

Editor's note: 80 I.D. 323; Appealed -- aff'd, sub nom. Roberts v. Morton, Civ. No. C-5308 (D. Colo. Jan. 23, 1975), 398 F.Supp. 87; aff'd, No. 75-1155 (10th Cir. March 15, 1977) 549 F.2d 158, cert denied, S.Ct. No. 76-1812 (Oct. 3, 1977) 434 US 834

UNITED STATES

v.

MERLE I. ZWEIFEL ET AL.

IBLA 72-311

Decided May 29, 1973

Appeal from a decision by Administrative Law Judge 1/ L. K. Luoma in Colorado Contest 441 declaring appellants' 2/ association placer mining claims null and void.

Affirmed.

Mining Claims: Discovery: Marketability

The marketability test of discovery is applicable to all minerals, including intrinsically valuable minerals.

1/ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effected pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).
2/ Appellants are the contestees in Colorado Contest 441, as listed in Attachment No. 1 accompanying Judge Luoma's decision of February 25, 1972. See discussion under the heading Default of Certain Contestees, infra.

Mining Claims: Discovery: Marketability

The fact that alumina, the raw material from which aluminum is produced, is present in the area of a group of mining claims does not satisfy the marketability test of discovery when there is no known process by which aluminum may be extracted from the particular alumina-bearing mineral compounds on a profitable basis.

Mining Claims: Location -- Mining Claims: Placer Claims

Even though a placer mining claim is located by legal subdivisions on surveyed land, 43 CFR 3401.1 (1966) [now 43 CFR 3831.1] requires, in part, that the corners of the claim be staked and that a notice of location be posted thereon in order for such a location to be valid.

Administrative Procedure: Burden of Proof -- Mining Claims:
Contests -- Mining Claims: Discovery: Generally -- Rules of Practice:
Evidence

A mining claimant is the proponent of the validity of his claim under the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. (1970), and has the burden of overcoming by a preponderance of evidence the Government's prima facie case of failure to comply with the location requirements of

the mining law and of lack of discovery of a valuable mineral deposit.

Mining Claims: Contests

Despite the fact that the Government's witnesses were not present on each claim in contest, their testimony taken with the testimony of the principal contestee, called as part of the Government's case in chief, may be sufficient to establish a prima facie case that the mining claims are invalid.

Mining Claims: Discovery -- Mining Claims: Location -- Rules of Practice: Evidence

Where a mining claimant's testimony as to location and discovery is superficial and implausible, it is reasonable for the Administrative Law Judge to conclude from the evidence and the testimony of other witnesses that none of the claims was located according to the requirements of the mining laws and that no discovery was made thereon.

Mining Claims: Contests -- Rules of Practice: Government Contests

When a mining claimant has failed to answer a complaint in a mining contest, the allegations are deemed admitted under

43 CFR 4.450-7 and the Manager will decide the case without a hearing.

Mining Claims: Contests -- Rules of Practice: Government Contests

When, pursuant to 43 CFR 4.450-7, a Manager has decided a mining contest against a defaulting contestee and no timely appeal was taken therefrom, a late appeal will be dismissed under 43 CFR 4.411(b).

Mining Claims: Contests -- Rules of Practice: Government Contests

A defaulting contestee cannot rely on an answer filed by a co-claimant when such answer never purported to be on the defaulting contestee's behalf.

Mining Claims: Determination of Validity

The Department of the Interior has been granted plenary power in the administration of the public lands, and it has authority, after proper notice and upon adequate hearing, to determine the validity of an unpatented mining claim.

Administrative Procedure: Generally -- Constitutional Law --
Mining Claims: Contests -- Rules of Practice: Government Contests

A mining claimant is not denied due process merely because of prehearing publicity where he fails to show that there was any unfairness in the contest proceeding itself.

Administrative Procedure: Administrative Law Judges -- Rules of Practice: Hearings

An administrative Law Judge is not disqualified nor will his findings be set aside in a mining contest because of a mere charge of bias in the absence of a substantial showing of bias.

Administrative Practice -- Administrative Procedure: Adjudication

The procedures followed by the Department of the Interior in the initiation, prosecution, hearing and administrative decision of mining contests are in full compliance with the requirement of the Administrative Procedure Act, 5 U.S.C. § 554 (1970), as to separation of investigative or prosecuting functions from decision making, and such procedures do not deny due process.

Administrative Procedure: Administrative Law Judges

No request for a prehearing conference having been made, the failure of an Administrative Law Judge to order a prehearing conference, sua sponte, is not error unless it can be shown that such failure was an abuse of discretion.

Administrative Procedure: Administrative Law Judges

The refusal of an Administrative Law Judge to grant a motion for severance is not a denial of due process when a mining claimant is afforded a hearing and yet fails to present any evidence of unfairness because of such denial.

Federal Employees and Officers: Authority to Bind Government --
Mining Claims: Generally

The authority of the Government to proceed with the determination of the validity of a mining claim is not barred by laches, because Government property is not to be disposed of contrary to law, despite any acquiescence, laches, or failure to act on the part of its officers or agents.

Mining Claims: Contests

The failure of the Government to contest other unpatented mining claims in a given area cannot support a charge of discrimination when a mining claimant fails to show that such action was arbitrary or prejudiced his rights in any way.

Rules of Practice: Hearings -- Administrative Procedure: Hearings

Where an Administrative Law Judge's decision contains a ruling, in a single sentence, on all of the proposed findings and conclusions submitted by a party to a hearing and the ruling on each finding and conclusion is clear, there is no requirement that the Judge rule separately as to each of the proposed findings and conclusions.

Mining Claims: Hearings -- Rules of Practice: Evidence -- Rules of Practice: Hearings

Evidence tendered on appeal in a mining contest may not be considered except for the limited purpose of deciding whether a further hearing is warranted, since the record made at the hearing must be the sole basis for decision.

APPEARANCES: Clement Theodore Cooper, Esq., Washington, D. C.; Kenneth Kienzle, Jr., Esq., Shawnee, Oklahoma; Edward L. Stolarun, Esq., Alexandria, Virginia, for appellants. Bryan L. Kepford, Esq., and George E. Longstreth, Esq., Office of the Solicitor, Department of the Interior, Denver, Colorado, for the Government.

OPINION BY MR. GOSS

The United States issued a complaint dated August 7, 1968 (amended April 25, 1969, and June 12, 1969), contesting the validity of 2,910 association placer mining claims located in Garfield, Moffat and Rio Blanco Counties, Colorado. The majority of claims were located in an area of Garfield and Rio Blanco Counties termed the Piceance Creek Basin. The complaint charged (1) the claims were not located in accordance with the mining laws 3/ and (2) there was no discovery of a valuable, locatable mineral deposit within the meaning of the mining laws within the limits of any of the claims.

