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August 1, 2008

UNITED STATES OF AMERICA,) N-76738-01
)
 Contestant) Involving the Orange Nos. 281 through
) 284, 291 through 294, 311 through 314,
 v.) 321 through 324, Pink Nos. 202, 204E, 211
) through 214, 281, 282, 284, 323, 324, 332,
 CARLWOOD DEVELOPMENT, ET AL.,) Purple Nos. 41 through 44, 52 through
) 54, 63, 64, 71, 72, 81, 82, 91, 92, and Red
 Contestee) Nos. 251 through 254, 261 and 262 placer
) mining claims situated in Clark County,
) Nevada

.....

UNITED STATES OF AMERICA,) N-76738-02
)
 Contestant) Involving the Red Nos. 263, 264, 271
) through 274, 341 through 344, 351
 v.) through 354, 361 through 364, Yellow
) Nos. 11, 22, 122, and Brown Nos. 151 and
 CARLWOOD DEVELOPMENT, ET AL.,) 152 placer mining claims situated in
) Clark County, Nevada
 Contestee)

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UNITED STATES OF AMERICA,) N-76738-03
)
 Contestant) Involving the Green 231 placer mining
) claim situated in Clark County, Nevada
 v.)
)
 CARLWOOD DEVELOPMENT, ET AL.,)
)
 Contestee)
)

.....
 UNITED STATES OF AMERICA,) N-76738-04
)
 Contestant) Involving the Brown Nos. 33, 34, 101
) through 104, 111 through 114, 121
 v.) through 124, 131, 133, 134, 141 through
) 144, 153, 154, and Green Nos. 221
 CARLWOOD DEVELOPMENT, ET AL.,) through 224, 232 through 234, 241
) through 244, 251 through 254, 261, 263,
 Contestee) 271, 272, 351 through 354, and 361
) through 364 placer mining claims
) situated in Clark County, Nevada

.....
 UNITED STATES OF AMERICA,) N-76738-05
)
 Contestant) Involving the Black Nos. 51, 53, 61
) through 64, 71 through 74, 81, 83, 171,
 v.) 173, 181 through 184, Blue Nos. 191
) through 194, 201 through 204, 211
 CARLWOOD DEVELOPMENT, ET AL.,) through 214, 291 through 294, 301
) through 304, and Brown Nos. 11 through
 Contestee) 14, 21 through 24, 31 and 32 placer
) mining claims situated in Clark County,
) Nevada

UNITED STATES OF AMERICA,

Contestant

v.

ANDREW DALL, ET AL.,

Contestee

) N-76738-06
)
) Involving the Blue Nos. 321 through 324,
) Gold 51, 62 through 64, 72, Grey Nos.
) 191, 192, 201, 202, 204, 211 through 214,
) 281 through 284, 292, 294, 331 through
) 334, Green Nos. 273, 274, 341 through
) 344, Orange Nos. 191, 193, Peach 42, 44,
) 92, Pink Nos. 311, 312, 331, Purple Nos.
) 73, 74, 83, 84, 93, 94, 161 through 164, 171
) through 174, 181 through 184, Red Nos.
) 221 through 224, 231 through 234, 241
) through 244, and Yellow Nos. 13, 21, 23,
) 24, 31 through 34, 101 through 104, 111
) through 114, 121, 123, and 124 placer
) mining claims situated in Clark County,
) Nevada

TABLE OF CONTENTS

| | | |
|------|--|----|
| I. | <u>Introduction</u> | 1 |
| II. | <u>Background and Proceedings</u> | 2 |
| | A. <u>The 1993 Corporate Claims</u> | 2 |
| | B. <u>The 1999 Individual Claims</u> | 3 |
| III. | <u>Discussion</u> | 4 |
| | A. <u>The Claimants Must Prove by a Preponderance of Evidence That They Acted in Good Faith, Independently, and for Their Own Self-interest.</u> | 4 |
| | 1. <u>Statutes and Regulations</u> | 4 |
| | 2. <u>Judicial Opinions</u> | 7 |
| | 3. <u>Departmental Decisions</u> | 14 |
| | 4. <u>Secondary Sources</u> | 17 |
| | 5. <u>Claimants must Prove the Validity of Their Claims by a Preponderance of Evidence.</u> | 19 |
| | 6. <u>Locators of a Valid Association Placer Claim must Act in Good Faith, Independently, and for Their Own Self-interest.</u> | 23 |
| | B. <u>In 1993 Two Joint Ventures Used a Scheme to Have Eight Corporations Act as Locators for More Land than the Statutes Allowed.</u> | 26 |
| | C. <u>In 1999 One Individual Used a Scheme to Have Eight Individuals Act as Locators for More Land than the Statutes Allowed.</u> | 40 |
| IV. | <u>Conclusion</u> | 49 |

N-76738-01 through 06

DECISION

Appearances: John W. Steiger, Esq., Grant L. Vaughn, Esq., Salt Lake City,
Utah, for Contestant

Mark H. Gunderson, Esq., Elaine S. Guenaga, Esq., Reno,
Nevada, for Contestees

Before: Administrative Law Judge Robert G. Holt.

I. Introduction

The Government has brought six consolidated contest complaints to invalidate two groups of association placer mining claims situated southeast of Las Vegas, Nevada, in an area known as the Eldorado Valley. The 261 claims were located in two groups. The first group was located during September 1993 in the names of eight corporations and the second group was located in May 1999 in the names of eight individuals.

Seven of the eight corporations were incorporated shortly before the 1993 locations. Four of the corporations were owned by members of a group represented by a James T. Roe, III. The other four corporations were owned by a second group represented by a Charles A. Ager.

The individuals who located the 1999 claims were all either relatives or employees of Charles Ager or companies he controlled.

Under the mining laws an individual may locate no more than 20 acres, but an association of eight persons may locate up to 160 acres. Shortly after Congress authorized the location of placer mining claims in the 1870s, the judicial courts and the Department of the Interior began to invalidate association claims where the locators had used a scheme or device to locate more land than the 20 acres allowed for each participant. These schemes often used what came to be known as "dummy locators" to disguise the identity of the true person locating the claim. While numerous fact patterns have emerged over the years, the decisions have emphasized that the claims must be located in good faith, independently, and for the locator's

N-76738-01 through 06

own self-interest in order to avoid the prohibition against one person locating more than 20 acres.

The preponderance of evidence in this case does not establish that eight persons or entities located the claims in good faith, independently, and for their own self-interest. Rather, the evidence shows that the 1993 claims were likely located for the benefit of two groups of persons and entities, represented by Charles Ager and James Roe. Further, the 1999 claims were likely located for the benefit of one individual, Charles Ager. Therefore, all 261 of the challenged claims must be declared invalid.

The following sections will first describe the background and proceedings of this contest. Next, because the burden and standard of proof in administrative contest proceedings has never been clearly articulated for so-called "dummy locator" allegations, it will discuss in some detail the prior history of judicial and Departmental decisions. It will conclude that the Contestees have the burden to prove the validity of their claims by a preponderance of evidence; and not, as argued by the Contestees, that the Government has the burden to prove their invalidity by clear and convincing evidence. Finally, I will discuss the evidence that leads me to conclude that the claims are invalid.

II. Background and Proceedings

A. The 1993 Corporate Claims

Eight corporations located the first group of 170 claims in September 1993. All the claims, except one, were located on 160-acre parcels. This is the maximum amount of land that an eight-person association may locate. All but one of the locators (Pilot Plant, Inc.) were incorporated on July 29, 1993, in the state of Nevada. Ex. A-2 at 9-10. Four of the corporations, Broadway Enterprises, Inc., Camel, Inc., Carlwood Development, and Crescent Corporation had the same president, James T. Roe, III. Three of the corporations, Geosearch, Inc., Mincor, Inc, and Geotech Mining, Inc., all had presidents from the family of Charles A. Ager. The filing fees were paid by a check from the eighth corporation, Pilot Point, Inc. Ex. A-2, App. 21 at 7.

N-76738-01 through 06

The claims were located on land that had been formerly covered by other placer claims. These claims had been allowed to terminate by operation of law for non-payment of maintenance fees. Tr. 620:13-621:12, 770:12-20. The new claims used colors for names and were numbered in sequence. (i.e., BROWN 33, BROWN 34, GREEN 221, GREEN 222, etc.).

Within a year (August 1994), all eight corporate locators transferred their claims to a single corporation, Cactus Gold Corp., in return for a \$12,500 payment and a royalty. Ex. B -6 and B-7. The president and sole director of Cactus Gold was Charles Ager. Ex. A-10 and A-11. Cactus Gold later conveyed (October 1996) a portion of the claims to Valley Gold Corp., another corporation in which Charles Ager was president. Exs. A-2 at 16 and App. 19, B-10.

B. The 1999 Individual Claims

Eight individuals located the second group of 91 claims in May 1999. These were situated on the periphery of the 1993 corporate claims now owned by Cactus Gold and Valley Gold. They had the same naming method (i.e., colors and sequential numbers) as the 1993 corporate claims. The eight individual locators were all either relatives of Charles Ager or employees of a company he owned and controlled: (1) Andrew L. Dall was an employee of Cactus Mining Corp.; (2) Shannon L. Dall was Andrew Dall's wife and was or had been an employee of Cactus Mining; (3) Charlton S. Ager was Charles Ager's son; (4) Caroline I. Ager was Charles Ager's daughter; (5) Carol J. Ager was Charles Ager's wife; (6) Fred J. Toti was Carol Ager's father (i.e., Charles Ager's father-in-law); (7) George Stephen, IV was an employee of Cactus Mining; and, (8) Kathleen M. Stephen was George Stephen's step-mother and an employee of Cactus Mining. Ex. A-2 at 20. Cactus Mining was owned and controlled by Charles Ager. Tr. 536:15-539:6.

As with the corporate claims, all the individual locators transferred their claims to Cactus Gold in return for a \$2,000 payment and a royalty, within fourteen months (July 2000). Ex. B-15 and B-16. Thus, by July 2000 all the contested claims had been transferred to an entity controlled by Charles Ager.

Congress withdrew most of the land (i.e., all but six claims) covered by both groups of claims in 2002 because the land was located in the Piute-Eldorado Desert

N-76738-01 through 06

Tortoise Area of Critical Environmental Concern (ACEC). A-1 at 8. In 2003, Cactus Gold requested an amendment to its approved Plan of Operations. This action required BLM to perform a validity examination of the claims because the lands had been withdrawn. 43 C.F.R. § 3809.100. Ex. A-2 at 5. The resulting Mineral Report concluded that the claims were invalid because "dummy locators" had been used to locate more land than allowed. The instant contest proceeding resulted.

