

Editor's note: Reconsideration granted; decision reaffirmed -- See U.S. v. Robert B. Lara (On Reconsideration) 80 IBLA 215 (April 30, 1984); Appealed -- aff'd, Civ.No. 84-1272 (D. Oreg. April 30, 1986), 642 F. Supp. 458; aff'd, No. 86-3954 (9th Cir. July 8, 1987) 820 F.2d 1535

UNITED STATES
v.
ROBERT B. LARA

IBLA 81-47

Decided September 9, 1982

Appeal from a decision of Administrative Law Judge E. Kendall Clarke declaring two placer claims and a portion of a third placer mining claim invalid. CA 5121, OR 18078, and OR 18079.

Affirmed.

1. Mining Claims: Mineral Lands -- Mining Claims: Placer Claims

Although placer claims may be validated by a single discovery, each 10-acre subdivision embraced by the claim must be mineral in character.

2. Mining Claims: Contests -- Rules of Practice: Government Contests -- Rules of Practice: Hearings

In a mining contest, a matter not charged in the complaint cannot be used as a ground to invalidate a claim, unless it has been raised at the hearing and the contestee has not objected.

3. Administrative Procedure: Burden of Proof -- Mining Claims: Contests

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

4. Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Discovery

A mining claim which is not supported by the discovery of a valuable mineral

deposit at the time of withdrawal of the land is not excepted from the effect of the withdrawal. Neither the subsequent exposure of previously undiscovered deposits nor a subsequent increase in value of a mineral previously exposed can breathe life into such an invalid claim.

APPEARANCES: William B. Murray, Esq., Portland, Oregon, for appellant; Elden M. Gish, Esq., Office of the General Counsel, U.S. Department of Agriculture, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Robert B. Lara has appealed from a decision of Administrative Law Judge E. Kendall Clarke, dated September 8, 1980, declaring the Madeline Nos. 1 and 2 placer mining claims invalid for lack of discovery of a valuable mineral deposit (OR 18078 and OR 18079) and a portion of the Sunshine placer mining claim invalid because the land is nonmineral in character (CA 5121).

The Sunshine placer mining claim was located August 21, 1932, along the Elliot Creek tributary of the Applegate River, in Siskiyou County, California. The northeastern portion of the claim, declared invalid by the Administrative Law Judge, was withdrawn from appropriation under the mining laws, pursuant to Public Land Order (PLO) No. 4982, dated December 24, 1970. See 36 FR 61 (Jan. 5, 1971). The Madeline Nos. 1 and 2 placer mining claims were located May 15, 1933, and September 2, 1933, respectively, along the Applegate River, in Jackson County, Oregon. The land was segregated from appropriation under the mining laws pursuant to an application for withdrawal filed July 12, 1972 (OR 9651). See 38 FR 30894 (Nov. 8, 1973). All of the claims are situated within the Rogue River National Forest.

On June 21, 1978, the Bureau of Land Management (BLM), on behalf of the Forest Service (FS), U.S. Department of Agriculture, filed a contest complaint regarding the Sunshine mining claim, charging:

1. 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.
2. The claim is being held and used for other than bona fide mining purposes.

On December 8, 1977, BLM, also on behalf of the Forest Service, filed two contest complaints regarding the Madeline Nos. 1 and 2 mining claims, charging:

1. Minerals have not been found within the limits of the claim in sufficient quantities to constitute a valid discovery.
2. The claim is being held and used for other than bona fide mining purposes.

3. The claimants have failed to substantially comply with the requirements for annual assessment work on the claim as required by the statutes (30 U.S.C. 28; R.S. 2324) and the regulations (43 CFR 3851.3).