The 2,910 mining claims contested in Colorado Contest 441 were all located by one man, Merle I. Zweifel. Zweifel, acting as locator and agent for over 250 co-locators, filed the vast majority of

3/ At the hearing the elements of this charge were developed and the Government stated that appellants had failed to: (1) stake the claims, (2) go upon the land embraced by each claim, (3) post a location notice on each claim (Tr. 984-85). Attorneys for appellants acknowledged that they understood such to be the composition of the charge (Tr. 985-88).

claims between May 2, 1966, and February 10, 1967. Most of the claims are 160-acre association placer claims with eight co-locators.

A document was recorded with each claim group identifying the claims as "dawsonite claims;" however, at the hearing appellants asserted that the claims were actually located for alumina, the raw material from which aluminum is produced (Tr. 24, 771). Although the Piceance Creek Basin is widely known to contain extensive deposits of oil shale, none of the mining claims were located for such material. In any event, oil shale is not locatable under the general mining laws and has not been since it was made a leasable mineral by section 21 of the Mineral Leasing Act of February 25, 1920, as amended, 30 U.S.C. § 241 (1970).

Answers to the complaint were filed by a number of contestees. As to those contestees who failed to file answers, the Colorado Land Office Manager, Bureau of Land Management, on February 17, 1970, acting pursuant to 43 CFR 1852.1-7 (1970), now 43 CFR 4.450-7, declared their interests, if any, in the contested claims to be void.

A hearing was held June 2 through 5, and September 21 through 24, 1970, in Denver, Colorado. After post-hearing briefs were filed, oral argument was heard on June 4, 1971, in Arlington, Virginia.

Judge Luoma issued his decision on February 25, 1972. Attached thereto were a list of contestees, a list of the contested claims, the names of contestees represented by Clement Theodore Cooper, Esq., and a list of the claims which were located on patented or withdrawn lands (Attachments 1-4, respectively). The Judge declared that those claims or portions thereof which were filed on lands withdrawn for reclamation purposes by Public Land Order 2632, published in the Federal Register on March 17, 1962, were null and void ab initio. He also dismissed the complaint as to those claims or portions of claims which were filed on lands previously patented without mineral reservation (Exh. B-5). He declared all remaining claims null and void (1) because they were not located according to the mining laws and (2) for failure to show a discovery of a valuable mineral deposit on any of the claims.

Judge Luoma also determined it was not necessary to consider the question of whether aluminum, as part of the alumina in dawsonite, is locatable under the general mining laws or whether the mineral dawsonite in its entirety is only leasable under the Mineral Leasing Act of February 25, 1920, as amended, 30 U.S.C. § 261 (1970).

On appeal three attorneys representing various groups of appellants filed statements of reasons. Their substantive arguments are summarized as follows:

- (1) The evidence adduced at the hearing clearly shows that appellants had a discovery of a valuable mineral deposit on each and every claim.
- (2) Alumina is an intrinsically valuable mineral and as such a market is deemed to exist, and a claimant may continue to develop his claim with a prospective anticipation of profit.
- (3) Appellants proved the validity of each and every claim under the doctrine of known geological facts.
- (4) Appellants were restrained from expanding and developing their surface discovery because to do so would have damaged the oil shale which is a leasable mineral and the property of the United States.
- (5) Alumina, as found in dawsonite, gibbsite, nordstrandite, and analcite, is a locatable mineral within the meaning of the mining laws.
- (6) Colorado state statutory location requirements were not applicable to the location of the claims involved in Colorado Contest 441, and location by legal subdivisions of government surveyed lands is sufficient to satisfy the mining laws.
- (7) The Judge erred in refusing to grant appellants' motion to dismiss at the conclusion of the Government's case.
- (8) The Government has the burden of proof in a mining claim contest.
- (9) The Government failed to follow Departmental standards in examining the placer mining claims.
- (10) The failure of some contestees to file answers to the complaint was not a ground for dismissal because such an alleged defect was cured by the answer filed by Merle I. Zweifel.
- (11) Appellants were deprived of property without due process of law and without just compensation.
- (12) Appellants could not receive a fair hearing because of adverse publicity and it was error not to grant appellants' motion to suspend the proceeding.
- (13) The Judge was predisposed as to the outcome of the contest, and due to his relationship with the Department the rendition of a fair hearing and an unbiased decision were impossible.

(14) It was prejudicial error and an abuse of discretion for the Judge to refuse to direct a prehearing conference.

(15) Appellants were denied due process when the Judge refused to grant a motion for severance and thereby hear and decide issues regarding each individual claim.

(16) Colorado Contest 441 was barred by laches.

(17) It was discriminatory for the Government not to proceed against other holders of unpatented mining claims in the Piceance Creek Basin.

(18) The Judge erred in failing to rule on all of appellants' proposed findings of fact and conclusions of law.

Discovery

In order for a mining claimant to establish the validity of one or more mining claims he must show the discovery of a valuable mineral deposit within the limits of each claim; therefore, a discovery on one claim cannot serve to validate a group of claims. United States v. Bunkowski, 5 IBLA 102, 79 I.D. 43, 51-2 (1972). The requirement of a discovery on each claim is admitted in the brief for certain appellants filed by Clement Theodore Cooper, Esq., on May 15, 1972, at page 47.

Appellants' arguments relating to discovery are:

1) The evidence adduced at the hearing clearly shows that appellants had a discovery of a valuable mineral deposit on each and every claim.

2) Alumina is an intrinsically valuable mineral and as such a market is deemed to exist, and a claimant may continue to develop his claim with a prospective anticipation of profit.

3) Appellants proved the validity of each and every claim under the doctrine of known geological facts.

4) Appellants were restrained from developing their discovery because to do so would have damaged the federally owned oil shale deposits.

The "prudent man rule" has been established by the Department as the test for determining what constitutes a discovery of a valuable mineral deposit. This test was first laid down in Castle v. Womble, 19 L.D. 455, 457 (1894), in which the Secretary stated:

* * * [W]here 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, the requirements of the statute have been met. * * *

The Supreme Court has expressed its approval of the rule in a number of decisions. United States v. Coleman, 390 U.S. 599, 602 (1968); Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335-36 (1963); Chrisman v. Miller, 197 U.S. 313, 322 (1905). Another test to complement the prudent man rule was approved in Coleman, supra. It is the so-called "marketability test." The Court said at p. 602-03:

* * * Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent-man test, and the marketability test which the Secretary has used here merely recognizes this fact.

