

Editor's note: 79 I.D. 709 (not in I.D. format in IBLA volume); Appealed -- dismissed, Civ. No. S-2755 (E.D. Calif. June 12, 1974), aff'd, No. 74-2762 (9th Cir. March 28, 1977), 549 F.2d 622, cert. denied, S. Ct. No. 78-1856 (Oct. 2, 1977) 434 U.S. 836, 98 S.Ct. 125

UNITED STATES
v.
HUMBOLDT PLACER MINING COMPANY
and
DEL DE ROSIER

IBLA 70-205

Decided December 20, 1972

Appeal from decision (California Contest 10-747) of the Office of Appeals and Hearings, Bureau of Land Management, holding mining claims null and void.

Affirmed.

Mining Claims: Discovery: Marketability -- Mining Claims: Common Varieties of Minerals: Generally -- Mining Claims: Placer Claims

To satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim, by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, could have been extracted, removed, and marketed at a profit as of that date.

Mining Claims: Discovery: Marketability

The Government may raise a presumption that the material on mining claims could not be extracted and marketed at a profit by introducing evidence that the claimant has done nothing to develop the claim.

Mining Claims: Contests -- Mining Claims: Discovery: Generally

Government mineral examiners have no affirmative duty to search for indications of a discovery on a mining claim; nor do they have a duty to go beyond examining the discovery points of a claimant. Their function is to examine the discovery points made available by a claimant and to verify, if possible, the claimed discovery.

Rules of Practice: Appeals: Burden of Proof -- Contests and Protests: Generally

Where the Government has made a prima facie showing of a lack of discovery, the burden of producing preponderating evidence of the existence of a valuable mineral deposit sufficient to support a discovery is upon claimant.

Rules of Practice: Evidence

The weight and credibility of evidence are matters properly considered by an Administrative Law Judge in the first instance. His findings, when in accord with the preponderance of the substantial and probative evidence adduced, will not be disturbed.

APPEARANCES: William B. Murray, Esq., Portland, Oregon, for the appellants; Charles F. Lawrence, Esq., Office of the General Counsel, Department of Agriculture, San Francisco, California; Burton J. Stanley, Esq., Office of the Solicitor, Department of the Interior, Sacramento, California.

OPINION BY MR. FISHMAN

The Humboldt Placer Mining Company and Del De Rosier have appealed from a decision dated June 9, 1970, rendered by the Office of Appeals and Hearings, Bureau of Land Management, hereinafter termed the "Bureau decision." That decision affirmed a decision of a Hearing Examiner 1/ dated March 6, 1969, which declared the placer mining claims in issue null and void for lack of a discovery of a valuable mineral deposit on any of the claims.

The Humboldt Placer Mining Company is a corporation which was organized in 1896. All of its mining claims in issue were located prior to 1920. On November 19, 1954, Humboldt filed a patent application for the claims in issue. On June 27, 1957, the United States commenced an action in the District Court to condemn certain property which included the land embraced within the claims in order to construct the Trinity River Dam and Reservoir. After obtaining

1/ The United States Civil Service Commission has changed the title "Hearing Examiner" to "Administrative Law Judge." 37 F.R. 16787 (August 17, 1972). Hereinafter that official will be referred to as the "Judge."

a writ of possession in the District Court, the United States, on May 15, 1958, instituted a contest proceeding in the local Land Office of the Bureau seeking an administrative determination of the validity of the unpatented mining claims. Humboldt thereupon brought suit to enjoin the administrative proceedings, contending that the proper jurisdiction to determine the validity of the claims was in the courts. The issue of jurisdiction was ultimately decided by the United States Supreme Court in Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963), in which it was held that the issue of the validity of the claims was to be resolved by the Department of Interior. In the interim, contestees prosecuted an appeal to the Secretary of the Interior from a decision rejecting their answer to an amended complaint, and denying their motion to dismiss the complaint. The Secretary reinstated the contest proceedings by decision, United States v. Humboldt Placer Mining Company and Del De Rosier, A-30055 (Supp.) (December 16, 1964).