The hearing took place during two sessions in Las Vegas, Nevada. At the end of the first four days, in February and March 2007, the Contestees moved to dismiss on the grounds that the Government had not presented a prima facie case. I denied the motion, and the hearing resumed for two more days in January 2008.

Having set out this background, the next section will discuss, in some detail, the law related to association placer claims.

III. Discussion

A. The Claimants Must Prove by a Preponderance of Evidence That They Acted in Good Faith, Independently, and for Their Own Self-interest.

1. Statutes and Regulations

Congress authorized the location of placer claims in the Act of July 9, 1870, ch. 235, § 12, 16 Stat. 217 (1870). It later amended the law by the Act of May 10, 1872, ch. 152, § 10, 17 Stat. 91, 94 (1872). These acts are now codified in 30 U.S.C. §§ 35 - 36 (2000), which provides:

Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands. And where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the 10th day of May, 1872, shall

N-76738-01 through 06

conform as near as practicable with the United States system of public-land surveys, and the rectangular sub-divisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead purposes.

Id. § 35 (emphasis added).

Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the 9th day of July, 1870, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona-fide homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona-fide settler to any purchaser.

Id. § 36 (emphasis added).

The Department of the Interior has implemented these statutes with regulations published at the time of the contested locations in 43 C.F.R. § 3842.1-2 (1992 and 1999). They allow for a placer claim to be filed by more than one person so long as the total acreage does not exceed 20 acres per person or 160 acres in total. These are commonly referred to as association placer claims and are often filed by eight persons.

N-76738-01 through 06

§ 3842.1-2 Maximum allowable acreage.

(a) By R.S. 2330 (30 U.S.C. 36), it is declared that no location of a placer claim made after July 9, 1870, shall exceed 160 acres for any one person or association of persons, which location shall conform to the United States surveys.

(b) R.S. 2331 (30 U.S.C. 35) provides that all placer-mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, and such locations shall not include more than 20 acres for each individual claimant.

(c) The foregoing provisions of law are construed to mean that after July 9, 1870, no location of a placer claim can be made to exceed 160 acres, whatever may be the number of locators associated together, or whatever the local regulations of the district may allow; and that from and after May 10, 1872, no location can exceed 20 acres for each individual participating therein; that it [sic], a location by two persons can not exceed 40 acres, and one by three persons can not exceed 60 acres.

These regulations have since been amended at 68 Fed. Reg. 61,046, 61,070 (Oct. 24, 2003) and are now published at 43 C.F.R. §§ 3832.21(b) and 3832.22(b).

Neither the statutes nor the regulations establish the burden of proof in contest proceedings and the parties disagree over who should bear the burden of proof and what that burden should be. The Government contends that the Contestees must prove the locations valid by a preponderance of the evidence and the Contestees contend that the Government must prove the locations invalid by clear and convincing evidence. Because the Board of Land Appeals 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.

N-76738-01 through 06

2. Judicial Opinions

The California Supreme Court was the first court to interpret the placer acreage limitation statutes in *Mitchell v. Cline*, 24 P. 164 (Cal. 1890). The case considered two placer claims. In the first, five locators had agreed among themselves that in order to locate 160 acres they should use the names of three additional persons as locators who would voluntarily convey their interest to the other five after the location was completed. The three so called "dummy locators" did indeed subsequently convey their interest without consideration. The same procedure was used for the second placer claim, except that the names of five "dummy locators" were used. Through a series of conveyances, title to the claims wound up in the names of two of the original locators.

The heirs of one owner later filed a partition action against the devisees of the second owner. The devisees of the second owner counterclaimed to impose a constructive trust over a portion of the first owner's interest. Although not completely clear from the opinion, the second owner apparently claimed that the first owner had received a higher share of the interest of the dummy locators than he should have. The trial court refused to impose the constructive trust.

In this factual context the California Supreme Court for the first time articulated that the policy of the mining statute was to limit the quantity of placer mineral land that one person may obtain with a single location.

Section 2331 of the United States Revised Statutes provides that, after the 10th day of May, 1872, "no such location [of placer claims] shall include more than twenty acres for each individual claimant." The policy and object of this law are to limit the quantity of placer mineral land, which may be located by one person, to twenty acres; and although one person may obtain a patent for more than twenty acres, he can do so only by representing to the government that he is a purchaser

N-76738-01 through 06

of the excess from one or more bona fide locators whose locations were made in conformity with the above statutory limitation as to quantity. .

Id. at 165.

Because the court believed that the second owner had obtained his interest through a "fraud upon the government" the court found that the devisees of the second owner should be content with what they got and held that the trial court had correctly refused to impose a constructive trust. The court did not find the placer claims void because the Government had already issued patents for the claims. Therefore, the court did not address what the Government must prove or what standard of proof must be achieved in order to invalidate an association placer claim.

Following this case other federal trial courts reached similar decisions. *See, e.g., Gird v. California Oil Co.*, 60 F. 531, 545 (S.D. Cal. 1894) (three individuals had "in reality" located the claim for the oil company"); *Durant v. Corbin*, 94 F. 382, 384 (E.D. Wash. 1899) ("it is contrary to . . . the provisions of sections 2330 and 2331, for one person to cover more than 20 acres of placer ground by one location by the device of using the names of his employes and friends as locators")

Cook v. Klonos, 164 F. 529 (1908), *modified on other grounds on denial of rehearing*, 168 F. 700 (9th Cir. 1909), is the first reported federal appellate court opinion involving an association placer claim location. This case also originated as a private contest in the trial court. The plaintiffs had alleged that an association claim was superior to a conflicting claim. The trial court had granted a motion to dismiss because the plaintiffs had not made the location in the name of eight bona fide locators.

The testimony disclosed that a pre-location understanding existed between a man named Barnette and two other men whereby the two men would stake the claim in Alaska. Barnette gave the two men the names of six other individuals, who lived in Ohio, four of whom were relatives of Barnette. Barnette, who was not himself a named locator, was to receive half of the 120 acres located in the names of the six individuals.

N-76738-01 through 06

The Ninth Circuit framed the issue as "whether an individual can, by use of the names of his friends, relatives, or employes [sic] as dummies, locate for his own benefit a greater area of mining ground than that allowed by law." *Id.* at 538. The court held that schemes used to secure more land than one person could locate renders the entire claim void.

The mineral land laws of the United States are extremely liberal in the requirements under which possessory rights may be acquired. The few restrictions imposed 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. The scheme of using the names of dummy locators in making the location of a mining claim for the purpose of securing a concealed interest in such claim appears to be contrary to the purpose of the statute; but when this scheme is used to secure an interest in a claim for a single individual, not only concealed but in excess of the limit of 20 acres, it is plainly in violation of the letter of the law, and when, as in this case, all the locators had knowledge of the concealed interest and were parties to the transaction, it renders the location void.

Id. at 538-39.

The court described the understanding among the parties as "fraudulent and void as against the United States," but did not impose a special standard of proof. *Id.* at 537

The Ninth Circuit expressed a similar opinion in *Nome & Sinook Co. v Snyder*, 187 F. 385 (9th Cir. 1911), where it noted that "[a]ny scheme or device entered into whereby one individual is to acquire more than [20 acres] or proportion in area 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." *Id.* at 388. As in *Cook*, the circuit court did not impose any special standard of proof. *See also Hall v. McKinnon*, 193 F. 572, 581 (9th Cir. 1911) (implied that a "dummy location" involved a question of fraud but because the parties had not placed a question of fraud at issue in the pleadings a jury instruction was not required).

N-76738-01 through 06

In *Chanslor-Canfield Midway Oil Co. v. United States*, 266 F. 145 (9th Cir. 1920), the Ninth Circuit concluded that a placer claim could be found void without willful fraud by the locators.

We have no doubt there was no willful fraud on the part of the locators themselves; but, even so, it is perfectly plain that no one of them had any intention whatever of taking up or developing a claim upon the public lands. They were not bona fide occupants or claimants, and, although guiltless of active, positive fraud, each must be charged with a knowledge that he or she had no rights, and had no authority to make the deed to Stokes.

Id. at 149 (emphasis added).

Against this backdrop of opinions, a pair of decisions originating with District Judge Robert S. Bean of Oregon, while sitting in the Southern District of California, has created some confusion in later years. See *Houck v. Jose*, 72 F. Supp. 6, 9 (S. D. Cal. 1947) *aff'd*, 171 F. 2d 211 (9th Cir. 1948). In *United States v. Brookshire Oil Co.*, 242 F. 718 (S.D. Cal. 1917), a person named Burge had located a placer claim purportedly on behalf of eight named locators. The other seven alleged locators were principally relatives of Burge and nonresidents of the state. Burge had no previous authority from the other seven and they did not know of the location. Burge, without consulting the alleged locators or obtaining authority from them, and without their knowledge, entered into a contract to develop the land. 242 F. at 719.

Judge Bean followed established precedent when he found the claim invalid.

It is manifest that Burge could acquire no right in mineral lands as against the government by such subterfuge, It is true there is no limitation as to the number of mining claims an individual or association of individuals may locate, but it is provided that no claim shall exceed 20 acres for each individual (section 2331, R.S. [Comp. St. 1916, § 4630]) or 160 acres for any association. Section 2330, R.S. (Comp. St. 1916, § 4629). This is a direct and positive limitation of the amount of mining ground any one claimant may appropriate individually or as a member of an association in any one claim, and he cannot evade the

N-76738-01 through 06

law by the use of the names of his friends, relatives, or employes [*sic*]. Any device whereby one person is to acquire more than 20, or an association more than 160, acres in area, by one discovery, constitutes a fraud upon the government and is without legal support and void. *Cook v. Klonos*, 164 Fed. 529, 90 C.C.A. 403; *Nome & Sinook v. Snyder*, 187 Fed. 385, 109 C.C.A. 217; *Gird v. Cal. Oil Co. (C.C.)* 60 Fed. 531; *Hall v. McKinnon*, 193 Fed. 572, 113 C.C.A. 440; *Duffield v. S.F. Chemical Co.*, 205 Fed. 480, 123 C.C.A. 548.

Id. at 721.