The marketability test was explained further in Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971). The court felt present marketability was necessary. It stated at 83:

The "marketability test" requires claimed materials to possess value as of the time of their discovery. Locations based on speculation that there may at some future date be a market for the discovered material cannot be sustained.

Thus it is not enough that a mineral deposit found within the limits of a claim may some day in the future, due to advancements in technology, become valuable. To satisfy the test, one must show that the minerals have a present value, and locations based on the speculation that improved mining and processing technology will make the mineral marketable in the future cannot be sustained. United States v. Wurts, 76 I.D. 6 (1969).

The lands herein involved were withdrawn from metalliferous location by Public Land Order 4522, 33 F.R. 14349, filed September 23, 1968. They were segregated from location and entry under the mining law when the Bureau of Land Management filed an application to withdraw on January 27, 1967. See 43 CFR 2351.3(a) and 43 CFR 2091.2-5(a). Therefore, for the claims to be valid, appellants must show a discovery on each claim prior to the date of the application for withdrawal. See Udall v. Snyder, 405 F.2d 1179 (10th Cir. 1968); United States v. Wurts, supra, at 9.

Appellants claim that they have made a discovery of alumina on each claim involved herein. Although alumina (Al_2O_3) is the source compound of aluminum metal, it does not occur freely in nature. It is found as a constituent oxide of other minerals (Tr. 634). In the Piceance Creek Basin where most of the subject claims lie, alumina is found most abundantly in a carbonate of aluminum and sodium ($\text{NaAl}(\text{OH})_2\text{CO}_3$) called dawsonite. Alumina is also found in gibbsite, nahcolite, and halite (Exh. C-5). Dawsonite and the other alumina-bearing mineral compounds are found mixed with kerogen-bearing dolomites termed "oil shales" in the Green River Formation which underlies most of the Piceance Creek Basin.

Appellants' belief that they have proved a discovery on each claim is based on the testimony of Merle I. Zweifel. Zweifel stated a number of times that he took surface samples from each and every claim (Tr. 247, 321, 736). The samples were never segregated as to individual claims and were merely thrown into the back of Zweifel's pickup truck for later identification (Tr. 230-32, 715-16). There were only about 20 assays performed on the 2,910 samples claimed to have been taken (Tr. 137-40). None of the assays could be identified to any particular claim, but only to claim groups (Tr. 140-44). The groups sometimes comprise 70 or 80 claims (Tr. 144).

The assay reports (Exh. B-70 through 78, 80, 81) are spectrographic analyses of oil shale samples. Generally they show 10 percent

aluminum. John Ward Smith ^{4/} testified for contestant that spectrographic analysis is only semi-quantitative, and a 10 percent figure of aluminum content might actually be anything between 2 and 20 percent (Tr. 544). Edmund E. Phillips, a chemist-assayer who tested the samples and prepared the reports, believed the 10 percent analysis of aluminum content could represent somewhere between 7 and 15 percent, as outside limits (Tr. 894). The assay reports do not indicate in what form the aluminum is found or whether or not it would be recoverable (Tr. 550, 901). Even conceding that aluminum may be present throughout the oil shale, it may not be in a form which is extractable (Tr. 551). The assay reports are of no probative value in determining the existence of a discovery on any particular claim.

Appellants argue that alumina is an intrinsically valuable mineral and as such by its very nature meets the marketability test. Appellants cite as support for this proposition Solicitor's Opinion, 69 I.D. 145 (1962). At 146 the Solicitor stated:

An intrinsically valuable mineral by its very nature is deemed marketable, and therefore merely showing the nature of the mineral usually meets the test of marketability. * * * (Emphasis added.)

^{4/} Mr. Smith is a research chemist and project leader with the United States Bureau of Mines at the Laramie, Wyoming, Energy Research Center. The function of the Center is the study of oil production from oil shale (Tr. 510-11).

The inference to be drawn from the Solicitor's statement is not that an intrinsically valuable mineral need not meet the marketability test, but rather that the probability of such a mineral meeting the test is greater. The question of whether the marketability test is applicable to intrinsically valuable minerals was laid to rest in Converse v. Udall, 399 F.2d 616, 621 (9th Cir. 1968), cert. den., 393 U.S. 1025 (1969), where the court stated that the marketability test, including the profit factor, was applicable to all mining claims including those containing precious metals.

The record clearly shows that appellants have failed to establish that alumina from any of their claims could be presently marketed at a profit.

At the hearing Smith testified that approximately 100,000 samples had been taken from 640 to 650 sample sites located throughout the Piceance Creek Basin. Of that number 98,000 to 99,000 have been analyzed by the Bureau of Mines and found to contain oil shale (Tr. 515-16). The non-hydrocarbon elements present in the oil shale samples resemble the elemental composition of the earth's crust and are present in very nearly the same proportion (Tr. 563). Despite the fact that aluminum constitutes roughly eight percent of the earth's crust (Tr. 593), only bauxite ore, in which alumina is concentrated by a weathering process, has qualified commercially as a source of

aluminum. At present the majority of the bauxite ore used in the United States is imported from tropical countries (Tr. 564; Exh. C-3).

Smith testified that aluminum cannot be presently economically extracted and produced from any of the alumina-bearing compounds in the area of the claims (Tr. 619, 628, 640). He felt the investment necessary to commence and maintain commercial operation would continue to be, as it has been, a prohibitive factor (Tr. 646).

Appellants assert that alumina is always found in oil shale and contend that each and every claim is valid under the doctrine of "known geological facts," citing Freeman v. Summers, 52 L.D. 201 (1927). The Freeman case involved the sufficiency of a discovery of oil shale on the surface and in shallow workings in the Green River Formation in Colorado. It was claimed that the formation consisted of one massive homogeneous deposit of oil shale which was capable of being commercially developed. It was also argued that oil shale found on the surface and in shallow workings on the formation was an integral part of the mass below and discovery of the surface shale was sufficient to satisfy the requirements of the law. In Freeman the Secretary held at 206:

While at the present time there has been no considerable production of oil from shales, due to the fact that abundant quantities of oil have been produced more cheaply from wells, there is no possible doubt of its

value and of the fact that it constitutes an enormously valuable resource for future use by the American people.

