

Editor's note: Reconsideration denied by order dated Oct. 28, 1976

UNITED STATES
v.
GOLD PLACERS, INC.

IBLA 74-342

Decided July 6, 1976

Appeal from decision of Chief Administrative Law Judge L. K. Luoma declaring the New Discovery mining claim null and void for lack of discovery. Contest OR 8765 (Wash.).

Affirmed.

1. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

To constitute a discovery upon a mining claim there must be physically exposed within the limits of the claim minerals in such quality and quantity to warrant a prudent man in expending his labor and means with a reasonable prospect of success in developing a valuable mine.

2. Mining Claims: Contests--Mining Claims: Determination of Validity--Rules of Practice: Government Contests

A mining claim is properly declared invalid where the Government establishes a prima facie case of lack of discovery, and the contestee does not show by a preponderance of the evidence that a discovery has been made.

3. Mining Claims: Contests--Mining Claims: Determination of Validity--Rules of Practice: Government Contests

Where the Government contests a mining claim, official notice of a change in the published price of gold from that given at the hearing, as set forth in

the evidence, may be taken by both the Administrative Law Judge and the Board of Land Appeals, but official notice cannot be given to asserted "modern methods of extraction of gold."

APPEARANCES: Joseph J. Carr, Esq., Seattle, Washington, for appellant; Arno Reifenberg, Esq., Regional Attorney, U.S. Department of Agriculture, Portland, Oregon, for the United States.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Gold Placers, Inc., has appealed from a decision of Chief Administrative Law Judge L. K. Luoma, dated April 8, 1974, which declared the New Discovery placer mining claim located in secs. 1 and 2, T. 20 N., R. 17 E., W.M., Kittitas County, Washington, to be null and void.

Contest proceedings were originally initiated upon a recommendation from the Forest Service, United States Department of Agriculture, charging that: (a) minerals have not been found within the limits of the claim in sufficient quantities to constitute a valid discovery; (b) the land within the claim is non-mineral in character. The contestee denied the charges. 1/

A hearing was held on the complaint July 26, 1973, at Ellensburg, Washington. The only witness for contestee at the hearing was its president, Virgil E. Hiner. He and counsel for contestee requested that the hearing be extended to allow the presentation of additional evidence. The second hearing, granted pursuant to this request, was called to order December 11, 1973, in Yakima, Washington, but was adjourned upon contestee's failure to appear.

By decision issued on April 8, 1974, Judge Luoma declared the New Discovery mining claim void, concluding that the contestee had failed to rebut the Government's prima facie case of no discovery. Appellant thereupon pursued an appeal to this Board.

1/ The record indicates that the surface of the New Discovery claim is occupied by a number of "squatters" who, with their predecessors, have been in residence thereon for many years. In Nugget Properties v. County of Kittitas, 71 Wash. 2d 903, 431 P.2d 580 (1967), the Supreme Court of the State of Washington held that the various and several squatters had established possessory rights against the mining claimant (the contestee herein) on the basis of equitable estoppel and laches. The Government was not a party to the suit. The Forest Service requested this contest proceeding to determine who has title to the land.

The contestee presents various grounds of appeal in the instant case. First and foremost, the contestee alleges that the Government failed to present a prima facie case that the mining claim was invalid.

The Department has held that "[P]rima facie means that the case is completely adequate to support the government's contest of the claim and that no further proof is needed to nullify the claim." United States v. Charleston Stone Products, Inc., 9 IBLA 94, 102 (1973), vacated on other grounds, Charleston Stone Products, Inc. v. Morton, Civil No. LV 2039 BRT (U.S.D.C. Nev.) (November 8, 1974), appealed; United States v. Bunkowski, 5 IBLA 102, 119, 79 I.D. 43, 51 (1972).

The Government introduced the testimony of Milvoy M. Suchy, a mineral engineer employed by the Forest Service, who testified as to the nature and extent of the gold-bearing gravel deposits both within the limits of the New Discovery claim and patented claims held by the contestee both south and east of the New Discovery. Judge Luoma summarized Suchy's testimony as follows:

The claim, which straddles a creekbed, and the surrounding area are described geologically as an overburden of pleistocene gravels on top of a cap of basalt which covers most of the sandstone bedrock beneath it (Tr. 10-11). The placer gold is contained in the gravels covering the bedrock (Tr. 11). The bedrock underlying the New Discovery claim is between 12 to 20 feet below the surface (Tr. 22, 35).

