

UNITED STATES  
v.  
ESTATE OF MELVIN E. VILES  
MARY S. VILES

IBLA 91-172

Decided May 10, 1993

Appeal from a decision by Administrative Law Judge Harvey C. Sweitzer declaring lode mining claims OR MC 28543 through OR MC 28548 null and void for lack of discovery.

Affirmed.

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

Federal employees charged with the management of Federal lands have the right and authority to challenge the validity of mining claims for any reason.

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

Evidence that valuable mineral had been successfully produced from the claims is not sufficient to establish a discovery without additional evidence that material of a similar grade remains on the claims. Without a showing that additional mineral material of a similar quality remains on the claims, the logical conclusion is that the mined material was an isolated showing.

3. Evidence: Generally -- Evidence: Sufficiency -- Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally

Standing alone, the Government's reason for conducting a mineral examination or initiating a contest is not sufficient to establish error in a finding that a mining claim is not supported by a discovery. Without a showing that evidence was deliberately or inadvertently skewed to support a finding that the claims were invalid, it cannot be said that the mineral examiner's motivation has affected the evidence or the presentation at the hearing, or that the Government's

motivation ultimately affected the Administrative Law Judge's conclusion that the claims were not supported by a valuable mineral deposit.

4. Evidence: Generally -- Evidence: Sufficiency -- Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally -- Rules of Practice: Generally -- Rules of Practice: Hearings

When presenting evidence to overcome a Government's prima facie case that the claim is not supported by a discovery the claimants are not limited to rebutting the evidence submitted by the mineral examiners, and may present evidence of the location of the claims and the location of mineralization at any place on the claims, including places not examined or sampled by the mineral examiners.

APPEARANCES: Mary S. Viles, pro se; Arno Reifenberg, Esq., Office of General Counsel, U.S. Department of Agriculture, Portland, Oregon, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE MULLEN

Mary S. Viles has appealed from a December 28, 1990, decision by Administrative Law Judge Harvey C. Sweitzer declaring the Kingfish (a.k.a. King Fish), Brother Crawford, Henry Van Porter, The Strip, Wild Horse, and Kidnap lode mining claims (OR MC 28543 through OR MC 28548) null and void for lack of discovery of a valuable mineral deposit. 1/

On October 18, 1989, the Bureau of Land Management (BLM) filed a complaint initiating a contest on behalf of the U.S. Forest Service (Forest Service), Department of Agriculture, alleging that the claims were null and void because they contained no discovery. Viles answered the complaint denying the allegations.

Judge Sweitzer presided at the hearing held in Prineville, Oregon, on May 23, 1990. In his decision Judge Sweitzer outlined the evidence in the record, the statements of the parties, and the applicable law. He concluded that the Government had established a prima facie case that the claims were not supported by a discovery, and that the Government's case had not been overcome by the claimant. Based on these findings he declared the claims null and void. Viles has appealed.

The statement of reasons for appeal filed by Viles is somewhat limited in scope. Viles contends that the field examination, which formed the basis

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1/ All of the claims are in sec. 23, T. 13 S., R. 17 E., Willamette Meridian, Crook County, Oregon. They are also within the Ochoco National Forest.

for the Government's prima facie case, was biased because it was conducted for the purpose of invalidating her claims. She also states that the testimony shows that there is valuable mineral on the claims, that mercury had been produced from the claims, and that, if the claims had been examined for any purpose other than to declare them null and void, the result would have been different. She also contends that the mineral examiner actually failed to examine her claims.

[1] We will first address the question of bias on the part of the mineral examiner. To support this contention Viles points to a statement in a May 5, 1987, Forest Service memorandum recommending that a letter be sent to her advising her that the Forest Service was going to examine her claims on a certain date and, when she did not show up to point out the discovery points, the Forest Service would be able to invalidate the claims. 2/

The surface of the vast majority of the Federal land in the western United States which is open to mineral entry is managed either by BLM or the Forest Service. Federal employees charged with the management of Federal lands have the right and authority to challenge the validity of mining claims for any reason. The action in this case was triggered by a general Forest Service policy to determine the validity of mining claims located prior to 1955 if the claimant had filed a verified statement asserting rights to the surface resources, pursuant to section 5 of the Act of July 23, 1955, 30 U.S.C. § 613 (1988). A predecessor-in-interest had filed such an affidavit.