* * * * *

The evidence in this case shows that in this particular area of Colorado the lands contain the Green River formation, and that this formation carries oil shales in large and valuable quantities; that while the beds vary in the richness of their content, the formation is one upon which the miner may rely as carrying oil shale which, while yielding at places comparatively small quantities of oil, in other places yields larger and richer quantities of this valuable mineral.

The Secretary then concluded:

In other words, having made his initial discovery at or near the surface, he may with assurance follow the formation through the lean to the richer beds.

Since Freeman was decided, the courts, e.g., United States v. Coleman, supra, and Converse v. Udall, supra, have approved the Department's refinement of the prudent-man test to include the requirement of a showing of present marketability. This Board has held that Freeman is not applicable to sand and gravel claims. United States v. Clear Gravel Enterprises, Inc., 2 IBLA 285, 300 (1971). Freeman involved oil shale mining claims, and the precedential value of Freeman is now being considered by the Board in another appeal. As to the alumina claimed herein, it is clear that Coleman and Converse are controlling.

At the hearing Smith testified that he felt alumina could eventually be produced economically from dawsonite (Tr. 603, 639). However, at present there is no known process by which alumina may be produced from dawsonite-bearing oil shale on a commercial basis (Tr. 603, 620, 628).

Whether appellants' assertion that alumina is always found in oil shale is true is not the important issue; as Smith testified, the real question is what part of the alumina is economically extractable (Tr. 620). Appellants' witness, John Stevenson, stated that he did not have the expertise to testify as to whether reduction processes can be used economically (Tr. 820).

The evidence is not, therefore, that economically recoverable alumina exists in all oil shale or under all the contested claims. The evidence is that aluminum is an element universally present in the earth's crust. It is found in alumina-bearing compounds throughout the oil shale of the Piceance Creek Basin, but there is no evidence that all of such oil shale, or the shale which is on the claims concerned, contains economically recoverable alumina from which aluminum may be commercially extracted.

As to whether there has been a discovery of any other valuable minerals, Government witness Smith was asked, in connection with the analysis of the nearly 100,000 samples taken in the area of the

claims, whether any of the elements in the samples (excluding aluminum, kerogen from oil shale and sodium) exist in sufficient quantities to be classified as a valuable mineral deposit. He responded that they did not (Tr. 563). According to section 21, as amended [43 U.S.C. § 241 (1970)], and section 23, as amended [43 U.S.C. § 261 (1970)], of the Mineral Leasing Act of February 25, 1920, oil shale and sodium, respectively, are subject to disposition only by leasing and, as such, are not locatable under the general mining laws. Therefore, the only mineral upon which appellants can be basing a discovery is alumina, the source compound of aluminum.

Appellants made no attempt to pinpoint any claim and assert that it contained economically extractable aluminum by showing reliable evidence as to the cost of extraction and marketing.

In arguing that they were restrained from developing their discovery, appellants cite a letter to Zweifel (Exh. C-97) dated December 13, 1966, from the Solicitor for the Department. Zweifel testified that he felt the letter restrained him from making any further development on the claims, other than surface sample operations (Tr. 951-52). The letter did not have the effect of a court order enjoining appellants from taking any further actions with respect to the claims; rather it merely informed Zweifel that if any action was taken which damaged the oil shale, the Government would then move to restrain such activity. The Solicitor further

stated that development work which was not harmful to the oil shale could, of course, be performed. Appellants' argument that the letter restrained them from pursuing their discovery work is lacking in merit.

We, therefore, find that appellants have failed to prove a discovery of a valuable mineral deposit on any of their claims and for that reason their claims are null and void.

Alumina as a Locatable Mineral

Appellants' argument that alumina, as found in the alumina-bearing compounds commingled with leasable oil shale in the Piceance Creek Basin, is a locatable mineral within the meaning of the mining law need not be considered in light of the conclusions that have been reached above. Appellants have failed to prove a discovery on any of their claims.

Failure to Locate in Compliance with Mining Laws

Even if appellants had proved a discovery on each claim, appellants have not proved that any specific claim was located in compliance with the mining laws.

One of the two original charges in the complaint filed by the Government in Colorado Contest 441 was that the mining claims had

not been located in accordance with the mining laws. Appellants argue that locating mining claims by legal subdivisions on surveyed land was sufficient to satisfy the federal mining law and that the requirements of Colorado state law need not be complied with.

The federal law governing location of mining claims is as follows:

30 U.S.C. § 22 (1970) provides, in part -

* * * [A]ll valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, * * * under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. (Emphasis added.)

30 U.S.C. § 28 (1970) provides, in part -

The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims made after May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. * * * (Emphasis added.)

Departmental regulation, 43 CFR 3401.1 (1966) [now 43 CFR 3831.1], provides, in part -

Rights to mineral lands, owned by the United States, are initiated by prospecting for minerals thereon, and, upon the discovery of mineral, by locating the lands upon which such discovery has been made. A location is made by staking the corners of the claim, posting notice of location thereon and complying with the State laws, regarding the recording of the location in the county recorder's office, discovery work, etc. As supplemental to the United States mining laws there are State statutes relative to location, manner of recording of mining claims, etc., in the State, which should also be observed in the location of mining claims. * * * (Emphasis added.)

Appellants, citing Reins v. Murray, 22 L.D. 409, 411 (1896), and the instructions issued by the Department, Location of Oil Shale Placer Claims, 52 L.D. 631 (1929), argue that the Department does not require compliance with state or local regulations when placer mining claims are located by legal subdivisions on surveyed lands.

The 1929 instructions issued by the Assistant Secretary are limited. They refer to oil shale placer claims located prior to February 25, 1920, by legal subdivision on surveyed lands, without having the claim boundaries otherwise marked. The instructions stress the fact that particular mining claimants had relied on previous Departmental decisions. Under the instructions, the claims were to be considered valid as against the federal government within the meaning of section 37 of the Mineral Leasing

Act, 5/ if they otherwise met the requirements of the section. In such case the Department would not inquire about the claimant's compliance with state or local regulations regarding marking of claims on the ground. Here, there was no reliance by appellants on prior Departmental decisions because Zweifel testified that he staked the corners of each of the claims herein (Tr. 188).

Reins involved the Departmental interpretation of Rev. Stat. § 2324, as amended, 30 U.S.C. § 28 (1970), and Rev. Stat. § 2329 and 2331, as amended, 30 U.S.C. § 35 (1970). The conclusion was that when placer claims are located by legal subdivision on surveyed land, it is not necessary to mark the boundaries of the claim. Reins involved land in Montana and made no mention of state requirements. The events concerned therein occurred prior to promulgation of Departmental regulation 43 CFR 3401.1 (1966), now 43 CFR 3831.1, which requires staking the corners of the claim. We find that the Departmental regulation is controlling and that compliance therewith was required in the location of the mining claims, herein.