Judge Bean later decided another placer claim case in *United States v. California Midway Oil Co.*, 259 F. 343 (S.D. Cal. 1919), *aff'd*, 279 F. 516 (9th Cir. 1922), *aff'd per curiam*, 263 U. S. 682 (1923). In this case, a person named McMurry had requested three individuals to obtain the signatures of eight New York residents on powers of attorney appointing McMurry as their attorney in fact. McMurry used the powers of attorney to locate an oil placer claim in California. After the location McMurry entered into contracts with various oil companies to develop the oil, received considerable money for the contracts, and appropriated the bulk for himself without accounting to his principals.

The Government brought an action in equity to enjoin the oil companies, cancel the locations, and account for the oil taken. The Government alleged that the New York locators were dummies, that McMurry fraudulently used the powers of attorney, and that the location was not made by the named locators but was made for the use of the oil companies.

Judge Bean cited his prior decision in *Brookshire* for the following proposition:

Any device, therefore, whereby one person is to acquire more than 20 acres, or an association more than 160 acres, by one location, is a violation of law, a fraud upon the government, and without legal support.

Id. at 352.

N-76738-01 through 06

But the judge then stated that the Government must follow the well-settled rules for proving fraud. Such rules included: "Fraud is never presumed, but must be established by clear, unequivocal, and convincing proof;" "The law presumes, in the absence of evidence to the contrary, that the business transactions of every man are done in good faith and for an honest purpose;" and "where two inferences can be drawn from proven facts, one in favor of fair dealing and good faith and the other of a corrupt motive, it is the duty of the trier of fact to draw the inference favorable to good faith and fair dealing." *Id.* at 352. The judge ultimately found that the Government had not established fraud within these rules. *Id.* at 353.

On appeal the Ninth Circuit noted that Judge Bean "held that the question thus presented was one of fraud, and that fraud must be established by clear, unequivocal, convincing proof, and that the evidence did not measure up to the requisite degree of proof." 279 F. at 519. Nevertheless, the appeals court also noted that "[t]he case for the government must stand or fall upon the bona fides of the location which was made" and that "[i]f, however, the power of attorney was procured and used by McMurtry for the purpose of acquiring oil land in violation of the statute, it follows that the location was fraudulent." *Id.* The Supreme Court affirmed the appeals court without an opinion. 263 U. S. 682.

Even though Judge Bean found that the Government had not proven its claim by clear and convincing evidence, the Ninth Circuit did not explicitly require this standard of proof. The appeals court merely agreed with the trial court that the location was valid. 279 F. at 520. Therefore, the Ninth Circuit's affirmation should not be viewed as precedent for requiring that the Government prove fraud by clear and convincing evidence. Further, the court did not even mention, much less overrule, its prior decision in *Chanslor-Canfield*, where it acknowledged that association claims could be held void without proof of fraud.

An interesting aspect of mining law history helps explain the proliferation of "dummy locator" cases in the 1910s and 20s. During the early years of the mining law, petroleum deposits were considered a mineral that could be located with placer claims. Clay Tallman, *The Public Domain*, 20 Tex. L. Rev. 55, 74-75 (1941-42). When oil was discovered in central California, the practice developed whereby individuals tied up land before they made a discovery, by using "dummies." These nominal locators then conveyed the association claim to a single person who then conveyed it to an oil

N-76738-01 through 06

company. The oil company would then make the investment to make the required discovery. See 2 Curtis H. Lindley, *American Law Relating to Mines and Mineral Lands*, § 450 at 1064-65 (3d ed. 1914).

The Government contested the validity of these claims, resulting in judicial decisions such as those described above, in *Gird*, *Brookshire*, *California Midway*, and *Chanslor-Canfield*. Administrative decisions, such as that described below in *McKittrick Oil Co.*, 44 I.D. 340 (1915), also came from this period. Congress eventually passed the Leasing Act of February 25, 1920, which settled many of the pending disputes and substituted a leasing system for the placer claims on petroleum deposits. See Tallman, *supra*, at 75. See also William E. Colby, *The Law of Oil and Gas*, 30 Cal. L. Rev. 245, 261-62 (1942). Since the end of the oil placer claims, fewer courts have been called upon to decide association claim disputes.

The next case in chronological order is *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). Contestees cite this opinion for the proposition that the Government must prove fraud by clear and convincing evidence. The Wyoming Supreme Court entered this opinion in a quiet title action between competing locators. Eight individuals, some of whom were related by marriage, located the association claim and later sold their interests to a corporation in return for stock. In affirming a finding that the claims were valid, the court seemed to note that proof of dummy locators must be proven by clear and convincing evidence.

After the claim was perfected the locators thereof certainly could agree among themselves as to what each should receive for their respective interests therein. So long as they were satisfied we fail to see how anyone else could complain. The use of "dummies" in locating mineral claims to obtain more ground than the law allows is a species of fraud upon the government. Fraud must be proven by clear, satisfactory, and convincing evidence. We do not find such a situation presented by this record.

Id. at 148.

N-76738-01 through 06

The court cited no authority and stated no reason for the assertion that a fraud against the Government must be proven by "clear, satisfactory, and convincing evidence." It had already held that substantial evidence supported the trial court's finding that the location was bona fide and that none of the locators were "dummies." The statement therefore appears to be non-binding dicta. But, even if it could be construed as a holding, the decision of a state supreme court cannot bind the Department of the Interior.

In the most recent reported case, the court in *United States v. Toole*, 224 F. Supp. 440 (D. Mont. 1963), invalidated a claim because a corporation and its principal stockholders had used dummy locators. But it did not discuss any particular standard of proof.

Finally, a recent unreported trial court order admonished the parties to address "whether proof that a claim is fraudulent must be clear and convincing or by a mere preponderance." *Cuykendall v. Dolan*, 2006 WL 2252558, at 13 (D. Or. Aug. 3, 2006). Thus, this court appears to believe that the standard of proof still remains uncertain.

3. Departmental Decisions

Having examined the judiciary's treatment of the placer location statutes, the Departmental precedent will next be considered..

In *McKittrick Oil Co.*, 44 I.D. 340 (1915), the Department considered an appeal of a decision to institute adverse proceedings against a placer claim located by sixteen individuals and later conveyed to a corporation. The decision found that the locations

were made with the understanding that each of said locators would have an equal interest in all of the land so located by them and that it was the intention and understanding of all of said sixteen persons that a corporation would be organized by them for the purpose of developing the claims, and that to such company when organized the claims would

N-76738-01 through 06

be conveyed, the stock of the corporation to be distributed among said persons according to their respective interests in the land to be conveyed.

44 I.D. at 343.

The decision concurred with a prior judicial decision in *Borgwardt v. McKittrick Oil*, 130 P. 417 (Cal.1913); concluded that the acts described did not constitute a violation of the mining statutes; and dismissed the adverse proceeding.

In *Centerville Mine and Milling Co.*, 49 I. D. 508 (1923), the Department considered an appeal of a decision to reject a mineral application because of the "dummy character of the locations." *Id.* Acting on advice of counsel, a location notice had been prepared in the name of eight individuals. None of the persons had any material interest in the claims, except as stockholders of a corporation. The individuals had the intention and understanding that they would later quitclaim their interests to the corporation, which they did. *Id.* at 510. The decision distinguished this situation from that in *McKittrick Oil Co.* by stating that the *Centerville* locators "did not claim or have any personal or individual interest in the locations but that they acted solely on behalf and in the interest of the corporation." 49 I.D. at 513. The locators in *McKittrick* had formed their corporation after the location; but, in *Centerville* the corporation existed at the time of location.

The *Centerville* decision went on to discuss the significance of bad faith or fraudulent purpose.

The plea that the parties acted under legal advice and without the slightest thought that there was anything unlawful in the methods pursued, serves to relieve them from the stigma of actual bad faith and fraudulent purpose and intent. The acts performed, however, and the results sought to be attained were unauthorized and beyond the pale of the law.

Id.

N-76738-01 through 06

As support for this analysis the *Centerville* decision relied upon *Chanslor-Canfield Midway Oil Co. v. United States*, 266 F. 145 (9th Cir. 1920) in which

[t]he court entertained no doubt that there was no willful fraud on the part of the locators. Yet, it was plain that no one of them had any intent of taking up and developing the land. Although guiltless of active, positive fraud, each was charged with the knowledge that he had no rights.

49 I.D. at 513.

In the next cases, the Board of Land Appeals reviewed BLM decisions declaring association placer claims void because of "dummy locators." In *Big Horn Calcium Co.*, 44 IBLA 289 (1979); *Big Horn Limestone Co.*, 46 IBLA 98 (1980), eight individuals located the claims and then conveyed them to a corporation. The Board held that the locators should have the "opportunity to establish the bona fides of their intentions concerning the location and the conveyance of their interest to the corporation" and advised that the BLM should initiate contest proceedings. 44 IBLA at 291; 46 IBLA at 99-100. These decisions emphasized that the locators must establish the "bona fides" of their intentions. This emphasis seems to place the burden of proof on the locators.

The Board again discussed association placer claims in *Fairfield Mining Co., Inc.*, 66 IBLA 115 (1982). The decision found that the appellant was entitled to a hearing on disputed issues related to the chain of title. In a footnote the Board noted that the appellant's own submissions raised serious questions concerning whether certain locations "were made by 'dummy' locators and, as such, constituted fraud upon the Government." *Id.* at 119-20 n.5. The Board noted that if the locations had been made at the behest of one person "rather than independently by the named co-locators and for their own benefit they were absolutely void." *Id.*

Other decisions of the Board have included *Alumina Development Corp. of Utah*, 77 IBLA 366 (1983) (location invalid because alleged association was the alter ego of one person); *Allen C. Kroeze*, 153 IBLA 140 (2000) (two individuals had located the claims in excess of the statutory maximum acreage); *American Colloid Co.*, 154 IBLA 7

N-76738-01 through 06

(2000) (an individual relying on seven recorded powers of attorney properly filed a notices of intent to locate mining claims under the Stock Raising Homestead Act).

In its most recent decision, *Rock Solid Inc. and Mining*, 170 IBLA 312 (2006), the Board affirmed a BLM decision that invalidated a group of 160-acre placer claims. A corporation had filed the location notices and later presented an agreement of eight individuals whom it claimed had actually located the claims. The Board distinguished a location by an association of claimants from a location by a legitimate association. The latter is allowed but the former is not. It found that the agreement of eight people confirmed that a single entity had located the claims. *Id.* at 316. The Board concluded that because the eight names were "dummy locators," the claims should be declared void. *Id.* at 318.

In summary, the Departmental decisions have been consistent with the judicial opinions. 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.