Mrs. Viles contends that the Forest Service intentionally conducted the examination at a time when she was not able to attend, and suggests that the Forest Service deliberately sought to exclude her from the examination by scheduling the examination at an inconvenient time. The record does not support this allegation. Viles was given advance notice of the proposed dates of the examination and was advised again on the first day of the examination. See App. Exh. B at 9. There is no evidence that she responded to the initial notification or ever indicated that she would not be able to attend before being contacted by Forest Service on September 14. Nor is there any evidence that she made any effort to have the examination rescheduled. See *id.* at 9-10. The Forest Service made a reasonable attempt to include her in its examination. 3/

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2/ This memorandum also indicates that the author recognized that the Forest Service must actually determine that there is no discovery before declaring the claims null and void: "[W]e now want to have the claims declared null and void, if there is no discovery." There is no suggestion that the mineral examiner sought to declare the claims null and void, rather than to determine if they were valid. See also Tr. 52-53, 57.

3/ A claimant is not precluded from offering to disclose the discovery points following the initial examination. See United States v. Mavros, 122 IBLA 297, 304 (1992). Nor does the failure to participate or cooperate render the evidence presented in the hearing unrebuttable, or preclude the claimant from conducting his or her own mineral examination or presenting

Mrs. Viles also contends that the Forest Service failed to examine the actual claims. It appears that most of the claim corners were missing at the time of the examination. See Gov't Exh. 2. During the hearing the examiners admitted some difficulty locating the claims on the ground. See App. Exh. B at 1, 10-11; Tr. 14-15, 107-11, 112-17. Based upon the evidence presented to him, Judge Sweitzer found that, although the mineral examiners were unsure of the exact location of the claim boundaries, they made a reasonably comprehensive attempt to locate the claims and examine the mineral exposures in the area, including those in areas outside the boundaries of the claims, as placed on the ground by them. See Decision at 9.

[2] Viles also contends that the mineral examiners ignored evidence of valuable mineralization on the claims. She points to the fact that mercury had been produced from the claims and was found on the claims. The Forest Service was also aware of past production from the area. See App. Exh. B at 6; Tr. 35-36. We presume that the mercury production Viles referred to is the same as that mentioned in her July 26, 1990, submittal to the Hearings Division. In that document she stated that William Stewart, a local miner, had assisted her husband when he extracted 35 pounds of mercury from 1,000 pounds of mineral bearing material "[f]rom the Kidnap Springs area" (Tr. 67). <sup>4/</sup> There is little evidence of where this material came from, however. See Tr. 68. Assuming that it came from one of the claims, this evidence is not sufficient to establish a discovery without additional evidence that material of a similar grade remains on the claims. Without this showing that additional mineral material of a similar quality remains on the claims, the logical conclusion is that the 1,000 pounds her husband mined was an isolated showing. See United States v. Gillette, 104 IBLA 269, 275 (1988).

When alluding to the presence of valuable mineral material on the claims, we assume Viles is referring to a comment in her July 26 submission that her son testified that he and his father had been looking to find high-grade ore underlying the claims similar to that they had found on other claims to the east, and depicted on appellant's Exh. A. See Tr. 73. There is no evidence of similar mineral material on the contested claims, however. See Tr. 73-74. The testimony is not probative of the presence of a mineral reserve within the boundaries of these claims.

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fn. 3 (continued)

independent evidence of the existence of a discovery. The primary advantage of cooperating at the time of the examination is that, if the mineral examiner can be satisfied that a discovery exists, a hearing will probably be avoided.

