

Editor's note: Appealed -- aff'd, Civ. No. 75-1413 (C.D.Cal. June 16, 1975)

UNITED STATES
v.
JACK L. GARDENER

IBLA 73-64

Decided December 30, 1974

Appeal from decision of Administrative Law Judge Dean F. Ratzman (Contest S-077650)
Declaring appellant's mining claims null and void and rejecting application for mineral patents.

Affirmed.

1. Administrative Procedure: Hearings -- Rules of Practice: Evidence -- Mining Claims: Generally

Government witnesses in a contest proceeding who are qualified by education and experience are competent to testify as experts with reference to the prudent man rule.

2. Administrative Procedure: Burden of Proof -- Mining Claims: Contests -- Mining Claims: Determination of Validity

Where the government contests a mining claim, it has assumed only the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid. Where a government mineral examiner testifies that he extensively examined the claims and workings thereon, and had assayed numerous samples taken from the claims but found no evidence of a valuable mineral deposit that would support a discovery, a prima facie case of lack of a mineral discovery has been made.

3. Mining Claims: Determination of Validity -- Mining Claims:
Discovery: Marketability -- Mining Claims: Discovery: Generally

The prudent man test is not satisfied when a mining claimant fails to consider labor costs in determining whether a mining operation has a reasonable prospect of success, and asserts that he is willing to accept a meager income from the claims sufficient to satisfy the needs of a one-man retirement project. A determination of validity cannot rest upon such subjective considerations, but only upon objective criteria.

4. Mining Claims: Discovery: Marketability

While a placer gold mining claimant need not prove in fact that the deposit on his claims supports a profitable mining operation, the evidence of value must be such that a person of ordinary prudence would expend labor and means in the reasonable expectation that a profitable venture might be developed.

5. Administrative Procedure: Adjudication -- Mining Claims: Contests --
Mining Claims: Determination of Validity -- Mining Claims:
Discovery: Generally

Where a contest is brought on an application for mining patents and it is determined that no discovery has been made on the claims, the necessary result of this determination is [**3] that the mining claims are invalid. The Administrative Law Judge's declaration that the claims are void must stand and the patent application must be rejected.

APPEARANCES: George W. Nilsson, Esq., Los Angeles, California, and Donald D. Paul, Esq., Woolway, Paul & Magnus, Los Angeles, California, for appellant; Charles F. Lawrence, Esq., Office of the General Counsel, United States Department of Agriculture, San Francisco, California, for the United States.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Jack L. Gardener has appealed from a decision by Administrative Law Judge Dean F. Ratzman, dated June 22, 1972, declaring appellant's Capitol, Diamond, Finlander, Carol and Elaine placer gold mining claims null and void and rejecting appellant's patent application for the claims.

Upon the recommendation of the Forest Service, U.S. Department of Agriculture, a contest proceeding was initiated in 1970 by the Bureau of Land Management's Sacramento Land Office. The contest complaint charged that there was not disclosed within the boundaries of any of the claims minerals in sufficient quantity, quality and value to constitute a discovery under the mining laws. A hearing on the matter was held at Yreka, California, on December 8, 1971, and continued in Los Angeles on January 11 and 12, 1972.

Following a thorough discussion of the evidence and applicable law, Judge Ratzman concluded that appellant had failed to establish the existence of a discovery of a valuable mineral deposit on any of the contested claims. We have carefully reviewed the record and considered to decision of the Judge and find his discussion and conclusions to be correct. Accordingly, we affirm his decision, a copy of which is attached as Appendix A. In response to additional issues raised by the appeal, the following is added.

In his Statement of Reasons on Appeal, appellant contends that a) the Judge's findings and decision are not supported by substantial evidence as the government mineral examiner's testimony regarding the quantity, quality and processing costs for the material on the claims should have been given little if no weight, and thus the Judge incorrectly determined that the government had made a prima facie case of no discovery on the contested claims; b) the contestee presented sufficient evidence to preponderate on the issue of discovery; and c) the decision is contrary to law as the Judge improperly required appellant to actually prove that he would, in fact, develop a profitable mine. In addition, appellant requests that, should the Board fail to reverse the Judge's rejection of the patent application, then by reason of the equities involved, the declaration of nullity should be reversed and the patent application rejection should be without prejudice. We are not persuaded by these arguments and, as indicated infra, must reject his request.

[1] In his initial argument, appellant asserts that the government mineral examiner's qualifications as an expert in placer mining are inadequate and his testimony should be ignored. Appellant then argues that reliance on such testimony by the Judge rendered his finding that the government made a prima facie case

of no discovery unsupported by substantial evidence. As a basis for this proposition appellant cites Snyder v. Udall, "D.C. Colo (1967), 267 F. Supp. 110, reversed on other grounds 405 F.2d 1179 * * *," cert. denied, 396 U.S. 819 (1969). (Emphasis added.) Contrary to appellant's assertion that the lower court's decision was reversed on "other grounds," the Circuit Court opinion is directly on point with respect to this issue. The Court, in reversing the District Court's decision, relied upon United States v. Coleman, 390 U.S. 599 (1968), and stated that government witnesses with essentially the same qualifications as those in the instant case, were competent to testify as experts with reference to the prudent man test. 405 F.2d at 1180. See also United States v. Mellos, 10 IBLA 261, 268 (1973); United States v. Winters, 2 IBLA 329, 336, 78 I.D. 193, 196 (1972).