4. Secondary Sources

The *American Law of Mining* expresses the law related to association placer claims as follows:

[b] Good Faith Required for Association Claims

The location of an association claim through the use of dummy locators, in an attempt to appropriate more than 20 acres for each bona fide individual claimant, is a fraud upon the United States and the claim is void. Similarly, an agreement among members of an association which results in one or more members acquiring an interest in excess of the equivalent of 20 acres is fraudulent and the location is void. In short, any scheme or device by which a bona fide locator seeks to acquire more than 20 acres renders the location void.

N-76738-01 through 06

If an association placer claim based upon a valid discovery is located in good faith, the locator may thereafter transfer their interests as they wish without affecting the validity of the claim. Thus it has been held that an association of persons may locate a claim with the understanding that a corporation will be organized by them for the purpose of developing the claim if the locators retain, through the corporation, their respective interests in the claim. The good faith of the locators of an association placer claim is a question of fact. The burden of establishing good faith is on the party seeking patent and, if the original locators are no longer available to testify, the burden may be formidable.

The right of conflicting locators to challenge a claim on the basis that there was a fraudulent use of dummy locators depends on the type of action brought. In actions over unpatented land, commonly called "possessory actions," the question concerns which party litigant has the better right to mine the land in question. Thus, as the use of dummy locators is a fraud upon the government, parties to a possessory action may not raise the issue of dummy locators. However, in patent proceedings and adverse suits arising from patent proceedings the issue of fraudulent use of dummy locators can be raised by any party to the location. In contests brought by the government, it bears only the burden of going forward with the evidence. The claimant must then rebut with a preponderance of the evidence the government's prima face case, by showing his claim is valid.

1 *American Law of Mining*, § 32.04[3](b) at 32-42 to -43 (2d ed. 2007) (footnotes omitted).

Earlier treatises on mining law have made similar pronouncements. See Lindley, *supra*, § 450. See also Colby, *supra*, at 261-62; Rodney D. Knutson & Hal G. Morris, Jr., *Coping with the General Mining Law of 1872 in the 1980's*, 16 *Land & Water L. Rev.* 411, 419-21(1981); Don H. Sherwood & Gary L. Geer, *Mining Law in a Nuclear Age: The Wyoming Example*, 3 *Land & Water L. Rev.* 319, 326-28 (1968). All these secondary source statements express views consistent with the judicial and Departmental precedents described above.

N-76738-01 through 06

5: Claimants must Prove the Validity of Their Claims by a Preponderance of Evidence.

Having reviewed the decisional precedent and secondary sources, it now must be determined who bears the burden of proof, what standard of proof must be used, and what must be proven.

The respective burdens of presenting evidence in a normal contest proceeding is well settled.

In a mining contest, the contestant bears the burden of making a prima facie case in support of its allegations that the contested claims are invalid. *United States v. Boucher*, 147 IBLA at 248-49. "The well-established rule is that the Government establishes a prima facie case when a mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery." *United States v. Dresselhaus*, 81 IBLA 252, 257 (1984); *Hallenbeck v. Kleppe*, 590 F.2d 852, 859 (10th Cir. 1979). The determination of whether or not the Government has presented a prima facie case is to be made solely on the evidence adduced during the Government's case-in-chief. *United States v. Miller*, 138 IBLA 246, 269 (1997); *United States v. Knoblock*, 131 IBLA 48, 101 I.D. 123.

If a prima facie case is established, the burden shifts to the contestee (the mining claimant) to overcome that case by a preponderance of evidence.

Once a prima facie case is presented, the burden then shifts to the claimant and it is incumbent upon the claimant to present evidence which is sufficient to overcome the Government's case on the issues raised. *United States v. Springer*, 491 F.2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 834 (1974); *Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959); *Cactus Mines, Ltd.*, 79 IBLA 20 (1984); *United States v. Rice*, 73 IBLA 128 (1983).

N-76738-01 through 06

United States v. Gillette, 104 IBLA 269, 274 (1988).

The Board has drawn a distinction between the burden placed on a claimant seeking a patent to the land on which his or her claim is located and that placed on a claimant defending against a Government initiated contest. A claimant seeking patented title to public land must prove all elements of validity. In a contest proceeding, a claimant need only defend against the elements raised in the Government's prima facie case. "[M]atters not placed in issue by the Government case need not be disproved by the claimant." *United States v. Dresselhaus*, 81 IBLA at 257, citing *United States v. Cactus Mines Limited*, 79 IBLA 20.

United States v. E. K. Lehmann & Associates of Montana, Inc., 161 IBLA 40, 44-45 (2004). See also *United States v. Toole*, 224 F. Supp. 440, 445 (D. Mont 1963) (citing *Foster v. Seaton*, 271 F.2d 836, 838 (D. C. Cir. 1959)).

The definition of "preponderance of the evidence" has also been well settled by the Board. The following definition is found in *United States v. Feezor*, 130 IBLA 146 (1994):

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.

South-East Coal Co. v. Consolidation Coal Co., 434 F.2d 767, 778 (6th Cir. 1970). Accord *Winston L. Thornton*, 106 IBLA 15, 19-20 (1988); *Thunderbird Oil Corp.*, 91 IBLA 195, 201 (1986), *aff'd sub nom. Planet Corp. v. Hodel*, CV No. 86-679 BB (D. N.M. May 6, 1987).

130 IBLA at 200.

N-76738-01 through 06

But the Contestees have asserted that special rules should apply for a contest alleging "dummy locators." They argue that the Government must prove its case by clear and convincing evidence, citing *United States v. Prowell*, 52 IBLA 256 (1981); *United States v. Dillman*, 36 IBLA 358 (1978); and *Chittim v. Belle Fourche Bentonite Products Co.*, 149 P.2d 142 (Wyo. 1944).

Both *Prowell* and *Dillman* involved allegations that the contested claims were located on non-mineral land and were "not held in good faith for mining purposes." 52 IBLA at 261-62 and 36 IBLA at 362. The Board held in *Prowell* that "in order to support a finding of bad faith the evidence must be substantial and clear." 52 IBLA at 259. *Accord, Dillman*, 36 IBLA at 360 ("In order to support a finding that a claim is not held in good faith for mining purposes the evidence should be clear").

The Government made no allegations of bad faith in these pending contests. Rather, the Government charged that the claims had not been located for the benefit of the eight persons named in the location certificates. Nothing in the *Prowell* or *Dillman* cases requires that the standard for proving that claims were held in bad faith should also provide the standard for proving that claims were located in violation of the law. In the former the Government does not challenge the validity of the location, whereas in the latter the Government does. The standard of proof for one need not apply to the other.

Similarly, the Contestees also misplace reliance on the *Chittim* decision. The Wyoming Supreme Court cannot create precedent that is binding upon a federal agency. Further, the Wyoming court's assertion that "dummy locators" must be proven by clear and convincing evidence runs counter to the weight of federal authority and may have been only dicta in the court's reasoning.

Since the cases cited by Contestees do not provide the correct standard of proof, the standard must be derived from other sources. The precedents have sometimes described invalid location attempts as a "fraud upon the law, and consequently a fraud upon the government." *See, e.g., Cook*, 164 F. at 537; *Nome & Sinook*, 187 F. at 388; *Toole*, 224 F. Supp. at 456. But, except for one federal trial court (*California Midway*) and the dicta of a state supreme court (*Chittim*), none of the precedents have required proof that the locators committed the common law tort of fraud by the traditional standard of clear and convincing evidence. Rather, the

N-76738-01 through 06

majority of courts use the term "fraud" as a descriptive term for the locator's conduct. They have not used the term to define the cause of action

The only federal court case which mentions a heightened standard of proof is *United States v. California Midway Oil Co.*, 259 F. 343 (S.D. Cal. 1919). In that case District Judge Bean seemed to require the Government to prove its case under the "clear and convincing" standard for proving common law fraud. *Id.* at 352-53. But no other judicial or Departmental decision has followed Judge Bean's application of the "clear and convincing" standard. Only three published opinions have cited *California Midway*, but for precedent on other issues. *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 534 (9th Cir. 1987) (federal common law requirements to prove fraud before Erie); *Baker v. United States*, 613 F.2d 224, 229 n. 8 (9th Cir. 1980) (number of claims an individual may stake); *Houck v. Jose*, 72 F. Supp. 6, 9 (S. D. Cal. 1947) (number of claims that an individual may stake). Moreover, Judge Bean did not use the "clear and convincing" standard of proof in a similar case he decided two years earlier. *United States v. Brookshire Oil Co.*, 242 F. 718, 721 (S.D. Cal. 1917) ("Any device whereby one person is to acquire more than 20, or an association more that 160, acres in area, by one discovery, constitutes a fraud upon the government and is without legal support and void.")

The Ninth Circuit, in affirming the result in *California Midway*, did not specifically endorse or reject the standard of proof used by Judge Bean. Previously the court had made clear in *Chanslor-Canfield Midway Oil Co. v. United States*, 266 F. 145 (9th Cir. 1920), that willful fraud need not be proven to conclude that the statute had been violated. *Id.* at 149 ("We have no doubt there was no willful fraud on the part of the locators themselves [A]lthough guiltless of active, positive fraud, each must be charged with a knowledge that he or she had no rights, and had no authority to make the deed")

The apparently conflicting standards of proof endorsed by the Ninth Circuit decisions in *California Midway* and *Chanslor-Canfield* may be reconciled by distinguishing the facts and the issues presented on appeal. In *California Midway* an agent had located the claims using a power of attorney from the eight locators. In *Chanslor-Canfield* seven of the locators had conveyed to the eighth, who in turn conveyed to a relative for nominal consideration. In the former the Government sought to prove a conspiracy among the locators and the agent to violate the law,

N-76738-01 through 06

while in the later the Government sought only to prove that the locators were not bona fide.

The appeals court decided *Chanslor-Canfield* first, finding that the locators had not committed willful fraud but still invalidating the claims. When it decided *California Midway* two years later, it considered a different issue, i.e., whether the Government had proven a conspiracy between the locators and their agent to violate the law. Significantly, when it decided *California Midway* the court did not even mention its earlier decision in *Chanslor-Canfield*. One may conclude from this omission that the court had no intention to overrule its prior precedent for invalidating association claims.

A review of the above cases demonstrates that no binding authority requires the Government to prove that association placer locators committed fraud by clear and convincing evidence. Thus, no precedent prevents the application of the usual rules for contest proceedings. That is, 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. *See also 1 American Law of Mining, § 32.04[3](b) at 32-43 (2d ed. 2007)* (“In contests brought by the government, it bears only the burden of going forward with the evidence. The claimant must then rebut with a preponderance of the evidence the government’s prima face case, by showing his claim is valid.”).