5/ Section 37 of the Mineral Leasing Act of February 25, 1920, as amended, 30 U.S.C. § 193 (1970), reads:

Sec. 37. "The deposits of coal, phosphate, sodium, potassium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, * * * shall be subject to disposition only in the form and manner provided in this chapter except as to valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

The procedure that was followed in locating the 2,910 claims was elicited from Merle I. Zweifel at the hearing. Zweifel testified that he initially went to the Rio Blanco County courthouse in Meeker, Colorado, and obtained a county map (Tr. 120; Exh. B-65). He described his location methods by testifying:

A (The Witness) When I left the courthouse and had what I considered to be sufficient information to locate the claims, I went back out to the ground and I would examine, and I did examine, to determine that there were no other stakes or other claiming in the area, to the best of my ability. And then I would take the map which has been referred to as Exhibit 65 and I would -- there are no county roads in the area, no section lines, and I would try to determine, and I did determine by the confluence of washes and streams shown on this map where I was, and to the existing roads in the area where they may have crossed a stream or intersected a stream or where there were any other pertinent -- (Tr. 186.)

* * * * *

A Then I would determine by the speedometer of the truck how far I had moved, and by those principal means I did locate these claims.

Q At what point did you establish the legal description?

A Well, I would take that map and where the rivers and the roads intersected, when I would come to that point I would determine on the map whether that was Section 1, 2, or 3, or the Southwest or the Northwest Quarter.

Q Well now, if it was the northwest quarter and you were driving along

the west section line, you locate the northwest quarter rather easily, couldn't you? (Tr. 187.)

A I'm not sure it would be easy but by the stream patterns shown on the map I did locate them. (Tr. 188.)

* * * * *

Q (By Mr. Longstreth) Mr. Zweifel, in going in through the area to locate these claims you obtained a map which showed roads; isn't that right?

A Yes, sir; the existing roads.

Q And you drove on those roads insofar as possible?

A Yes, and sometimes there were trails that I would follow beyond the roads. (Tr. 241.)

* * * * *

Q So in order to locate a claim some distance from the road you had to walk, didn't you?

A No, no. In some instances you could drive out across the country up on -- well --

Q In all instances could you drive?

A Not in all instances; no, sir.

Q Did you see any fencing out there?

A I do recall fences, yes. They were drift fences or Bureau of Land Management fences that were installed. I recall going through gates. (Tr. 242.)

Q But now where you couldn't drive, Mr. Zweifel, how did you locate them?

A We packed them where we couldn't drive.

Q You mean you walked in?

A Well, I wouldn't say walked in. We stopped the pickup and carried what we needed to go east, west, north or south. (Tr. 243.)

* * * * *

In the early stages of the hearing Zweifel stated that he did not recall seeing any brass caps or rock monuments marking survey corners (Tr. 146). Yet at one point he testified that he had put stakes on the quarter corners of the claims (Tr. 188). Later he reversed himself stating that he did not stake or post the four corners of the claims (Tr. 221).

As to the posting of location notices Zweifel testified:

Q And did you put up a location notice?

A Yes, sir; I put up a notice.

Q Where was that located?

A Anywhere on that 160-acre claim. (Tr. 188.)

* * * * *

A This is a copy of the notice I left on the claims.

Q Well, didn't I understand you to say I believe yesterday or today that you prepared your location certificates after you located and sent them out to your principal locator?

A We would make arrangements to locate these claims and we would mail a certificate out to the locator, and I would take a copy and place on the claim.

Q Would that copy be identical to this as to names?

A Well, yes, each copy; I'm not referring to -- there were many claims and there were many different names on many different claim groups.

Q Did you put up your notice by claim group?

A On each claim, yes.

Q If you had 20 claims you would have 20 notices?

A That's correct, sir. (Tr. 190.)

* * * * *

Q And now, the location certificate, certificate of location that you posted on the land didn't contain the names of all the locators, did they?

A Yes, because I took them to Shawnee, that is correct. I took them to Shawnee and I had them drawn up, and when we posted the balance we would bring them back to the claim and post them on the claims. As you know, I made many trips back and forth to Colorado and I do this, I would do this work as I went to Colorado and beyond. (Tr. 191.)

* * * * *

A * * * I would take these claims to the office and they were being prepared, and were prepared; they were mailed to our people, our co-locators, for their signature which they mailed directly to the county courthouse; and I would return then and place the location notices on the claim and do the sampling. (Tr. 192.)

* * * * *

Q You mean the location certificates?

A Right, copies of the certificates.

Q Were those all executed?

- A They have always been executed at Shawnee and mailed to the co-locaters for their signature. Then we would post a copy on the claim. (Tr. 193-94.)

Subsequently at the hearing Zweifel's testimony was contradicted by the testimony of Mrs. Jo Beamer, admission of which was stipulated (Tr. 828). Mrs. Beamer's evidence is that Zweifel would telephone the office in Shawnee, Oklahoma, while he was purportedly locating claims in Colorado; each time Zweifel called he would report the claims, descriptions, and co-locator names so she could prepare location certificates (Tr. 827-28).

Zweifel then testified that he spent the majority of his time in the field doing location work and that he telephoned the necessary information to his Shawnee office (Tr. 859-60). This testimony is at variance with his prior statements that after scouting the available areas in the Piceance Creek Basin he would return to Shawnee, draw up the location notices, and return to Colorado to post them on the claims (Tr. 191-92; 202-03).

The Government presented the testimony of four Bureau of Land Management Area Resource Managers, Robert L. Kline, Stanley G. Colby, L. Duane Hillberry, and Carroll Leavitt, who administer the areas encompassing the claims.

Kline's area covers portions of the Agate, Nose, and Tag claim groups located in Garfield County. This area represents a very small part of the total area encompassed by the 2,910 claims in the contest (Tr. 328; Exh. B-6). Kline testified that he patrolled the area at least once a week in the summer but during the winter it was inaccessible (Tr. 337). He said he never observed any staking, nor any location notices, nor any evidence of mining in 1966, 1967 or 1968 (Tr. 338-39). The topography in the northern part of his area is very steep, with deep canyons and in some places rimrock escarpments (Tr. 330). The survey corners are marked by brass caps or rock monuments (Tr. 332). He stated that he did not believe one could accurately determine distance by the use of an odometer (Tr. 331).

