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Interior Board of Land Appeals
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TAKE PRIDE IN AMERICA

UNITED STATES
v.
CARLWOOD DEVELOPMENT, INC.
&
ANDREW L. DALL

IBLA 2008-243 Decided April 17, 2009

Appeal from a decision of Administrative Law Judge Robert G. Holt, declaring 261 association placer mining claims null and void ab initio in their entirety. Contest Nos. N-76738-01 through N-76738-06.

Affirmed.

1. Administrative Procedure: Burden of Proof--Evidence: Burden of Proof--Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Location--Mining Claims: Placer Claims

When BLM brings a Government contest challenging an association placer mining claim on the basis that it was fraudulently located, the Government bears the burden of going forward with sufficient evidence to establish a prima facie case of invalidity, whereupon the burden shifts to the claimant to demonstrate, by a preponderance of the evidence, that the claim was validly located.

2. Mining Claims: Determination of Validity--Mining Claims: Location--Mining Claims: Placer Claims

An association placer mining claim is properly declared null and void ab initio, in its entirety, when the Government establishes a prima facie case that the claim was not located in good faith by a bona fide association of persons, but rather by a single claimant and dummy locators for the purpose of affording to the claimant

acreage in excess of the 20 acres allowed per individual claimant, and the claimant fails to overcome that prima facie case by a preponderance of the evidence.

APPEARANCES: Elaine S. Guenaga, Esq., and Mark H. Gunderson, Esq., Reno, Nevada, for appellants; Grant L. Vaughn, Esq., and John W. Steiger, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Carlwood Development, Inc. (Carlwood), and Andrew L. Dall (collectively, Contestees) have appealed from an August 1, 2008, decision of Administrative Law Judge (Judge or ALJ) Robert G. Holt in consolidated contest proceedings, N-76738-01 through N-76738-06, declaring 261 association placer mining claims null and void ab initio in their entirety as fraudulent locations violative of the 20-acre per claimant limitation of 30 U.S.C. § 35 (2006).[1] For the reasons that follow, we affirm Judge Holt's decision.

I. BACKGROUND

The present proceeding concerns the validity of 261 association placer mining claims, 170 of which were located in September 1993 by an association of eight corporations, and 91 of which were located in May 1999 by an association of eight individuals, for gold and other valuable minerals in Ts. 26-28 S., Rs. 63 and 64 E., Mount Diablo Meridian, in the Eldorado Valley area of Clark County, near Searchlight, Nevada. Together, they cover a total of approximately 42,240 acres of public land, more than 65 square miles, and nearly all of Eldorado Valley, in a single irregularly-shaped block.[2]

Historically, Eldorado Valley in southern Nevada has had numerous placer mining claims filed by various interests. Ex. B-28; Tr. 400-402. In 1991, Charles Ager began a close business association with Kenneth Ian Matheson,[3] who

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[1] The 261 mining claims at issue and the corresponding Bureau of Land Management (BLM) serial numbers, grouped together by mining claim contest, are set forth in the Appendix to this opinion.

[2] All but one of the claims, which covers 80 acres, encompass 160 acres per claim.

[3] Matheson and Ager have a longstanding business relationship, one that was throughly examined in ALJ Harvey C. Sweitzer's May 8, 2003, decision in Contest (continued...)

owned claims in Eldorado Valley through his company, Pilot Plant, Inc. (Pilot Plant). Ex. 2, App. 16; Tr. 550, 559-62. Matheson, through various corporations, had acquired mining claims and other interests in Eldorado Valley covering approximately 12,000 acres. Tr. 619-20, 771-74, 1088-89. In 1992 and 1993, Ager also began obtaining interests in mining claims in Eldorado Valley. Tr. 620. James T. Roe, III, acquired claims in Eldorado Valley in 1985 or 1986 through Cambridge Resources, Inc. (Cambridge), Brookline Mining Company (Brookline) and Crimson Resources, Inc. (Crimson). Tr. 1168, 1173-75. By early 1993, Ager and Roe owned, controlled, or had significant influence over numerous mining claims in Eldorado Valley through a series of corporate entities. Tr. 566-67, 619-20.

In April 1993, Ager entered into an agreement or partnership with Roe to jointly develop mining claims in Eldorado Valley that they and others, including Matheson and Pilot Plant, owned. Ex. A-21; Tr. 641-42. Ager provided most of the money for this joint venture, with no evidence of any significant contributions from Roe. Tr. 637, 735-39, 749-60, 1332-34, 1339-40. According to Contestees,

> [d]ue to the complex nature of all the disparate ownership of all the different claims and potential uncertainties of clear title that might be associated with certain existing claims, the existing claim holders . . . decided to let their claims lapse and then to relocate the claims as partners with eight locator companies, with the companies reflecting the interests of the existing claim holders.

SOR at 7; *see also* Exs. A-2 at 21, A-14, B-12, B-21 at 12, B-23 at 433, B-28. Ager stated at the hearing that the corporations were placeholders to "warehouse" mining claims. Tr. 569-73, 575, 614, 651-52, 655, 772. On page 37 of his decision, Judge Holt provided a diagram setting out the relationship of the various individuals and corporate entities.

At Ager's direction, on May 3, 1993, Roe organized a Nevada corporation, Cactus Gold Corporation (Cactus Gold). Ex. A-2, App. 18; Exs. B-4, B-6; Tr. 1213-14; *see also* Ex. B-21 at 25-26. On July 29, 1993, Roe incorporated four corporations, naming himself President, Secretary, Treasurer, and Resident Agent of each: Broadway Enterprises, Inc. (Broadway), Camel, Inc. (Camel), Carlwood Development, Inc. (Carlwood), and Crescent Corporation (Crescent). Also on

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[3] (...continued)
No. 66052, affirmed by the Board in *United States v. Pass Minerals, Inc.*, 168 IBLA 115 (2003). Pages 24-29 of Judge Sweitzer's decision provide details of that relationship and are included as Appendix 17 of the Mineral Report dated Oct. 13, 2004, prepared in this case.

July 29, 1993, Ager incorporated three corporations, naming himself as Secretary and Treasurer of each: Geosearch, Inc. (Geosearch), Geotech Mining, Inc. (Geotech), and Mincor, Inc. (Mincor). Ager then named his wife President of Geosearch, his daughter President of Mincor, and himself President of Geotech. The eighth corporation is Pilot Plant, owned by Matheson. *See* Decision at 2-3; Mineral Report at 17-18.

A. Location of the 1993 Association Claims

These seven corporate entities and Pilot Plant entered into the Eldorado Partners Agreement in July 1993. They allowed their pre-existing claims to lapse by not paying the annual maintenance fee and then relocated them on September 1 and 2, 1993, as 170 association placer mining claims with the eight corporations named as locators. Such actions were contemporaneous with the statutory increase in mining fees that went into effect on September 1, 1993. Pub. L. 103-66, Sec. 10101, 107 Stat. 405 (Aug. 10, 1993), *codified at* 30 U.S.C. § 28f (2006); Tr. 378-80. Pilot Plant paid the fees for filing and maintaining all the 1993 claims with funds provided by Ager. Ex. A-2, App. 21 at 7-11; Tr. 745-53. No separate bank account was established for the Eldorado Partners as required by the agreement. Ex. A-9, ¶ 4; Tr. 745-46. In August 1994, all 170 claims located in 1993 were transferred to Cactus Gold, in return for a one-time payment of $12,500 and a royalty, by which time "[t]he president and sole director [and sole shareholder] of Cactus Gold was Charles Ager." Decision at 3; Exs A-10 and A-11; B-6, B-7; Tr. 812-13.[4]

B. Location of the 1999 Association Claims

In the case of the 1999 claims, the eight individual locators forming the association were either relatives or employees of Ager or Cactus Mining Corporation (Cactus Mining), a company he owned and controlled. Those eight individuals were (1) Andrew Dall, an employee of Cactus Mining; (2) Shannon L. Dall, Andrew Dall's wife and an employee of Cactus Mining; (3) Charlton S. Ager, Ager's son; (4) Caroline I. Ager, Ager's daughter; (5) Carol J. Ager, Ager's wife; (6) Fred J. Toti, Carol Ager's father; (7) George Stephen, IV, an employee of Cactus Mining; and (8) Kathleen M. Stephen, George Stephen's step-mother and an employee of Cactus

[4] In 1996, Cactus Gold transferred a subset of the 1993 claims, known as the "Josh" claims, to Valley Gold, which then, through a series of companies owned and controlled by Ager, were salted to manipulate assayed values and sold to Delgratia Mining, Inc. (Delgratia). The resulting scandal caused Delgratia's stock to collapse, in turn triggering various investigations and lawsuits. *See United States v. Pass Minerals*, 168 IBLA at 123 n. 10.