Having determined who has the burden of proof and what that burden is, the next section will discuss what facts must be proven to establish a valid association claim.

6. Locators of a Valid Association Placer Claim must Act in Good Faith, Independently, and for Their Own Self-interest.

The decisions have not always been clear about what locators must show in order to prove a valid association claim. Perhaps this results from the variety of factual circumstances in which validity has been challenged.

N-76738-01 through 06

The acreage limits are well settled and easy to determine. The association claim may not exceed 160 acres and a participant in the association may not have more than 20 acres. But the attributes of the participants have been less well defined.

One authority has emphasized that the participants must be "bona fide." See 1 *American Law of Mining*, § 32.04[3](b) at 32-42 to -43 (2d ed. 2007). See also *Chanslor-Canfield Midway Oil Co. v. United States*, 266 F. 145, 149 (9th Cir. 1920) (participants were not bona fide occupants); *United States v. Brookshire Oil Co.*, 242 F. 718, 720 (S.D. Cal. 1917) ("locations were not made in good faith for the use and benefit of the alleged locators").

The term "bona fide" carries the meaning of "made in good faith; without fraud or deceit." *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." *Id.* at 713.

But the decisions have required more than honesty and a lack of intent to defraud or seek advantage. For example, in *Chanslor-Canfield* one person had located an association claim in the names of seven other persons who did not know that their names were being used. The court found that the seven other locators were guiltless of active, positive fraud, but still found the claim invalid because the other participants, upon learning that their names had been used, did not contribute to perfecting the locations or do any act toward holding the locations. 266 F. at 149. Similarly, in *Centerville Mine and Milling Co.*, 49 I.D. 508 (1923), eight stockholders of a corporation had located an association claim. The Department recognized the good faith of the participants, but still found that they did not have any personal or individual interest in the locations because they acted solely on behalf of and in the interest of the corporation. *Id.* at 513.

The Board's footnote five in *Fairfield Mining Co., Inc.*, 66 IBLA 115 (1982) seems to add further definition to the bona fide requirement. It noted that if the locations had been made at the behest of one person "rather than independently by the named co-locators and for their own benefit they were absolutely void." *Id.* at 119-20 n.5. This articulation requires that the participants in the association also act independently and for their own self-interest.

Including requirements that the locators act both independently and for their own self-interest advances the statutory policy found by the earliest federal court cases. In *Durant v. Corbin*, 94 F. 382 (E.D. Wash. 1899), the court expressed the policy as limiting the amount of land that a single person could obtain.

[T]he policy of the government in disposing of the mineral lands . . . is to make a general distribution among as large a number as possible of those who wish to acquire such land for their own use, rather than to favor a few individuals, who might wish to acquire princely fortunes by securing large tracts of such land; and it is contrary to this policy . . . for one person to cover more than 20 acres of placer ground

Id. at 383-84.

An individual person who located an individual 20-acre claim would act independently and for their own self-interest, almost by definition. A similar requirement of independence and self-interest for the individual who chooses to participate in an association would also limit their interest to no more 20 acres. Using this articulation would require 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.

Contestees argue that a valid association claim may be proven by simply showing that each participant had an equal interest (as determined from the face of the location certificate), had a bona fide interest, and participated in the location and development of the claims. Reply Br. of Contestees 17-18. This articulation over simplifies the required proof. In *Chanslor-Canfield* the locators named on the certificate of location each had an equal interest, but the court found the claim invalid. The locators in *Centerville* acted in good faith, that is they believed they had located a valid claim, yet the Department held the claim invalid because they had acted on behalf of a corporation in which they were stockholders. And participation in the location and development of claims cannot, by itself, prove a valid location because individuals can just as easily perform these activities for the benefit of others and not for their own self-interest. See *United States v. Brookshire Oil Co.*, 242 F. 718, 721 (S.D. Cal. 1917) ("cannot evade the law by use of the names of his friends,

N-76738-01 through 06

relatives, or employes"). Thus, the Contestees' statement does not accurately state what must be shown.

In summary, I conclude 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 placer claim. Having thus established the requirements for a valid association placer location, I will next address the application of these requirements to the facts of this contest.

B. In 1993 Two Joint Ventures Used a Scheme to Have Eight Corporations Act as Locators for More Land than the Statutes Allowed.

On the face of the filed documents the 1993 claims appear to comply with the mining laws. They were located in the name of eight corporations, and corporations are recognized as persons which may locate claims. See *Alumina Development Corp of Utah*, 77 IBLA 366, 369 (1983). These eight legal entities did not locate any claims that exceeded 160 acres. This complied with the statutory and regulatory requirements limiting the amount of land that could be located. 30 U.S.C. §§ 35-36 (2000); 43 C.F.R. § 3842.1-2 (1992). Further, a single agent signed the location certificates on behalf of all eight locators and this use of an agent also complied with accepted practice. See *American Colloid Co.*, 154 IBLA 7, 15 (2000).

But, when one goes behind the filed documents evidence of a scheme to locate claims for a much smaller group emerges. An examination of the ownership and management of the corporations reveals the dominance of two individuals, James Roe and Charles Ager.

Four of the locator corporations are dominated by a single individual, James 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 role (i.e., Brookline). James Roe is the only shareholder of the fourth corporation. He is also a director and president of all four locator corporations. No other directors have been identified for any of these four corporations.

N-76738-01 through 06

The following table summarizes the relationships among the corporations and James Roe:

| Name of Parent Corp. | Cambridge Resources | Brookline Mining Company | Crimson Resources, Inc. | |
|------------------------|---------------------------|-------------------------------|-----------------------------|---------------------------|
| Shareholders | Roe (50%) (1) | Roe (<5%), + 60-90 others (3) | Roe (60%) (4) | |
| Director | Roe, + ? (2) | Roe, + ? (3) | Roe (sole?) (4) | |
| President | Roe (2) | Roe (3) | Roe (4) | |
| Name of Locator | Camel, Inc | Broadway Enterprises | Crescent Corporation | Carlwood Development |
| Incorporation date (7) | 07/29/1993 | 07/29/1993 | 07/29/1993 | 07/29/1993 |
| Shareholders | Cambridge Resources (2) | Brookline Mining Company (3) | Crimson Resources, Inc. (4) | Roe (5) |
| Director | Roe (sole) (2) | Roe (sole) (3) | Roe (sole) (4) | Roe (sole) (5) |
| President | Roe (2) | Roe (3) | Roe (4) | Roe (5) |
| Dissolution (6) | 1994-95-96? (involuntary) | 1994-95-96? (involuntary) | 1994-95-96? (involuntary) | 1994-95-96? (involuntary) |

Numbers in parenthesis show citation to record: (1) Tr. 1325:11-1326:1; (2) Tr. 1326:18-1327:7; (3) Tr. 1327:8-1328:10; (4) Tr. 1328:11-1329:10; (5) Tr. 1329:11-18; (6) Tr. 1329:19-1330:10; (7) Ex. A-2, Apps. 9-12.

More detailed information is required to support an assessment that Roe also dominated Brookline Mining Company. Brookline is the parent corporation of Broadway Enterprises, one of the locators. James Roe was only a minority shareholder in Brookline, but he was its president. The other shareholders all seemed to have small holdings and their numbers expanded over time. Tr. 1169:23-1170:10, 1173:22-1174:21, 1264:13-1266:25. Despite the fact that normal corporate governance would place Roe's activities as president under the supervision of a board of directors, Roe formed a special "board of advisors" to assist his activities on behalf of the corporation. Tr. 1209:20-1212:20, 1274:9-1276:9, 1286:16-25, 1293:4-1296:21, 1298:3-

N-76738-01 through 06

1299:19. Because the board of directors seem to have been by-passed, this structure more closely resembles an investment vehicle than it does a normally functioning corporation. Roe's controlling influence in the activities of Brookline, and the lack of evidence of a functioning board of directors, leads me to conclude that he dominated this parent corporation to the same degree that he dominated the parent corporations of the other locator corporations.

Three of the remaining locator corporations are also dominated by a single person, this time Charles Ager. The shareholders, directors, and officers were all members of Charles Ager's immediate family. They consisted of his wife; his daughter, who was 22 years old and a college student at the time (Tr. 454:9-455:7, 677:7-10, 680:1-12); and two of his sons, one of whom was 11 years old. Tr. 716:11-13. Charles Ager described the group collectively as a "mining family" who used the corporations to "warehouse" their United States mining interests. E.g., Tr. 569:12-573:8, 575:13-19, 614:4-14, 651:15-652:2, 655:16-23, 660:11-21, 667:2-5, 712:10-713:15, 718:14-719:11, 731:17-733:11, 772:11-14, 774:13-23, 775:4-21, 776:10-777:4, 777:23-778:10, 952:13-953:6.

The connection of Pilot Plant, Inc. to Charles Ager is not quite as apparent. But the following discussion will show it was a member of group represented by Charles Ager and that it was part of the plan that ultimately consolidated all of the claims under a single entity controlled by Charles Ager.

The following table summarizes the relationships among the corporations and Charles Ager at the time of the locations in September 1993.

N-76738-01 through 06

| Name of Locator | Geosearch, Inc. | Mincor, Inc. | Geotech Mining, Inc. |
|-----------------------|-------------------------------|--|----------------------|
| Date of Incorporation | 07/29/1993 | 07/29/1993 | 07/29/1993 |
| Shareholders | Carol J. Ager (wife) | Charles F. Ager (Son - 1/3) Caroline Ager (1/3) (daughter - 22y) Charleton Ager (1/3) (son- 11y) | Charles Ager |
| Director | Carol J. Ager Charles Ager | Charles Ager Caroline Ager Charleton Ager | Charles Ager |
| President | Carol Ager (wife) | Caroline Ager | Charles Ager |

Ex. A-2 at 10 (Tbl. 5), App. 13 at 3, App. 14 at 3, App. 15 at 3, App. 16 at 11; Tr. 656:1-8, 697:15-698:5, 682:2-683:9, 677:7-10, 716:11-13.

Finally, the connections of Roe and Ager with Cactus Gold Corp. are relevant because all the locators conveyed their claims to this corporation within a year of the location. The following table shows that James Roe was the president and director at the time Catus Gold was incorporated, five months before the locations. By the time the corporate locators conveyed their claims to it, Charles Ager was the president and sole shareholder.