Colby administers the largest part of the areas here involved, including all of the area covered by Exhibit B-6 other than that within Kline's area (Tr. 350). He travels various parts of the Piceance Creek Basin about every two or three weeks (Tr. 352). He never observed any mining posts, stakes or notices that contained any reference to Zweifel or Zweifel International Prospectors (Tr. 353). The terrain is mountainous, ranging from steep canyons to foothills with a few escarpments in some places (Tr. 354). He traversed the Piceance Basin in 1966 and 1967 and observed no mining activity on any of the areas occupied by the claims (Tr. 356-57). He gave detailed testimony as to the roads that would have to be traveled

and the routes necessary to set foot on the claims shown on Exhibit B-6 (Tr. 361-406). He stated that attempting to locate the governmental subdivisions strictly by use of a pickup truck odometer might result in mistakes. He attributed this to the curves and bends in the road and the general terrain itself (Tr. 360). It was also his opinion that given a pickup truck with an accurate odometer and the map used by Zweifel, he could not with accuracy stake the corners of the claims involved herein (Tr. 444).

Hillberry's and Leavitt's areas of responsibility lie in Moffat County, involving only a small part of the total claimed area (Exh. B-7). Both visited their areas frequently in 1966 and 1967. Hillberry observed no mining activity nor any mining location notices (Tr. 454-55). Leavitt found location notices posted in his areas but he found none of Zweifel's. In Hillberry's area the topography is ridges from moderate to moderately steep and the valleys are from moderate to gently sloping. The access is good throughout (Tr. 455). The terrain in Leavitt's area is "fairly level, generally rolling sagebrush country, deep washes." (Tr. 465.)

Zweifel testified about certain photographs which purportedly depict his sampling and staking work in the Piceance Creek Basin (Exh. C-13 through C-70; Tr. 882). He said he was unable to identify the pictures of stakes to any particular claim (Tr. 879), but he did identify them to certain claim groups. A red figure on the

back of each photograph represented a correspondingly numbered area on Exhibit B-6, at which place the photograph was allegedly taken (Tr. 884). On cross-examination Zweifel was asked:

Q Now, upon which basis, sir, did you identify this Exhibit C-13 with a red 13? I think you testified you took it off of this plat?

A This is correct.

Q How did you get the figure 13 to put on the plat?

A Well, we just laid the pictures out and I identified where I had been doing my stake work.

Q All you had to look at was the picture?

A That is correct.

Q Are you intending to testify under oath by looking at that piece of ground you can tell exactly where it was?

A Yes, I do.

Q It that true of all these other pictures?

A Yes, that is true. (Tr. 970-71.)

The fact that Zweifel could remember the location at which these photographs were taken and identify them to a claim group is unusual in light of his lack of ability to recall other facets of his location procedure (Tr. 122, 140, 192, 221, 243-44, 859). In addition, when asked at the hearing to identify three sets of photographs, Exhibits B-66, B-67, and B-68, Zweifel replied:

A I hesitate to state at this late stage. This has been four years, and I hesitate to attempt to identify it. I staked

a number of claims and we are not going to get tangled up in a little thing like that. We have several thousand pictures. (Tr. 128.)

Q Do you recognize these pictures?

A I doubt if I could pick them out among thousands of pictures we have taken. I probably could, but I am not going to take a chance at it. I will put it like that. I have several thousand others and they all look almost the same. It is not a requirement of mining law to take pictures. We do that as an added precaution, as you know. (Tr. 129.)

The photographs (Exh. C-13 through C-70) are completely lacking in probative value. They do not support the contention that the claims were located in accordance with the mining law. They substantiate only the fact that they were taken.

At the hearing Zweifel was questioned as to the possibility of locating the same land twice.

He replied:

A No, I don't think there is that possibility there. It might have occurred but I don't recall of knowing of the circumstances of that nature.

Q If you are really careful it probably wouldn't happen, is that right?

A I think it wouldn't happen. (Tr. 128.)

Zweifel also stated that he checked the lands prior to locating and saw no indication of other staking (Tr. 290). When confronted with the fact that he had top filed in more than 200 separate instances (Exh. B-92), Zweifel had no explanation (Tr. 313).

Zweifel testified that he located all the claims in contest without any assistance (Tr. 714). Yet between May 2 and May 23, 1966, Exhibits B-1 and B-2 show that Zweifel purportedly located a total of 2063 claims in Colorado covering over 287,000 acres of land. On May 15, 1966, at the same time that Zweifel filed location notices for 497 mining claims in Rio Blanco County, Colorado, (Exh. B-1 and B-2), he also filed location notices for 73 mining claims in Sweetwater County, Wyoming (Tr. 534, Exh. B-100).

The record reveals the impossibility of the task purportedly undertaken by Zweifel. Judge Luoma concluded at page 27 of his decision:

It is obvious from Mr. Zweifel's own testimony and pictures that his efforts, in addition to filing claim notices in the courthouse, were basically directed at posting notices or identification markers, on groups of claims, not on individual claims. He made no effort to establish individual claim corner monuments nor to ascertain whether the individual claims were in fact monumented by the public land surveys. In fact, an exercise in simple arithmetic would reveal the impossibility of a person's being able to set foot and post a notice on each one of the numerous claims within the time limitations fixed by Mr. Zweifel's activities. Furthermore, it defies belief that a person could find his way to each and every claim, considering the nature of the terrain and roads, the lack of fence lines, the disregard of survey monuments, and the navigational tools utilized by Mr. Zweifel. The finding is inescapable that Mr. Zweifel did not and could not post a claim notice on each and every claim so as to serve notice on the world that the land embraced thereby was under claim. * * *

Although we realize that Zweifel could have properly staked, posted notice upon and located some of the claims in contest, the burden rests with appellants to establish which of the claims, if any, were properly located. This burden appellants have not met.

Appellants failed to comply with the federal mining law in the location of their 2,910 placer mining claims. Therefore, the claims are invalid.

Burden of Proof

In arguing that the Government has the burden of proof in a mining contest, appellants are incorrect as to the law. It is well settled that in a mining contest the Government has the burden of establishing a prima facie case that the mining claim is invalid. The claimant then must prove by a preponderance of evidence that his claim is valid. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). Appellants contend that such a rule has developed only because of a misinterpretation of the Foster holding. The rule, however, has been consistently followed by the Department, United States v. Harper, 8 IBLA 357 (1972); United States v. Taylor, 8 IBLA 264 (1972); United States v. Bass, 6 IBLA 113 (1972), and by the courts, Converse v. Udall, *supra*; United States v. Toole, 224 F. Supp. 440 (1963).

