

Editor's note: Reconsideration denied by Order dated Sept. 6, 1983

UNITED STATES
v.
FLORENCE CANNON

IBLA 82-855

Decided February 1, 1983

Appeal from a decision of Administrative Law Judge E. Kendall Clarke declaring the Weitchpec Bar Placer Mining Claim to be null and void. CA 6133.

Affirmed.

1. Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Hearings

Absent a patent application, in a mining claim contest hearing there is no requirement that a mining claimant show that a contested claim is valid; rather, the claimant's burden is to preponderate on the issues raised by the evidence.

2. Evidence: Burden of Proof -- Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge; however, the mining claimant has the ultimate burden of refuting the Government's case by a preponderance of the evidence.

APPEARANCES: John J. Wells, Esq., Sacramento, California, for appellant; Burton J. Stanley, Esq., Office of the Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Florence Cannon, administratrix of the estate of John C. Gist, has appealed the May 10, 1982, decision of Administrative Law Judge E. Kendall

Clarke which declared the Weitchpec Bar Placer Mining Claim 1/ null and void. Judge Clarke found that the sand and gravel on the claim was neither presently marketable nor locatable. He also found that the cost of extracting gold on the claim far exceeded the value of the gold shown in the samples.

The California State Office, Bureau of Land Management (BLM), instituted contest No. CA 6133 through the filing of a complaint dated April 25, 1979. The complaint alleged that there were not "presently disclosed within the boundaries of the mining claim minerals of variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery."

Cannon denied the charges and on December 14, 1979, a hearing was held before Administrative Law Judge Dean F. Ratzman in Sacramento, California. After testimony from John McKee, a geologist for BLM, the parties agreed to undertake a joint sampling of the claim by Terrence Waller, a geologist for Cannon and Robert Middleton, a mining engineer for BLM. Since Judge Ratzman at that time was contemplating retirement, it was agreed that if a new judge were assigned to the second half of the proceeding, the record of the first half would be accepted as part of the overall hearing.

Following the joint examination, a further hearing was held before Administrative Law Judge E. Kendall Clarke on July 10, 1981, in Sacramento, California.

[1, 2] We have thoroughly reviewed the record of this case and the arguments advanced by the parties. Judge Clarke's decision issued on May 10, 1982, set out a full 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 the Judge's decision is attached. 2/

While we are in agreement with the Judge's findings and conclusions, we must point out a potential problem which could arise from his discussion of the applicable law. Clearly, he properly applied the law to the facts in this case. However, one statement in the decision needs explanation. On page 5 of the decision the Judge stated: "When the Government contests the validity of a mining claim, the ultimate burden of proof as to the validity of the claim is upon the mining claimant." This is an incorrect statement of the law. Absent a patent application, in a mining claim contest hearing, there is no requirement that a mining claimant show that a contested claim is valid; rather, the claimant's burden is to preponderate on the issues raised by the evidence. United States v. Hooker, 48 IBLA 22, 26-27 (1980); see United States v. Imperial Gold, Inc., 64 IBLA 241, 243 (1982). Despite this general misstatement, Judge Clarke correctly announced the specific legal standard applicable in this case, and he applied it properly. We find no error. That standard is that when the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie

1/ The Weitchpec Bar Placer Mining Claim is situated in secs. 4, 9, and 10, T. 9 N., R. 4 E., Humboldt meridian, Humboldt County, California.

2/ We note that on page 3 of his decision, the Judge states that pits 1 and 2 were in the southwest corner of the claim. Those pits, as shown on exhibit 12, are actually in the southeast corner of the claim.

case as to that charge; however, the mining claimant has the ultimate burden of refuting 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.), cert. denied, 419 U.S. 834 (1974); United States v. Lewis, 58 IBLA 282, 284-85 (1981).