N-76738-01 through 06

| Cactus Gold | | | |
|--|-----------------|-----------------|-----------------|
| Relevant Date | President | Director | Shareholder |
| Incorporation (May 3, 1993) | James Roe | James Roe | Unknown |
| Claim Location (September 1993) | | | |
| Royalty Agreement (i.e., purchase of claims by Cactus Gold) (August 12, 1994) | Charles Ager | Charles Ager | Charles Ager |

Ex. A-2, App. 18 at 4, 7, 8; Ex. B-21 at 25-26; Tr. 810:22-813:2.

The Contestees argue 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. They principally rely on the fact that all eight of the locators had been separately incorporated and that the location certificates named the eight corporations as locators.

In addition, they presented the testimony of both Charles Ager and James Roe, the presidents of seven of the corporate locators. No one purported to testify on behalf of the eighth corporate locator, Pilot Plant, Inc. I observed the demeanor of these witnesses while testifying and found that their body language, eye contact, and other mannerisms did not enhance the believability of their testimony on contested issues.

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 exploration); 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

N-76738-01 through 06

(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 of 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 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 provide documents unless the Government signed a confidentiality agreement. Tr. 692:22-695:20. 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); 1336:12-1343:12 (receipt of income from 1994 Royalty Agreement and payment of note owed to Ager); 1343:13-1350:1 (abandonment of prior claims).

In summary, I do not consider either Mr. Ager or Mr. Roe credible enough for their testimony to outweigh the inferences that can be drawn from other uncontested facts in the record. These facts show the locator corporations did not act with good faith, independently, and for their own self-interest in locating the claims.

N-76738-01 through 06

The evidence which supports these findings is summarized below:

- K. Ian Matheson used a check from Pilot Point, Inc. (one of the corporate locators) to pay the filing fees for the 1993 corporate locators. Ex. A-2, App. 21 at 7. This act violated a written Partnership Agreement that the eight corporate locators had entered in July 1993, more than a month before the claim locations in September. One of the terms requires K. Ian Matheson to open a bank account to carry out the purpose of the partnership:

The partnership appoints K. Ian Matheson to act as treasurer of the partnership and to open such bank accounts at Bank of America, Las Vegas, Nevada as required to carry out the purposes of the partnership.

Ex. B-1 at 1.

The fact that Matheson paid the location fees with a Pilot Point check, and not from a partnership bank account, violated the agreement. Similar violations of the partnership agreement continued for the payment of rental fees in 1994, 1995 and 1996. Checks from Pilot Point paid for all these expenses. Ex. A-2, App. 21 at 8-11. An inference can be drawn from this activity that the eight corporate locators did not act independently because they did not follow their own partnership agreement.

- None of the corporate locators presented documents showing that they funded the cost of locating and maintaining the claims. Another partnership agreement term required each corporate locator to "contribute its pro rata portion of the costs required to properly locate and maintain the claims." Ex. B-1 at 1. Yet none of the Contestees presented documents to show that each corporation had contributed funds to pay for these costs.

Rather Charles Ager testified that the money came from a "pool of funds." Tr. 745:21-746:6. He was very vague and evasive as to the source of the funds when questioned by counsel for the Government, but his testimony can fairly be understood to mean that the "Ager Group" (i.e., the Ager family members or the corporations they owned) provided the funding. How that funding moved from Charles Ager to the corporate locators was never clearly explained. Tr. 746:7-753:4. Charles Ager alluded that it was loaned or that it was accounted for among the

N-76738-01 through 06

various entities (presumably through debits or credits on corporate accounts), but the Contestees provided no promissory notes or accounting records as evidence.

Documentation of how the corporations were funded could have gone a long way toward demonstrating the independence of the corporations. Its absence infers that the source was hidden so as to allow a plausible argument that they acted independently.

- None of the corporate locators presented documents showing how the only known revenue from the claims was received or accounted for. In August 1994, less than a year after the September 1993 locations, each locator conveyed their interest to Cactus Gold, which by this time was controlled by Charles Ager. Exs. B-6 and B-7; Tr. 812:17-813:2. As part of the consideration for the transaction, the agreements recited that Cactus Gold paid each corporate locator \$12,500. The Contestees presented no records showing actual receipt of these funds. Neither, did they show how this income was accounted on individual corporation records.

Because each corporation must have incurred expenses for the location and yearly rental fees on the claims, one would expect a mining company operating in good faith to make a record of this \$12,500 income. One may infer from the lack of records that the locator corporations never actually received the payment and that the transaction was intended to create the illusion that the corporations acted independently and for their own self-interest.

- The Roe Corporations (Cambridge, Broadway, Crescent and Carlwood) were all incorporated on same day (July 29, 1993), just barely a month before the locations, and they all had the same person (James Roe) for all their officers and director. They all had their corporate authority temporarily revoked for failure to pay filing fees in 1995 and 1996, and their authority was permanently revoked in 2003, even though they still have a retained royalty interest under the Royalty Agreement with Cactus Gold. James Roe was of the opinion that the royalty interest would revert to the shareholders, but at least two of these corporate shareholders (Crimson and Brookline) have also been dissolved. Exs. A-2, Apps. 9-12, B-6; Tr. 1267:1-1270:5, 1301:6-23, 1329:19-1330:10.

N-76738-01 through 06

All of this infers that the corporate locators did not have a good faith intent to independently carry on mining operations after the claims were located.

- The Ager Corporations (Geosearch, Mincor, and Geotech) also were all incorporated on the same day as the Roe Corporations (July 29, 1993) with Ager family members for all their officers and directors. The sole shareholder and president of Geosearch was Carol Ager, Charles's wife. The president of Mincor was his daughter, Caroline, and the shareholders were his son, Charles F., who was eleven at the time; his daughter, Caroline, who was twenty-two; and his son, Charleton. The sole shareholder and president of Geotech was Charles Ager. Ex. A-2, Apps. 13-15; Tr. 677:7-10; 777:12-18.

An inference can be drawn from these facts that the corporations were under a unified family control, and they did not act independently or for their own self-interest. Indeed, Charles Ager even refers to the corporations and their individual shareholders as the "Ager family group." Tr. 569:12-570:2; 772:11-14.

- The locations did not achieve the stated purpose for relocating the former claims as association claims (i.e., to clear and consolidate desperate ownership). An assortment of individuals and entities originally owned claims covering most of the land that the 1993 corporate locations eventually covered. According to Charles Ager and James Roe, they desired to unite these interests in a way that made economic, business, and control sense. They decided to let the existing claims lapse and then relocate the land using eight locator companies that reflected the interests of the former claim holders. Tr. 623:7-624:18. Their calculations are reflected in Exhibit B-28.

The testimony describing the calculations is very general and vague, but a couple of examples will demonstrate the fallacy of the justification given for the creation of the eight corporate locators. Cambridge Resources, which had 320 acres of the total 25,800 acres (or 1.2%) in the former claims, became the sole shareholder of Camel, Inc., which wound up with a 1/8th (12.5%) share of the relocated association claims. Thus, the effective ownership of Cambridge increased from 1.2% to 12.5%. Further, none of the Ager family had a record interest in any of the original claims, yet the three corporations in which the Agers became shareholders (i.e., Geosearch, Mincor and Geotech) wound up with a 3/8th (37.5%) share in the relocated

N-76738-01 through 06

association claims. Ex. B-28. For at least Cambridge and the Ager family, the form of the new claims increased the amount of acreage they controlled.

From these facts it can be inferred that the relocation strategy achieved some purpose other than clearing and consolidating ownership. It certainly cannot be inferred that the eight corporate locators merely changed the form of their respective shareholders' prior ownership. Rather, the evidence suggests that they desired to create an impression of equal ownership where unequal ownership had existed before.

- The relocation of the original claims as association claims achieved considerable savings. The location of 160 acres as a single claim allowed the owners to pay one set of filing fees and annual rentals, instead of eight for the same amount of land located as individual claims. According to a Government witness, the savings amounted to more than \$1.4 million between 1993 and 2004. Tr. 233:2-35:23; Exs. A-2 at 21, A-14, A-15. From this fact it can be inferred that a considerable motive existed to control the ground as association claims rather than as individual claims. That monetary incentive motivated someone to create a group of nominal owners that did not act in good faith for their own self-interest but, rather, acted for the interests of others in savings fees.

The Contestees argue that not all the original claims were individual placer claims. Nevertheless, they admit that 32% of the acreage was previously located as association claims (implying that 68% was located as individual claims of twenty acres). Reply Br. of Contestees 4. Even if this assertion is accepted, they achieved considerable savings when they located all the acreage as association claims.

The facts discussed above suggest that the locating corporations did not act in good faith, independently, or for their own interests. But these facts do not fully explain the likely relationship among the true actors. The following facts suggest that two joint ventures, acting for their own self-interest, likely located the claims.

As early as April 1993, before the September 1993 locations, Charles Ager and James Roe had signed a handwritten "Letter of Agreement" in which the parties they represented agreed to form a partnership to own 50% each of the mining interests in the Eldorado Valley. The agreement identified the parties represented by Ager as

N-76738-01 through 06

himself, K. Ian Matheson, and Pilot Plant, Inc.; and, the parties represented by Roe as himself, Brookline Mining Company, Crimson Resources, Inc., Cambridge Resources, Inc., High Deseret Resources, Inc., Ground Research Services, Inc., and M&R Partners. The Ager group promised to contribute \$500,000 in "project funding" and the Roe Group promised to sign a one year promissory note for 50% of that amount. Ex. A-21.

The Letter of Agreement did not explicitly refer to the members of the Ager group (i.e., Charles Ager, K. Ian Matheson, and Pilot Plant, Inc.) or the Roe group (i.e., James Roe, Brookline Mining Company, Crimson Resources, Inc., Cambridge Resources, Inc., High Deseret Resources, Inc., Ground Research Services, Inc., and M&R Partners) as constituting a joint venture or a partnership. But each of these groups would have had to constitute some type of business entity in order to form a partnership between themselves. Thus, for purposes of analyzing the validity of the claims ultimately located in the Eldorado Valley, they may each be considered a joint venture of their own. The two joint ventures agreed to form a third entity (a "partnership") in which each of the two joint ventures would own 50% of the mining interests in the Eldorado Valley.

Four months later, in July 1993, seven of the eight locators were incorporated. The eighth, Pilot Plant, was already incorporated. The owners of each of the eight corporate locators had been named in the prior April 1993 Letter of Agreement. Cambridge, Brookline, Crimson, and James Roe, respectively owned the newly created locator corporations, Camel, Broadway, Crescent, and Carlwood. Charles Ager and his family mining interests owned the newly created locator corporations, Geosearch, Mincor, and Geotech. And Pilot Point owned itself. These eight corporations represented the 50/50 split agreed to between the two joint ventures represented by Roe and Ager in the Letter of Agreement, signed the previous April. The eight corporations in turn signed a new Eldorado Partners agreement in July.