Appellants charge that the Government did not follow Departmental standards for the examination of placer mining claims. Appellants overlook the fact that such standards are merely general guidelines and do not have the force and effect of statutes or regulations. There is no requirement that such guidelines be followed. Whether or not they were followed is not the essential issue. It is, rather, whether or not the Government established a prima facie case that the claims are invalid.

In the proper circumstances the Government may establish a prima facie case even though its witnesses were not physically present on the mining claims. United States v. Fischer Contracting Co., John T. Katsenes, Intervenor, A-28779 (August 21, 1962). Government witnesses herein testified, as set forth supra, that they were familiar with the subject area; that 98,000 to 99,000 oil shale samples had been taken in the area of the claims; that such samples had been analyzed to determine the minerals present; and that although alumina-bearing compounds were found, there was no known present process by which aluminum could be extracted from such compounds and marketed at a profit. Even though the Government witnesses were not physically present on each claim, their testimony, coupled with the testimony of Zweifel, is sufficient to establish the Government's prima facie case.

As part of the prima facie case, the Government called Zweifel as an adverse witness. Zweifel was asked to state under oath what he did to locate the claims (Tr. 120, 145, 186-213, 240) and to discover a valuable mineral deposit on each claim (Tr. 144, 226, 231, 247, 715, 735-37). Zweifel's testimony as to location was so superficial and so implausible that it was reasonable for the Judge to conclude from that testimony and the testimony of other witnesses, that none of the claims were located according to the requirements of the mining law. See Adair v. Shallenberger, 119 F.2d 1017, 1019 (7th Cir. 1941).

As to discovery, Zweifel is not an experienced assayer, metallurgist, chemist, engineer or surveyor. (Tr. 117, 246). He testified that he had taken surface samples from every claim, but that none were identified to any particular claim (Tr. 715). Only approximately 20 of the samples were assayed. None of the assays could be related to any specific claim and none of the assays showed the existence of any valuable minerals which could be extracted and marketed at a profit. Again, considering the inherent implausibility of the Zweifel testimony concerning discovery, it was reasonable for the Judge to conclude from such testimony and the testimony of the Government witnesses that there was no discovery of an economically recoverable mineral on any of the claims herein.

We find that the Government presented a prima facie case on both allegations in the complaint. The Government's prima facie case having been established, appellants had the responsibility of proving that the claims were located according to the mining law and that there was a discovery of a valuable mineral deposit on each claim. Appellants have failed to produce persuasive evidence that any claim was located properly or that there was a discovery on any claim.

Default of Certain Contestees

Appellants contend that the failure of some contestees to file answers to the complaint was cured by the answer as filed by Zweifel. The contestees against whom the judgment was rendered may not rely upon the answer filed by Zweifel, as his answer never purported to be on their behalf. United States v. Holcomb, A-31019 (August 21, 1969).

The rules of practice of the Department governing procedures in contest proceedings provide that, within 30 days after service of the complaint a contestee must file in the office where the contest is pending an answer specifically meeting and responding to the allegations of the complaint. 43 CFR 4.450-6. The rules provide further that:

If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing. 43 CFR 4.450-7(a).

On February 17, 1970, acting pursuant to the rules, the Colorado Land Office Manager issued a decision declaring the interests in the mining claims of the defaulting contestees named therein null and void for failure to answer the charges of the complaint. The only appeal taken from that decision was by John C. Sterge, a named contestee, which appeal related to additional interests acquired by him in the King Midas claims 1-7 and Westwood claims 1-7. Sterge also owned other claims and filed a timely answer. That answer is deemed to relate to all claims in which he had an interest, and his appeal herein is likewise deemed to encompass his interest in all such claims. The separate appeal is therefore moot.

No other defaulting contestee appealed the Land Office Manager's decision. As to those contestees, the allegations in the complaint were deemed admitted and the decision of the Manager was proper. No timely appeal having been taken therefrom, the contest against the defaulting contestees is considered to be closed.

In the Notice of Appeal filed in the present case by Kenneth Kienzle, Jr., such notice purports to be on behalf of "the contestees

in Colorado Contest 441." As to defaulting contestees who did not file a timely appeal from the February 17, 1970, decision, the present appeal is dismissed pursuant to 43 CFR 4.411(b).

Due Process

Appellants' assertion that they were deprived of property without due process of law and without just compensation is without merit. Due process requires notice and opportunity for hearing. As to mining claims, it does not require that the hearing be held in the courts or forbid inquiry and determination by the Department. Best v. Humboldt Placer Mining Co., *supra*, at 338. Until the issuance of a patent, the legal title to a mining claim remains with the United States Government and the Department is empowered, after proper notice and adequate hearing, to determine the validity of the claim. Davis v. Nelson, 329 F.2d 840, 846 (9th Cir. 1964); Cameron v. United States, 252 U.S. 450, 459-60 (1920).

Appellants argue that they did not receive a fair hearing. They allege that there was sufficient adverse publicity surrounding the contest proceeding so as to render a fair hearing impossible. They also charge that they were denied due process because of the bias and predisposition of the Administrative Law Judge and other Department of the Interior employees. They argue that such individuals

should have been disqualified from participating in the adjudicatory proceedings.

Appellants who were represented by Clement Theodore Cooper, Esq., made these same arguments in motions to disqualify and suspend the proceedings before the hearing. The Administrative Law Judge denied the motions by order dated May 13, 1970. Mr. Cooper renewed the motions at the hearing (Tr. 6-7).

Appellants contend that before the contest proceeding the Department of the Interior issued a number of statements to the news media implying that judgment had already been passed on the validity of the claims. Although appellants have made general allegations of adverse prehearing publicity, they have failed to present any persuasive evidence that there was any unfairness in the contest proceeding itself. See United States v. Gunn, 7 IBLA 237, 246, 79 I.D. 588, 592 (1972).

Appellants grounded their motion for disqualification on the concept that an Administrative Law Judge is an "employee" of the Department of the Interior and therefore subject to Departmental control. The relationship itself does not prove that the hearing was unfair or lacking in due process. United States v. Gunn, supra. In order to disqualify an Administrative Law Judge or justify a ruling that the hearing was unfair upon a charge of bias, there must be a substantial showing of bias. Converse v. Udall, supra;

United States ex rel. DeLuca v. O'Rourke, 213 F.2d 759, 763 (8th Cir. 1954); United States v. Cody, 1 IBLA 92 (1970). In addition, the Departmental procedure in initiating, prosecuting and deciding mining contests does not violate that section of the Administrative Procedure Act, 5 U.S.C. § 554 (1970), which requires the separation of the investigative or prosecuting functions from those of decision making. United States v. Avgeris, 8 IBLA 316, 322 (1972); United States v. Mullin, 2 IBLA 133, 139 (1971); United States v. Melluzzo, 76 I.D. 160, 180-81 (1969).