[2] It has long been established that the government need only present a prima facie case that there has been no discovery; after such presentation the burden devolves on the mineral claimant to prove by a preponderance of the evidence that there has been such a discovery. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); United States v. King, 15 IBLA 210, 213 (1974). Here the competent testimony of the government mineral examiner that he extensively examined the claims and workings thereon, and had assayed numerous samples taken from the claims but found no evidence of a valuable mineral deposit that would support a discovery on any of the claims, is sufficient to establish a prima facie case of a lack of discovery. United States v. Mineral Ventures, Ltd., 14 IBLA 82, 92 (1973); United States v. Mellos, supra at 267; United States v. Jones, 2 IBLA 140, 148 (1971).

The next question is whether appellant presented sufficient evidence to preponderate on the issue of discovery. With respect to evaluating the quantity and quality of the material on the claims, there is no need to repeat the findings and discussion in Judge Ratzman's decision, infra. We note, however, that while there was evidence developed with respect to the material on the claims, very little was offered regarding projected costs and benefits of a mining operation. In particular, labor costs and an objectively adequate return on investment have been disregarded by appellant. In appellant's brief in support of appeal, he maintains that:

[T]he factor of mining costs about which contestant makes such an issue is completely irrelevant to the inquiry at hand since contestee proposes to work the claims himself as a profitable retirement project. Thus, he would not be concerned with prevailing wage rates * * *. (Brief at 11.)

Objective criteria were not only disregarded by appellant, but also by his expert witness, Schroter. In expressing the opinion that a small operation could be conducted on the claims with a reasonable prospect of success, Schroter stated the following in his mineral report:

That since you regard such operations primarily as a retirement project your profits may be modest. * * * It is not the function of the examining engineer to judge what to you are "acceptable profits." "Acceptable profits" are those which are acceptable to you and are controlled by such factors as your retirement income, income tax bracket, lack of overhead, mechanical ingenuity, living requirements, etc. You must be the judge. (Ex. G1-4).

[3] In a government evaluation determination these arguments are completely without merit. Labor costs must clearly be considered in determining whether a mining operation has a reasonable prospect of success, and there is no reason to treat the value of the labor of a claimant any differently from that of one he might hire. Either one must be taken into consideration in determining the likelihood of a profitable venture being established. United States v. Harper, 8 IBLA 357, 365 (1972); United States v. White, 72 I.D. 522 (1965), aff'd, White v. Udall, 404 F.2d 334 (9th Cir. 1968). In the Harper case, supra, the Board rejected the argument that a meager yield of income from the claims would constitute a substantial increment to the income of a person living on retirement benefits and would be sufficient to satisfy the amount required to establish a profitable operation. The determination of validity cannot rest upon such subjective considerations, but only on objective criteria. United States v. Harper, supra at 367; United States v. Stewart, 5 IBLA 39, 53, 79 I.D. 27, 34 (1972). Appellant's willingness to ignore labor costs and to expend further time and money for a meager return does not warrant the conclusion that the material on the contested claims is valuable within the meaning of the general mining laws, since no prudent man would invest in actual operations under these circumstances. United States v. Edwards, 9 IBLA 197, 203 (1973); United States v. Harper, supra at 369.

Our conclusion is not altered even if we compute the value of gold at present day prices, which is about three times that used by Judge Ratzman in his evaluation of the claims. Even when we consider such higher prices, appellant has failed to establish sufficient quantity of the material on four of the claims, and in the one instance where a substantial quantity of unworked gravels remain, appellant has failed to demonstrate that he could process a sufficient number of cubic yards of gravel per day to compensate for reasonable labor costs, let alone other mining costs. See Placer Examination Principles and Practice, Technical Bulletin #4, U.S.

Department of the Interior, BLM [relied on by appellant in Ex. G1-4] p. 97, n. 1 (1967): one cubic yard of material averages about 3,000 pounds; see also United States v. King, supra at 214-15.

The evidence relating to past operations on the claims indicates that a substantial portion of the claims was mined-out by the "old-timers." Appellant and his lessees sampled and worked the remaining areas thought to yield the highest values. The average values produced were about 30 cents per cubic yard, or 90 cents to \$1.00 at current values. Following seven months of substantial preparatory work, it took Gould, a lessee, and his wife, 90 days to process 2,000 yards of gravel for a yield of 10 to 11 ounces of gold. That comes to .005 oz. per cubic yard, or about 75 to 90 cents per cubic yard at current values. The Goulds managed to work about 20 cubic yards per day with the aid of an extensive hydraulic system left behind from the old days. Without a substantial investment appellant could not presently process 20 cubic yards per day. The ditch and hydraulic equipment have deteriorated (Yreka Tr. 58), and appellant testified that the equipment no longer has any value (L.A. Tr. 298). Appellant's inability to process a sufficient amount of material is evidenced by the fact that the Gardener family, working 12 days per year for 10 years, have extracted a total of only \$400 worth of gold, with an additional \$250 received from a lessee.