The contestant, the United States, filed a second amended complaint on July 20, 1966, alleging in part as follows:

- a. There is not disclosed within the boundaries of the mining claims mineral materials of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery.
- b. The land embraced within the claim or claims is nonmineral in character.
- c. With respect to the public lands in each and all of the mining claims identified in Paragraph III of this Second Amended Complaint, contestant charges separately and collectively that each 10-acre legal subdivision or part thereof is nonmineral in character and therefore should be excluded from the respective alleged mining claims.
- d. The Cademartori placer claim, as described in the location notice, embraces contiguous tracts of land, and is therefore contrary to law.

Contestees answered the second amended complaint generally denying the allegations contained therein. A hearing was held on November 28, 29, 30, and December 1, 1967, and on January 8 and 9, 1968. All parties were represented by counsel at the hearing.

The contested claims are located on the south side of Stuart Fork of the Trinity River, in Trinity County, California, upstream from the recently constructed Trinity Dam. The most significant geological characteristic in the area is the Weaverville Formation with a reported depth where greatest of over 800 feet. It is an old tertiary river channel which has been bisected by streams and has been preserved by the relative uplifting of the older hard and resistant sediments around it. The tertiary gravels are unconsolidated, deeply weathered, red-colored clay gravels resulting from volcanic activity and reworking, and which are estimated to be approximately 35 million years old. The claims also expose some recent and present stream gravel, and some ultramafic and granitic intrusive rocks. The bedrock series in the area are the Bragdon Formation (Mississippian), Copley Greenstone (Devonian), and Salmon Schist.

The principal issue on this appeal is whether the evidence presented at the hearing established a discovery of a valuable mineral deposit on any of the claims within the meaning of 30 U.S.C. § 22 (1970). Appellants assert that the evidence supports such a discovery with respect to both gold and gravel on each claim.

A discovery exists "where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine * * *." Castle v. Womble, 19 L.D. 455, 457 (1894); see United States v. Coleman, 390 U.S. 599 (1968).

In applying this rule to the present case, we are of the opinion that the preponderance of the credible evidence fails to support a discovery on any of the claims. Six qualified geologists and engineers testified for appellee. None was called by appellants, and only one geologist testified on behalf of Archibald, a party permitted to intervene in the hearing. 2/ The assay methods used for the geologist called by Archibald were not explained.

GRAVEL

Common varieties of sand and gravel were withdrawn from location under the mining laws on July 23, 1955. See 30 U.S.C. § 611 (1970). Consequently, to satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim, by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, could have been extracted, removed, and marketed at a profit as of

2/ J. O. Archibald was allowed to intervene at the hearing and assert an interest in some of the claims under a lease agreement. However, he did not appeal and is no longer a party to the proceedings.

proximity to market, existence of present demand, and other factors, could have been extracted, removed, and marketed at a profit as of that date. United States v. Coleman, *supra*; Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971); United States v. Isbell Construction Co., 4 IBLA 205, 78 I.D. 385 (1971).

While the record discloses that gravel was an abundant commodity on the claims (Tr. 250, 344, 957), there is no evidence of any sales of gravel from the deposits. George W. Nielsen, a mining engineer employed by the Bureau of Land Management and called by appellee, testified that at no time has the Weaverville Formation been mined and processed for the production of sand and gravel (Tr. 960). He further testified that the Weaverville Formation, because of weathering, is generally too dirty and too soft to make concrete aggregate, although it could be used for sub-base and fill material (Tr. 961). Robert Middleton, a mining engineer called by appellee, testified that he examined the claims (Tr. 292), and further testified that no aggregate has been produced from the claims, and that there was no evidence on the ground of any removal (Tr. 354).

This evidence was sufficient to establish a prima facie case that the gravel on the claims could not have been marketed at a profit prior to July 23, 1955. As stated in United States v. E. A. Barrows and Ester Barrows, 76 I.D. 299, 306 (1969):

* * * [W]hile the fact that no sale had been made at the critical time is not controlling in itself, the fact that nothing is done toward the development of a claim after its location may raise a presumption that the market value of the minerals found therein was not sufficient to justify the expenditure required to extract and market them. (Citing cases)

Where, as in the present case, the Government has made a prima facie showing of a lack of a discovery, the burden of producing preponderating evidence of the existence of a valuable mineral deposit sufficient to support a discovery is upon claimants. Foster v. Seaton, *supra*; United States v. Wayne Winters d/b/a Piedras Del Sol Mining Company, 2 IBLA 329, 78 I.D. 193 (1971).