On July 30, 1979, and October 30, 1979, consolidated hearings were held in Portland, Oregon, and Sacramento, California, before Administrative Law Judge Clarke. 1/

In his September 1980 decision Administrative Law Judge Clarke held that the Government had presented a prima facie case that the northeastern portion of the Sunshine mining claim is nonmineral in character and that appellant had not overcome that case by a preponderance of the evidence. In invalidating that portion of the mining claim, Judge Clarke relied on the "ten-acre rule," *i.e.*, each 10-acre subdivision of a placer mining claim must be mineral in character, citing United States v. Williamson, 45 IBLA 264, 87 I.D. 34 (1980). 2/

In his statement of reasons for appeal, appellant contends that Judge Clarke erred in declaring the northeastern portion of the Sunshine mining claim invalid when no such charge was contained in the contest complaint, thus denying him notice and an opportunity for a hearing as to that charge. In addition, appellant argues that the "ten-acre rule" is solely an administrative policy, which applies to an association placer mining claim of 160 acres and not to an individual placer mining claim of 20 acres. He states that discovery of a valuable mineral deposit on one 10-acre portion of a mining claim "supports location of the entire twenty acres" (Statement of Reasons at 6).

[1] It is well established that "although placer mining claims may be validated by a single discovery, each 10-acre subdivision embraced by the claim must be mineral in character." McCall v. Andrus, 628 F.2d 1185 (9th Cir. 1980), *cert. denied*, 450 U.S. 996 (1981); Laden v. Andrus, 595 F.2d 482, 491 (9th Cir. 1979); United States v. Oneida Perlite Corp., 57 IBLA 167, 88 I.D. 772 (1981); United States v. Nickol, 47 IBLA 183, 187 (1980), and cases cited therein. The 10-acre rule is equally applicable to individual and association placer mining claims. Ferrell v. Hoge, 29 L.D. 12 (1899). Therefore, the Department properly examines whether the 10-acre northern half of the Sunshine mining claim is mineral in character.

[2] Appellant, however, is correct in his contention that generally a matter not charged in a contest complaint cannot be used as a ground to

1/ The transcript of the July 1979 hearing in Portland, Oregon, will be referred to as I Tr.; the transcript of the October 1979 hearing in Sacramento, California, will be referred to as II Tr.

2/ Judge Clarke dismissed the contest complaint as to the southwestern portion of the Sunshine mining claim, based on testimony by Paul F. Boswell, the Government mineral examiner, that there was a discovery of a valuable mineral deposit (I Tr. 68). *See* discussion, *infra*. FS has not appealed that dismissal.

invalidate a mining claim. See United States v. McElwaine, 26 IBLA 20 (1976). This rule is based on elementary principles of procedural due process. See Harold Ladd Pierce, 3 IBLA 29 (1971). However, where an issue has been raised at the hearing and the contestee has not objected nor requested a postponement, a mining claim may be invalidated on the basis of resolution of that issue. United States v. Williamson, supra. This is the situation herein.

At the July 1979 hearing, the Government mineral examiner testified that only the southwestern quarter of the Sunshine mining claim was "placer ground" (I Tr. 69). Similarly, in his mineral examination report, dated June 7, 1979, he stated that the land "appears to be nonmineral in character," because it is characterized by hornblende schists and not gold-bearing gravels (Exh. 10 at 7). Subsequent to the introduction of this evidence, the following colloquy took place between Judge Clarke and William B. Murray, Esq., one of appellant's attorneys, which illustrates, we conclude, that appellant was aware that the issue of the mineral character of the northeastern portion of the Sunshine mining claim had been raised:

JUDGE CLARKE: Mr. Murray, would you like to explore some sort of a stipulation so that we wouldn't have to take any evidence concerning this portion of a claim that the Government admits is placer ground?

MR. MURRAY: First, I'd like to know what claim this would be on? What claim?

MR. GISH: The Sunshine.

MR. MURRAY: Sunshine.

JUDGE CLARKE: If you'll look at -- do you have a copy of "Exhibit 13"?

MR. CARNESE: Yes.

JUDGE CLARKE: Well, the Government, as I understand their contention, that portion of the claim lying in Section 20 southwest of the road, indicated as "graveled and oiled road," is placer ground. So, I take it that that portion of the claim that is represented in that legal subdivision, or that portion of the legal subdivision, is ground that the Government would stipulate as a valid mining claim.

I guess it will have to be necessary to come to some determination as to what portion of Section 20 constitutes that legal subdivision -- that 10-acre subdivision.