Mining. Decision at 3; Mineral Report at 18. In May 1999, 91 of the association placer mining claims involved in this matter were located in the names of these eight individuals. In July 2000, within 14 months of location, all of the individual locators transferred their claims to Cactus Gold in return for a $2,000 payment and a royalty. Exs B-15 and B-16.[5] Thus, as observed by Judge Holt, "by July 2000 all of the contested claims had been transferred to an entity controlled by Charles Ager." Decision at 3.

C. Public Land Withdrawals in Eldorado Valley

On October 5, 1998, BLM's Nevada State Director signed the Record of Decision for the Las Vegas Resource Management Plan (RMP). This plan designated the area underlying all but six of the 261 claims as the Paiute-Eldorado Desert Tortoise Area of Critical Environmental Concern (ACEC) to protect the desert tortoise. The Final RMP contained direction to withdraw the ACEC from mineral entry as part of the management strategy for the protection of the desert tortoise. *See* Mineral Report at 8.

On November 6, 2002, Congress enacted the Clark County Conservation of Public Land and Natural Resources Act of 2002 (the Clark County Act), Pub. L. No. 107-282, 116 Stat. 1994. Section 502(a) of the Clark County Act withdrew, subject to valid existing rights, all ACECs identified in the Las Vegas RMP from location, entry, and patent under the mining laws. The withdrawal effected by section 502(a) of the Clark County Act was temporary, "for a period not to exceed five years," and would "lapse at the earlier [of] . . . (1) five years; or (2) when the Secretary [of the Interior] issues a final decision on each proposed withdrawal." 116 Stat. at 2009. Section 502(b) of the Clark County Act required the Secretary to make a "final decision" on the temporary withdrawal "within five years of the date of enactment of this Act." *Id.* Although we find no evidence of a final decision, most of the relevant lands covered by the Clark County Act were included in an October 26, 2007, proposed withdrawal, NVN-83979, pursuant to section 204 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1714 (2000).[6] Notice of the proposed withdrawal was published in the *Federal Register* on November 1, 2007. 72 Fed. Reg. 61898. Publication of the proposed withdrawal had the effect of segregating most of the lands at issue, subject to valid existing

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[5] A table at page 41 of Judge Holt's decision depicts the relationships among the various individuals involved in this association, with citations to the record.

[6] Although initiated by BLM, upon approval by the Assistant Secretary, Land and Minerals Management, the petition/application for withdrawal was deemed to be "a Secretarial proposal for withdrawal," pursuant to 43 C.F.R. § 2310.1-3(e). *See* 72 Fed. Reg. 61898, 61902 (Nov. 1, 2007).

rights, from location, entry, and patent under the mining laws, pursuant to section 204 of FLPMA and 43 C.F.R. § 2310.2(a), for a period of 2 years from the date of publication, unless the segregative effect was terminated sooner by denial, cancellation, or approval of the petition/application for withdrawal. *See* 72 Fed. Reg. at 61898, 61901-03.

D. The Mining Contests and Judge Holt's Decision

On January 24, 2003, Cactus Gold submitted an amendment to its approved Plan of Operations pursuant to 43 C.F.R. Part 3809. Section 3809.100(a) requires a validity determination for plans of operation and notices when the lands are withdrawn. On April 1, 2003, BLM initiated the validity examination of 39 association placer mining claims and assigned Mineral Examiners Mark Chatterton, Burrett Clay, and Matthew Shumaker to the case. As part of the examination process, the Mineral Examiners reviewed the placer mining claim recordation files in BLM's Nevada State office, including the certificates of location. Because the Mineral Examiners found irregularities in the location and maintenance of the claims comprising the entire mining claim block, they "determined that it was not in the public interest to expend public funds to verify the presence of a valuable mineral deposit, if one exists, until questions about the legitimacy of the subject placer mining claims were answered." Mineral Report at 1. The Mineral Examiners therefore focused the "resulting validity examination . . . only on the propriety of the location and maintenance of the subject placer mining claims." *Id.* We set forth their conclusions below:

> All of the 261 association placer mining claims involved in this examination were located by agents. Eight corporations were involved in the 1993 locations. Those placer mining claims were transferred to two corporations controlled by Charles Ager. In 1999, eight individuals formed an association and had one of the eight act as agent for the other seven. This agent located association placer mining claims that were transferred, shortly thereafter, to one of the two corporations controlled by Charles Ager. The eight corporations involved in the 1993 locations were controlled by James T. Roe, III, Charles Ager, and Kenneth Ian Matheson. The two corporations that received placer mining claim title to the 1993 and 1999 locations were controlled at the time, and continue to be controlled, by Charles Ager.
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> The 261 association placer mining claims involved in this examination do not appear to have been properly located. The evidence shows that the 261 association placer mining claims were located using dummy locators, who lent their names to the project so

> as to increase the acreage that Mr. Ager could control. The evidence also indicates that Mr. Ager would have been entitled only to placer mining claims of 20-acres each, and not association placer mining claims of any size over 20-acres.

Id. The specifics of the findings of the Mineral Examiners are considered in the course of our analysis.

On November 22, 2004, BLM filed six contest complaints challenging the validity of all 261 claims.[7] BLM charged that the subject claims were fraudulently located in violation of the 20-acre per claimant limitation of 30 U.S.C. § 35 (2006), because they were located for the use and benefit of Ager or Cactus Gold, not the two placer associations that filed the claims in 1993 and 1999. The Contestees answered, disputing BLM's charges. On February 15, 2007, the complaints were amended by stipulation to plead in the alternative that the claims were located for the use and benefit of Cactus Gold and not for the use and benefit of members of the two placer associations. By the same stipulation, the Contestees amended their answers to deny BLM's amendments to the complaints. By order dated June 3, 2005, Judge Sweitzer consolidated all six contest proceedings for purposes of a hearing and final decision on the merits.

A 6-day hearing was held before Judge Holt on February 26-28, and March 1, 2007, and January 14 and 15, 2008, in Las Vegas, Nevada. At the conclusion of the Government's case, Judge Holt denied Contestees' motion to dismiss the complaints, ruling that BLM had made its prima facie case that the claims were not located in good faith and that the burden shifted to the Contestees to establish the validity of the claims. Tr. 1146.

On August 1, 2008, Judge Holt issued his decision, declaring all 261 claims null and void ab initio in their entirety because they were fraudulently located in

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[7] The contests were brought either against Carlwood, *et al.* (N-76738-01, N-76738-02, N-76738-03, N-76738-04, and N-76738-05), or Andrew L. Dall, *et al.* (N-76738-06). In addition to Carlwood and the other seven corporate locators, BLM brought the first five contests against four individuals, Kathleen M. Stephen, K.I. Matheson, Ian Matheson, and Donald J. Hales, and five entities, Pilot Research, Inc., Cactus Gold, Cactus Mining, Delgratia, and Valley Gold. Pass Minerals, Inc. (Pass Minerals), was also included as a contestee in N-76738-02. In addition to Andrew L. Dall and the other seven individual locators, BLM brought the last contest against three entities, Cactus Gold, Cactus Mining, and Geotech. All of the named contestees were said to own or to assert ownership of the claims involved in each of the contests, and thus were parties in interest.

violation of the 20-acre per claimant limitation of 30 U.S.C. § 35 (2006). Decision at 49. He held that the Contestees had failed to carry their burden to overcome BLM's prima facie case and to prove, by a preponderance of the evidence, that eight persons or entities had located each of the claims "in good faith, independently, and for their own self-interest[.]" *Id.* Rather, he concluded that the preponderance of the evidence established that "the 1993 claims were more likely located by two groups consisting of business entities represented by Charles Ager and business entities represented by James Roe," and that "the 1999 claims were more likely located for the sole benefit of one individual, Charles Ager," and not the eight named corporations or the eight named individuals. *Id.* He found that "[i]n both instances other persons used the named companies and individuals to locate more land than the law allowed." *Id.*

II. ARGUMENTS OF THE PARTIES

The disagreement between Contestees and BLM is sharply presented. In their Statement of Reasons (SOR),[8] Contestees argue that Judge Holt failed to apply the correct burden of proof to decide the case, and that his decision is "based on errors . . . as well as [his] misapprehension of facts presented." SOR at 1. They contend that under either the clear and convincing standard, which they argue governs this case, or the preponderance of the evidence standard, which Judge Holt applied, BLM failed to establish that the claims at issue were fraudulently located. The essence of Contestees' argument is set forth below:

> There is nothing illegal, improper, wrong or fraudulent about eight people or entities forming an association and staking association placer claims of 160 acres to save money, as long as they are all bona fide locators and all have an equal interest and stake in the claims. The Decision discusses the motivation of the Appellants, or at least some of them, to use dummy locators to locate 160 acre placer claims to save money. However, the motivation to save money by locating larger claims would be true of anyone locating a placer claim of more than 20 acres. The fact of wanting to save money, by itself, proves nothing because any mining claimant wants to save money on staking, recording and maintaining mining claims. It is unfortunate and unfair that the government says it allows association placers and then latches on to the fact that certain claims are association placers when the

[8] Contestees also requested a stay of the effect of Judge Holt's decision, which the Board denied by order dated Nov. 19, 2008, on the basis that they had not shown that any immediate and irreparable harm would result from denial of the stay. *See* 43 C.F.R. § 4.21(b).