Contestant's witness, Mr. Suchy, dug a test cut 12 to 14 feet deep, to bedrock, on the south edge of the New Discovery claim in 1966 (Tr. 44-45). Contestee's employees helped run the 630 yards of gravel taken from the cut as though it were a normal mining operation through a Grizzly, trommel, sand pump and sluice arrangement (Tr. 22-23). The 630 yards yielded 3.175 ounces of approximately .750 fineness gold, which was valued at the hearing at \$ 285.75 using a price of \$ 120 per ounce (Tr. 23-24). The sample cut thus produced at a rate of 45 cents per yard (Tr. 24). [Emphasis supplied.]

This area along Williams Creek contains two levels of bedrock, a so-called higher bar and a lower bar 20 feet or so below (Tr. 24-25). Gravels on the higher bar have lower gold values and

hold largely wire or crystalline gold (Tr. 30). The lower bar contains higher gold values and more nuggets, evidence that the gold has traveled farther and been better sorted (Tr. 26, 30). In a hearing on a claim called the Hogg 101 to the west of the New Discovery, values found in the higher bar gravels were not significant, while lower bar gravels yielded enough to validate the claim when the price of gold was \$ 35 per ounce (Tr. 24-25). The lower bar, as far as it has been defined, is present north of Williams Creek at the Hogg 101 site, and runs west to east across the southwest corner of the New Discovery claim, and under the bulk of the Bigney claim to the south of the New Discovery (Tr. 27, 36, Exh. 3). The greater depth of the bedrock in these areas is evidenced by old drift mining operations in the southwest corner of the New Discovery and the south half of the Bigney claim (Exh. 3).

* * * * *

Mr. Suchy testified, on the basis of his experience with the Hogg 101 hearing that depended on lower bar values, and his knowledge of the geology of the area, that the New Discovery claim was entirely underlain by the higher bar except for the southwest corner containing the old drift workings (Tr. 27, 36, 41). It was his opinion that the 630-yard cut was a representative sample (Tr. 43).

Mr. Suchy also testified that the costs of a placer operation like the claimant's would run from \$.70 to \$.80 per yard--figured on the basis of fuel and labor plus depreciation of already owned equipment--to \$ 1.00 per yard on a labor plus excavation rental and equipment depreciation method of computation (Tr. 27-28). He later asserted costs could range from \$.72 to \$ 1.06 per yard (Rehearing Tr. 3). These figures were corroborated, in the witness' opinion, by evidence introduced at the Hogg 101 hearing and reference to a newspaper article quoting Mr. Hiner, adjusted to reflect higher wage costs (Tr. 29-30, 46).

Based on these cost estimates and the accuracy of his 630-yard sample, Mr. Suchy concluded that the New Discovery claim could only be worked at a loss

of at least \$.25 per yard (Tr. 46) (Rehearing Tr. 3). [Footnote omitted.]

(Dec. 2-4).

[1, 2] The initial question is whether such evidence establishes a prima facie case. Clearly it does. Suchy testified that depending on computation methods the costs would run between \$.70 to \$ 1.00 per yard. Utilizing the price of gold at the time of hearing, \$ 120 per troy ounce, the claim could, at best, be worked at a \$.25 loss per cubic yard. Suchy also gave his expert opinion, following his examination of the claim and based heavily on his estimate of the amount of placer materials in place on the claim and his estimate of the probable cost of recovery of the gold from the auriferous gravels that a profit could not result from placer mining operations on the claim. Faced with such realities a prudent man would not be justified in a further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. If a prudent man would not do so, the test for discovery of a valuable mineral deposit under the mining laws has not been met. See e.g., Castle v. Womble, 19 L.D. 455, 457 (1894); United States v. Coleman, 390 U.S. 599 (1968); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).

The burden then devolved upon the mining claimant to show by a preponderance of the evidence that his claim was not invalid on any grounds upon which the Government had presented a prima facie case. The likelihood of marketability at a profit was clearly a point to which contestee's evidence had to be directed.