In an attempt to meet this burden, appellants called James R. Miller, a marketing consultant, to testify. He expressed an opinion that gravel could have been mined from the claims and removed and disposed of at a profit prior to July 23, 1955 (Tr. 721). However, there is no evidence in the record that Miller was in the Trinity County Area in or prior to 1955; nor was his testimony based upon personal knowledge. Cf. Verrue v. United States, 457 F.2d 1202 (9th Cir. 1972). He admitted that he did not examine the sand and

gravel on the claims (Tr. 693, 734) and it is apparent from the record that his opinion was based upon conversations with other persons who were not called to testify (Tr. 694, 735) and literature which he studied on the market potential of sand and gravel generally in the State of California and the United States. Moreover, Miller qualified his opinion by conditioning it on the ability to commercially produce gold (Tr. 719, 721), and stated that he was "not prepared to say whether the amount of gold that's been evidenced would be a commercial operation" (Tr. 721).

In expressing his opinion, Miller failed to articulate whether he was referring to gravels of the type which can only be used for fill and similar uses, or whether he was referring to gravels of the type which could be used to make concrete aggregate. The distinction is crucial. In determining the marketability of materials on a mining claim, sand and gravel which can only be used for fill purposes or for other comparable purposes cannot be considered since such materials have never been locatable under the mining laws. See United States v. E. A. Barrows and Esther Barrows, *supra*, and cases cited therein.

Appellants, in our view, failed to overcome the prima facie case established by the Government. Their evidence was too vague and inconclusive to establish that locatable gravels from the claims in issue could have been extracted and marketed at a profit prior to July 23, 1955. Moreover, appellants have failed to establish by substantial and probative evidence the existence of a demand for the gravel as of that date from these claims. United States v. William A. McCall, Sr., et al., 2 IBLA 64, 78 I.D. 71 (1971).

GOLD

Mining engineers and geologists conducted, on behalf of the contestant, a comprehensive mineral examination on the claims from 1957 to 1961. Samples were taken in accordance with accepted standard procedures by excavating churn drill holes, auger holes, surface channels, pits, and trenches. The samples were taken at points selected by contestant's engineers and at points which contestees had indicated in their patent application the existence of significant mineral values. The samples were assayed in accordance with accepted standard procedures. The record discloses the following data with respect to each claim:

Ukiah Placer Mining Claim

Three of seven channel and trench samples taken from this claim contained no gold values. (Contestant's Exhibit Q). The remaining

four samples contained gold values ranging from .076 to 5.65 cents per cubic yard. An auger hole drilled to a depth of 25 feet revealed gold values of .142 cents per cubic yard.

Covelo Placer Mining Claim

Three of nine channel and trench samples taken from this claim revealed no gold values (Contestant's Exhibit P). The remaining six samples contained gold values ranging from .192 to 1.40 cents per cubic yard. An auger hole 25 feet in depth revealed gold values of .045 cents per cubic yard.

Humboldt Placer Mining Claim

Three channel samples were taken from this claim. Two of the samples contained no gold (Contestant's Exhibit O). The third channel sample contained gold values of .549 cents per cubic yard. An auger hole drilled to a depth of 46 feet revealed gold values of .071 cents per cubic yard. The auger hole was put down on a depositional contact of the Weaverville Formation on the Bragdon.

White Placer Mining Claim

Three channel samples taken from present stream gravels on this claim contained gold values ranging from .197 to .688 cents per cubic yard (Contestant's Exhibit R). Two auger holes, drilled to depths of 17 and 57 feet, revealed respective gold values of .049 and .095 cents per cubic yard.

Tannery Placer Mining Claim

The contestant took four samples from this claim. (Contestant's Exhibit J). A channel sample taken from the exposed Weaverville Formation contained .576 cents gold per cubic yard. An auger hole, 21.8 feet deep, revealed no gold values. Two churn drill holes, each 45 feet deep, revealed gold values of 1.13 cents and .157 cents per cubic yard.