> government wants to remove claimants from mining certain areas when the government has no other basis for doing so.

SOR at 2. In their Request for Stay, Contestees summarized their argument in the following terms:

> [T]he Government did not meet its burden of proof, as the evidence presented at hearing clearly shows that the locators all had a bona fide interest in these claims at the time of location, they all had an equal interest, and they were locating the claims for their own interest, not for the sole interest of Dr. Charles Ager, James Roe or Cactus Gold Corp.

Request for Stay at 4. They argue that the Government's case did not come close to establishing the typical "dummy locator" situation "where the proven facts show blatant and egregious schemes to use dummy locators, and where witnesses admit they loaned their names or . . . admitted they had no interest in the claims at issue." *Id.* at 5.

In its Answer, BLM counters that "[t]he evidence establishes that the association placer mining claims in this contest were located by dummy locators for the benefit of Charles Ager or for joint ventures of Charles Ager and Mr. James T. Roe, III, and are, therefore, void." Answer at 3. It is precisely the desire to save money that BLM asserts was a primary motivation for the "two separate schemes using dummy locators" at issue herein: "The motivation to use dummy locators was to allow Charles Ager or the joint ventures to control larger placer mining claims than they would otherwise be entitled to under the law, allowing for a significant savings in fees for locating and maintaining the claims." *Id.*

III. DISCUSSION

A. Standard of Review and Burden of Proof

Contestees argued before Judge Holt, as they presently argue before the Board, that special rules should apply in a contest alleging "dummy locators," *i.e.*, that the Government must prove its case by clear and convincing evidence, citing *United States v. Prowell*, 52 IBLA 256, 261-62 (1981); *United States v. Dillman*, 36 IBLA 358, 362 (1978); and *Chittim v. Belle Fourche Bentonite Products Co.*, 149 P.2d 142 (Wyo. 1944), *overruled on other grounds, River Springs Ltd. Liability Co. v. Board of County Comm'rs of Teton*, 899 P.2d 1329 (Wyo. 1995). The Government contends, on the other hand, that the proper burden is found in the usual Government contest case, *i.e.*, it bears the burden of establishing a prima facie case

that the claims were improperly located and the Contestees must prove the locations valid by a preponderance of the evidence.

Judge Holt stated that "[b]ecause the Board . . . has never explicitly articulated the burden and standard of proof for a contest that challenges only an association placer location (as distinguished from the existence of a discovery), a detailed survey of prior judicial and Departmental decisions is necessary."[9] Decision at 6. He reviewed a series of judicial decisions which dealt with scenarios by which dummy locators were used to avoid or circumvent the acreage limitation statutes, and failed to discern a definite rule as to what standard of proof should apply.[10] He then reviewed a number of Departmental decisions dealing with placer association claims, beginning with *McKittrick Oil Co.*, 44 I.D. 340 (1915), and concluded: "Like the judiciary, the Department has required that claims in excess of 20 acres must be located by an 'association of persons.' It has emphasized that the association must be 'bona fide,' that is acting in good faith. Further, the Department has not required an enhanced standard of proof."[11] Decision at 17.

It is well settled, as Judge Holt observed, that in the usual Government contest proceeding the Government bears the burden of going forward with evidence sufficient to establish a prima facie case of the invalidity of the challenged mining claim, whereupon the burden shifts to the claimant to overcome that case by a

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[9] Judge Holt also observed that 30 U.S.C. §§ 35 and 36 (2006), which generally governs the location of placer mining claims, and 43 C.F.R. § 3842.1-2 (1992 and 1999), in effect when the contested locations were made, do not establish the burden of proof in contest proceedings.

[10] Judge Holt reviewed *Mitchell v. Cline*, 24 P. 164 (Cal. 1890); *Cook v. Klonos*, 164 F. 529, 538 (1908), *modified on other grounds*, 168 F. 700 (9th Cir. 1909); *Nome & Sinook Co. v. Snyder*, 187 F. 385 (9th Cir. 1911); *Chanslor-Canfield Midway Oil Co. v. United States*, 266 F. 145, 149 (9th Cir. 1920); *United States v. Brookshire Oil Co.*, 242 F. 718, 721 (S.D. Cal. 1917); *United States v. California Midway Oil Co.*, 259 F. 343, 352-53 (S.D. Cal. 1919), *aff'd*, 279 F. 516 (9th Cir. 1922), *aff'd per curiam*, 263 U.S. 682 (1923); *Chittim v. Belle Fourche*, 149 P.2d at 142; *United States v. Toole*, 224 F. Supp. 440 (D. Mont. 1963); and *Cuykendall v. Dolan*, 2006 WL 2252558, at 13 (D. Or. Aug. 3, 2006).

[11] Other Departmental cases discussed by Judge Holt include *Centerville Mine and Mining Co.*, 49 I.D. 508, 513 (1923); *Big Horn Calcium Co.*, 44 IBLA 289 (1979); *Big Horn Limestone Co.*, 46 IBLA 98 (1980); *Fairfield Mining Co., Inc.*, 66 IBLA 115 (1982); *Alumina Development Corporation of Utah (Alumina Development)*, 77 IBLA 366, 370 (1983); *Allen C. Kroeze*, 153 IBLA 140 (2000) *American Colloid Co.*, 154 IBLA 7 (2000); and *Rock Solid Inc. and Mining*, 170 IBLA 312 (2006).

preponderance of the evidence. *Hallenbeck v. Kleppe*, 590 F.2d 852, 856 (10th Cir. 1979); *United States v. Winkley*, 160 IBLA 126, 142-43 (2003); *United States v. LeFaivre*, 138 IBLA 60, 67 (1997). Judge Holt quoted from *United States v. E. K. Lehmann & Associates of Montana, Inc.*, 161 IBLA 40, 44-45 (2004), that "[i]n a mining contest, the contestant bears the burden of making a prima facie case in support of its allegations that the contested claim is invalid," and that then "the burden shifts to the contestee (the mining claimant) to overcome that case by a preponderance of the evidence." Further, "[i]n a contest proceeding, a claimant need only defend against the elements raised in the Government's prima facie case." *Id.*

Contestees contend that the burdens of proof in the usual contest proceeding, as in *United States v. Lehmann*, do not apply in contests such as brought by the Government in their case, "where the issue is one of dummy locators." SOR at 15. They argue that Judge Holt erred in holding that they bore the ultimate burden of proof to overcome the Government's prima facie case by demonstrating compliance with the statutory acreage limitation by a preponderance of the evidence. According to Contestees, "[w]here the government raises the issue of fraud, the Government bears the ultimate burden of proof." *Id.*, *citing Prowell*, 52 IBLA at 261-62, and *Dillman*, 36 IBLA at 362. The Contestees assert that "[a] claim of fraud must be proven by clear and convincing evidence." SOR at 15, *citing In re Renovizor's, Inc.*, 282 F.3d 1233, 1239 (9th Cir. 2002), and *Chittim v. Belle Fourche*, 149 P.2d at 148. They rely upon the Ninth Circuit's opinion in *California Midway* to support their argument that "the question of use of dummy locators to locate a claim where one person is to acquire more than 20 acres is a question of fraud." *Id.* at 16. In that case, the Court indeed stated: "Fraud is never presumed, but must be established by clear, unequivocal and convincing proof. Proof which merely creates suspicion is not enough." 259 F. at 352. They argue that "the Government was required to prove its case by clear and convincing evidence, which it did not do." SOR at 15-16.