It was incumbent upon the contestee to overcome this showing by a preponderance of the evidence that its costs of a mining operation would not exceed the probable returns for the mineral values to be extracted. Adams v. United States, 318 F.2d 861 (9th Cir. 1963). The prudent man test has not been met where there is not a reasonable expectation of returning a profit from a mining operation. Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).

Judge Luoma summarized the testimony of Virgil Hiner, President of Gold Placers, Inc., as follows:

Contestee's operations are on the lower bar on the Bigney and Elliot claims to the south and east of the New Discovery claim (Tr. 31, 49-50). The area around the drift mining shafts on the southwest

corner of the claim was worked by Contestee around 1966 (Tr. 48), but the rest of the claim has been neither mined nor well explored (Tr. 49).

Mr. Hiner testified that Gold Placers is able to sell wire gold of the type found in the Williams Creek area for about 25 percent more than the quoted market price because of its market as "specimen gold" (Tr. 51). He testified that when the gold price was \$ 38 per ounce, Gold Placers sold specimen wire gold for \$ 50, and that at the time of the hearing such gold would have sold for "\$ 150 or \$ 160" per ounce, not the \$ 120 market price (Tr. 51).

(Dec. 3).

The claimant was afforded opportunity to refute the allegations of Suchy but in no way did it do so. Hiner, testifying for the contestee, related only that specimen-type gold had been recovered from adjacent patented claims, and by geologic inference should be found on the New Discovery claim. He offered no evidence of sale of any gold recovered from the New Discovery, either at the hearing or during the period the record was left open for submission of additional evidence.

Even given the upper figure of \$ 160 per ounce, the net possible yield is still only \$ 0.60 per yard, thus entailing a net loss where costs exceed \$ 0.70 per yard. Judge Luoma in his decision noted that at the time of decision the Handy & Harman price varied between \$ 163.20 and \$ 176.30 per troy ounce. Adopting the figure of \$ 170 per troy ounce, Judge Luoma noted that the rate of return was only \$ 0.64 per yard. On appeal, contestee asked that official notice be made of the fluctuations in the price of gold, and contestant did not object. We note that the price of gold, as reported by the Bureau of Mines, ranged from a high of \$ 184.75 to a low of \$ 142.80 during 1975. In 1976, the price has dropped still further to the present level between \$ 125 and \$ 130. The average price per ounce during the period of June 7 to June 16, 1976, was \$ 126.86. This figure is not reasonably compatible with the figure of \$ 170 used by Judge Luoma in his decision, and is only slightly higher than figures used by Suchy in his computation at the hearing.

At the time of hearing, therefore, the mineral claimant clearly failed to show by a preponderance of the evidence that a prudent man could expect to develop a valuable mine, and that the mineral material was marketable at a profit. It is true, of course, that numerous Departmental decisions have indicated

that the ability to market the minerals within a deposit at a profit need not be shown to be a certainty. See, e.g., United States v. Gardener, 18 IBLA 175, 181 (1974); United States v. Harper, 8 IBLA 357, 367 (1972); United States v. Smith, 66 I.D. 169, 172 (1959). Implicit in this standard is an assumption that uncertainties exist in relation to the extent and quality of the deposit.

In contradistinction, if it were shown as a matter of certitude that a deposit contained X amount of mineral for which the costs of removal would be one cent more than the value obtained no prudent man would expend further labor or means with a reasonable prospect of success. Suchy estimated the presence of 200,000 cubic yards of auriferous gravel within the New Discovery claim, a figure not disputed by the claimant. Suchy also estimated the cost of recovering the gold would be between \$ 0.70 and \$ 1.00 per yard, with an anticipated return of \$ 0.45 per yard. The only conceivable justification for continuation of mining activities would be in the hope that the market value of the mineral might rise. But until a rise of sufficient magnitude is an actual fact so that a prudent man then could expect a profitable mining venture, no discovery has been made, and a contested claim is properly declared invalid. See United States v. Winegar, 16 IBLA 112, 168, 81 I.D. 370, 393 (1974). Indeed, subsequent declines in the price of gold show that blind reliance in an indiscriminate future rise of gold prices is not justified.