MR. MURRAY: Well, as far as the facts are concerned, we might be able to enter into a stipulation. I think from the point of law, however, that only one discovery is necessary on each claim.

JUDGE CLARKE: Well, it has to be mineral in character. I think the Government is contending that it's not mineral in character -- the rest of it.

MR. MURRAY: That 10-acre subdivision rule only applies to association placers, not to an individual placer.

JUDGE CLARKE: Why don't we just go on and take the evidence then, and you can -- that's not my understanding of the law, Mr. Murray, by the way -- but you'd have an opportunity to brief that question. [Emphasis added.]

(I Tr. 71-72; see also II Tr. 14-15).

Appellant's attorney clearly understood the thrust of the Government's contention. His response was in the nature of a demurrer to the effect that he did not believe the rule applied to individual placer locations. Judge Clarke indicated that this was not his view of the law and stated that, while appellant was free to brief this contention, evidence would be taken on the mineral character of the two 10-acre tracts. Inasmuch as the failure of the contestee to appear at the initial hearing necessitated another hearing, held on October 30, 1979, contestee had more than sufficient time to prepare any evidence on this matter. Thus, the failure to properly charge that the land was nonmineral in character was not prejudicial to appellant. ^{3/}

As to the issue of whether the land is mineral in character, we conclude that the Government presented a prima facie case that the northern half of the Sunshine mining claim is nonmineral in character. Land is mineral in character when known conditions engender the belief that the land contains mineral of such quality and quantity as to render its extraction profitable and to justify expenditures to that end. United States v. Meyers, 17 IBLA 313 (1974). Such a determination may be based on observable external conditions upon which a prudent and experienced person would rely, without the actual physical exposure of the mineral. Id. at 317. We hold that the testimony of the Government mineral examiner established a prima facie case, based on his failure to observe gold-bearing gravels within the northern 10 acres of the Sunshine claim.

The burden then shifted to appellant to show by a preponderance of evidence that the land is mineral in character. United States v. McCall, 7 IBLA 21, 79 I.D. 457 (1972). The record contains no evidence that appellant attempted to rebut the Government's case. Rather, appellant presented evidence, which at best merely confirmed the discovery of a valuable mineral

^{3/} While, as we have indicated, the failure to properly charge that portions of the land embraced by the claim were nonmineral in character was not prejudicial in the instant case, it should be obvious that the preferred practice is to draft complaints with sufficient specificity so as to put the claimant on notice of the substance of the Government's real concerns. There seems scant justification herein for the failure of the Government to formally amend its complaint once it determined that a discovery existed in the southern half of the claim.

deposit on the southwestern quarter of the Sunshine mining claim, which fact the Government readily admitted. In the absence of evidence that the northern half of the claim was mineral in character, it was proper for Judge Clarke to invalidate that part of the claim.

In his September 1980 decision Administrative Law Judge Clarke also held that the Government had presented a prima facie case that the Madeline Nos. 1 and 2 placer mining claims did not contain a valuable mineral deposit, either at the time of withdrawal or the date of the hearing, and that appellant had not overcome that showing by a preponderance of the evidence.

As a prerequisite to establishing the validity of a mining claim, a claimant must establish the presence of a valuable mineral deposit. 30 U.S.C. § 22 (1976). A valuable mineral deposit exists where the mineral found is of such quality and quantity 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. Chrisman v. Miller, 197 U.S. 313 (1905); Castle v. Womble, 19 L.D. 455 (1894). This "prudent man test" has been refined to require a showing of marketability, i.e., that the mineral can be presently extracted, removed, and marketed at a profit. United States v. Coleman, 390 U.S. 599 (1968). Where a claim is located on land subsequently withdrawn from appropriation under the mining laws, the claim must be supported by a discovery at the time of withdrawal, as well as the date of the hearing into its validity. Cameron v. United States, 252 U.S. 450 (1920); United States v. Foresyth, 15 IBLA 43 (1974) (application for withdrawal).