In summary, the Administrative Law Judge found, and we agree, that appellant's evidence was too vague to prove the existence of a marketable quantity of recoverable gold on those claims which the government witness testified did not have enough gravel left for a profitable mining venture. As to the Diamond claim, which the government witness testified has approximately 100,000 cubic yards of gravel beneath 12 to 15 feet of overburden, appellant offered no testimony regarding estimated costs of a feasible mining operation. Considering the time and effort that appellant, his family and lessees have invested in the claims, appellant has had the opportunity to establish the extent and value of the remaining gravels, and the anticipated costs of mining the gold. In the absence of such evidence, the increase in the market price for gold does not alter the soundness of Judge Ratzman's findings.

[4] Appellant next argues that the Judge improperly required him to prove that he would, in fact, develop a profitable mine, and thus the decision was contrary to law. Appellant cites Converse v. Udall, supra at 622, wherein the Court stated that a discovery does not require that the locator must prove that he will, in fact, develop a profitable mine. Having reviewed the Judge's decision as a whole, we cannot agree with appellant's contention that the Judge applied an improper test. References to profitability were made with respect to the potential economic viability of the claims. The Judge's

evaluation of the quantity and quality of gold on the claims and the costs of removing and processing the material indicated that a mining venture would not be profitable. His consideration of the economics of the situation when making his evaluation regarding discovery on the claims was proper. In Chrisman v. Miller, 197 U.S. 313, 322 (1905), the Supreme Court stated that in order to satisfy the prudent man test of Castle v. Womble, 19 L.D. 455, 457 (1894):

The mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify the expenditure of money for the development of the mine and the extraction of the mineral.

Thus, while a claimant need not prove in fact that the deposit supports a profitable mining operation, the evidence of value must be such that a person of ordinary prudence would expend labor and means in the expectation that a profitable mine might be developed. Converse v. Udall, *supra* at 623; United States v. Adams, 318 F.2d 861, 870 (9th Cir. 1963); United States v. Harper, *supra* at 367; United States v. White, *supra* at 525. It is clear from the decision that Judge Ratzman did not require appellant to prove demonstrated or future profitability in fact, but only to adduce sufficient evidence to demonstrate that a profitable venture might reasonably be expected to result. This was the proper test and appellant failed to satisfy it.

[5] Finally, we must reject appellant's request that his patent application be denied without prejudice to the validity of the claims. Where it is determined in a government contest against mining claims that no discovery exists within the limits of any of the contested claims, the necessary result is that the mining claims are invalid. Thus, the declaration that the claims are void must stand and the patent application must be rejected. United States v. Carlile, 67 I.D. 417 (1960).

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

Martin Ritvo
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Joan B. Thompson
Administrative Judge

June 22, 1972

DECISION

United States of America, Contestant v. Jack L. Gardener, Contestee
Contest No. S-077650

Involving the validity of five placer mining claims: Capitol Location; Diamond Location; Finlander; Carol; and Elaine, located in Mineral Survey 6698 Secs. 3, 27, 28, 33 and 34, T. 37 and 38 N, R.11 W., M.D.M. Siskiyou County, California

MINING CLAIMS DECLARED NULL AND VOID PATENT APPLICATION REJECTED

In 1960 Mr. Jack L. Gardener purchased five placer mining claims from an estate for \$5800. Mr. Gardener is a sheetmetal contractor in Los Angeles. The claims are in Northern California, near Cecilville, a community which is southwest of the City of Yreka. In 1964 Mr. Gardener filed a mineral patent application for the Capitol Placer and Diamond Placer claims (located in 1885), the Carol Placer and Elaine Placer claims (located in 1945), and the Finlander Placer claim (located in 1954). ^{1/} By the fall of 1969, a number of steps required for correcting the original mineral survey and establishing Mr. Gardener's title to the five unpatented claims had been taken. On April 17, 1970, the Manager of the Bureau of Land Management's Sacramento Land Office, acting on behalf of the Forest Service, United States Department of Agriculture, initiated a contest against the claims, alleging as to each of them that:

"Minerals are not discovered within the boundaries of the mining claims in sufficient quantity, quality, and value to constitute a discovery under the mining laws."

The attorney for Mr. Gardener filed a timely answer to the Bureau's complaint, raising several issues. However, in the first session of the hearing in this proceeding (held in Yreka, California on December 8, 1971) the parties stipulated that "only one factual issue is to be considered in this contest; namely, the question relating to discovery, which

^{1/} These name versions are from the Amended Application (August 24, 1964).

is raised by . . . charge number five of the complaint." Page 5, Yreka transcript, hereafter referred to as "Y Tr."

The Testimony Relating to Discovery

The bulk of the substantive testimony at the Yreka hearing session was presented by Harold Gould and Jack Quinn, who pursuant to agreements with Mr. Gardener, lived in cabins on the Diamond claim during the early 1960's, and performed and observed prospecting and material processing activities on the claims.

Harold Gould entered into a contract with Mr. Gardener on October 19, 1961, under which he was entitled to process placer ground on the Carol claim. Y Tr. 51. Mr. Gould is a heavy equipment operating engineer, but has extensive gold mining experience. During the 1930's he worked at Big Bar for about six years -- "some drifting, some open work, some placer work." At that location he mined gold on property which he had leased. Y Tr. 46-47. He also worked for a dredging concern on a gold placer deposit for several years. Y Tr. 47. Since 1943 he has spent a substantial amount of time in mining during "off work" or spare time periods. Y Tr. 48.