In the statement of reasons for appeal, counsel for appellant recites the factual background of the claim and states that "because of harassment and prolonged attack" by the Bureau of Indian Affairs "to invalidate this claim in order to resolve a conflict created by their own negligence, the Board of Land Appeals should modify the harshness of the decision by appropriate administrative action, namely exclude the five native Indian allotments from the claim and leave the balance of the mining claim intact" (Statement of Reasons at 7). Counsel for appellant also states that a market was shown to have existed prior to 1955 for sand and gravel from the claim and, again citing harassment, asks this Board to consider such in this appeal (Statement of Reasons at 7). Counsel for appellant further contends that given a conflict of findings and opinions by two mineral examiners, i.e., that of the examiner for BLM and that of the examiner for Cannon, the burden of proving no discovery, by a preponderance of the evidence, shifted to the Government and that the burden has not been met. Counsel asks that the decision issued by the Administrative Law Judge on May 10, 1982, be reversed.

As found in Judge Clarke's decision and as noted in counsel for BLM's brief at page 1, "the reason for the managing organization's bringing a contest is of no concern to the Office of Hearings and Appeals." In addition, even if it is assumed that a market existed for sand and gravel prior to 1955, appellant failed to establish the present marketability of sand and gravel. See Judge Clarke's decision at 7.

Further, as discussed above, Judge Clarke correctly stated and applied the law relating to the burden of proof in a case where the Government contests a mining claim on the basis of lack of 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, we affirm the decision of the Administrative Law Judge and adopt it with the comments included in this decision.

Bruce R. Harris
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Gail M. Frazier
Administrative Judge

May 10, 1982

United States of America,	:	<u>Contest No. CA-6133</u>
	:	
Contestant :	:	Involving the Weitchpec
	:	Bar Placer Mining Claim
v. :	:	situated in Secs. 4, 9,
Florence Cannon,	:	and 10, T. 9 N., R. 4
Administratrix of Estate	:	E., Humboldt Meridian,
of John C. Gist, deceased	:	Humboldt County,
	:	California
Contestee :	:	

DECISION

Appearances: Burton J. Stanley, Esq., Office of the Solicitor, U.S. Department of the
Interior, Sacramento, California, for the Contestant

John J. Wells, Esq., Wells and Baldwin, Sacramento, California,
for the Contestee

Before: Administrative Law Judge Clarke

A Complaint was filed in the captioned-matter concerning the Weitchpec Bar Placer Mining Claim on April 25, 1979 by the Bureau of Land Management (BLM). The Complaint alleges in paragraph 5 that:

"there are not presently disclosed within the boundaries of the mining claim minerals of a variety subject to the mining laws, sufficient in quantity, and quality, and value to constitute a discovery."

A hearing was scheduled and held on December 14, 1979 in Sacramento, California. At that time Judge Dean F. Ratzman was presiding. Mr. John McKee, a geologist for BLM, was called as a witness for the contestant. He received a degree in geology from the University of Missouri in 1972.

The mining claim in question is located on the Klamath River and is depicted in Exhibit 4 (Tr. 17). The claim has been mined off and on since 1864 (Tr. 21). Mr. McKee described the

bedrock on the claim itself as an upturn of black slate with bedding plains that are nearly perpendicular. He found the rock types in the gravels were slate, schist, quartz, monzonites, granites, and various other igneous and metamorphic rocks. He observed remnants of a bench on Gist Creek which enters the Klamath River on the claim. The lower gravel bars involved an accretion area and contained several boulder dumps and had a lot of scrub-type vegetation growing on them. He found the Gist homesite with a vineyard but no evidence of recent mining was observed (Tr. 28)

Mrs. Cannon, who was present during the examination, was asked to point out where her discoveries were located. When the areas that were purposed to be sampled were pointed out she indicated she had no preference where the samples were taken (Tr. 29). When asked if she wanted samples taken anywhere else she said no.

Mr. McKee testified that he tried to find a location that he could get to physically that would show a good section of the area or a good bank rather than just digging in topsoil. He found that most of the mining had taken place on Gist Creek where he found bedrock exposed above the homesite. There was a bank approximately 23 feet in length which represented a vertical height of 15 feet. In sampling the bank he attempted to get as close as possible to bedrock and then took a channel sample up the bank. The area of samples are shown in photos marked Exhibits 7 and 7A.