Judge Holt rejected the Contestees' argument that "special rules should apply for a contest alleging 'dummy locators,'" and that the "Government must prove its case by clear and convincing evidence." Decision at 21. With the exception of *California Midway*, 259 F. at 352-53, in which the U.S. District Court for the Southern District of California seemed to require the Government to prove its case under the "clear and convincing" standard for common law fraud, Judge Holt found no authority to support the position advanced by the Contestees. He noted that the Ninth Circuit affirmed the result reached by the District Court in *California Midway* without endorsing or rejecting the standard of proof used by the District Court. *See California Midway*, 279 F. at 516. He concluded that "no binding authority requires the Government to prove that association placer locators committed fraud by clear and convincing evidence," and, thus, that "no precedent

prevents the application of the usual rules for contest proceedings." Decision at 23.[12] Accordingly, he ruled that "once the Government has made a prima facie case, the burden then shifts to the Contestees to prove by a preponderance of the evidence that they validly located the claims." *Id.*, *citing 1 American Law of Mining*, § 32.04[3](b) at 32-43 (2007).[13]

We similarly conclude that the Government bears the burden of going forward to establish a prima facie case of a fraudulent location, *i.e.*, the claim was not located in "good faith," under 30 U.S.C. §§ 35, 36 (2006), whereupon the ultimate burden of proof shifts to the claimants to establish that the claim was properly located by a preponderance of the evidence.[14] *See United States v. Lehmann*, 161 IBLA at 44-45;

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[12] We note that in *Alumina Development*, 77 IBLA at 370, involving the location of a mining claim by use of dummy locators, BLM simply issued a decision declaring the association placer claim null and void in its entirety, which decision was appealed to the Board, rather than bringing a Government contest.

[13] Judge Holt stated that "[t]he definition of 'preponderance of the evidence' has also been well settled by the Board," quoting the definition from *United States v. Feezor*, 130 IBLA 146, 200 (1994), as follows:

> To establish the preponderance of the evidence means to prove that something is more likely so than not so; in other words, the "preponderance of the evidence" means such evidence, when considered and compared with that opposed to it, has more convincing force and produces in your minds belief that what is sought to be proved is more likely to be true than not true.

See also South-East Coal Co. v. Consolidation Coal Co., 434 F.2d 767, 778 (6th Cir. 1970); *Winston L. Thornton*, 106 IBLA 15, 19-20 (1988); *Thunderbird Oil Corp.*, 91 IBLA 195, 201 (1986).

[14] We do not disagree that a heightened standard of proof is generally warranted in the case of a charge of "fraud or some other quasi-criminal wrongdoing," where "[t]he interests at stake . . . are deemed to be more substantial than mere loss of money," and involve "tarnish[ing]" a person's "reputation" or "prejudici[ng]" his "character and honesty," contrary to "the general presumption that men are honest and do not ordinarily commit fraud or act in bad faith." *Addington v. Texas*, 441 U.S. 418, 424 (1979), *quoting George Rodda, Jr.*, 37 IBLA 189, 190 (1978), *rev'd sub nom., McBride v. Andrus*, No. 79-96-TUC-MAR (D. Ariz. Dec. 14, 1983). However, we do not regard BLM's assertion that Contestees located the claims in violation of the statutory acreage limitation as akin to a charge of quasi-criminal wrongdoing. A violation of the statutory acreage limitation may be, but need not be, based upon the

(continued...)

United States v. Knoblock, 131 IBLA 48, 81, 101 I.D. 123, 138 (1994); *1 American Law of Mining*, § 32.04[3](b) at 32-43. The claimants are required to preponderate only with respect to those issues for which the Government has established a prima facie case. *E.g., United States v. Miller*, 138 IBLA 246, 268-70 (1997).

B. Association Placer Mining Claims Located in Violation of the 20-Acre Per Claimant Limitation

We start with the rule that a single individual or legal entity is precluded by 30 U.S.C. § 35 (2006) from locating a placer claim of more than 20 acres.[15] The consequence of locating an association placer claim in violation of the 20-acre per claimant limitation of 30 U.S.C. § 35 (2006) turns upon whether the claim was located in good faith. If the excess acreage was included *in good faith*, the claim is voidable as to that excess and, before voiding the claim as to the excess, BLM is required to afford the claimant notice and an opportunity to correct the situation by selecting the appropriate amount of land commensurate with the true number of locators. *See, e.g., Samuel P. Barr, Sr.*, 65 IBLA 167, 168 (1982); *1 American Law of Mining*, § 32.04[2](b), at 32-43; 58 C.J.S. *Mines and Minerals* § 44(a)(2) (1948) at 92-93. If, however, the excess acreage was included *in bad faith*, BLM is required to declare the claim void in its entirety. *See, e.g., United States v. Toole*, 224 F. Supp. at 456; *Donald D. Hall*, 95 IBLA at 36A; *Alumina Development*, 77 IBLA at 369-70; *Centerville Mine*, 49 L.D. at 513; *1 American Law of Mining*, §§ 32.04[2](b) and 32.04[3](b) at 32-40, 32-42 to 32-42.1; 58 C.J.S. *Mines and Minerals* § 44(a)(2) (1948) at 93. As the court stated in *United States v. Toole*, 224 F. Supp. at 456, *quoting Nome & Sinook v. Snyder*, 187 F. at 388:

> Any scheme or device entered into whereby one individual is to acquire more than [20 acres] . . . constitutes a fraud upon the law, and consequently a fraud upon the government, from which the title is to be acquired, and *any location made in pursuance of such a scheme or device is without legal support and void.*" [Emphasis added.]

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[14] (...continued)
allegation that a willful fraud was committed in the location of a claim, thus requiring invalidation of the entire claim.

[15] As stated in *Cook v. Klonos*, 164 F. at 538, the acreage restriction in the mining laws "are only intended to prevent the primary location and accumulation of large tracts of land by a few persons, and to encourage the exploration of the mineral resources of the public land by actual bona fide locators." *See also Durant v. Corbin*, 94 F. 382, 383 (E.D. Wash. 1899).

In *Alumina Development*, 77 IBLA at 368-69, the Board provided the following discussion of how the 20-acre limitation is to be applied:

> An association of claimants may locate an association placer claim encompassing up to 160 acres. The permissible size of the claim is dictated by the number of parties in the association. Thus, if the association were to contain eight individuals, the association would be able to locate a claim of 160 acres. However, 30 U.S.C. § 35 clearly dictates that: "[N]o such location shall include more than twenty acres for each individual claimant." *See also Clayton S. Hale*, 62 IBLA 35 (1982); *Big Horn Limestone Co.*, 46 IBLA 98 (1980).
>
> If the persons locating the placer mining claims subsequently form a corporation with each owning stock in proportion to their claim ownership, the locations are not invalid. However, if persons merely lend their names to a corporation in order to enable it to acquire more ground than is allowed, the locations are invalid. *See Borgwardt v. McKittrick Oil Co.*, 130 P. 417, 64 Cal. 650 (1913). The policy and objective of 30 U.S.C. § 35 (1976) is to limit the quantity of placer mineral land which may be located by one person to 20 acres per claim. *Mitchell v. Cline*, 24 P. 164, 84 Cal. 406 (1890). The Federal courts have held that the corporation will be looked upon as a separate entity, with the right to locate no more than 20 acres. *See United States v. Toole*, 224 F. Supp. 440 (D. Mont. 1963); *Big Calcium Co.*, 44 IBLA 289 (1979); *United States v. Schneider Minerals, Inc.*, 36 IBLA 194 (1976).

See also Owyhee Calcium Products, Inc., 72 IBLA 235, 238 (1983). The Board's application of these rules to the specific facts in *Alumina Development*, set forth below, sets the standard against which we will measure Ager's relationships with the companies and individuals Judge Holt found to be "dummy locators":

> A person cannot use the names of his friends, relatives, or employees as dummies, in order to locate for his own benefit a greater area of placer ground than is allowable by law. *Cook v. Klonos, supra. Any sham or device entered into whereby one individual is to acquire by location an amount or portion of a placer mining claim in an area more than 20 acres constitutes a fraud upon the Government, from which title is to be acquired, and any location made pursuant to such scheme or device is without legal support and void. Nome & Sinook Co. v. Snyder*, 187 F. 385 (9th Cir. 1911). [Emphasis added.]

77 IBLA at 370.

There appears to be no single standard for determining whether a mining claimant has utilized dummy locators in order to circumvent the acreage limitation set by 30 U.S.C. § 35 (2006). In their Mineral Report, the Mineral Examiners enumerated several factors which they considered in determining whether an association placer claim has been located in good faith, including (1) the amount each member of the association has contributed to the venture (*McKittrick Oil Co.*, 44 I.D. at 343-44); (2) whether each locator has a material interest in the claim (*Centerville Mine*, 49 I.D. at 509); (3) the intent of each locator in filing and developing the land (*id.* at 523); (4) the location notices themselves, which are considered "the best evidence" (*Alumina Development*, 77 IBLA at 371); and (5) who has control over the claims (*id.* at 370). In its Post-Hearing Response Brief (Post-Hearing Response), BLM reiterates that these factors are applicable. Post-Hearing Response at 42-43. Likewise, our review of the record takes into account, but is not limited to, these factors.