Assisted by his wife and son, Mr. Gould spent five or six months cleaning and rehabilitating a ditch and pipe system that had been installed to convey water to the claims before Mr. Gardener purchased them. Y Tr. 54, 56. The ditch extended three or four miles above the claims on the east side of the river.

By the process of washing placer material into a pile, and then rewashing it through sluice boxes, Mr. Gould recovered approximately eleven ounces of gold from about two thousand cubic yards of material. Y Tr. 55-57. This was done in a period of about ninety days following the period devoted to restoring the water supply system. Y Tr. 85.

Mr. and Mrs. Gould lived in a cabin on the Gardener claims, rent free. However, they did have expenses associated with items such as groceries, gas and electricity. The amount of gold recovered during the year they were on the claims did not sell for enough to cover their grocery bill for that period. Y Tr. 81.

Mr. and Mrs. Gould returned to the claims in the fall of 1962, and did some hand mining which "wasn't worth it." A major washout of the ditch at the upper end prevented any further attempts to wash gravel and soil with water conveyed through the ditch, flumes and pipes. Y Tr. 58. By 1971 that system was in a seriously deteriorated state -- "there's a lot of pipes apart and flumes out and ditches are filled up. It would all have to be done over again." Y Tr. 62, 65-67. There has been no suggestion

in this contest that it would be economically practicable to attempt to restore the long ditch and flume system which Mr. Gould utilized during his first year on the claims.

On the basis of his hydraulic mining during 1962, and limited panning operations over a wide area on Mr. Gardener's claims, Mr. Gould concluded that a prudent man would not be justified in spending further time, money and effort on those claims with a reasonable hope of developing a paying mine. Y Tr. 60-62.

Jack Quinn, a retired chef and a part-time prospector, learned of the availability of the contested claims in 1959, looked into their history and recommended that Mr. Gardener purchase them. Y Tr. 90-92; 114. In 1960 and 1961 he lived on the claims as a caretaker. Y Tr. 114-115. He prospected and panned material on the claims and observed the sampling activities of others who "came on to take a look at the property." Y Tr. 95. Mr. Quinn sampled each of the claims except the Finlander, either by hand panning, sluice box, or winch and sluice box. He recovered gold worth approximately 35 cents per cubic yard from material obtained from a ditch 32" wide by 11' deep by 100' long on the Elaine claim, and from another test of one cubic yard. Y Tr. 98. In panning on the Carol and Elaine he found colors, but when he worked the material at greater depth he found that there was no improvement. Y Tr. 100-102. The results of his panning work on the Diamond and Capitol claims were no better. Tr. 103-104. He regards "color" in a pan as worthless. The recovery from sampling work is promising when "you get a stringer of gold in the corners of your pan." Y Tr. 103.

Mr. Quinn represented the contestee when a contract was entered into between the latter and a Mr. Kinsman, who conducted a "black sand recovery" operation on the Elaine claim. Mr. Kinsman did not pay any amount to Mr. Gardener under the contract because his work on the claim produced nothing of value. Y Tr. 110, 112. Mr. Quinn submitted a document in support of the contestee's patent application; however, by an affidavit dated October 21, 1968, he advised that the claims were not a "valid mining property, or operatable as a paying venture." Y Tr. 105.

On cross-examination, Mr. Quinn conceded that his testimony indicating that other persons had failed to recover gold from the contestee's claims was based upon what he had been told by those who actually performed the exploratory work. In addition, he acknowledged that he and Mr. Gardener had been involved in litigation, and no longer were on friendly terms. Y Tr. 124.

Mr. William L. Johnson, a mineral examiner employed by the United States Forest Service, testified at the Yreka and Los Angeles hearings concerning his examination and evaluation of the Gardener claims. He is a graduate

geological engineer, and has been evaluating mines and prospects for more than 20 years, both for private industry and the Forest Service. In the course of his work he has examined more than 200 claims.

Accompanied by two other mining engineers Mr. Johnson was on the claims from June 3 through June 10, 1969. He also spent portions of three additional days on the property under consideration. Tr. 15 - 16.

The claims lie below the 2800 foot contour level, and occupy about 8500 feet along the south fork of the Salmon River. Each claim except the Carol is either bisected or bounded by the river. LA (Los Angeles) Transcript 5-6. The expert testimony for both parties gives primary consideration to the gravels in a bench level which is approximately fifteen to twenty feet above the present stream. There seems to be no contention that the gravels in the present stream could be profitably developed for their gold content.