The following diagram may help visualize the relationships of the various entities:

N-76738-01 through 06

| | | | |
|---|-----------------------|--|----------------------------|
| The Ager Group, a joint venture consisting of: Charles Ager (1) K. Ian Matheson Pilot Plant, Inc. (2) | | The Roe Group, a joint venture consisting of: James Roe (4) Brookline Mining Company (5) Crimson Resources, Inc. (6) Cambridge Resources, Inc. (3) High Deseret Resources, Inc. Ground Research Services, Inc. M&R Partners | |
| The Letter of Agreement (Ex. A-21), a partnership consisting of the Ager Group (a joint venture) and the Roe Group (a joint venture) | | | |
| Four corporations, owned by members of the Ager Group joint venture (three incorporated in July 1993) | | Four corporations, owned by members of the Roe Group joint venture (all incorporated in July 1993) | |
| Owner | Corporation | Owner | Corporation |
| | Pilot Plant, Inc. (2) | Cambridge Resources, Inc. (3) | Camel, Inc. |
| Charles Ager (1) | Geotech Mining Inc. | James Roe (4) | Carlwood Development, Inc. |
| Charles Ager's (1) children | Mincor, Inc. | Brookline Mining Company (5) | Broadway Enterprises, Inc. |
| Charles Ager's (1) wife | Geosearch, Inc. | Crimson Resources, Inc. (6) | Crescent Corporation |
| Eldorado Partners, a partnership consisting of eight corporations [the locator corporations] (Ex. B-1) | | | |

Note: Numbers in parenthesis, i.e., (1), show the continuity in ownership from the original joint venture participants to the corporate locators.

N-76738-01 through 06

The following December, after the eight corporations had located the new association claims, Roe authored a letter to the Brookline shareholders. Ex. B-21 at 8. It described entering a "50-50 joint venture" with an unnamed "Canadian group." It also stated that the

joint venture arrangements call for the creation of a single operating entity ("New Co") to which Brookline and its affiliates, as well as the Canadian group, will contribute all Eldorado Valley project assets, including mining claims, technologies, and processing facilities in return for a 50-50 ownership in New Co. The Canadian group is funding ____ for initial project expenses including claims payments, staking of claims, an extensive geotechnical and process testing program, environmental permitting costs, and certain overhead expenses. Since ownership and financing of the joint venture is on a 50-50 basis, the Canadian group is providing Brookline its ____ share of the funding in the form of a loan on April 30, 1994.

Id. at 9.

The description of a "50-50 joint venture" with an unnamed "Canadian group" coincides with the April 1993 Letter of Agreement (Ex. A-21) signed by Ager (who is a Canadian citizen) and Roe. The plan to create 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 Point 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. *See also* Ex. B-21 at 25-26.

Six months later, in June 1994, Roe authored another letter to the Brookline shareholders. This letter sought approval to transfer the company's assets to the operating company. It continued to describe an "original joint venture (Eldorado Partners of which Brookline and its affiliates own 50%)." Ex. B-21 at 12.

This letter was followed in July 1994 by a Proxy Statement to Brookline Shareholders. It continued to describe an April 1993, 50-50 joint venture with a "Canadian Group" headed by Dr. Charles Ager. "The joint venture known as Eldorado Partners consists of eight corporations that acted as mining claim locators

N-76738-01 through 06

in a procedure which consolidated the claims positions of the two groups." Ex. B-23 at 433.

By comparing the April 1993 Letter of Agreement (Ex. A-21) with Roe's descriptions of the relationship in subsequent letters to Brookline shareholders (Exs. B-21 at 8-9, 12, B-23 at 433), an inference can be drawn that Roe and Ager had a plan, dating back to as early as April 1993, to use the eight corporate locators as a means of consolidating the interests of the two joint ventures they represented under a single entity, which eventually became Cactus Gold. *See* Tr. 1213:15-1214:15. Thus, the eight corporate locators did not act independently or for their own self-interest but, rather, acted on behalf of the two joint ventures that owned them.

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 the 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).

After considering all of the evidence, I find 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. Rather, I find it more likely that two

N-76738-01 through 06

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.

C. In 1999 One Individual Used a Scheme to Have Eight Individuals Act as Locators for More Land than the Statutes Allowed.

As with the 1993 corporate locations, the 1999 individual locations appear to comply with the mining laws on the face of the filed documents. They were located in the names of eight individual persons and these eight persons did not locate any claims that exceeded 160 acres. On the face of the documents, this complied with the statutory and regulatory requirements limiting the amount of land that could be located. 30 U.S.C. §§ 35 - 36 (2000); 43 C.F.R. § 3842.1-2 (1992). Further, a single agent signed the location certificates for all eight locators and this use of an agent also complied with accepted practice. *See American Colloid Co.*, 154 IBLA 7, 15 (2000).

But when one goes behind the filed documents, evidence of a scheme to locate claims for a single person emerges. Each of the locators were either related to or employed by Charles Ager or companies he controlled. The following table summarizes the relationships:

N-76738-01 through 06

| Locator | Relationship to Charles Ager |
|---------------------|---|
| Andrew L. Dall | Employee of Cactus Mining (owned and controlled by Charles Ager) |
| Shannon L. Dall | Wife of Andrew Dall and former employee of Cactus Mining (owned and controlled by Charles Ager) |
| Charlton S. Ager | Son of Charles Ager |
| Caroline I. Ager | Daughter of Charles Ager |
| Carol J. Ager | Wife of Charles Ager |
| Fred J. Toti | Father of Carol Ager (i.e., father-in-law of Charles Ager) |
| George Stephen, IV | Employee of Cactus Mining (owned and controlled by Charles Ager) |
| Kathleen M. Stephen | Step-mother of George Stephen IV and employee of Cactus Mining (owned and controlled by Charles Ager) |

Ex. A-2 at 20; Tr. 817:3-821:12; 536:15-539:6.

Nevertheless, the Contestees argue that each person acted independently to locate the claims and each made unique contributions to the staking effort. For example, Andrew Dall did exploration, staking, sampling, and preparation of certificates; Shannon Dall provided support to her husband, Andrew, prepared food, and did bookkeeping; Charlton Ager helped with staking, as did Caroline Ager; Carol Ager provided financing; Fred Toti provided support services in Reno and transportation in the field; and George Stephen and Kathleen Stephen helped with staking. Tr. 844:4-848:21, 921:5-932:18 (Ager), 1441:23-1443:24 (Dall). As discussed above, the law does not recognize a valid association placer simply because each named locator made a contribution. The locators must also show that they acted independently and for their own self-interest. The 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.

To prove the validity of the claims, the Contestees presented the testimony of two witnesses. The first witness was Charles Ager, the owner of Cactus Gold. This

N-76738-01 through 06

corporation now holds record title to the claims. The second witness was Andrew Dall, one of the locators, and the person who signed all of the location certificates as their agent. I observed these witnesses' demeanor while testifying and found that their body language, eye contact, and other mannerisms did not enhance the believability of the assertions they made.

I have previously discussed my reasons for not giving the testimony of Charles Ager full credibility. By the time these claims were located in 1999, Ager owned Cactus Mining (Tr. 536:15-539:6), which owned the vast majority of shares in Cactus Gold (Tr. 964:5-965:22). By the time of the hearing, the eight individual locators had transferred their interests to Cactus Gold. Thus, as owner of Cactus Gold, Ager had an obvious interest in the outcome of this contest.

In addition he gave evasive, vague, and sometimes contradictory answers. E.g., Tr. 821:13-829:14 (expenses incurred by Stephen family for exploration); Tr. 829:15-834:20 (payment of location fees and balancing of accounts between Cactus Mining and individual locators); Tr. 834:21-841:4 (exploration activities of Cactus Mining employees); *Compare* Tr. 820:16-821:12 (Kathleen Stephen was employee of Cactus Mining in May 1999) *with* Tr. 943:11-944:21 (Does not recall if Kathleen Stephen was employee).

I also did not find Andrew Dall's testimony fully believable. Except for periods from 1993 to 1996 and from 2002 to 2008, he had been employed by Charles Ager, or the companies he controlled, since 1981. And, he continues to depend upon him for some level of employment. (Tr. 1378:10-1397:6. Thus, he had a motivation to support the interests of Charles Ager.

His testimony was sometimes conflicting. *Compare* Tr. 1393:13-1394:7 (locators had group meetings) *with* Tr. 1422:15-1423:17 (all eight locators did not come together). It also conflicted with Ager's. *Compare* Tr. 829:15:-21, 946:20-947:1 (Ager: Cactus Mining loaned money for location fees) *with* Tr. 1371:7-9; 1396:8-1397:19 (Dall: Caroline Ager provided money for location fees). Further, he gave particularly vague answers about the receipt of \$5,000 for the transfer to Cactus Gold. Tr. 1376:10-23, 1401:24-1403:9; 1435:24-1441:1. Dall also testified that he had no interest in Cactus Gold. Tr. 1432:21-1433:6. But Ager testified that Dall did have a small shareholder interest. Tr. 960:20-961:8 (corporate shareholder records showed a stock purchase date for Dall in 1998 and a stock issue date in 2001).

N-76738-01 through 06

Most of Dall's testimony was as consistent with his actions being for the benefit of Charles Ager, as it was with his actions being for the benefit of the individuals. For example, Dall testified about how he and some of the individual locators took samples from the ground. Tr. 1413:3-1420:2. This activity 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.

He also described meetings among some of the locators, when they discussed how Caroline Ager had offered to "put up money for the actual filing of the claims" but did not discuss how she would be paid back or how fees for annual assessments would be collected. Tr. 1423:4-1427:6. Again, Caroline could have just as easily made this offer for the benefit of her father's "mining family" business as she could have made it for her own self-interest.

Dall also described conversations with two of the locators who were absent from the meetings. He testified that his wife's attitude was "Fine. Do whatever. It's okay. I'll support you, I'll help you." He stated that Fred Toti, Ager's father in law, responded simply "I'm in," when asked to join the group. Tr. 1429:10-1431:4. These descriptions hardly evidence a bona fide interest in locating mining claims for one's own behalf. Rather, they are consistent with responses that one may give when agreeing to help someone else.