The first sample consists of 577 pounds and the second sample contained 250 pounds (Tr. 34). These bulk samples were then run through a Denver Gold Saver which had an extended six foot riffle and the resulting concentrates were then panned (Tr. 35). The results of this sampling are shown on Exhibit 10. Using a gold value of \$209.50, per 900-fine placer gold per cubic yard, the value in the first sample was 21.8 cents and in the second sample .1 cents per cubic yard. Mr. McKee estimated the volume of gravel in the benches which remained on the claim at fifty thousand cubic yards (Tr. 37).

Testimony was received that a Mr. George Neilson made an examination of the claim in question for BLM in 1958 and with a supplement in 1960, and at that time Mr. Neilson found the claim to have a discovery. However after the Neilson reports, a extraordinary flood of 1964 occurred which covered all of the lower benches obliterating the discovery which Mr. Neilson found (Tr. 46- 47). Mr. McKee was of the opinion that a prudent man would not be justified in expending his time and means with a reasonable prospect of developing a paying mine.

After the testimony of Mr. McKee, the parties agreed to a further examination of the claim in a joint effort between the geologist for the contestee, Mr. Waller, and Mr. Middleton, the head mining engineer for BLM. It was agreed at the time that if a new Judge was assigned to the second half of the proceeding the first half of the proceeding would be accepted as part of the overall hearing.

As a result of the joint examination a further hearing was held July 10, 1981 in Sacramento, California. At this hearing, Mr. Robert Middleton, a mining engineer for BLM testified for the contestant. Mr. Middleton has been a mining engineer for BLM for 25 years.

A joint examination was conducted September 30, 1980 and lasted two days. Mr. Waller was present with a backhoe operator who was hired by the claimants (Tr. 12). They found the north boundary of the claim but were uncertain about the south boundary along the river. Mr. Waller directed the backhoe operator to go to certain areas and dig pits (Tr. 13). Mr. Middleton had no objection to the places selected by Mr. Waller. He was certain that they were on the claims. There was an attempt to reach bedrock in the four pits since this was the most logical place to find the best placer gold.

Pits 1 and 2 were excavated to bedrock. They were located in the southwest corner of the claim (Tr. 14-15). The pit locations are shown on Exhibit 12. Pit 1 was dug to a depth of five feet with exposed slate bedrock. They took samples at every one foot interval and each sample was washed in a rocker. Each sample amounted to about 28 pounds or five buckets. Five colors were found in the sample number 1 and no silver or platinum. Pit 2, fifty feet easterly of Pit 1, was dug to bedrock. Mr. Waller took several pan samples from bedrock. Gold was insignificant (Tr.17). On Pit 3 near Gist Creek they were not able to reach bedrock. They took six buckets from nine and one-half feet of depth. Mr. Waller cut the sample. The two mining engineers worked together. In Pit 3 they found one very fine color and two colors that were almost like wire gold about one-sixteenth of an inch long. Pit 4 was thirty-five feet northerly of Pit 3. Again they tried to reach bedrock but encountered water and caving conditions at the depth of seven and one-half feet (Tr. 19). They took six buckets from that area. A sample resulted in a discovery of two very, very minute colors.

Mr. Middleton observed that there was lots of sand and a smaller amount of gravel on the claim (Tr. 21). Some of the sand would have been suitable for general use such as road

base or sand for construction. He checked with CalTrans and found that there were no projects requiring sand in the area. He checked with Mr. Brown who worked with CalTrans in 1953 and mined the area then. The material which he removed was not more than one thousand to fifteen hundred tons and that was strictly for maintenance of a local roads. There was no evidence remaining of the sand removal because of the flood in 1964.

The only producer of sand and gravel in the area had no shortage of sand and gravel. They had forty to fifty thousand tons ready to sell. Mr. Middleton also checked with the Hoopa Sand and Gravel Ready Mix Company and they had plenty of material available. Their price was \$5.50 per yard for washed sand. Crushed stone was \$4.50 a yard. The Forest Service advised him that they sell sand and gravel on a permit basis and their demand was very low (Tr. 28).