Mr. Johnson found old tailings piles on the claims, and that much of the area had "been cleaned to bedrock." Exhibits 5A and 5B, Tr. 7. His report (Exhibit E) provides the following information concerning the remaining gravels:

"Finlander - 2 small areas of unworked gravel
Carol - 2 separated remnants of unworked gravel
Elaine - 1 30' bank containing 15' gravel, 15'
overburden
Diamond - 1 meadow area, 6' gravel, 15' over- burden
(largest volume)
Capitol - 2 small remnants of unworked gravel"

Due to recent increases in the price obtainable for gold, I have increased the values per cubic yard listed by Mr. Johnson for his samples by 20% (his calculations were made on the basis of gold at \$43.00 per ounce). The adjusted values are:

Carol: One sample 24cents per cubic yard
Elaine: One sample 43cents per cubic yard
Finlander: One sample 92cents per cubic yard; a
second sample, 84cents
Diamond: One sample 36cents per cubic yard;
a second sample 5cents

Capitol: One sample \$1.99 per cubic yard.

Mr. Johnson's conclusion is that miners worked out the good ground on the Gardener claims in the early days. In his view the small gravel remnants on the Finlander and Capitol claims cannot be worked at a profit, and larger volumes on the Diamond, Elaine and Carol claims are too low in value to justify placer operations. He regards them as a picnic operation or as "good recreational sniping sites" -- where it is possible "as a family group to snipe around and get a few colors." Exhibit E; L.A. Tr. 111. As to much of the terrain on the five claims he stated:

"There is just nothing but bare, bare, rock, without hardly anything except some piles of tailings . . ." L.A. Tr. 46.

A reasonable rate for labor in the area where the claims are located is at least \$20.00 per day. L.A. Tr. 95. In his opinion a prudent man would not be justified in spending his time and money on the claims (individually or as a group) with the expectation of making a profit by mining the residual gravels which lie within their limits. L.A. Tr. 48, 52.

The contestee's expert, Mr. G. Austin Schroter, attended the California Institute of Technology and Arizona College of Mines, graduating from the latter institution as a mining engineer. He has many years of experience in mine exploration and management work for private concerns, and at the present time is a self-employed consultant. L.A. Tr. 134-136.

Mr. Schroter spent approximately fourteen days on the claims, took samples from unmined areas, recovered gold quantities from those samples, and had the gold weighed by a leading West Coast gold buyer. He testified that he had "verified the fact that there yet remained unmined gravels on the various claims which a prudent man would invest money in with the anticipation that he would make a profit . . ." L.A. Tr. 141.

Mr. Schroter described his work on the claims as follows:

"I estimated by reconnaissance methods order of magnitude tonnages of unmined gravel to be certain that it hadn't been completely mined out, since it was easily recognized that the oldtimers had taken most of the gravels away." L.A. Tr. 147.

Exhibit H is Mr. Schroter's "Discovery Map." The five hexagon symbols on that exhibit mark the locations where Mr. Schroter excavated pits and washed goldbearing gravels in a sluice box provided by the contestee. L.A. Tr. 168.

To allow a ready comparison, I will list the volumes of unworked gravels estimated by Mr. Johnson, and those estimated by Mr. Schroter:

	<u>Johnson</u>	<u>Schroter</u>
Carol	1000 cu. yds.	14,000 cu. yds.
Elaine	4000 cu. yds.	18,000 cu. yds.
Finlander	600 cu. yds	9,300 cu. yds.
Diamond	100,000 cu. yds.	120,000 cu. yds.
Capitol	200 cu. yds.	12,500 cu. yds.

Based on an examination of Exhibits 5A and 5B (prepared by Forest Service mining engineers) Mr. Schroter provided alternative estimates for Carol of 6600 cubic yards more or less, for Elaine of 24,000 cubic yards, for Capitol of 2600 cubic yards and for Finlander of 3000 cubic yards. L.A. Tr. 194-197.

Mr. Schroter's estimated values per cubic yard for his five samples are as follows (taken from Exhibit G-4, and increased by 25% since Mr. Schroter used a gold price of \$41.51 per ounce):

Carol	\$ 0.13
Elaine	.45
Finlander	.29
Diamond	.73
Capitol	2.96

The amounts per cubic yard listed by Mr. Schroter reflect gold recoveries that are double the quantities which actually were obtained in his sluicing operation. He made an adjustment because he estimated that there was a 50% loss of gold due to the use of Mr. Gardener's metal sluice box, with riffles which "weren't exactly optimum." L.A. Tr. 199, 240. The Government counsel refers to this adjustment as reporting "not merely the gold which he recovered but also that which he imagined got away. . . thus placing claimant in the position of seeking patent on the basis of what hasn't been found." Contestant's Brief dated March 9, 1972. The recovery process for the Carol sample was deficient for another reason -- the mercury floured, due to agitation that was too violent, and this required the clean-up recovery to be arrived at by estimation. L.A. Tr. 242.

In Exhibit G-4, a letter dated December 29, 1971, directed to Mr. Gardener, Mr. Schroter stated (concerning his understanding of the contestee's plans):

1. That you have been disillusioned by poor operating performance of under-financed leasers on your claims.
2. That you propose to mine virgin yardages on subject claims as dictated by your long mechanical experience at places and times to be decided by you.
3. That you may elect to excavate gravels by hand or with any one of several types of equipment, including but not restricted to dozers, front-end loaders, hydraulic booming with pumped or channeled waters, or by such other simple and prudent methods as may be dictated by your future development work in unmined yardages.
4. That you may wash said unmined gravels in rockers, portable sluices, Long Toms or by ground sluicing, or otherwise, as you may elect.
5. That you propose to dispose of coarse tailing by backfilling with dozer, gin pole derrick where required for larger boulders, or otherwise.
6. That since you regard such operations primarily as a retirement project, your profits may be modest."