He also described how the money for the initial filing fees was transferred. Caroline wired the money to the Cactus Mining account in May 1999 shortly before filing the claims. Dall knew the money had arrived because he was the only signer on the corporate account. He didn't use his personal account because he didn't want to pay taxes on it. He didn't recall the amount and no one ever signed a promissory note for it. He stated that accounts were kept of what the individuals owed, but was vague about how they were maintained or where in his home they were. Tr. 1433:7-1435:17. Again, it is hard to distinguish this transfer of money from a transfer intended to benefit Charles Ager's mining business.

I find that 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. He did not provide enough information to differentiate their actions from those that would benefit their relative and employer, Charles Ager.

N-76738-01 through 06

As with the witnesses who testified in support of the 1993 corporate locations, I do not give enough credibility to the testimony of Dall or Ager to find that the eight individual locators in 1999 acted in good faith, independently, and for their own self-interest. Their testimony was not credible enough to outweigh the inferences that can be drawn from the other uncontested facts in the record. These facts support a finding that the claims were more likely located for the benefit of Charles Ager rather than for the self-interest of his relatives and employees.

The evidence which supports this finding is summarized below:

- The 1999 individual claims were located adjacent to and along the boundary of the 1993 corporate claims, then owned of record by Cactus Gold and its subsidiary Valley Gold. Tr. 535:3-18. Both corporations were under the effective control of Charles Ager. The claim names followed the same pattern of using colors and sequential numbering as did the 1993 corporate claims. For example, the 1993 claims had names such as Pink 323, Pink 324, and Pink 332; and the 1999 claims had names such as Pink 311, Pink 312, and Pink 331. This pattern evidences a unified plan for blanketing an area of interest rather than the independent action of eight individuals. Ex. A-2 at 3-4 (Tbls. 1-2).

Dall described the decision to continue using colors for claim names as "arbitrary, no specific reason." Tr. 1428:12-1429:9. Ager claims that neither Valley Gold nor Cactus Gold had any interest in the mineralized areas (i.e., what became the 1999 individual claims) adjacent to their claim block because they had all the land they would ever want "in terms of targets and everything" and "all they could fund to maintain in good standing." He claimed that in 2000 his interest "changed to some extent, because after a year or two of geologic mapping, we came to understand for the first time how the mineralization arrived there. And it [i.e., the 1999 individual claims] became of some interest to Cactus Gold, but not a lot . . ." And, after re-drilling a lot of it they "became somewhat interested in these peripheral Claims, which these were around-the-corner Claims." Tr. 841:5-844:3.

I do not give either witness much credibility. The 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. Ager's explanation that re-drilling and additional geologic mapping caused Cactus Gold to become "somewhat

N-76738-01 through 06

interested" during the fourteen months between the locations in May 1999 and Cactus Gold's purchase in July 2000 provides little detail. He did not explain when, where, or how much drilling occurred. Nor did he discuss what the geologic mapping showed. The drilling and mapping activities must have been a substantial undertaking for a company that just a few months before had all the land they would ever want "in terms of targets and everything" and "all they could fund to maintain in good standing." I therefore give the assertions of both witnesses little weight. Compare Tr. 1009:11-17 (hearsay testimony from BLM investigator, Randolph August, of telephone conversation with one of the individual locators, Kathleen Stephen, that the purpose of the 1999 claims was to "quote, blanket the area, unquote, so no others could file mining claims in the area that [C]actus was operating in.")

- All the individual locators were either related to Charles Ager or employed by Cactus Mining, a company owed and controlled by Charles Ager, and they all eventually conveyed their interests to Cactus Gold, another company Ager controlled. A-2 at 20 (Tbl. 9). This pattern is very similar to that condemned by the courts soon after Congress created association mining claims. See *Durant V. Corbin*, 94 F. 382 (E.D. Wash. 1899) (seven locators conveyed to the eighth locator who admitted arranging for and directing the location); *United States v. Brookshire Oil Co.*, 242 F. 718, 720-21 (S.D. Cal. 1917) ("[H]e cannot evade the law by use of the names of his friends, relatives, or employes [sic]. Any device whereby one person is to acquire more than 20 . . . acres in area, by one discovery, constitutes a fraud upon the government and is without legal support and void."); *United States v. Toole*, 224 F. Supp. 440, 456 (D. Mont. 1963) (eight individual locators conveyed their interest to a corporation six months later).

An inference can be drawn from the close relationships between the eight locators and Ager that they acted at his behest and for his benefit. The Contestees attempt to counter this inference with testimony that the individuals had Ager's permission to locate the claims for their own benefit. For example, Ager testified that he encouraged employees of Cactus Mining to explore for and stake claims for their own account. Since Cactus Mining was only engaged in exploration and not in owning claims, no conflict resulted. Tr. 837:4-842:11. Similarly, Dall testified that he obtained Ager's permission to stake the claims. Tr. 1374:5-1375:6, 1393:13-1394:7, 1431:5-1432:20. But, I give little credence to these assertions.

N-76738-01 through 06

The 1999 claims were adjacent to and in the same Eldorado Valley as the 1993 claims now owned by Cactus Gold and Valley Gold. Valley Gold was a wholly owned subsidiary of Cactus Gold (Tr. 535:3-18) and the vast majority of Cactus Gold shares were owned by Cactus Mining. Tr. 964:5-965:22. Therefore, any new claims in the area would directly compete with the existing claims owned by Ager's companies. It did not make economic sense for him to encourage his employees to explore for and locate claims adjacent to his own. These would likely compete with his own interests in the future. And Dall's description of his conversation when Ager gave him permission to stake the claims lacks the detail and documentation one would expect if Ager had truly waived a conflict of interest. I also find significant that Ager did not mention the express permission described by Dall and Dall did not describe Ager's encouragement of independent exploration. For these reasons, I give little credibility to the testimony that Ager's employees acted independently of his interests when they located the claims.

Further, truly independent locations by Ager's relatives would violate the loyalty customarily expected among family members. Since Ager effectively owned and controlled Cactus Gold and Valley Gold, the claims by his family members would directly compete with those of their father, spouse, and son-in-law. These claims would also compete with the family's joint interests since Ager has testified that his family operated as a group in the mining business. Tr. 775:4-11.

In summary, I find that the employee and family relationships with Ager made it more likely that the locators acted for his interest. The evidence about independent exploration and Ager's permission was not strong enough to conclude that the locators acted independently and for their own self-interest.

- A check from Cactus Mining, a corporation controlled by Ager, paid the location filing fees to the BLM. A-2, App. 21 at 33-34. An inference can be readily drawn from this fact that the claims were not made in good faith and independently but, rather, were located for the Ager's benefit.

Dall testified that one of the locators, Caroline Ager, the daughter of Charles Ager, provided the money for paying the location fees and other expenses. He testified that she had wired the necessary funds for the filing fees into the account of Cactus Mining shortly before he wrote the check to pay the filing fees. He explained that he did not use a personal check to pay the fees because he had no local checking

N-76738-01 through 06

account. Tr. 1433:7-1434:14. The Contestees would like an inference to be drawn that the locators used the Cactus Mining account merely for convenience.

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).

- No record exists that the individual locators actually received the \$5,000 payment described in the 2000 Royalty Agreement for transferring their interest to Cactus Gold. B-15. Ager and Dall imply that the locators used this payment for location expenses such as filing fees and supplies. But their testimony is vague, speculative, and short on specifics. Tr. 951:17-958:1 (Ager); 1401:24-1403:9 (Dall). Further, the record lacks any documents, such as checks or receipts, to show that Cactus Gold actually paid the money. Nor does the record contain 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. *See also* Tr. 1016:20-1018:8 (hearsay testimony from BLM investigator, Randolph August, of a telephone conversation with one of the individual locators, Kathleen Stephen, that no payments were received for the claims). Again one would expect such a record if the individual locators had acted independently, in good faith, and for their own self-interest. Rather, the inference can be drawn that the transaction was a sham, intended to support the illusion of independent and self-interested actions by the individual locators.

N-76738-01 through 06

I recognize that the transfer from the individual locators to Cactus Gold occurred some time after the initial location and that cases have cautioned that the relevant time to determine the validity of a claim is the time of location and not later. See *Rooney v. Barnette*, 200 F. 700, 708-09 (9th Cir. 1912). But courts have recognized that evidence of actions after location may be used if it tends to show the validity, or invalidity, at the time of location. See *United States v. California Midway Oil Co.*, 259 F. 343, 354 (S. D. Cal. 1919). See also *Mitchell v. Cline*, 24 P. 164 (Cal. 1890) (locators conveyed their interest without consideration after location); *Durant v. Corbin*, 94 F. 382 (E.D. Wash. 1899) (seven of eight locators conveyed their rights after location); *United States v. McCutchen*, 217 F. 650 (S. D. Cal. 1914) (claim located by eight family members who later conveyed their interest to a single member); *Chanslor-Canfield Midway Oil Co. v. United States*, 266 F. 145 (9th Cir. 1920) (seven of eight locators conveyed their rights to a single person); *United States v. Toole*, 224 F. Supp. 440 (D. Mont. 1963) (eight locators conveyed to a single corporation six months after location). It is for this purpose that I have considered the evidence that the locators were not paid by Cactus Gold for their conveyances. It tends to confirm that the named locators did not act for their own interest but, rather, acted for the interests of Charles Ager.

In weighing the evidence of whether the eight named individuals validly located the claims, I find it more likely that the claims were located by so-called "dummy locators." The chief evidence supporting a valid location is the location certificates showing eight individuals as locators. But very little else supports a finding that their actions were self-interested or independent.

A corporation controlled by Charles Ager (Cactus Mining), who later controlled the corporation into which the locators conveyed their interests (Cactus Gold), paid the initial filing fees. No promissory notes or internal accounting support any financial contributions by the individual locators.

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.

N-76738-01 through 06

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.

IV. Conclusion

The Contestees in these consolidated contests have not satisfied their burden to prove by a preponderance of the evidence that they acted in good faith, independently, and for their own self-interest when they located the 261 challenged association placer claims. Rather, the preponderance of evidence shows 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. Further, the 1999 claims were more likely located for the sole benefit of one individual, Charles Ager, and not for the eight named individuals. The individual locators were all relatives or employees of Ager, or companies he controlled. In both instances other persons used the named companies and individuals to locate more land than the law allowed. Therefore, all 261 of the challenged claims must be declared null and void ab initio in total.

Appeal Information

Any party adversely affected by this decision has the right to appeal to the Interior Board of Land Appeals. The appeal must comply strictly with the regulations in 43 C.F.R. Part 4 (see enclosed information pertaining to appeals procedures).



Robert G. Holt
Administrative Law Judge

See page 50 for distribution.

N-76738-01 through 06

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