[3] The Judge, in his decision, adverted to the rise in the price of gold that had occurred subsequent to the hearing but prior to his decision. He computed these figures and reached a value of approximately \$ 0.64 per yard. He subsequently noted that application of Hiner's testimony relating to an asserted 125 percent ratio of "wire gold" to general gold prices, would result in a return of roughly \$ 0.80 per yard. At such a level of return, contestee would fall within the cost parameters of from \$ 0.70 to \$ 1.00 testified to by Suchy.

Judge Luoma discounted this conclusion for two reasons. First, there was no evidence in the record as to what portion of the gold taken from the claim could command the premium price, and second, there was no evidence that the 125 percent ratio which existed when gold was selling at \$ 35 per troy ounce would continue at the same level when gold was valued at \$ 170 per troy ounce or even when gold is valued in the range of \$ 130 per troy ounce. And as discussed, supra, Hiner did not present

evidence that "wire gold" existed on the New Discovery claim in any amount. None was reported as recovered from the 630-yard sample run during Suchy's examination.

We believe it was reasonable for the Judge to recompute the value of the auriferous gravel subsequent to the date of hearing in light of the tremendous upsurge in the price of gold then rampant. Indeed, there is precedent for such action in a number of our own decisions. See, e.g., United States v. Kinsley Ranch Resort, Inc., 20 IBLA 14 (1975); United States v. King, 15 IBLA 210 (1974). The implicit premise of this approach has been that the prices of certain minerals in universal demand where there is an established and definite general market price are matters of which official notice may be taken pursuant to 43 CFR 4.24(b) and 43 CFR 4.450-4(c). We adhere to that position. Quoted mineral and metal prices in standard financial and mining journals, as well as in weekly reports submitted by the Bureau of Mines are subject to official notice, but we hasten to point out that the applicable regulations are clearly permissive, not mandatory. The weight to be given unilaterally to an increase in the value of a mineral or metal must be carefully considered in the entire context of a case, especially where no new data concerning possible increases in the costs of mining is available. We must also insist that where a falling price cycle is apparent, similar notice be taken of the current lower values.

We recognize that the present reported price of gold is less than 10 percent higher than it was at the time of hearing, but it is considerably less than it was at the time the Chief Administrative Law Judge wrote his decision. We are cognizant that the price of gold has been falling steadily for a considerable period, but the price has seemingly stabilized in the range of \$ 125 to \$ 130, so perhaps the decline has bottomed. While it is not improper to take notice of the increase in the price of a mineral after the time of hearing, we think it is improper not to recognize the great increase in the prices of petroleum products and other service costs necessary to placer mining operations. We cannot reconcile the present higher price of gold, weighed against the operational costs of 1973, as indicative of a profitable mining venture on this claim. We are convinced that a marginal operation in 1973 would continue to be a marginal operation now because, although gold prices are 10 percent higher, costs of operation fuel have increased more than 25 percent.

Appellant's assertion that official notice should be given to modern methods of extraction of gold, however, is a different matter. Other than making this general statement he has not referred to any particular method which might affect the profit-loss mining on the claim. Mining methodology is not subject to

statistical, well-established data readily available through published documentation. Mining methods may vary depending upon many variables including the geological conditions of the mine, sources of water, transportation and equipment costs, etc. Thus, evidence would have to be presented to show that any new method could be utilized at costs lower than those estimated using appellant's present mining methods.

This decision is not to be considered prejudicial to continued exploration of the subject land, and if discovery of a valuable mineral deposit is made, location of a new mining claim so long as the land is not closed to operation of the mining laws.

Accordingly, 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.

Douglas E. Henriques

Administrative Judge

I concur:

Joan B. Thompson
Administrative Judge

ADMINISTRATIVE JUDGE STUEBING DISSENTING:

I cannot concur that the appellant, Gold Placers, Inc., would be acting imprudently if it undertook to develop a valuable mine on the New Discovery claim. There are several special aspects of this case which tend to influence my view.