Judge Holt held the view, with which we agree, that the participants in an association must be "bona fide." Decision at 24, *citing 1 American Law of Mining*, § 32.04[3](b) at 32-42 to -43; *see also Chanslor-Canfield*, 266 F. at 149 (participants were not bona fide occupants); *Brookshire*, 242 F. at 720 (locations were not made in good faith for the use and benefit of the alleged locators). As he explained, "[t]he term 'bona fide' carries the meaning of 'made in good faith; without fraud or deceit.'" Decision at 24, *quoting Black's Law Dictionary* 186 (8th ed. 2004). "And 'good faith,' in turn, has been defined to mean '[a] state of mind consisting in (1) honesty in belief or purpose, . . . or (4) absence of intent to defraud or to seek unconscionable advantage.'" Decision at 24, *quoting Black's Law Dictionary* 713. Based upon his review of pertinent authorities,[16] he concluded "that Contestees must show that they each acted in good faith, independently, and for their own self-interest in order to prove a valid association claim." Decision at 26. We agree and therefore hold that Judge Holt's formulation is the standard against which to measure the location of the association claims at issue in this matter.

[16] He considered *Chanslor-Canfield*, 266 F. at 149; *Centerville Mine*, 49 I.D. at 513; *Fairfield Mining Co., Inc.*, 66 IBLA 115, 119-20 n.5 (1982); and *Durant v. Corbin*, 94 F. 382, 383-84 (E.D. Wash. 1899). Judge Holt surmised from *Durant v. Corbin* that the policy of limiting to 20 acres the amount of land a single person could obtain applied to an individual who participates in an association, requiring "that the Contestees not only prove that they were 'bona fide' participants (i.e., acted with good faith), but that they also acted independently and for their own self-interest when they located the claims." Decision at 25.

C. The 261 Association Claims Are Void in Their Entirety

[2] Judge Holt stated correctly that the preponderance of the evidence standard, which is longstanding within the Department, applies to the Governments' contests against the 261 association claims at issue herein. He did not expressly state that the Government established a prima facie case, but that finding is clearly implied. BLM introduced the Mineral Report through the testimony of Chatterton, Shumaker, and Clay, all Certified Review Mineral Examiners. BLM clearly satisfied the Government's burden of going forward to establish a prima facie case that the claims were not located in good faith by a bona fide association of persons, but rather by a single individual or legal entity in violation of 30 U.S.C. §§ 35 and 36 (2006). Thereupon, the burden of proof shifted to the Contestees to establish by a preponderance of the evidence that the claims were validly located. *See United States v. Lehmann*, 161 IBLA at 44-45; *United States v. Knoblock*, 131 IBLA at 81, 101 I.D. at 138; *1 American Law of Mining*, § 32.04[3](b) at 32-43. For the reasons that follow, we conclude that the Contestees failed to meet that burden.

1. The 1993 Claims Were Not Located by Eight Corporations in Good Faith

Judge Holt observed that "[o]n the face of the filed documents the 1993 claims appear to comply with the mining laws," being "located in the name of eight corporations, and corporations are recognized as persons which may locate claims." Decision at 26, *citing Alumina Development*, 77 IBLA at 369. However, despite the facial legitimacy of the 1993 claims, he found that BLM had demonstrated that two individuals, Ager and Roe, had devised a scheme for purposes of locating a greater number of claims than the law allows. He stated that "when one goes behind the filed documents evidence of a scheme to locate claims for a much smaller group emerges," and that his "examination of the ownership and management of the corporations reveal[ed] the dominance of two individuals, James Roe and Charles Ager." Decision at 26. Judge Holt found that four of the locator corporations, Cambridge, Brookline, Crimson, and Carlwood, were dominated by Roe:

> Three of these corporations are wholly owned by parent corporations in which James Roe is the majority shareholder (i.e., Cambridge and Crimson) or in which James Roe plays a dominate [sic] role (i.e., Brookline).[17] James Roe is the only shareholder of the fourth

[17] Judge Holt provided "[m]ore detailed information" to demonstrate "that Roe also dominated Brookline Mining Company." Decision at 27. Based upon "Roe's controlling influence in the activities of Brookline, and the lack of evidence of a functioning board of directors," Judge Holt concluded "that he dominated this parent (continued...)

> corporation. He is also director and president of all four locator corporations. No other directors have been identified for any of these four corporations.

Id.; see Table, Decision at 27, summarizing the relationships among Roe and the locator corporations. He also found that three of the remaining locator corporations, Geosearch, Mincor, and Geotech Mining, Inc. (Geotech), were "also dominated by a single person, this time Charles Ager." Decision at 28; *see* Table, Decision at 29, summarizing the relationships among these three locator corporations and Ager.[18]

Judge Holt was not persuaded that "each of the corporate locators were independent persons who legitimately formed an association of eight legal persons to locate the claims within the statutory acreage limit." Decision at 30. His findings regarding the testimony of Ager and Roe are set forth below:

> In particular, Charles Ager gave evasive, vague, and sometimes contradictory answers to questions about the operation of the locator corporations. *E.g.*, Tr. 701:23-715:21 (involvement of wife and funding of companies); Tr. 716:14-719:17 (initially implies 11 year old son performed field work and made contributions from savings for locations, but, under cross examination, admits he did not); Tr. 734:8-743:15 (funding for corporation); Tr. 744:18-754:20, 763:14-764:14, 788:12-790:14 (funding for government fees and pro rata shares); Tr. 764:15-780:1 (execution and purpose of "Partnership Agreement–Eldorado Partners", Ex. B-1); Tr. 781:2-785:19, 790:15-801:13 (meetings among corporate locators); Tr. 802:17-805:2 (accounting among corporate locators for income and expenses). For example, he refused to answer questions or provide documents about routine corporate governance matters, such as by-laws or minutes or shareholder and director meetings. *E.g.*, Tr. 691:7-692:21 (admits to being secretary and treasurer of Mincor, but denies involvement in operation of company; defers to answering questions to board of directors when Nevada state records show him as director–Ex. A-2; App. 14 at 3). *See also* Tr. 697:6-699:14 (similar responses for Geosearch). Instead he relied upon a "global operating policy" not to

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[17] (...continued)
corporation to the same degree that he dominated the parent corporations of the other locator corporations." *Id.*

[18] The eighth locator corporation was Pilot Plant, determined by Judge Holt to be "part of the plan that ultimately consolidated all of the claims under a single entity controlled by Charles Ager." Decision at 28.

> provide documents unless the Government signed a confidentiality agreement. Tr. 692:22-698:20. One would expect such disclosures would enhance the locators' case, but Ager's refusal to provide the information leads to an opposite inference. His refusal to present the documents, based solely on internal company policy, infers that the records, or lack thereof, may not support a finding that the corporations acted independently or for their own self-interest. *See Patricia C. Alker*, 79 IBLA 123, 127 (1984); *Hal Carlson, Jr.*, 78 IBLA 333, 341 (1984) ("when a party has relevant evidence within its control which it fails to produce, when it would be expected to do so under the circumstances, such failure may give rise to an inference that the evidence is unfavorable.") Further, as owner of Cactus Gold and Valley Gold, the current record owners of the claims, he had a significant interest in the outcome of this contest.
>
> Similarly, James Roe did not provide testimony with a high degree of credibility. On cross examination he became very vague, evasive, and rambling in his answers. He exhibited poor memory on subjects that should have been memorable for the president of the four locator corporations and their three corporate parents. *E.g.*, Tr. 1312:14-1314:9 (vague and rambling answer about pro rata monetary payments by locators); 1314:10-1317:15 (voting among locators); 1318:6-1320:12 (income and expenses of the locators); 1320:13-1323:21 (activities to physically locate the claims); 1330:11–1334:13 (accounting for expenses and income); 1334:14-1336:11 (meetings and decisions among locators); 1330:12-1343:12 (receipt of income from 1994 Royalty Agreement and payment of note owed to Ager); 1343:13-1350:1 (abandonment of prior claims).

Decision at 30-31. Judge Holt concluded that neither Ager nor Roe were "credible enough for their testimony to outweigh the inferences that can be drawn from other uncontested facts in the record," and that such "facts show the locator corporations did not act with good faith, independently, and for their own self-interest in locating the claims." *Id.* at 31.

Judge Holt found that in April 1993, before the September 1993 locations, Ager and Roe signed a handwritten "Letter of Agreement" in which the parties they represented agreed to form a partnership to own 50 percent each of the mining interests in the Eldorado Valley. Judge Holt found that the creation of the "50-50 joint venture," referred to as "a single operating company," "coincides with (1) the creation of Cactus Gold in May 1993 (Ex. A-2, App. 18), (2) agreements to transfer assets from Pilot Plant to Cactus Gold (Ex. B-4), and (3) agreements to transfer the

association claims from the corporate locators to Cactus Gold (Ex. B-6) in August 1994." Decision at 38; *see* Ex. B-21 at 25-26. Further, in a July 1994 Proxy Statement to Brookline shareholders, Roe described the April 1993 joint venture with a "Canadian Group," headed by Ager: "The joint venture known as Eldorado Partners consists of eight corporations that acted as mining claim locators in a procedure which consolidated the claims positions of the two groups." Decision at 38-39, *quoting* Ex. B-23 at 433.