Furnell Placer Mining Claim

Five of the sixteen samples taken from this claim contained no gold. Six samples ranged from .3 to 1.1 cents per cubic yard. A sample from a channel cut on a slope along a road had a value of 8.3 cents per cubic yard. Four sample shafts were put down in recent gravels along Slate Creek which runs northeasterly through the claim. A sample from a shaft 2.8 feet to bedrock in sec. 3 showed a cubic

yard value of 17.4 cents. In sec. 2, a shaft showed the following values per cubic yard: the top 3.2 feet, 1.4 cents; the next 4.7 feet, 42.8 cents; and the last foot in cemented Weaverville bedrock, 2.1 cents. In a third shaft the values per cubic yard were: the first 6 feet, 0.5 cents; the next 1.2 feet, 49 cents; and the last foot in cemented bedrock, 2.1 cents. The sample from the fourth test shaft went down 3.4 feet through to cemented bedrock and had a value of 67 cents per cubic yard. (Contestant's Exhibits D-D, E-E).

Last Chance Placer Mining Claim

The contestant took 21 samples from this claim (Contestant's Exhibit L), eight surface samples, twelve from churn drill holes ranging from 36 to 100 feet in depth, and one from an auger hole 42 feet in depth. The surface samples contained gold values ranging from .224 to 3.30 cents per cubic yard. The churn drill holes and auger hole revealed gold values ranging from .034 to 1.22 cents per cubic yard. Drill hole number 6, located between Humboldt holes number 13 and 14, drill hole number 7 located on the other side of Humboldt hole number 13, and drill hole number 8 located on the other side of Humboldt hole number 14, revealed gold values ranging from 0 to .156 cents per cubic yard. In each instance, holes were put down within five feet of the Humboldt hole.

Lewis Placer Mining Claim

Twelve channel samples taken from this claim contained gold values ranging from .02 to 14.48 cents per cubic yard (Contestant's Exhibit N). The sample showing the highest value and the second sample containing 6.21 cents gold per cubic yard were taken from limited occurrences of present stream gravels. A sample of the present Stuart Fork gravels contained gold values of 1.21 cents per cubic yard.

Enough Placer Mining Claim

Eighteen surface samples taken from this claim contained gold values ranging from .052 to 90.58 cents per cubic yard (Contestant's Exhibit M). The gold value shown in nine of those samples was 1.64 cents, or less, per cubic yard. Sample number 8-1 is composed of nine samples taken from recent gravel, gully bottom. The nine samples contained gold values ranging from 6.71 cents to 90.58 cents per cubic yard, with an average value of 33.93 cents per cubic yard. According to the exhibit, "It would be a physical impossibility to have more than 1,200 cubic yards at this value in this gully. The gully is mined out from this point downstream." An auger hole 47 feet deep revealed gold values of .362 cents per cubic yard.

Faurrell Placer Mining Claim

The Faurrell claim embraces two incontiguous tracts. Two channel samples taken from the east tract contained gold values of 1.04 cents and 1.56 cents per cubic yard. There was no evidence of prospecting on the west tract. Three channel samples cut from exposures on the west tract contained no significant gold values. (Contestant's Exhibit U). The concentrates of a number of samples were submitted for fire assay (Contestant's Exhibit G). The sample showing the greatest value, \$ 683.20 per ton of concentrate, had a 15,900 to 1 ratio of concentration. The value of the black sand concentrate reflected the similar inconsequential values when related back to the value of the black sand per cubic yard of gravel and clay.

Tannery No. 2 Placer Mining Claim

Twenty-five channel and trench samples, taken from present and recent stream gravels, contained gold values ranging from .132 cents to 22.82 cents per cubic yard (Contestant's Exhibit F). A churn drill hole, 35 feet in depth, revealed gold values of 4.26 cents per cubic yard. Two auger holes, 24 and 25 feet in depth, revealed respective gold values of .076 and .308 cents per cubic yard.