First, the Forest Service is not genuinely concerned about the existence of the mining claim, but is seeking its elimination only as a means of accomplishing its real objective. As stated by counsel for the Forest Service (Tr. 4):

This is a peculiar case. The reason the Government is bringing this case has nothing to do with the mining claim as such, but there are a number of cabins on the mining claim. There has been litigation on the cabins between the people living in the cabins and the contestee in Washington State. People in the cabins have established a right as against the contestee by right of adverse possession of their property. That has left the Forest Service with the problem of administering the area; insofar as the cabins are concerned, the Forest Service could not properly administer the area; therefore, this action was brought.

This is not to suggest that the contest was improperly brought, or that the Forest Service's reason for pursuing it is material, nor does the reason contribute anything to the validity of the claim. It serves only to illustrate that, in other circumstances, this marginally legitimate claim probably would not have been contested at all. Further, I should point out, the appellant's troubles with those persons asserting adverse possessory rights against it are not material or relevant to our consideration of the validity of the claim, since the appellant is at liberty to adjust its relationship with those persons privately in a variety of ways.

In addition, I entertain serious doubts as to the effect of the decision of the Supreme Court of the State of Washington to invest the "squatters" with any right, title or interest whatever on land in the federal public domain. Such rights can be acquired only through compliance with applicable federal law. Mere occupancy of public lands and making improvements thereon give no vested right therein against the United States or any [subsequent] purchaser therefrom. Sparks v. Pierce, 115 U.S. 408, 413 (1885). I am of the opinion that the Forest Service is in error in believing that it is without power to deal with occupancy trespass on federal lands in the national forest by persons

who do not assert a right to be there under any federal law, notwithstanding that the land they occupy is within an unpatented mining claim. I believe that the Forest Service has not only the power to evict the trespassers but the duty to do so, and that the elimination of this mining claim will not contribute anything to the authority of the Forest Service to take such action.

In a case involving a dispute over the possessory right to public land between a claimant under the agricultural land laws and a claimant under the mining law this Department said:

The mere fact that a tract of the public domain is covered by a mining location does not deprive the Land Department of its jurisdiction and authority to investigate and adjudicate the facts establishing the character of the land or the status of any claim asserted thereto under the public land laws. Such jurisdiction exists until patent has issued.

* * * * *

It is the peculiar function and duty of the Land Department to investigate and determine controversies involving the character of land arising between mineral locators and agricultural claimants preliminary to the issuance of patent. In such cases the intervention of a local court is useless, except in order to preserve the status quo or to protect the property. "The Land Department is a special tribunal created by law for the purpose of determining the conflicting claims arising over the public land." [Citation omitted.]

Independent Lead and Copper Co. v. Levelle (On Rehearing), 47 L.D. 169, 172 (1919). 1/

1/ The occupation of unpatented mining claims by town-type development, either by squatters or those claiming under the townsite entry statutes, was not an uncommon occurrence in the past. It happened at Helena, Butte, Central City, Nome, and a number of less well known places. See, e.g., Dower v. Richards, 151 U.S. 658 (1893); M. A. and Edward Hickey, 3 L.D. 83 (1884); Hulings v. Ward Townsite, 29 L.D. 21 (1899); Nome and Sinook Co. v. Townsite of Nome (On Review), 34 L.D. 276 (1891); Golden Center of Grass Valley Mining Co., 47 L.D. 25 (1919), and cases cited therein. The several cases were resolved in diverse ways, presumably on the basis of the different nature of the parties' interests, but in all instances the holder of a prior mining claim avoided divestiture by the encroaching surface occupants--including those who had received patents.

As noted in the majority opinion, the Forest Service could have proceeded to acquire surface management authority pursuant to 30 U.S.C. @ 613, and, in my opinion, it should have done so, that being the purpose of the statute. 2/

My fundamental reason for dissenting from the majority opinion is that, despite its disclaimer, it imposes a requirement that the claimant prove that commercial ore is present on the property, and that a profitable mine can be developed. This Department and the several courts have consistently eschewed this standard in considering the validity of a claim located for an intrinsically valuable mineral. See, e.g., United States v. Heard, 18 IBLA 43, 47 (1974).