Based upon the documents that were placed into evidence at the hearing, just described, Judge Holt stated:

> In summary, I find it more likely that the corporate locators did not act in good faith, independently, or for their own self-interest. The chief evidence supporting a valid location are the incorporation documents for eight different entities and the location certificates signed by one agent on behalf of all eight corporations. But very little else supports independence of their activities. A single entity paid the initial filing fees and subsequent annual rentals when the agreement among the participants required the establishment of a separate checking account. No documents, such as promissory notes or internal accounting, support the financial contributions by the individual corporations. And no actual receipt, or internal accounting, is shown for the consideration paid to the eight corporations when they transferred their interests to a single corporation as the ultimate owner.
>
> In contrast, considerable evidence exists that two groups of persons or entities located the claims. The April 1993 Letter of Agreement signed by Ager and Roe evidences a plan to contribute the mining interests of two joint ventures to another partnership that would form eight corporations to locate association claims. These new claims would ultimately be consolidated under a single entity. The four corporate locators created or controlled by the Ager group, and the four corporate locators created by the Roe group, did not carry out this plan in their own self-interest. Rather, they acted on behalf of the two joint ventures that created them (i.e., the Ager Group and the Roe Group).

Decision at 39. He concluded that there was "very little evidence to support a conclusion that the eight corporations acted in good faith, independently, and for their own self-interest in locating the claims," but that it was "more likely that two groups of persons and entities (i.e., the joint ventures), represented by Roe and Ager, used corporate entities to locate more acreage than the law allowed." *Id.*

The Contestees argue that there was no such "intentional plan" to evade the law on the part of any of the eight corporate entities or individuals involved in this contest. SOR at 1. However, their own arguments make clear several pertinent points that belie their case. As BLM states, Ager and Roe "jointly decided to file association placer claims of 160 acres each in order to clear title . . . and to save in the payment of mining fees." Answer at 4; *see* Exs. A-2 at 21, A-14, B-28; Tr. 233-35, 623-26; Ex. A-2, Apps. 9 thru 15; Ex. B-23 at 433; Ex. B-21 at 12. They divided all their interests into exactly eight corporations, seven of which were organized by them in 1993, and Pilot Plant, which paid the fees for filing and maintaining all the 1993 claims with funds provided by Ager. *See* Ex. A-2, App. 21 at 7-11; Tr. 745-53. These corporate entities formed the Eldorado Partners Agreement and, through agents, located 170 claims on September 1 and 2, 1993, contemporaneous with a statutory adjustment to raise mining fees that went into effect on September 1, 1993. *See* Pub. L. 103-66, Sec. 10101, 107 Stat. 405 (Aug. 10, 1993), *codified at* 30 U.S.C. § 28f (2006); Tr. 378-80. The savings they realized between 1993 and 2004 amounted to approximately $1,623,600.00. Tr. 236-37. Ager confirmed what BLM calls a "scheme" when he stated: "So I set about acquiring an interest in the Eldorado Valley, and found out there was all kinds of people who owned the Claims. It took me a long, long time, a lot of money – I might add it's all my money, private money – to acquire the grounds." Tr. 737. He characterizes Ager's 1993 agreement with Roe as "an attempt to put in a draft form our mutual agreement that we . . . had reached between how we may operate together as a unit as of whatever date it was, April, 1993. That's the start of our relationship." Tr. 1092. Again, Ager also states that when he and Roe later "looked at our common interest . . . it turned out that we could locate association placer Claims, because we had more than eight members of common interest. And so that's what we did, and would reduce our, our carrying costs." Tr. 648-49.[19]

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[19] In its Post-Hearing Response, BLM reviewed each of the eight corporate entities comprising the association in the context of key provisions of Nevada Revised Statutes to show that Ager meets the definition of "alter ego" with regard to the eight corporate entities:

> A stockholder, director or officer acts as the alter ego of a corporation if:
>
> (a) The corporation is influenced and governed by the stockholder, director or officer;
>
> (b) There is such unity of interest and ownership that the corporation and the stockholder, officer or director are inseparable from each other; and

(continued...)

BLM disputes Contestees' argument that Judge Holt erred because he "disregarded or glossed over certain evidence that all of the locators were bona fide locators," as well as Carlwood's claim that "[a]ll of the locators of the subject claims invested time, money, and/or experience and expertise regarding the location and development of these claims." Answer at 17, *quoting* SOR at 15. BLM emphasizes that "[i]t was precisely the allegations about contributions of 'time, money and/or experience and expertise' that gave Judge Holt concern as he weighed demeanor and testimony and ultimately found the witnesses not to be credible." Answer at 17.

BLM relies upon the following testimony of Ager in arguing that the Ager family members were operating as a group:

> [T]he Ager family operates as a group in the mining business. And if we have interests in things that we fund, we often share them.
>
> And in this case, our interest was shared through individual ownership of three corporations which we each owned individually. I want to make it very clear that the Ager family had already purchased an interest in some of the Claims, and spent a lot of money before this.
>
> And the purpose of this Agreement was to execute our rearrangement of title to those Claims, with no real change in underlying area of ownership.

Tr. 775. Regarding the corporate entities' interest in the claims, Judge Holt stated that "the agreements recited that Cactus Gold paid each corporate locator $12,500," but that "there was no documentation of any such payment and the inference is properly drawn that this was an illusory payment to create the appearance of equal interests." Decision at 33, *citing* Exs. B-6, B-7; Tr. 812-13.

The record shows that Ager controlled the arrangement from the inception. He principally funded the exploration of mining opportunities with Matheson. Tr. 569. Ager's funds or Ager corporate funds financed the joint venture with Roe and the association of eight companies that purported to locate the 1993 claims.

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[19] (...continued)

> (c) Adherence to the corporate fiction of a separate entity would sanction fraud or promote a manifest injustice.

Nev. Rev. Stat. § 78.747 (2007).

Consistent with Judge Holt's diagram showing the interrelationship of the eight corporate entities, BLM concluded that all eight corporate entities met this statutory definition.

Tr. 737, 739, 749, 752-53; Ex. B-23 at 2. The initial agreement was financed by Ager and his corporations (Tr. 759-60; Ex. B-23 at 2), and resulted in significant debts owed back to Ager or his corporate interests. Tr. 790; Ex. B-23 at 2). However, contestees failed to produce any documentation of these debts or any payment to or among the various corporate locators, and Roe was "unable to explain in any satisfactory way what happened to all the debts that were owed to Charles Ager and his companies in their joint ventures," and "could not specifically recall signing a note for the expenses of the four Roe corporations and Appellants never produced any such note." Answer at 18-19, *citing* Tr. 1288-89, 1332-34, 1338-40. BLM emphasizes that Ager himself admitted to an arrangement with Roe: "It was our group and their group, if you want to look at it globally, but it wasn't two people. It was two groups of people and companies." Tr. 642.

With regard to the creation of Cactus Gold, Ager testified: "It's very common in the mining business to take what you might call shell or shell companies and use them for a new purpose. It's not uncommon at all." Tr. 1099. There is little room to disagree with BLM's argument that "this 'shell' company explanation establishes that Cactus Gold had no other purpose than to serve as a 'shell' for Dr. Ager's interests." BLM's Post-Hearing Response at 46. As BLM states,

> Cactus Gold was incorporated on May 3, 1993 (Ex. A-2, App. 18 at 1), just after the April 1993 Agreement (Ex. A-21), and before the creation of the Eldorado Partners in July 1993 (Ex. A-9). Cactus Gold was then conveniently available for Dr. Ager's use when he needed an actual company to fill in the blank for OPCO [the Operating Company], a concept that existed as Dr. Ager and Dr. Roe were discussing how to develop the mining property. (Tr. 643).

Id. From 1994 through 2000, Ager himself constituted all the officers and directors of Cactus Gold. Ex. A-2, App. 18 at 8-27; Tr. 489, 499, 512, 516. Ownership of Cactus Gold has been controlled by Cactus Mining, which is owned and controlled solely by Ager. Tr. 225, 227, 538-39.