[3] The burden of establishing a prima facie case as to the lack of a discovery is on the Government. United States v. Zweifel, 508 F.2d 1150 (10th Cir. 1975), cert. denied, 423 U.S. 829 (1976). The Government can establish a prima facie case where a qualified mineral examiner testifies that he has examined a mining claim and found the exposed mineral values insufficient to support a finding of discovery. United States v. Hess, 46 IBLA 1 (1980); United States v. Arcand, 23 IBLA 226 (1976).

The testimony of the Government mineral examiner was summarized by Administrative Law Judge Clarke as follows:

Paul Frederick Boswell, a mining engineer with the United States Forest Service, testified that he has been making mineral examinations in the national forest in Oregon since 1965. (Tr. 9). His first examination of the Madeline claims was on June 27, 1977. The next examination was on March 20, 1979. (Tr. 11). The 20-acre claims are on the Applegate River in Jackson County, Oregon. (Tr. 12). The topography on the eastern side of the claims, away from the river, is fairly steep. The rest of the claims are fairly flat. The rock outcrops along the river and bedrock is exposed. The area consists of volcanic and metasomatic rocks.

In June of 1977, Mr. Boswell took a 1/4 yard sample from each of the Madeline No. 1 and Madeline No. 2 claims. He dug

down to bedrock along the creek and then removed this material. He then ran this material through a sluice box and panned it down to a concentrate. The concentrate was sent to the Union Assay Office in Salt Lake City, Utah. (Tr. 14). At the next inspection, Mr. Boswell dug down to bedrock with a small backhoe. A quarter yard of material was then run through a Denver gold saver. This procedure was performed on both the Madeline No. 1 and Madeline No. 2 claims. (Tr. 14). All the samples were reduced to a concentrate. (Tr. 16). These samples were also sent to the Union Assay Office for analysis. There was an estimated volume of 118,000 yards of gravel on the Madeline claims. (Tr. 20). Mr. Boswell calculated that at the date of withdrawal of the Madeline claims, the per yard value of the gravel present was 13.8 cents. Using gold prices on the date of the hearing, the value was 60 cents per yard. No discovery points were found on these claims. (Tr. 21).

* * * No mining activity was visible in 1979. There was no recorded mining history for the claims. In Mr. Boswell's opinion, there is no valuable mineral discovery on either of the Madeline claims. (Tr. 22). Additionally, it is his belief there was no discovery as of the date of withdrawal.

Upon further questioning, Mr. Boswell replied that gold will usually sink toward bedrock because of its specific gravity. (Tr. 31). The exposed bedrock on the Madeline claim is metavolcanic rock. The gravel on the claims has been washed by nature many times. As seasonal flooding occurs, the gold gravel washes further downstream. (Tr. 34). As the gravel is repeatedly washed, any gold contained therein is reduced into fine particles and washed away. (Tr. 35). Mr. Boswell also analyzed the black sand concentrates in order to get an accurate gold evaluation. The Applegate River has a fluctuating flow of water during April. Since the area is flat, it would make ground sluicing difficult. (Tr. 51). Before the claim could be profitable to mine, gold prices must reach the \$600 to \$700 an ounce value. (Tr. 58).

* * * * *

Mr. Boswell was recalled and he estimated that there are 5,800 yards of gravel on a 40' x 1300' section of the Applegate River. (Tr. 150). He took a sample from the channel of the Applegate River.

Paul Boswell prepared a mineral examination report (Ex. 7) and a supplemental report (Ex. 8) on the Madeline claims. He described the economic geology as consisting of coarse gravels averaging six inches in diameter. Total volume of gravel on both of the claims at the most is 113,000 cubic yards. * * * The claims have been mined before. Of the total volume of gravel on

the claims only 48,000 cubic yards can be mined. [4/] At a value of 20 cents a yard, recovery would be only \$9,600, which would not cover the amortization of large mining equipment. Hand mining methods must be utilized employing a sluice box. At the most ten yards a day can be processed. At a gold value of 20 cents a yard, a person could recover \$2 a day. Taking into consideration mining costs and labor expenses, Mr. Boswell concluded it would not be economical to develop these claims.

In the supplemental report, Mr. Boswell estimated an average gold value of 13 cents a yard at the value of gold at the date of the withdrawal of these claims, July 12, 1972. The value of gold at that date was \$65.35/tr. oz. Estimated mining costs in 1972 were \$1.28 per cubic yard.

