riverbed (Tr. 105-06, 118, 128), evidently working "an hour, an hour-and-a-half" to pan what he removed in a day (Tr. 128-29).

Williams testified that "it's a little expensive" to operate his dredge, which uses an 8-horsepower gasoline engine, explaining that "it will take a gallon, two gallons in three or four hours" (Tr. 107). Henry L. King, Williams' witness and holder of a neighboring claim, estimated the cost of gasoline to be "maybe a dollar" for 90 minutes (Tr. 89).

Williams brought "close to" 10 ounces (Tr. 119, 127) of gold with him to the hearing and testified that it was the gold which he had removed from the claim in 1979 (Tr. 119, 128). Henry King corroborated this testimony (Tr. 90). Although Williams' testimony as to recovery of gold from the claim in other years is uncorroborated, we will assume, as he testified, that he recovered 27 ounces from 1976 through 1979. ^{4/}

Contestees also presented the testimony of Henry L. King, owner of a claim situated across the Trinity River from theirs. He brought with him a concentrated sample of ore that he had mined in 1978 in one 90-minute "swipe across the river" with a 6-inch dredge (Tr. 84-85). By his own admission, this sample came in part from his own claim, as well as contestees' (Tr. 93). Accordingly, the sample is not probative of the mineralization on contestees' claim, since there is no way of ascertaining whether any gold in the sample came from it or from King's claim.

On June 6, 1980, after the hearing, contestees filed with Judge Clarke a brief containing additional evidence, to-wit, a report prepared by one David Bero, assertedly a geologist. The report included Bero's description of a 3-hour test sampling allegedly performed at the claim by Bero, Williams, his wife, and one Kenneth O'Byrne, on the morning of May 31, 1980. Since this report was not subject to cross-examination by the contestant, it has little evidentiary value.

^{3/} Williams subsequently changed his testimony to indicate that he had recovered 7 ounces in 1978, instead of in 1977, and 4 ounces in 1977, instead of 3 ounces in 1978 (Tr. 138), thus raising the total from 26 to 27 ounces.

^{4/} Williams actually testified variously that he recovered a total of 26 or 27 ounces of gold. See n.3, supra.

The most appropriate point at which to evaluate a mining claim in the absence of a withdrawal is at the time of the hearing, and specific values should be computed using the prices of minerals and other items as of this date. United States v. McDowell, 53 IBLA 270, 277 (1981). However, the recoveries testified to by contestees in this case took place over a 4-year period during which the price of gold fluctuated considerably. Neither is it possible to determine with any precision the number of hours contestees actually worked on the claim during that period. However, the Government's evidence is even more deficient, since it made no attempt to take samples from the claim by means of a suction dredge.

We therefore conclude, as did Judge Clarke, that contestees' evidence showing a recovery of 26 or 27 ounces of gold by suction dredge mining, which is uncontroverted in the present record, is enough to overcome the Government's prima facie showing of invalidity. The Government's case was based on evidence concerning only the insufficiency of techniques other than suction dredge mining to establish a marketable claim. Therefore, contestees' evidence of recovery by suction dredging, although certainly flawed by vagueness is adequate in the absence of evidence showing to the contrary.

We stress that contestees' evidence lacked by far the specificity and corroboration required to support a finding that the claim was valid. Our holding is limited to a determination that this particular contest was properly dismissed by Judge Clarke, and is without prejudice to the initiation of a new contest complaint and subsequent proceeding, in which the Government may present evidence showing that suction dredging on this claim has not resulted in a discovery of a valuable mineral deposit.

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.

Bernard V. Parrette
Chief Administrative Judge

We concur:

James L. Burski
Administrative Judge

Edward W. Stuebing
Administrative Judge