On page 5 of Exhibit G-4 Mr. Schroter explains that "profits are functions of development, stripping, operating, tailing disposal, and overhead costs" and "they cannot in any sense be determined by this or any other engineer on the basis of one or two test pit samples from each claim." Continuing (P. 6 of Exhibit G-4) he advises that "it is just as ridiculous to estimate future costs and profits from unmined and undeveloped gravels on these claims, as it is preposterous to estimate average value per yard and blocked-out yardages from one or two discovery test pits on each claim. Such economic conclusions regardless by whom made, must be treated as speculative"

Notwithstanding his view that the results are speculative, Mr. Schroter used 33 cents per cubic yard "mean costs for mining and washing with bucket line dredges", citing U.S. Bureau of Land Management Technical Bulletin 4, July 1969. These are 1964 costs which appear to be associated with relatively large volumes of placer material. In addition, the Technical Bulletin indicates bucket line dredges require substantial amounts of water in circulation. Therefore, use of the 33 cent figure is open to serious question.

A table included by Mr. Schroter in his 1971 report (Exhibit G-4) is as follows:

"TABLE III

<u>Claim</u>	<u>Order-of-Magnitude Profit</u>
CAPITOL	\$25,500
CAROL	--
DIAMOND	30,000
ELAINE	540
FINLANDER	-- "

This table reflects values per cubic yard and yardages as determined by Mr. Schroter, and a \$41.51 per ounce gold price.

Mr. Schroter conceded that he had no basis for estimating the total amount of gold in all of the gravels on Mr. Gardener's claims. He explained:

"There is a well-known fact that bench placer gravels in general and these in particular have streaks of low-grade material and streaks of high-grade material, some of which produce enormous nuggets."

* * * *

"You have to base total values upon complete sampling and mapping of the claims or upon actual operations at the end of the season.

"I didn't do that. Neither did anyone else, to my knowledge." L.A. Tr. 198.

In Mr. Schroter's opinion the cheapest method of recovering gold on the contestee's claims probably would be use of a rocker, taking water from the Salmon River. Since he had not made a detailed mine or metallurgical study, he had not determined where the water should be diverted. L.A. Tr. 257.

The 100,000 - 120,000 cubic yards of unworked gravels on the Diamond lie below a deep layer of soil in which there is no gold content. From his reconnaissance and measurements Mr. Schroter concluded that there is about one ton of overburden to one ton of gravel (Mr. Johnson estimates that the gravel layer is six feet thick, with a silty overburden fifteen feet thick). L.A. Tr. 308. To process the gravels it will be necessary to remove the overburden by stripping or some other method. L.A. Tr. 274-275.

The contestee, Jack L. Gardener, testified that he bought the claims after a friend who lived in the Cecilville area had said it was "a pretty good piece of property." L.A. Tr. 280. He has constructed a cabin on one of the claims, and has attempted to mine them with regularity. L.A. Tr. 284. He had not conducted mining operations during the winter months. L.A. Tr. 286.

When they are on the claims Mr. Gardener and his wife and children process placer gravels for gold. L.A. Tr. 286. Since 1960 the family's collective work during a two week period each year has been approximately ten hours a day, six days a week. They have recovered a gold quantity worth about \$ 400.00. He received an additional amount of gold, worth \$250, from a lessee. They have expended a total of "around \$6400" for mining equipment and miscellaneous items pertaining to mining. L.A. Tr. 288-292; 296.

Mr. Gardener is 51 years old and intends to retire when he is 55. He hopes to leave Los Angeles at that time and "try to employ some mining method" on the gravel deposits located on the claims. L.A. Tr. 294.

Decision

In this proceeding the contestant has the responsibility to produce sufficient evidence to establish a prima facie case in support of its contention that there are no discoveries on the Gardener claims; thereafter, the claimant must show by a preponderance of the evidence that his claims are valid. Foster v. Seaton 271 F.2d 836 (D.C. Cir. 1959).

The mining statutes do not expressly define a discovery. However, it has been held that one 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 profitable mine" Castle v. Womble, 19 L.D. 457 (1894).

The above-quoted definition is approved in United States v. Coleman, 390 U.S. 599 (1968), which holds also that in determining whether a mineral deposit is valuable, the Secretary of the Interior may require a showing that there is a reasonable expectation based upon the circumstances known at the time that the mineral can be extracted, removed and marketed at a profit. It is stated in Coleman:

". . . Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. 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. . . ."

A finding of mineralization may suggest the possibility of mineral of sufficient amount and value to justify further exploration, but it does not establish a discovery. Chrisman v. Miller, 197 U.S. 313 (1905).