(Decision at 2-3, 5).

There is no question that this testimony would normally be sufficient to establish a prima facie case. On appeal, however, appellant challenges the accuracy of the mineral examiner's sampling methods, alleging that the samples included a "large amount of topsoil" which diluted mineral values and that the manner in which the Denver gold saver was operated "permitted gold values to be lost" (Statement of Reasons at 8). The record does not support these allegations. On the contrary, it indicates that the mineral examiner attempted to concentrate on the gravels in his samples (I Tr. 36-38) and that use of the Denver gold saver included periodic checks of the tailings to determine if any gold values were not being recovered by the machine (II Tr. 152-58).

Appellant also alleges that the mineral examiner failed to take into account gold values present in the river gravels, rather than the bench gravels. We note that the two samples taken by Boswell in June 1977 came from the bank of the Applegate River, in each of the claims (Exh. 7 at 4). These samples clearly came from the channel of the Applegate River, as it is defined by annual flooding (II Tr. 58). Moreover, the testimony clearly

4/ While these figures relating to the existence of gravels did appear in Boswell's original report prepared in 1977 (Exh. 7 at 5), the supplemental report in 1979 (Exh. 8 at 10), indicated that there were considerably more gravels than was originally estimated. In preparing his supplemental report, Boswell had the assistance of Bernard Haas who conducted a geophysical seismic analysis of the Flumet Flat Campground located to the west of the Applegate River on the Madeline claims. Haas' report estimated that there existed approximately 115,130 cubic yards of gravel on the west side, and based on this and his own observations Boswell increased his estimate of the total amount of gravel in the claim to 240,000 cubic yards.

Nevertheless, though Judge Clarke arguably utilized the wrong figures in his decision, this error does not alter his basic conclusion. While the extent of gold bearing gravels may be important where there is a question of amortization of capital expenditures, the extent is irrelevant where, as here, there are insufficient amounts to recoup ongoing production costs.

establishes that the actual bed of the Applegate contained only approximately 5,800 cubic yards of gravel. ^{5/}

Finally, appellant argues that mineral examinations conducted in 1977 and 1979 cannot establish the lack of a discovery at the time of the withdrawal (1972). We disagree. Due to the absence of historical records, it is appropriate to extrapolate the current presence of mineral values to a prior point in time, where the nature of the deposit is such that no substantial change could be reasonably anticipated to occur over that time period. In the present case, the top layers of river gravel on the Madeline Nos. 1 and 2 claims are subject to annual erosion and replenishment. The lower layers of river gravel and the bench gravel are apparently stable. Indeed, it is precisely this relative stability that permits the long term accumulation of placer gold. In any case, there is no evidence that gold values significantly changed between 1972 and 1977 or 1979. In this sense, the gold-bearing gravels sampled by the Government mineral examiner constituted "pre-existing exposures" of the mineral deposit and the results of such sampling are clearly admissible. See United States v. Foresyth, *supra* at 49.

[4] The Government having presented a prima facie case of no discovery, the burden shifted to the mining claimant to overcome the Government's showing of no discovery by a preponderance of the evidence. United States v. Zweifel, *supra*. Administrative Law Judge Clarke summarized appellant's testimony:

Mr. Robert Lara, the mining claimant, was called to testify. He acquired the Sunshine Claim through Ramsey Realty and the Madeline No. 1 and Madeline No. 2 claims from the prior owner, Ray Poplar. He has owned the Madeline claims for seven years. (Tr. 45). Mr. Lara contends he has dredged on the Sunshine and Madeline claims. He has been "testing" the ground on the Madeline claims. (Tr. 46). In addition, he has permitted other miners to dredge the Madeline Claims. Using a four-inch dredge, 20 yards of gravel can be processed a day which would recover two to three pennyweight of gold. (Tr. 48). According to Mr. Lara, a pennyweight of gold would be worth \$20 at a gold value of \$400 an ounce. Based on his own estimates, he believes a recovery of \$3.75 per yard of gravel can be obtained on the Madeline claims. (Tr. 50). He asserts that a profit can be recovered over the expense of labor and equipment. (Tr. 51). He

