

UNITED STATES  
v.  
NEIL STEWART ET AL.

IBLA 70-42

Decided December 9, 1970

Mining Claims: Contests

Where a Government contest is brought in 1963 against sand and gravel placer mining claims located before 1955 on charges that no discovery has been made because the minerals cannot be marketed at a profit and that an actual market has not been shown to exist, the charges are properly construed as raising the issue of whether a valid discovery of a common variety of sand and gravel was made prior to July 23, 1955, particularly where the contestees expressly alleged in their answer to the complaint that materials from the claims were marketed at a profit prior to that date and both parties submitted evidence bearing upon that question at the hearing.

Mining Claims: Discovery: Marketability

A mining claim located for sand and gravel prior to July 23, 1955, is properly held to be null and void where it is not shown that material from the claim could have been profitably extracted, removed and marketed at that date.

IBLA 70-42

: Nevada Contest 3341

UNITED STATES : Placer mining claims  
v. : declared null and void  
NEIL STEWART ET AL.

: Affirmed

#### DECISION

Neil Stewart, G. L. Stewart, Harold Stewart and Wells Stewart Construction Company 1/ have appealed from a decision dated March 4, 1969, of the Office of Appeals and Hearings, Bureau of Land Management. The Bureau affirmed a decision of a hearing examiner declaring the King Nos. 2 and 4 placer mining claims in the SW 1/4, W 1/2 SE 1/4, and NE 1/4 SE 1/4 sec. 17, T. 19 S., R. 60 E., M.D.M., Nevada, to be null and void. 2/

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1/ Harry H. Benson, Loree A. Benson, Dinah Lou Benson, John M. Calhoon, Dayne C. Calhoon, Sophie B. Hesbon, Frank J. Sacco, G. L. Stewart, Neil Stewart, and Harold Stewart were named as contestees in the contest complaint. Only the Stewarts answered the complaint. Subsequently, it was ascertained that C. D. Stewart and Wells Stewart Construction Company had an interest in the claims, and, after counsel for the contestees accepted service on behalf of those two parties, an answer was filed by Wells Stewart Construction Company. The Nevada State Highway Department, as an intervenor, also participated in the proceedings which followed the filing of the complaint.

2/ The lands embraced in the King Nos. 2 and 4 claims were also embraced in the ABC Nos. 3 and 4 placer claims, respectively, also located for sand and gravel, which claims were declared null and void in a decision affirmed by the Department on March 27, 1970 (United States v. Clark County Gravel, Rock and Concrete Company, A-31025).

The record shows that the claims were located on March 6, 1954, by Arthur H. Hesbon and others (Exs. 12 thru 15). <sup>3/</sup> On June 26, 1963, a contest complaint was filed in the Nevada land office in which it was charged that:

1. The land embraced within the claims is nonmineral in character.
2. Minerals have not been found within the limits of the claims in sufficient quantity or quality to constitute a valid discovery.
3. No discovery of a valuable mineral has been made within the limits of the claims because the mineral materials present cannot be marketed at a profit and it has not been shown that there exists an actual market for these materials.

Following a hearing at Las Vegas, Nevada, on April 6, June 15 and July 19, 1966, the hearing examiner, in a decision dated June 7, 1968, declared the claims to be invalid. He found that the material on the claims was a common variety of sand and gravel and that, although material was taken from the claims for use in highway construction prior to July 23, 1955, the evidence did not establish the existence of a market for the material on that date. He concluded, therefore, that there had been no discovery of a valuable mineral deposit within the meaning of the mining laws.

The Office of Appeals and Hearings concluded in its decision of March 4, 1969, that appellants had failed to demonstrate the marketability of material from the King Nos. 2 and 4 claims as of July 23, 1955, and that the hearing examiner had properly held the claims to be null and void. Appellants' sole assignment of error in this appeal is their contention that the question of marketability as of July 23, 1955, is not an issue in this case. Pointing out that the third

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<sup>3/</sup> Except for a copy of an agreement dated May 11, 1956, between Arthur H. Hesbon and C. D. Stewart (Intervenor's Ex. 2) whereby the latter was to perform the assessment work for the claims in question, and another claim, and obtain patent to the claims in exchange for the conveyance of a one-half interest in the claims, the record does not disclose the nature, or the date of acquisition of appellants' interests in the claims.

charge of the contest complaint was that no "discovery of a valuable mineral deposit has been made within the limits of the claims because the mineral materials present cannot be marketed at a profit and it has not been shown that there exists an actual market for these materials," appellants argue that the Government was limited to determining marketability as of June 26, 1963 (the date of filing of the complaint), and thereafter. Having failed to specify the test of marketability must be as of July 23, 1955, they assert that the contestant is now estopped from relying on the authority of cases in which marketability as of that date was in issue.