Labor costs must be taken into account when one considers whether proposed mining operations have a reasonable prospect of success -- there is no reason to treat the value of the labor of a locator any differently from that of a person he might hire. United States v. Vernon O. and Iva C. White, 72 I.D. 522 (1965) affirmed 404 F. 2d 334 (9th Cir. 1968). Other expected costs of mining operations also should be taken into account. United States v. Hines Gilbert Gold Mines Company, 1 IBLA 296 (1971)

In determining whether a valuable mineral deposit has been found, the question is not viewed subjectively. The test is not whether the particular mining claimant feels justified in the further expenditure of labor and means. Instead, it is whether a person of ordinary prudence would, in the circumstances, be justified in undertaking the development

of a mine. See United States v. E. A. Barrows et al., 76 I.D. 299 (1969), affirmed 447 F. 2d 80 (9th Cir. 1971).

Amounts expended by reasonable and prudent men to conduct exploration activities cannot be considered proof of the prudence and reasonableness of an effort to develop a mining operation thereafter. United States v. Gunsight Mining Company, 5 IBLA 62 (1972).

The average value of samples taken is an accepted factor in evaluating a claim, and has a direct bearing on the question of discovery. See United States v. Richard L. and Nellie V. Effenback, A-29113 (Jan. 13, 1963).

Several observations relating to mining work on the claims and mining costs should be made. Mr. Quinn and Mr. Gould went beyond taking a few samples on the contested claims. They excavated substantial quantities of material on the Elaine and Carol claims and recovered gold worth only 30 to 40 cents per cubic yard. As has been indicated, Mr. Schroter's acceptance of a 33 cent per cubic yard mean cost figure for mining and washing is not persuasive because it was derived from a mining method which would not be utilized on the small remaining volume of unworked material on the Gardener claims.

A very conservative estimate of the value of Mr. and Mrs. Gould's labor on the Carol for three months would be \$1500. Their recovery from the 2000 yards that they worked was less than \$600. They had the advantage (no longer available) of a large stream of water under pressure inexpensively conveyed through the old ditch and flume system. Mining methods which could be utilized at the present time would call for the use, and attendant expense, of a pump, front end loader, hydraulic boom or similar equipment.

Mr. Johnson found small quantities of unworked gravel on four claims, and 100,000 cubic yards on the fifth. With respect to the latter (the Diamond) his two samples average only approximately 21 cents per cubic yard. In addition, for that claim substantial costs would be incurred in removing and disposing of the 15 foot layer of silt (overburden). It is clear that Mr. Johnson's testimony as to the quantity and quality of the unworked gravels, plus the information provided by Mr. Gould and Mr. Quinn, made a prima facie case that no discovery exists on any of the five contested claims. The Government's evidence fully supports the contention that the area involved has been worked to the economic limit.

The contestee's activities on the claims do not lend support to his assertion that a profitable mining venture may reasonably be expected to result from actual mining operations. Indeed, the return from an investment of \$6400 in mining equipment and 120 hours of labor each year over a ten year period -- less than \$500 recovered from the Gardener family's mining in that period -- must be viewed as minuscule.

The order-of-magnitude profit figures listed by Mr. Schroter in Exhibit G-4, prepared in late 1971, for Carol, Elaine and Finlander are nothing or less than \$1000. As to each of the latter three claims, the reports of Mr. Schroter and of Mr. Johnson demonstrate that they are not worth mining. Mr. Schroter's estimates of the volume of unmined placer gravels on those claims are much higher than those of Mr. Johnson, but the low values per cubic yard derived from the Schroter samples bring his order-of-magnitude profit estimates down to minimal levels. Mr. Johnson has low samples for Carol and Elaine, and quantities of only 1000 and 4000 cubic yards respectively. His average gold value of 88 per cubic yard from his two Finlander samples would in all likelihood exceed the mining costs which Mr. Gardener would incur (it is necessary to generalize on this point, since neither party to the contest furnished a specific and reliable amount per cubic yard for mining costs). Mr. Johnson, however, found only 600 cubic yards of unmined material on the Finlander claim. Averaging the Schroter sample value (29) with Mr. Johnson's samples (84 and 92) produces a 68 per cubic yard figure for Finlander. A recovery that high would place Mr. Gardener's mining operation at about the break-even point if Mr. Schroter's estimate of 9300 cubic yards is correct. The Schroter yardage estimates for all five claims are given as "more or less, subject to standard test pitting, trenching, drilling, or other development not made by either U.S.F.S. or Schroter." An estimate of that type, made on a basis which Mr. Schroter admits is speculative, cannot establish by the preponderance of the evidence that there are 9300 cubic yards on the Finlander rather than the two small areas of unworked gravel (600 cubic yards) listed in the Johnson estimate.

I find that discoveries have not been shown to exist on the Carol, Elaine and Finlander claims.

There is a lack of specific evidence from the contestee on expected costs of a mining operation on the Diamond claim. That claim poses a mining problem which does not exist on the other Gardener claims. The unworked gravels on this 152 acre claim are contained within a five acre area which is a fenced meadow or pasture. A layer of silt approximately fifteen feet deep lies on top of the unworked gravels. There are no valuable minerals in the silt. The stripping or washing away of the silt in order to reach the gravel obviously would be a major undertaking requiring the commitment of equipment and a great deal of labor.

The average of the two Johnson samples from the Diamond claim plus the sample taken by Mr. Schroter from that claim is 38 per cubic yard. 2/

2/ Mr. Johnson's rebuttal testimony that his 5 sample was taken at a point closer to, and is more nearly representative of, the unworked Diamond claim gravels than either Mr. Schroter's 73 sample or Mr. Johnson's 36 sample was not controverted. I find that the 5 sample (No. 02981) is more reliable, but have calculated an average in order to take a consistent approach for all five claims, and in view of the testimony that there are high and low pay streaks.