In looking at many documents related to the operations of the various corporations, including the royalty agreements at Exhibit B-6, the amendments to the royalty agreements at Exhibit B-8, and the undated agreement between Pilot Plant and Ager at Exhibit A-10 (Tr. 204), we see that Ager signed them on behalf of his various corporations as well as in his individual capacity. Several of these documents carry three signatures of Ager: one for Cactus Gold, one for an Ager locator company, and one for himself in his individual capacity. BLM argues persuasively that "[t]hese signatures have a form of corporate identity but lack the substance or reality thereof." BLM's Post-Hearing Response Brief at 47. Thus, Ager remained in

control of the operation, regardless of partnerships or ventures with Matheson or Roe, and, in the words of *Cook v. Klonos*, 164 F. at 538, he utilized the partners and corporations as dummies to "locate for his own benefit a greater amount of mining ground than that allowed by law."

The evidence is overwhelming that the real parties in interest of the 1993 claims were Ager and Roe through their joint ventures, and not the eight corporations they created and controlled in order to "warehouse" their claims. We agree with Judge Holt that there is "very little evidence to support a conclusion that the eight corporations acted in good faith, independently, and for their own self-interest in locating the claims," and that it is "more likely that two groups of persons and entities (i.e., the joint ventures), represented by Roe and Ager, used corporate entities to locate more acreage than the law allowed." Decision at 39-40. We therefore conclude that Judge Holt properly declared the 170 association placer mining claims located in 1993 by the eight corporations null and void in their entirety.

2. The 1999 Claims Were Not Located by Eight Individuals in Good Faith

Judge Holt noted that "[a]s with the 1993 corporate locations, the 1999 individual locations appear to comply with the mining laws on the face of the filed documents," but that "when one goes behind the filed documents, evidence of a scheme to locate claims for a single person emerges," with "[e]ach of the locators [being] either related to or employed by Charles Ager or companies he controlled." Decision at 40. He was simply not persuaded by the Contestees that the individual locators "acted independently and for their own self-interest," stating that "[t]he fact that each locator contributed to the effort is not persuasive by itself, because these actions are also consistent with benefitting their employer and relative, Charles Ager." *Id.* at 41; Tr. 844-48, 921-32, 1441-43. He added that Ager "gave evasive, vague, and sometimes contradictory answers." Decision at 42; *see, e.g.*, Tr. 821-41.

Andrew Dall, one of the locators and the person who signed all of the location certificates as their agent, was the only individual locator to testify at the hearing. Judge Hold did not find him "fully believable," deeming his testimony "sometimes contradictory," and his answers "particularly vague . . . about the receipt of $5,000 for the transfer to Cactus Gold." Decision at 42, *citing* Tr. 1376, 1378-97, 1401-03, 1422-23, 1435-41. Judge Holt viewed Dall's testimony as indicative of activity for the benefit of Ager rather than for the benefit of the individual locators. Decision at 43. For example, he stated that Dall's testimony regarding how he and some of the individual locators took samples from the ground "could have just as easily been for the benefit of their employer or relative as it could have been for their own independent self-interest." *Id.* at 43; *see* Tr. 1413-20. Judge Holt was unconvinced by Dall's testimony regarding Caroline Ager's offer to "put up money for the actual

filing of the claims," noting that there was no evidence as to how she would be paid back or how fees for annual assessments would be collected. Decision at 43; *see* Tr. 1423-27. Judge Holt concluded: "Dall's testimony about the location activities, the group meetings, and the transfer of funds lacked sufficient detail to demonstrate independent actions by the individual locators for their own benefit." Decision at 43.

Judge Holt pointed to a series of other matters in evidence that supported his conclusion. First, he noted that "[t]he 1999 individual claims were located adjacent to and along the boundary of the 1993 claims, then owned of record by Cactus Gold and its subsidiary Valley Gold," a "pattern [that] evidences a unified plan for blanketing an area of interest rather than the independent action of eight individuals." *Id.* at 44; *see* Tr. 535; Ex. A-2 at 3-4 (Tables 1-2). He concluded that "[t]he colors and numbers of the 1999 individual claim names have too much similarity and are too synchronized with the 1993 corporate claim names to believe Dall's explanation that the locators chose the names arbitrarily and for no specific reason." Decision at 44. He was unconvinced by "Ager's explanation that re-drilling and additional geologic mapping caused Cactus Gold to become 'somewhat interested' during the fourteen months between the locations in May 1999 and Cactus Gold's purchase in July 2000 . . . ." *Id.* at 44-45; Tr. 1009.

BLM explains the significance of the location and naming of the claims, as follows:

> The naming of the claims by color names continued (Tr. 1428), showing a coordinated pattern. 1999 "Red" claims are adjacent to the 1993 "Red" claims. To the east across the line between Ranges 63 and 64 East, are the "Orange" claims just as the 1993 "Orange" claims are across the same line farther south. On the west, the 1999 "Pink" claims are in the same area as the 1993 "Pink" claims. On the west further to the south are the "Purple" claims adjacent to the 1993 "Purple" claims and to the south are the "Green" and "Yellow" claims adjacent to 1993 "Green" and "Yellow" claims respectively. (Ex. A-2, Map 3). The 1999 claims were located around the north, south, and west perimeter of the 1993 Cactus Gold and Valley Gold claims showing a coordinated effort to "blanket the area" to prevent others from encroaching on the block of claims in the Eldorado Valley held and controlled by Dr. Ager and his various companies. (Ex. A-2, Map 3; Tr. 1009).

Post-Hearing Response at 56.

Judge Holt found that "[a]ll the individual locators were either related to Charles Ager or employed by Cactus Mining, a company owned and controlled by Charles Ager, and they all eventually conveyed their interests to Cactus Gold, another company Ager controlled." Decision at 45; *see* Ex. A-2 at 20 (Table 9). He was convinced that "they acted at his behest and for his benefit," not "independently and for their own self-interest." Decision at 45.

Judge Holt noted that "[a] check from Cactus Mining, a corporation controlled by Ager, paid the location filing fees to BLM." *Id.* at 46; Ex. A-2, App. 21 at 33-34. He rejected the Contestees' argument that because Caroline Ager, Ager's daughter, wired the necessary funds for the filing fees into Cactus Mining's account, an inference should not be drawn that the individual "locators used the Cactus Mining account merely for convenience," stating:

> Such an inference is not justified. The record contains no document showing a transfer of funds from Caroline to Cactus Mining. Nor is there a written record of a loan from Caroline to the other locators. Further, Dall only vaguely described how the locators did the accounting. Tr. 1433:7-1435:17. One would expect individual locators acting in good faith and for their own benefit, to meticulously separate their personal financial activities from a company they were tied to by family or employee relationships. Their own self-interest would require written records of loans and accounting entries on the company books. At a minimum, one would expect the locators to establish a group bank account or pay expenses from their personal accounts. Because the locators did not create a separate bank account, pay the filing fees from personal accounts, or document the alleged flow of money from Caroline Ager, I draw the inference that Charles Ager ultimately provided the financing for the filing fees through his corporation, Cactus Mining. *See also* Tr. 949:10-958:1 (vague description of accounting of payments among individual locators, Cactus Gold and Cactus Mining).

Decision at 47.

Judge Holt found that there was no record "that the individual locators actually received the $5,000 payment described in the 2000 Royalty Agreement for transferring their interest to Cactus Gold." *Id.*; Ex. B-15. The Contestees could provide no documentation, such as checks or receipts, to show that Cactus Gold actually paid the money; nor did they offer "accounting records from any of the individual locators, Cactus Gold, or Cactus Mining to show how the payment was

credited against expenses, if money did not actually change hands." Decision at 47; *see* Tr. 1016-18.

Judge Holt concluded that it was "more likely that the claims were located by so-called 'dummy locators.'" Decision at 48. He found very little, other than "[t]he chief evidence supporting a valid location," *i.e.*, the location certificates showing eight individuals as locators, to "support[] a finding that their actions were self-interested or independent." *Id.* He then stated:

> In contrast, considerable evidence exists that the claims were not located by a bona fide association of eight individuals who acted individually and for their own self-interest. The claims used the same naming pattern as adjacent claims owned by Ager companies. All of the locators were either related to or employed by Charles Ager or companies he controlled. And they all ultimately conveyed their interest to a company he controlled with no documentation of having received the recited consideration.
>
> In summary, I find very little evidence to support a conclusion that the eight individuals acted in good faith, independently, and for their own self-interest in locating the claims. Rather, I find it more likely that Charles Ager, through the companies he controlled, personally used these employees and relatives to locate more acreage than the law allowed.

Decision at 48-49.

Ager's own testimony belies the plan that obviously evolved. We have noted that Cactus Mining, which is owned and controlled by Ager, is the majority shareholder of Cactus Gold. Tr. 523-24, 965. Ager testified:

> Cactus Mining was not in the business of acquiring Claims or staking them. Cactus Mining was in the business of running exploration programs for projects in which it had a direct or indirect interest.
>
> And if Claims were, became available in the region, then one of the things we always encouraged our employees or associates or consultants to do was to locate the Claims so that they could in some way gain, hopefully, some value from their exploration efforts beyond their paycheck as an employee of Cactus Mining.