<sup>4/</sup> Thirty-five pounds of mercury had a value of \$140 at the time of the hearing. If gained from 1,000 pounds of material, the material would have a value of \$280 per ton. Mining costs were estimated to be between \$5 (if open pit) and \$40 (if underground). See Tr. 37-38. However, there is nothing to indicate the value of the mineral material in place because the rock processed may have been hand sorted.

[3] If we were to conclude that the Forest Service had conducted its mineral examination for the avowed purpose of invalidating the claims, there is no evidence to suggest that the mineral examiners deliberately or inadvertently skewed the evidence to support a finding that the claims were invalid, or that the claims did not contain a valuable mineral deposit. <sup>5/</sup> The record supports a finding that they did not. See Tr. 35. Without some proof that evidence was deliberately or inadvertently skewed to support a finding that the claims were invalid, we cannot say that the Forest Service's motivation has affected the evidence or the presentation at the hearing. For that reason, there is no basis for a finding that the Forest Service's motivation ultimately affected Judge Sweitzer's conclusion that the claims were not supported by a valuable mineral deposit. Standing alone, the Government's reason for conducting a mineral examination or initiating a contest is not sufficient to establish error in a finding that a mining claim is not supported by a discovery. See United States v. Page, supra at 23.

A fundamental issue is present in almost every mining claim contest. This issue is whether the claim is supported by a discovery, i.e. "minerals have been found and the evidence is of such a character 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." Castle v. Womble, 19 L.D. 455, 457 (1894). To determine whether a discovery exists, one must undertake a systematic estimation of the character, amount, and quality of the mineral in place, based upon known geologic evidence. See U.S. v. Feezor, 74 IBLA 56, 85, 90 I.D. 62, 278 (1983). The record establishes that the Forest Service mineral examiner examined the claims and the area surrounding them in an effort to verify whether valuable mineralization was in place on the claims (or any of them) in sufficient quantity and quality to support a discovery. They sampled the mineral in place at the site of old workings (where it was most likely that valuable mineral existed), and had the samples assayed. <sup>6/</sup> See App. Exh. B at 12. The results indicated that the mineralization on the claims is not sufficient to constitute a valuable mineral deposit because the costs of mining the material would exceed the value of the material recovered. See id. at 1, 14; Tr. 38-39, 50. This evidence was sufficient to establish a prima facie case that the claims were not supported by a discovery. See United States v. Page, supra at 20.

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<sup>5/</sup> A mineral examiner is expected to take reasonable steps to expose a representative sample of the mineral in place, but is not required to take steps in addition to those required for good sampling practice. See United States v. Page, 119 IBLA 12, 23 (1991); United States v. Anderson, 88 IBLA 316, 323-26 (1985).

<sup>6/</sup> The assay values of 20 Forest Service samples indicated less than 0.002 ounces of gold per ton and from 0.001 to 0.006 percent mercury. See Gov't Exh. 19.

[4] After the Forest Service presented its case, Viles was afforded an opportunity to present evidence and testimony showing that the claims were in fact supported by a discovery. See id. at 21. The claimants were not limited to disproving the results submitted by the mineral examiners, but could have presented evidence of the actual location of the claims and the location of mineralization at any place on the claims, including places not examined or sampled by the mineral examiners. Viles failed to present this evidence, and the record supports a finding that none of the claims contain mineral material in sufficient quantity and quality that a prudent man would invest further labor and means with the reasonable prospect of success in developing a valuable mine. See United States v. Mavros, supra at 301.

Based upon the evidence before us, we find that Judge Sweitzer properly declared the Kingfish (a.k.a. King Fish), Brother Crawford, Henry Van Porter, The Strip, Wild Horse, and Kidnap lode mining claims (OR MC 28543 through OR MC 28548) null and void for lack of 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.

R.W. Mullen  
Administrative Judge

I concur:

John H. Kelly  
Administrative Judge