Jackson Placer Mining Claim

Eight samples taken from this claim showed gold values ranging from 0.5 to 34.8 cents per cubic yard. The next highest value was 8.5 cents per cubic yard. The highest value came from a test shaft put down by the mineral examiner in recent gravels of Slate Creek. (Contestant's Exhibit D-D, E-E).

Cademartori Placer Mining Claim

The claim embraced two incontiguous tracts. One of the tracts was abandoned by contestees at the hearing. In the retained portion of the claim three samples have been taken. A channel cut in an eight-foot bank of weathered Weaverville Formation contained gold values of .8 cents per cubic yard. A pit sample from a gully in Irish Gulch revealed gold values of 1.2 cents per cubic yard. A channel sample along an old ditch showed nil. (Contestant's Exhibits D-D and E-E, Tr. 460-461 and 470-471).

The average gold values on the undisturbed Weaverville Formation which was exposed on the claims was .276 cents per cubic yard. The material exposed in the slopes and washes had an average gold value of 1.863 cents per cubic yard. The gully samples averaged 2.56 cents per cubic yard, and the recent stream gravels averaged 8.72 cents per cubic yard.

The mining engineers and geologists called by contestant testified to the effect that as a result of their examinations of the claims, they were of the opinion that none could be developed as valuable mines (Evans, Tr. 177; Middleton, Tr. 310; Scarfe, Tr. 478-480; Erich, Tr. 595, 640).

In light of this evidence, we conclude that the contestant established a prima facie case that no discovery existed on any of the claims. After a careful consideration of the record, we are of the opinion that the contestees have failed to meet their risk of non-persuasion in establishing by a preponderance of evidence that the claims are valid. Cf. Foster v. Seaton, supra; United States v. Neil Stewart, 5 IBLA 39, 79 I.D. 27 (1972).

Appellants have raised eighteen contentions of error in their brief on appeal. The principal claims of error raised by appellants have been considered above. The remaining claims of error, which largely relate to alleged procedural irregularities or criticisms of the Government's case in chief, will be considered in their order of appearance in appellants' brief.

I.

Appellants first argue that the second amended complaint is defective because it fails to allege the critical date when a discovery must be made and it fails to allege a lack of market for gravel. It should be noted that appellants made no objection with respect to this issue prior to or at the hearing.

The law is well settled that discovery must be shown to have been made at the latest as of the time a claim is challenged. United States v. Margherita Logomarcini, 60 I.D. 371 (1949). Contestees were well aware of the law in this regard. See Best v. Humboldt Placer Mining Company, supra. It is also well settled that in order to satisfy the requirements for discovery of a mining claim located for common varieties of sand and gravel it must be shown that prior to July 23, 1955, the materials could have been extracted, removed and marketed at a profit. Where a mining claimant fails to prove by a preponderance of the evidence that the materials from his claim could have been extracted, removed, and marketed at a profit prior to that date, the claim is properly declared null and void for the lack of a timely discovery of a valuable mineral deposit. United States v. Neil Stewart, supra. Inherent in the language of the second amended complaint is the charge that there had been no discovery of valuable minerals subject to location. The presentation of their case was in no way prejudiced by the failure of the second amended complaint to allege the critical date.

Contestees' position that the complaint should be dismissed for failing to allege a lack of market for gravel is untenable. In support of their position they rely upon an instruction in the Bureau of Land Management Manual. 3/ It provides in relevant part as follows:

1. Marketability of common place minerals.

.23. For claims located before July 23, 1955, for common place minerals where no actual market exists, the proper charges are:

(2) no discovery of a valuable mineral has been made within the limits of the claim because the mineral materials present cannot be marketed at a profit and it has not been shown that there exists an actual market for those materials.

Manual instructions which are issued for administrative purposes only, are neither published nor binding upon the public, and ordinarily, no one other than Bureau employees is expected to use the Manual. Barbara Rubenstein, A-28508 (December 28, 1960). Moreover, a charge of lack of discovery encompasses within its ambit a lack of a market for the mineral.