Tr. 840-41. The 1999 claims were in fact located by Cactus Mining or employees of Cactus Mining, and one year later transferred to Cactus Gold (owned and controlled by Ager).

Based upon these facts, we agree that the 91 claims located in 1999 by eight individuals were located by so-called "dummy locators." *See* Decision at 48. The record amply supports Judge Holt's ruling that "it [was] more likely that Charles Ager, through the companies he controlled, personally used these employees and relatives to locate more acreage than the law allowed." *Id.* at 48-49. We therefore affirm his ruling that the Contestees failed to carry their burden to show by a preponderance of the evidence that the eight individuals were bona fide locators of the 91 claims.

IV. CONCLUSION

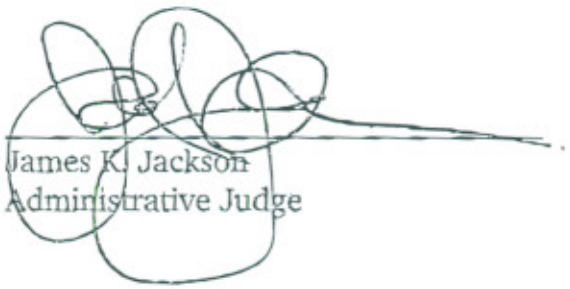
We conclude that Judge Holt properly held that the Government had the burden of going forward with sufficient evidence to establish a prima facie case that the association placer mining claims were not properly located, whereupon the burden shifted to the Contestees to demonstrate, by a preponderance of the evidence, that the claims were validly located. We conclude further that Judge Holt properly declared all 261 claims null and void ab initio, in their entirety, because they violated the 20-acre per claimant limitation of 30 U.S.C. §§ 35, 36 (2006). The Contestees failed to demonstrate by a preponderance of the evidence that the 1993 claims were located in good faith by a bona fide association of corporate entities or individuals, or that the 1999 claims were located by a bona fide association of persons, rather than a single claimant and dummy locators, for the purpose of affording to the claimant acreage in excess of the 20 acres per individual claimant allowed by the statute.

To the extent not expressly addressed herein, all other assertions of factual or legal errors in Judge Holt's decision have been considered and rejected by the Board.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the ALJ decision is affirmed.

James F. Roberts
Administrative Judge

I concur:



James K. Jackson
Administrative Judge

APPENDIX

Contest No.	Mining Claim	BLM Serial No.
Contest N-76738-01		
	Orange	
	Nos. 281 thru 284	NMC-682245 thru NMC-682248
	Nos. 291 thru 294	NMC-682249 thru NMC-682252
	Nos. 311 thru 314	NMC-682253 thru NMC-682256
	Nos. 321 thru 324	NMC-682257 thru NMC-682260
	Pink	
	No. 202	NMC-682261
	No. 202E	NMC-682262
	Nos. 211 thru 214	NMC-682263 thru NMC-682266
	No. 281	NMC-682267
	No. 282	NMC-682268
	No. 284	NMC-682269
	No. 323	NMC-682270
	No. 324	NMC-682271
	No. 332	NMC-682272
	Purple	
	Nos. 41 thru 44	NMC-682273 thru NMC-682276
	Nos. 52 thru 54	NMC-682277 thru NMC-682279
	No. 63	NMC-682280
	No. 64	NMC-682281
	No. 71	NMC-682282
	No. 72	NMC-682283
	No. 81	NMC-682284
	No. 82	NMC-682285
	No. 91	NMC-682286
	No. 92	NMC-682287
	Red	
	Nos. 251 thru 254	NMC-682288 thru NMC-682291
	No. 261	NMC-682292
	No. 262	NMC-682293

Contest N-76738-02

Red	
No. 263	NMC-682294
No. 264	NMC-682295
Nos. 271 thru 274	NMC-682296 thru NMC-682299
Nos. 341 thru 344	NMC-682300 thru NMC-682303
Nos. 351 thru 354	NMC-682304 thru NMC-682307
Nos. 361 thru 364	NMC-682308 thru NMC-682311
Yellow	
No. 11	NMC-682312
No. 22	NMC-682313
No. 122	NMC-682314
Brown	
No. 151	NMC-682317
No. 152	NMC-682318

Contest N-76738-03

Green	
No. 231	NMC-682704

Contest N-76738-04

Brown	
No. 33	NMC-682148
No. 34	NMC-682149
Nos. 101 thru 104	NMC-682150 thru NMC-682153
Nos. 111 thru 114	NMC-682154 thru NMC-682157
Nos. 121 thru 124	NMC-682158 thru NMC-682161
No. 131	NMC-682162
No. 133	NMC-682163
No. 134	NMC-682164
Nos. 141 thru 144	NMC-682165 thru NMC-682168
No. 153	NMC-682169
No. 154	NMC-682170
Green	
Nos. 221 thru 224	NMC-682171 thru NMC-682174
Nos. 232 thru 234	NMC-682175 thru NMC-682177

Contest N-76738-04 (continued)

Nos. 241 thru 244	NMC-682178 thru NMC-682181
Nos. 251 thru 254	NMC-682182 thru NMC-682185
No. 261	NMC-682186
No. 263	NMC-682187
No. 271	NMC-682188
No. 272	NMC-682189
No. 351	NMC-682190
No. 352	NMC-682191
No. 354	NMC-682192
Nos. 361 thru 364	NMC-682193 thru NMC-682196

Contest N-76738-05

Black	
No. 51	NMC-682197
No. 53	NMC-682198
Nos. 61 thru 64	NMC-682199 thru NMC-682202
Nos. 71 thru 74	NMC-682203 thru NMC-682206
No. 81	NMC-682207
No. 83	NMC-682208
No. 171	NMC-682209
No. 173	NMC-682210
Nos. 181 thru 184	NMC-682211 thru NMC-682214
Blue	
Nos. 191 thru 194	NMC-682215 thru NMC-682218
Nos. 201 thru 204	NMC-682219 thru NMC-682222
Nos. 211 thru 214	NMC-682223 thru NMC-682226
Nos. 291 thru 294	NMC-682227 thru NMC-682230
Nos. 301 thru 304	NMC-682231 thru NMC-682234
Brown	
Nos. 11 thru 14	NMC-682235 thru NMC-682238
Nos. 21 thru 24	NMC-682239 thru NMC-682242
No. 31	NMC-682243
No. 32	NMC-682244

Blue	
Nos. 321 thru 324	NMC-804090 thru NMC-804093
Gold	
No. 51	NMC-804094
Nos. 62 thru 64	NMC-804095 thru NMC-804097
No. 72	NMC-804098
Gray	
No. 191	NMC-804099
No. 192	NMC-804100
No. 201	NMC-804101
No. 202	NMC-804102
No. 204	NMC-804103
Nos. 211 thru 214	NMC-804104 thru NMC-804107
Nos. 281 thru 284	NMC-804108 thru NMC-804111
No. 292	NMC-804112
No. 294	NMC-804113
Nos. 331 thru 334	NMC-804114 thru NMC-804117
Green	
No. 273	NMC-804118
No. 274	NMC-804119
Nos. 341 thru 343	NMC-804120 thru NMC-804123
Orange	
No. 191	NMC-804125
No. 193	NMC-804126
Peach	
No. 42	NMC-804127
No. 44	NMC-804128
No. 92	NMC-804129
Pink	
No. 311	NMC-804130
No. 312	NMC-804131
No. 331	NMC-804132

Contest N-76738-06 (continued)

Purple	
No. 73	NMC-804133
No. 74	NMC-804134
No. 83	NMC-804135
No. 84	NMC-804136
No. 93	NMC-804137
No. 94	NMC-804138
Nos. 161 thru 164	NMC-804139 thru NMC-804142
Nos. 171 thru 174	NMC-804143 thru NMC-804146
Nos. 181 thru 184	NMC-804147 thru NMC-804150
Red	
Nos. 221 thru 224	NMC-804151 thru NMC-804154
Nos. 231 thru 234	NMC-804155 thru NMC-804158
Nos. 241 thru 244	NMC-804159 thru NMC-804162
Yellow	
No. 13	NMC-804163
No. 21	NMC-804164
No. 23	NMC-804165
No. 24	NMC-804166
Nos. 31 thru 34	NMC-804167 thru NMC-804170
Nos. 101 thru 104	NMC-804171 thru NMC-804174
Nos. 111 thru 114	NMC-804175 thru NMC-804178
No. 121	NMC-804179
No. 123	NMC-804180
No. 124	NMC-804181