^{5/} There was some confusion concerning the amount of gravels present in the river at the hearing. Thus, Lara testified that based on the assumption that the river was 1,300 feet long, as it traversed the claim, and approximately 40 feet wide, and further assuming an average depth of 3 feet between the riverbed and bedrock that there was a total of about 150,000 cubic yards of gravels under the river (II Tr. 130). Boswell, in rebuttal, based on these same assumptions, estimated cubic yardage as roughly 5,800 (II Tr. 150). It seems clear that Lara made a computation error. The number "150,000" actually represents the approximate number of cubic feet of gravel. In order to ascertain cubic yardage, this figure must be divided by the number of cubic feet in a cubic yard--27. When this further computation is made, the end result is approximately 5,800 cubic yards, as testified to by Boswell.

calculated the volume of gravel on the Madeline at about 150,000 yards. (Tr. 52).

* * * * *

In 1971, Mr. Lara spent a lot of time out on the Applegate River. He also spend one-half of his time working as a carpenter. An ounce of gold was recovered from the Madeline Claim in 1971. (Tr. 112). Three weeks of work was performed on the Madeline Claim in 1975. (Tr. 113). He has no estimate as to the total amount of gold taken out of the Madeline Claims. (Tr. 114).

(Decision at 4-5).

Based on this testimony, we cannot conclude that appellant overcame the Government's prima facie case by a preponderance of the evidence. Appellant presented no evidence that mineral values were such that the gold could be extracted, removed and marketed at a profit at the time of withdrawal of the land covered by the Madeline Nos. 1 and 2 mining claims. The Government mineral examiner established an average gold value, at the July 1972 gold price, of 13 cents per cubic yard compared to mining costs of \$1.28 per cubic yard. ^{6/} At best, appellant's testimony established an average gold value, at the July 1972 gold price, of 60 cents per cubic yard (based on \$3.75 per cubic yard in 1979), still clearly insufficient to cover mining costs.

In light of the fact that we agree with Judge Clarke that appellant did not preponderate on the question relating to the existence of a discovery as of the date of the withdrawal, it is unnecessary to determine whether a discovery existed as of the date of the hearing. It is axiomatic that a mining claim, not supported by a discovery of a valuable mineral deposit at the time the land was withdrawn from the operation of the mining laws, is not excepted from the effect of the withdrawal. Cameron v. United States, *supra*; Clear Gravel Enterprises v. Keil, 305 F.2d 180 (9th Cir. 1974). Neither the subsequent exposure of previously undiscovered deposits nor a subsequent substantial increase in value of a mineral previously exposed can breathe life into such an invalid claim. Thus, even if appellant could show that the Madeline claims were supported by a discovery of a valuable mineral deposit as of the date of the instant hearing it would avail him nothing. ^{7/}

^{6/} In his mineral examination report (Exh. 8 at 11), Boswell estimated that "[m]inimum direct costs" for mining in 1972 would be 40 cents per cubic yard, based on an updated average of the costs listed in "'Peeles' `Mining Engineers' `Handbook'" for a suitable placer mining operation in 1937. Boswell also updated the cost listed in "Placer Examination, Principles and Practice," authored by John Wells, in order to arrive at the figure of \$1.28 per cubic yard. Appellant does not dispute these cost figures.

^{7/} In the alternative, appellant contends that the Department does not have jurisdiction over the land covered by his mining claims, either because they are in the bed of a navigable river, which is State land, or because of application of the "equal-footing doctrine," as construed by the Attorney General, State of Nevada. We disagree with both contentions. There is no evidence

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 for the reasons set forth herein.

James L. Burski
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Edward W. Stuebing
Administrative Judge

fn. 7 (continued)

that the Applegate River is considered to be a navigable river. Even if it were, to the extent the claims extend beyond the meandered banks of the river, they are located on Federal land and subject to the jurisdiction of the Department. Further, we can find no basis in law for application of the "equal-footing doctrine" so as to divest the United States of land which has long been considered Federal land.