The record discloses that the patent applications did not specifically state that location was for gravel, and while it is not essential to identify each specific mineral claimed to be valuable in a patent application, the failure to mention gravel or any other commonplace materials in the patent application would account for the absence of an allegation regarding the lack of discovery by July 23, 1955, and the corollary market for gravel in the instant case. In any event, it is apparent from the record that both parties directed their proof to the issue of marketability in connection with gravel. The first witness called by contestees was called as an expert to express an opinion on the marketability of gravel. Contestant also called an expert witness to rebut the evidence regarding the marketability of gravel put on by the contestees.

3/ Bureau of Land Management Manual, Vol. VI, Part 5, Chapter 5.2. (August 1, 1958).

Contestees, we conclude, were reasonably apprised of the issues in controversy and there is no showing that they were misled in any respect. Under such circumstances the notice provided by the complaint is adequate. See United States v. Independent Quick Silver Co., 72 I.D.367 (1965), and authorities cited therein.

II.

Contestees next argue that the complaint should be dismissed because contestant failed to comply with an order for the production of documents. While contestees did not raise this argument in their appeal to the Bureau, they did claim at the hearing that contestant had not fully complied with the order.

The same Judge who issued the order for production of documents ruled that contestant substantially complied with the order, and we perceive no error in this ruling. The record discloses that counsel for contestees was given ample opportunity to inspect documents which he claimed were not produced (Tr. 22). It is also apparent from the record that some of the information contained in documents which contestees claim were not produced was turned over to counsel for contestees in what is referred to as the "Frenzell Report" (Tr. 19). Other documents not produced did not relate to the mineral examination made by the contestant (Tr. 19-20). Upon a review of the record we are of the opinion that those documents which were not produced prior to the hearing were not necessary to the preparation of contestees' case, and under such circumstances, failure to produce does not constitute error. See Mrs. R. W. Hooper, 3 IBLA 330 (1971).

III.

Contestees next argue that the Director's decision cannot stand because the record fails to show that the Director ruled on each assignment of error and failed to adopt each requested finding presented. In support of their petition, contestees rely on the Administrative Procedure Act, § 8; 5 U.S.C. § 557 (1970). Section 557(c) provides an opportunity for parties to submit proposed findings and conclusions for consideration before an initial decision is made. The record clearly shows that this provision of the Act was complied with in every respect. The Judge ruled on each requested finding. He adopted 38 of those findings and rejected the remainder, stating his reasons therefor in each instance. It is implicit in the decision of the Bureau that it agreed with the Judge with respect to his findings and conclusions, at least insofar as they were material and relevant to deciding the ultimate issues in the case.

The assignments of error made by contestees on appeal from the decision of the Judge related, almost entirely, to asserted errors committed by the Judge in making the findings and conclusions in the case, or failing to make certain findings or conclusions requested by contestees.

While the Bureau decision did not consider each assignment of error separately, it gave adequate consideration to the exceptions presented. The Act does not require detailed or numbered findings on every subsidiary evidentiary fact. See NLRB v. Sharples Chemicals, Inc., 209 F.2d 645 (6th Cir. 1954). Furthermore, a separate finding need not be made on exception to a Judge's report. See 2 K. Davis, ADMINISTRATIVE LAW TREATISE § 16.02 at 438 (1958); cf. United States v. Chas. Pfizer & Co., Inc., 76 I.D. 331, 352 (1969).

IV.

Contestees next argue that the ultimate finding of nondiscovery with respect to the mining claims is erroneous because it is not supported by evidentiary facts. Contestees cite several cases in support of the proposition that evidentiary facts are necessary to prove ultimate facts (a proposition with which no one takes issue) but refer to no evidentiary facts in the record to support an ultimate conclusion of discovery. We are of the opinion that the ultimate fact of nondiscovery is amply supported by the evidence, with respect to each claim.

V.

Contestees next argue that it is error to require more than one discovery to be made in order to support an association placer claim. They cite several cases in support of the proposition that only one discovery is required to support the validity of an association placer claim, again a proposition with which no one takes issue. In answer to the alleged error, we only point out that no requirement beyond the showing of "a discovery" with respect to each of the association claims was imposed on the contestees.

VI.

Contestees next argue that the Government's gold placer samples were invalid because the samples were not taken to the bedrock. We disagree.