Clearly, appellants were not denied due process nor can we find support in the record for appellants' allegations that adverse publicity and bias rendered a fair hearing impossible. The Judge did not err in denying appellants' motions to disqualify himself and to suspend the proceedings.

Prehearing Conference

Appellants also maintain that the failure of the Judge to direct a prehearing conference was prejudicial error and an abuse of discretion. Under 43 CFR 4.430, the Administrative Law Judge may in his own discretion, on his own motion or motion of one of the parties, direct that a prehearing conference be held. The regulation clearly states that the decision of whether or not to hold a prehearing conference is discretionary with the Administrative Law Judge. In the present

case, appellants did not make a motion to hold a prehearing conference, yet they assert that the failure of the Judge to order such a conference on his own motion was an abuse of discretion.

To constitute an abuse of discretion the action must be arbitrary, fanciful, or clearly unreasonable. United States v. McWilliams, 163 F.2d 695, 697 (D.C. Cir. 1947). Appellants present no evidence that the failure to order a conference by Judge Luoma was arbitrary or clearly unreasonable. In addition, while the issues were being framed at the hearing (Tr. 23-29), Clement Theodore Cooper, Esq., stated that he considered the hearing at that juncture to be a small pre-trial conference (Tr. 27).

Having been afforded the opportunity to handle such matters at the hearing, appellants cannot be heard to complain that the lack of a prehearing conference was prejudicial error.

Severance

Appellants, prior to the hearing, filed a motion for severance. By order dated May 25, 1970, Judge Luoma denied the motion. Appellants renewed the motion at the hearing (Tr. 27). Appellants argue that the failure to grant such motion was a denial of due process because it was virtually impossible to hear and receive evidence

as to each individual claim. Such an argument is merely the statement of an unsupported conclusion. Appellants present no evidence of unfairness of the hearing based on the large number of claims involved herein. Appellants were afforded the opportunity to present evidence concerning each claim at the hearing, yet they failed to present any probative evidence in regard to any individual claim.

Laches

Appellants argue that the Government should have acted by injunction, ejectment, or withdrawal of the lands when it had actual knowledge that vast numbers of location notices were being filed for areas in the Piceance Creek Basin and that failure to do so precluded the later contest proceeding. The argument cannot be sustained.

Colorado Contest 441 was not barred by the doctrine of laches. By statute, 43 U.S.C. § 2 (1970), the Secretary of the Interior has been granted plenary authority to administer the public domain. Inherent in such authority is the duty to see that valid mining claims are recognized, invalid ones eliminated, and the rights of the public preserved. Cameron v. United States, *supra*.

The general rule is that laches or neglect of duty by the officers of the Government is no defense to a suit by the Government to protect the public interest or preserve a public right.

43 CFR 1810.3(a); United States v. California, 332 U.S. 19, 39-40 (1947); Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917).

Until mining claims are patented they are not immune from attack, and the Government, as the holder of legal title, may contest the validity of such at any time. United States v. Ideal Cement Company, Inc., 5 IBLA 235, 79 I.D. 117, 120 (1972). Appellants have provided no evidence that the delay from February 10, 1967, when the last location notices were filed until August 1968 when the complaint was issued, has prejudiced their rights in any way.

Given the above, there is no need to explore appellants' argument involving the question of whether the Secretary of the Interior's administration of the public lands is the exercise of a governmental or proprietary function.

Other Unpatented Claims

Appellants' argument that the contest was discriminatory because the Government did not join, herein, other persons holding interests in unpatented mining claims in the Piceance Creek Basin also lacks merit. It would be unreasonable to require that all such individuals and corporations be joined as parties in Colorado Contest 441. Colorado Contest 441 had a common thread which made logical the

contest of 2,910 claims involving numerous contestees. The thread was that all the claims herein were allegedly located by Merle I. Zweifel. He had personal knowledge of the procedures followed in the location of all the claims involved in the contest.

Appellants have made assertions of discrimination, but have provided no substantive evidence to advance such a charge. In order for appellants' assertions to stand they must show that the Government acted arbitrarily by not joining other persons -- not Zweifel's co-locators -- who held interests in unpatented mining claims in the Piceance Creek Basin. Merely because such claimants were not joined does not support appellants' charge of discrimination.

Findings and Conclusions

The action of Judge Luoma in rejecting appellants' proposed findings of fact and conclusions of law was not an abuse of discretion. According to 43 CFR 4.452-8(b), the Administrative Law Judge may adopt the findings and conclusions proposed by one or more of the parties to a hearing. The regulation allows the Judge to exercise his discretion in accepting or rejecting the findings and conclusions.

Appellants also charge error because the Judge did not make a ruling on each and every finding and conclusion as required by 43 CFR 4.452-8(b). However, the Department and the courts, have held that

where an Administrative Law Judge rules, in a single sentence, on all of the proposed findings and conclusions submitted by a contestee, and the ruling on each finding and conclusion is clear, it is not necessary that the Judge make a separate ruling on each finding and conclusion. National Labor Relations Board v. Sharples Chemicals, Inc., 209 F.2d 645, 652 (6th Cir. 1954); United States v. Chas. Pfizer & Co., Inc., 76 I.D. 331, 352 (1969); United States v. Driear, 70 I.D. 10, 11 (1963).

Such is the case herein, as Judge Luoma stated in his decision:

The proposed findings of fact and conclusions of law submitted by Contestees have been considered and, except to the extent that they have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial.

New Evidence

Appellants have also submitted with their appeal additional evidentiary material. Such material may not be considered or relied upon in reaching a final decision. The record made at the hearing constitutes the sole basis for decision except to the extent that official notice may be taken of the public records of the Department of the Interior and of any matter of which the courts may take judicial notice. 43 CFR 4.24. Such a tender of evidence may only

be considered for the limited purpose of deciding whether a further hearing is warranted. United States v. Gunn, *supra*; United States v. Winters, 2 IBLA 329, 78 I.D. 193 (1971). The evidence submitted in this case does not justify such a further hearing.

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.

Joseph W. Goss, Member

We concur:

Frederick Fishman, Member

Douglas E. Henriques, Member