In view of the undisputed fact that, at the time of the hearing the claims in question were being utilized in a successful commercial sand and gravel operation, the charges that "the mineral materials present cannot be marketed at a profit" and that "it has not been shown that there exists an actual market for these materials" seem somewhat incongruous. Unquestionably, the issues to be resolved could have been more explicitly set forth in the complaint. However, the failure to state in the clearest of terms that marketability of material from the claims as of July 23, 1955, was a critical issue is not necessarily a fatal defect in the complaint.

The act of July 23, 1955, as amended, 30 U.S.C. §§ 611-615 (1964), removed common varieties of sand and gravel from operation of the mining laws of the United States. After that date there could be no "discovery" of a valuable deposit of a common variety of sand and gravel, regardless of the quantity or quality of such material present. Moreover, it is well established that in order to be valuable, minerals must be marketable at a profit (United States v. Coleman, 390 U.S. 599 (1968)) and that, in order to establish the validity of a mining claim located for a common variety of sand and gravel before July 23, 1955, it must be shown that the material on the claim could have been extracted, removed and marketed at a profit prior to that date (see e.g., United States v. E. A. Barrows and Esther Barrows, 76 I.D. 299 (1969), aff'd in Esther Barrows v. Walter J. Hickel, Civil No. 70-215-F (D. Calif., April 20, 1970).

Thus, when it is asserted as it was in this case, in connection with a sand and gravel claim located prior to July 23, 1955, that "minerals have not been found within the limits of the claim in sufficient quantity or quality to constitute a valid discovery," the charge can reasonably be interpreted only as an allegation that there was no discovery prior to July 23, 1955. This, in turn, raises the question of whether or not the material found on the claim could be profitably marketed on that date.

The third charge of the complaint cannot be so readily related to the date of July 23, 1955. Since it must be shown as a present fact that the material found on a contested claim is marketable, it is not apparent on its face that a charge that materials cannot be marketed at a profit is intended as an allegation that they could not be marketed at a profit on July 23, 1955. The question before us, then, is whether the complaint, taken as a whole, was so vague or so misleading as to have prejudiced appellants by failing to put them on notice of the showing which they were required to make, thereby depriving them of a fair opportunity to demonstrate the validity of their claims. We think that it was not.

In their answer to the complaint filed on August 1, 1963, appellants Neil Stewart, G. L. Stewart and Harold Stewart affirmatively alleged "that the materials within these claims was [sic] marketed at a profit prior to July of 1955." At the hearing counsel for the contestees objected to the testimony of the contestant's witness, Robert T. Webb, relating to marketability of material from the claims prior to July 1955, not on grounds that marketability at that time was not in issue but on grounds that the witness was not qualified to testify as to facts existing in the Las Vegas Valley in 1955 (Tr. 72). Thereafter, appellants' counsel cross-examined Webb extensively on his testimony relating to that issue (Tr. 80-90) and elicited testimony from appellants' chief witness, Neil Stewart, concerning the same point (Tr. 110-112, 132-133) without suggesting that such testimony was irrelevant. Appellants also presented argument and cited authority regarding that issue (Tr. 163-164).

In comparable circumstances, the Department has held a complaint, worded essentially the same as the one in this case, to be sufficient to raise the issue of pre-1955 discovery. United States v. Keith J. Humphries, A-30239 (April 16, 1965); cf. United States v. Harold Ladd Pierce, 75 I.D. 255 (1968), in which the Department held that a similarly-worded charge could not be construed as raising the issue of whether a valid discovery of a common variety of limestone had been made prior to July 23, 1955, where no evidence was offered on that issue at the hearing; that issue was not adverted to by either party at the hearing; and the contestee asserted on appeal that he could prove that the deposits could have been marketed at a profit in 1955. In the latter decision the Department, nevertheless, declined to remand the case for further hearing in the absence of a meaningful offer of proof of marketability in 1955.

We have little difficulty in concluding in the present case that the question of pre-1955 marketability was brought into issue at the hearing and that appellants were aware at the time that it was an issue in the proceedings.

Appellants do not appear at this time to contend that the evidence warrants a finding that material from their claims could have been profitably mined and marketed prior to the critical date, July 23, 1955. Nor do they offer to submit additional evidence relating to the question. After review of the record we are not persuaded that the hearing examiner erred in concluding that it was not then marketable.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081) the decision appealed from is affirmed.

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Edward W. Stuebing, Member

I concur:

I concur:

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Anne Poindexter Lewis, Member

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Martin Ritvo, Member