Government mineral examiners have no affirmative duty to search for indications of a discovery on a mining claim; nor do they have a duty to go beyond examining the discovery points of a claimant. Their

function is to examine the discovery points made available by a claimant and to verify, if possible, the claimed discovery. United States v. Jimmie (Juanita) P. Laing, 3 IBLA 108 (1971). See United States v. Lawrence W. Stevens, et al., 76 I.D. 56 (1969); United States v. Coaton, A-30835 (February 23, 1968); United States v. Bryan Gold, A-30990 (May 7, 1969); United States v. George C. Johnson, et al., A-30606 (October 25, 1966).

In the instant case the samples taken by the Government were as deep or deeper than those of the contestees' (Tr. 221-223), and several samples taken by the Government did in fact reach bedrock. See Contestant's Exhibits F, I, M, N, O, T, Q, R, and E-E. In any event, while a person might predict that greater values of gold would be found at bedrock, such a prediction does not establish a "discovery" in the absence of a showing of the physical existence of such mineralization. See Henault Mining Company v. Tysk, 419 F.2d 766 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970); United States v. Wayne Winters dba Piedras Del Sol Mining Co., supra.

VII.

Contestees next argue that certain gold assays of the Government's samples were not made in accordance with standard procedures and were, therefore, invalid. In support of this argument the contestees point out that several samples were panned and run through a rocker or sluice box by James Bassham, a man with no scientific background, rather than by the Government mining engineers.

Counsel for contestees had no objection to the admission of assay reports introduced by the Government, (Exhibit G, Tr. 160). Government mining engineers in several instances personally performed the procedures in question (Tr. 250, 470). While Bassham may not have had formal scientific training, the record reflects that he was a professional panner (Tr. 251) and there is no evidence to indicate he lacked the requisite experience and knowledge necessary to perform the work in question, or that he was incompetent in any respect.

Contestees also claim that the assaying methods used by the Government did not recover all of the gold from the sample. However, the record shows that the recovery of gold in the sampling methods used by the Government were at least as accurate as any possible placer mining method (Tr. 507, 515). We conclude, therefore, that the gold assays of the Government samples were valid.

VIII.

Contestees next claim that several of the Government samples on Tannery No. 2 were invalid. They assert that the evaluation of certain of these samples was erroneous because the samples did not reach bedrock.

Those samples which did not reach bedrock were valid for reasons previously stated.

Contestees also assert that the evaluation of the samples was erroneous because overburden was included in the material sampled. However, as noted in the Bureau decision:

It is standard procedure in the testing of a placer mining claim to take channel samples from top to bottom of a cut, trench or pit, and in taking samples by churn or auger drilling to include the overburden in arriving at the mineral values for the cost of removal including the removal of the overburden is a factor in determining whether a prudent man would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. United States v. Robert W. Carnes, A-28178 (May 23, 1960).

IX.

Contestees next argue that it was error to judge a gold discovery by computing gold values averaged down by lithologic units.

The only evidence in the record which makes any reference to lithologic units appears in the testimony of Robert K. Evans, a geological engineer called by the Government. On direct examination he was asked whether he had reached any conclusions concerning the mineral valuation of the claims as a result of his examination. He stated (Tr. 177):

A. Yes. Considering them either as a claim or as a separate lithologic unit, thinking in terms of mining Weaverville or mining Slate Creek, in none of those -- it wouldn't warrant a man spending his time and money in the hope of developing a mine on any of them; and Tannery Gulch.

Q. Either as a claim?

A. Either as a claim or as a rock type unit.

The conclusion of the witness was the same whether mineral valuation was considered on the basis of lithologic units or on the basis of the mineral valuation of each separate claim. In light of this testimony we conclude that there is no merit to contestees' argument.

X.

Contestees next argue that the Judge erred in giving less evidentiary weight to the Yost report (Contestees' Exhibit 8) than he gave to the reports submitted by contestants.

The Judge in his decision stated:

The evidence of high gold values shown in the Yost report has been refuted by the Contestants' evidence relating to the results of sampling conducted in the immediate vicinity of the excavations and drill holes put down by Yost. Since Yost was not called as a witness to support the findings related in his report, the report is accorded much less evidentiary weight than the reports and opinions of the Contestant's witnesses which were made subject to cross-examination.