There was no way that Mr. Middleton could have duplicated Mr. Neilson's sampling because his samples in his report were not tied to any corner and because of the flood his sites could have been covered with ten feet of silt. Mr. Middleton was of the opinion that a prudent man would not be justified in expending his time and means with a reasonable prospect of developing a paying mine (Tr. 30).

Mr. Terrence Waller, a mining engineer testified for the contestees. He was employed as a mining engineer with BLM for fourteen years and is now self-employed as a mining consultant (Tr. 42).

One bulk sample, which was taken by Mr. Waller is marked on Exhibit G with a red square, resulted in a value of \$5.22 a yard. However when he returned for the joint samples with Mr. Middleton he did not go to the same spot but offset from the area where he took the bulk sample approximately one hundred to two hundred feet. The samples which were taken in Mr. Middleton's presence contained very little gold (Tr. 50). It was his opinion that most of the gold had been worked from the claim but that the claim still had enough values to justify a prudent man in expending his time and money on the remnants that remained (Tr. 51).

Mr. Waller took five samples on Gist Creek and satisfied himself that it was low grade (Tr. 50). He was not able to find the areas that were sampled in 1958 and 1960 by Mr. Neilson. It is his opinion that the sand and gravel on the claim has immense value. He considered the possibility that CalTrans would build a bridge within seven miles of the area that would require quantities of sand and gravel. It was his

opinion that a prudent man would invest his money to develop a mine considering, in particular, the sand and gravel that was evidenced on the claim (Tr. 58). He did believe that the claim marginally would stand on gold. There was no evidence given of sale of sand and gravel from the claim from 1955 to 1978.

Applicable Law

Under the mining laws of the United States [30 U.S.C. sec. 22 et seq. (1976)], the discovery of a valuable mineral deposit is essential to a valid claim. There must be found within the limits of a lode mining claim a vein or lode of quartz, or other rock in place, bearing mineral of such a quantity and quality that a prudent person would expend his time and means with a reasonable prospect of success in developing a valuable mine. Converse v. Udall, 399 F.2d 616, 621; Barton v. Morton, 498 F.2d 288 (9th Cir.) cert. denied, 419 U.S. 1021 (1974); United States v. Robert A. Rukke, et al., 32 IBLA 155 (1977).

When the Government contests the validity of a mining claim, the ultimate burden of proof as to the validity of the claim is upon the mining claimant. The Government, however, 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. 1959); United States v. Clare Williamson & Lapine Pumice Co., 87 I.D. 34; 45 IBLA 264 (1980); United States v. Bechthold, 25 IBLA 77 (1976). The Board of Land Appeals has stated that prima facie means that the case is adequate to support the Government's contest of the claim and that no further proof is needed to nullify the claim. The Government does not have to negate the evidence presented by the mining claimant. United States v. Bunkowski, 5 IBLA 102; 79 I.D. 43 (1972). If the Government shows that one essential criterion of the test was not met, it has established a prima facie case. United States v. Taylor, 82 I.D. 68; 19 IBLA 9 (1975)

Once the Government has established a prima facie case that the claim is not supported by discovery, the burden of going forward then shifts to the contestee to overcome the Government's showing. 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, *supra*; United States v. Fisher, 37 IBLA 80 (1978). The function of the Government mineral examiner is to verify, if possible, the existence of a discovery by examining the claim and by extracting mineral samples from accessible areas of exposed mineralization at which the claimant alleges a discovery to have been made. United States v. Arizona Mining and Refining Co., Inc., 27 IBLA 99 (1976). He is under no duty to undertake discovery work or to explore beyond the current workings of a claim. United States v. Timm 36 IBLA 316 (1978); United States v. Florence J. Mattox, 36 IBLA 171 (1978).

Discussion and Conclusion

There are several matters in this case which are peripheral to the central issue of discovery and which will be disposed of first.

The first deals with a motion to dismiss made both in the first and second hearing. The argument was advanced that the claim in question is not located on the Hoopa Indian Reservation since it was a valid existing claim prior to the creation of the Indian reservation and therefore was excluded from the reservation. This argument is premised on the assertion that the claim was known to be mineral in character at the time of the creation of the reservation since the historical evidence shows that 145 ounces of gold was mined and sold prior to 1890 from the claim.