This is reasonably close to the recoveries obtained by Mr. Gould and Mr. Quinn when they processed larger quantities of material on the adjacent Elaine and Carol claims. Except for the use of a bulldozer or loader to move the silt and gravels, the methods to be employed in Mr. Gardener's proposed small scale operation on the Diamond claim would not differ greatly from those utilized in earlier days by the miners who processed most of the gold-bearing gravels on the claim. Hand work with pick and shovel or the washing of gravels in rockers, portable sluices, long toms or by ground sluicing would not seem to employ recent advances in technology. Since the ditch and culvert system that was used at one time is ruined, Mr. Gardener would have the additional expense of pumping water. The miners who worked the claim in earlier times did not attempt to reach and process the Diamond claim gravels and neither has Mr. Gardener.

Mr. Schroter indicates that the yardage in his estimate for the Diamond claim and the recovery from the sample that he took on the claim (58 , raised herein to 73) would hardly be inconsequential to a prudent man. This, however, begs the question. The gold content of a placer gravel sample may be of consequence in the sense that it would encourage further prospecting or exploration. This does not establish that there is a reasonable possibility of developing the claims at a profit. A realistic presentation of the projected costs of equipment, labor, transport of water, disposal of overburden, etc. has not been made by the contestee. Instead there is a multiplication of an estimated yardage figure by an amount per cubic yard obtained from one sample, and a subtraction from the resulting product of mining and washing costs which patently are inappropriate for use when a small buried gravel deposit is under review. The mining claimant has not shown by preponderating evidence that a profitable mining venture would result from operations on the Diamond claim.

The most persuasive case for the existence of a discovery in this contest can be made for the Capitol claim if Mr. Schroter's order-of-magnitude yardage estimate (12,500 cubic yards) is accepted.

In his 1968 report Mr. Schroter listed a \$1.59 per cubic yard sample from the Capitol claim, but because it might have been an erratic high grade sample he ignored it in calculating an arithmetical average for all five of the Gardener claims. However, he did not treat it as non-representative in 1971 when he suggested an order-of-magnitude profit of \$25,500 for the claim. Corrected and adjusted, this sample at present is \$2.96.

Mr. Johnson's sample from the Capitol, \$1.99 per cubic yard, is also promising from the contestee's standpoint. However, he found only two small remnants of unworked gravel on the claim (200 cubic yards). Using a \$2.48 average, and assuming a mining cost of 58 per cubic yard

(which is conservative considering all of the evidence in this proceeding), \$380 would be realized from 200 cubic yards. The quantity processed by Mr. and Mrs. Gould in ninety days would indicate that extraction of the gold from the remnants described by Mr. Johnson would take less than one month. That quantity of material and a prospective net recovery of less than \$400 can not be justification for patenting a placer claim of approximately 100 acres.

In assessing Mr. Schroter's conclusion that a valid discovery had been made on the Capitol, one must take into account that the two high samples, Mr. Schroter's and Mr. Johnson's, were taken at the same point, referred to as the "Capitol Placer Discovery." Mr. Schroter explained that placer gravels can have high and low pay streaks. It may be that Mr. Schroter's original assumption that sampling took place in a high streak area is correct.

For the Capitol, Mr. Schroter has roughly estimated unmined areas of gold bearing gravel on the basis of observations of the growth of timber, bushes and vegetation. In his view the unworked gravels would be found to some extent under soil which is supporting the trees, bushes and plants. Looking at the same trees and other surface features the Government mining engineers concluded that gravel will not be found where Mr. Schroter believes it exists. We are dealing with a gravel layer which is about five feet deep where it is exposed. There is an indication in the case record that the gravel layer could extend over as much as eight acres, but Mr. Schroter did not outline a specific area on a photograph or map.

Only one foot of soil overlies the gravel layer at the sampling point on the Capitol claim. When all of the work that Mr. Gardener, members of his family, and his lessees have performed on the claims since 1960 is considered, it is unfortunate that three or four trenches or pits in this shallow soil cover were not excavated. Work of this type might have demonstrated that a substantial quantity of unworked gravel remains on the Capitol.

As this contest stands we must return to Mr. Schroter's concession that an estimate of yardage made on the basis of one or two test pics on a claim is speculative. His expert opinion that there are gold bearing gravels under some areas where trees and vegetation are to be seen might suggest the desirability of further exploration, but it does not show by the preponderance of the evidence that a substantial quantity of such gravels actually exists on the claim. Evidence that is sufficient only to warrant further exploration is not sufficient to meet the prudent man test. United States v. Silverton Mining and Milling Company, IBLA 70-22, 1 IBLA 15 (1970). The contestee has not demonstrated that there is a discovery on the Capitol claim.

Conclusion

The patent application for the five claims under consideration in this proceeding is rejected because as to each of those claims the Government has sustained the charge in Paragraph 5 of the Complaint; in addition, those claims are hereby declared null and void.

Dean F. Ratzman
Hearing Examiner

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