The record shows that the Government made no objection to the admission of the Yost report into evidence (Tr. 240). Contestees maintain that the effect of the admission of the report into evidence without objection constituted a waiver of cross-examination by the Government, and that the Judge, therefore, erred in giving less weight to the Yost report on the basis that it was not subject to cross-examination.

We perceive no error on the part of the Judge with respect to the consideration he gave the Yost report. It is a proper function of the Judge to assess and weigh evidence in considering all of the evidence presented at a hearing. United States v. Evelyn M. Kiggins et al., A-30827 (July 12, 1968); United States v. Taylor T. Hicks, A-30780 (October 24, 1967). The fact that the report was not subject to cross-examination is certainly a legitimate factor for consideration. We disagree with contestees' reasoning that the Government waived cross-examination simply because it did not object to the admission of the report into evidence without requiring contestees to lay a

foundation. Nowhere in the record does it appear that the Government stipulated as to the truth of the contents of the Yost report, and the Judge did not err, under the circumstances in this case, in giving the Yost report less evidentiary weight than he did to similar reports submitted by the Government which were subject to cross-examination.

XI.

Contestees next argue that the Judge did not give sufficient weight to the reports of W. S. Lowden (Contestees' Exhibit 11), John D. Hubbard (Contestees' Exhibit 10), William D. Ball (Contestees' Exhibit 9), and R. G. Percy (Contestees' Exhibit 7). We disagree.

These reports contained some data favorable to contestees, but for the most part the reports failed to relate specific information to any of the claims in question. The examinations of the property which were reported in these documents were conducted intermittently from 1901 to 1942. None of the reports purported to discuss mineral values on specific claims as of the time contestees filed their application for patent, and no evidence was presented to show whether the conditions on the property had remained unchanged from the time that the reports were prepared. See Adams v. United States, 318 F.2d 861 (9th Cir. 1963); United States v. Anton M. Ozanich, 7 IBLA 144 (1972); United States v. Calla Mortensen, 7 IBLA 123 (1972).

XII.

Contestees next argue that the Judge erred in finding gold values reported by the contestee J. O. Archibald unworthy of belief. In the alternative, contestees assert that these gold values cannot be used to discredit Humboldt, which neither offered nor vouched for this evidence.

We are of the opinion that the Judge properly rejected these gold values. They were based on samples taken over a five-hour period, assayed by the "Douglas" process involving the use of two unidentified solutions, and averaged \$ 100 per cubic yard, and as high as \$ 200 gold per cubic yard in place. No evidence was submitted regarding the nature of the unidentified and "secret" solutions (Tr. 924-927, 945), or the process by which the reported gold could be recovered.

There is nothing in the record to compel the conclusion that the Archibald data in any way controlled the Judge's findings vis-a-vis Humboldt. The weight and credibility of evidence, in any event, are

matters properly considered by the Judge in the first instance. Cf. State Director For Utah v. Edgar Dunham, 3 IBLA 155, 78 I.D. 272 (1971). His findings, when in accord with the preponderance of the substantial and probative evidence adduced, will not be disturbed. Id.

XIII 4/

XVII - XVIII

Contestees finally argue that the administrative action taken by the Department of the Interior in declaring the mining claims invalid amounts to an unlawful exercise of plenary power, and a taking of property without compensation, all in violation of the Constitution and laws of the United States.

This argument has no merit. The United States Supreme Court in Best v. Humboldt Placer Mining Co., supra, had stated that "the Department has been granted plenary authority over the administration of public land, including mineral lands * * *." The Court also clearly recognized that the determination of the validity of the mining claims was an issue to be resolved in administrative proceedings before the Department. We are of the opinion that this issue has been decided in accordance with due process of law.

After due consideration we adopt as our own the Judge's rulings on each of the proposed findings of fact submitted by appellants.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman, Member

We concur:

Douglas E. Henriques, Member

Joseph W. Goss, Member.

4/ This relates to parts XVII and XVIII of appellants' brief. All other Roman numbers deal with identical designations in appellants' brief.

Paragraphs designated XIII, XIV, XV, and XVI of appellants' brief were considered under the heading of "Gold" and "Gravel."