Whether or not the claim is on the Hoopa Indian Reservation or the extension thereof, or whether or not being mineral in character, as asserted by the contestees, prior to the creation of the extension and therefore exempted from the Indian reservation, is of no consequence so far as this proceeding is concerned. The jurisdictional fact required is that the land is public land of the United States and that jurisdictional question was clearly answered by the exhibits submitted from the BLM status records which are a part of the record.

The reason for the managing organization bringing a contest is of no concern to this tribunal so long as jurisdiction is shown. The only effect that would result from a finding that this is Indian reservation land is that the claim would have been withdrawn from mineral location at the time of the creation of the reservation unless it was a valid subsisting claim at the time. As with any claim located on land that is subsequently withdrawn from mining location the discovery

which resulted in validity of the claim at the time must be continuing to the date of hearing. The question of discovery may always be tested by the United States so long as title remains in the United States.

Next, there is an argument that the Government had once found the claim to be valid, and that appears true from the testimony that Mr. George Neilson, in his original examination of 1958 and his supplementary examination of 1960, did in fact find sufficient gold in his samples to reach a conclusion that the mining claim was valid. However, a discovery must be present at the time of the hearing.

There are many reasons why a mining claim may not continue to contain a discovery. Obviously the discovery can be mined out or it can be destroyed by some other means. Here a flood, an extraordinary flood, of 1964 so altered the claim that evidences of gold as found by Mr. Neilson cannot be duplicated. Either the gold washed away or was buried so deeply it could not be recovered in any reasonable manner. In addition to this the witnesses testified that the claim had been worked extensively and that there were only remnants of bars remaining, which, if they contained gold, would have resulted in only a limited amount of material from which the gold could be extracted. The results obtained by Mr. Neilson were never duplicated by any other examiners in recent years; and from Mr. Neilson's report it was impossible for the mining engineers to locate the exact spots where he took his samples in 1958 and 1960.

Mr. Waller believes that the sand and gravel on the claim are of immense value. Sand and gravel has not been a locatable mineral since the passage of Public Law 167 in 1955. Even if it was locatable prior to 1955 the market conditions must have been such that it was continually marketable at a profit from the time prior to 1955 until the time of the hearing. The evidence adduced at this hearing clearly shows that there was no market for sand and gravel existing at the time the engineers made their study; and that the only possible market was a future market in the event that a bridge was constructed.

Where there is no prevailing demand for a mineral on the general open market, the marketability test is not met unless it can be shown that either there was actual profitable sales or that there were willing buyers to whom the claimant could reasonably have expected to sell at a profit. United States v. Duval, 1 IBLA 103 (1970) affirmed Duval v. Morton, 357 F.

Supp. 501 (D. Oregon 1972); United States v. Wichner, 35 IBLA 240 (1978); United States v. Maurice Duval, et al., 53 IBLA 341 (1981).

The holding of a mining claim as a reserve for future development without present marketability does not impart validity to the claim. United States v. Taggart, et al., 53 IBLA 353 (1981); Barrows v. Hickel, 447 F.2d 80 (9 Cir., 1971). Present marketability is and always has been applicable to all mining claims. United States v. Rogers, 32 IBLA 77 (1977).

Discovery cannot be shown by adding the recovery of gold to a non-locatable mineral such as sand and gravel. The gold on this claim must stand alone. Here it is shown by the testimony that the cost of processing the gravel to remove the gold and other heavy minerals would be at least 54.6 cents per cubic yard, far in excess of the best showing that the government mining engineer and geologist were able to produce in their samples. The one higher sample which Mr. Waller said that he found was not duplicated in any of the subsequent sampling so it must be concluded that his sample fortuitously was taken in a small area where some gold remained and therefore cannot be used as an indicator as to the general run of the gravel on this claim.

Since I have found that the sand and gravel on this claim is not presently marketable and, in fact, is not presently locatable and since I have found that the cost of extracting the gold far exceeds the value of the gold shown in the samples, I therefore must declare the Weitchpec Bar Placer Mining Claim to be null and void.

E. Kendall Clarke
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