In the most recently reported judicial opinion on this point, the Court of Appeals held that the determinative question is not whether assured profits are presently demonstrated, but whether, under the circumstances, a person of ordinary prudence would expend substantial sums in the expectation that a profitable mine might be developed. Barton v. Morton, 498 F.2d 288 (9th Cir. 1974). I will have more to say, infra, concerning the prudence of this appellant in the prevailing circumstances of this case.

In Adams v. United States, 318 F.2d 861 (9th Cir. 1963), the Court held that discovery of a valuable mineral deposit within the limits of each claim is essential, but value, in the sense of proved ability to mine the deposit at a profit, need not be shown. The Court held further in that case that the Department of the Interior properly considered evidence as to the cost of extracting the mineral, not to ascertain whether assured profits were presently demonstrated, but whether, under the circumstances, a person of ordinary prudence would expend substantial sums in expectation that a profitable mine might be developed. Subsequently, the Court reiterated this holding in Converse v. Udall, 399 F.2d 616, 623 (1968), noting with approval the administrative ruling that "a valuable mine need not be a profitable one."

Moreover, through the years the decisions of this Department have held that the Department does not require the finding of a commercial ore body before finding that a valid discovery under the mining laws has been made. United States v. Mondte, A-29151

2/ However, if the appellant now locates new placer claims on this land, the same surface management authority provided by 30 U.S.C. § 613 will be invested in the Forest Service as a matter of law.

(February 4, 1963); United States v. Bunker Hill and Sullivan Mining and Concentrating Co., 48 L.D. 598 (1922); East Tintic Consolidated Mining Co., 43 L.D. 79 (1914).

Furthermore, this Department, like the courts, has held repeatedly that we do not require a mining claimant to prove discovery by showing that he is engaged in profitable mining operations or even that the economic success of an anticipated development is assured. United States v. Mellos, 10 IBLA 261, 267 (1973); United States v. Larsen, 9 IBLA 247, 253 (1973), aff'd Larsen v. Morton, Civ. No. 73-119 (D. Ariz., filed Sept. 24, 1974); United States v. Harper, 8 IBLA 357, 367 (1972); United States v. Ozanich, 7 IBLA 144, 145 (1972); United States v. Bunkowski, 5 IBLA 102, 79 I.D. 43 (1972); United States v. Gunsight Mining Co., 5 IBLA 62, 69 (1972) (judicial review pending); United States v. McKenzie, 4 IBLA 97, 100 (1971); United States v. Silverton Mining and Milling Co., 1 IBLA 15, 19 (1970), aff'd sub nom. Multiple Use, Inc. v. Morton, 504 F.2d 448 (9th Cir. 1974). 3/

Not only does the test of discovery not require proof of commercial ore, or proof of ongoing profitable mining operations, or proof that the claim can be worked at a profit, this Department has expressly rejected the suggestion that the claimant must show even that it is more probable than not that a profitable mining operation can be brought about. United States v. Smith, 66 I.D. 169, 172 (1959).

If we accept the foregoing analysis of what the claimant is not required to prove in order to establish that a discovery has been made, we perceive that the appellant has been held to too high a standard of proof in this case.

Using the figures developed by the expert testimony of the government mineral examiner as to the quantity of ore, gold content, value, and mining cost, we find that we are contemplating an anticipated profit or loss which is solely dependent on whether the gold market happens to be up or down at the moment of computation, and whether we apply the high, medium or low estimate of

3/ Other Departmental cases to the same effect include United States v. Wurts, 76 I.D. 6, 12 (1969); United States v. Fitzgerald, A-30973 (July 25, 1969); United States v. Fairchild, A-30803 (January 11, 1968); United States v. Lane Minerals, Inc., A-30497 (March 28, 1966); United States v. Santiam Copper Mines, Inc., A-28272 (June 27, 1960).

the cost of mining. In short, on the basis of the evidence presented by the government, it is possible to synthesize either a profit or a loss, with the break-even point somewhere near the mid-range of the figures available for the construction of the hypothesis.

The estimate of the mining cost by the mining engineer for the Forest Service was 70 cents to 80 cents per cubic yard. The average value of gold per yard was set by him at 45 cents based upon the then prevailing price of \$ 120 per troy ounce and his estimate that the gold was .750 fine. The Government's expert (Suchy) also testified that the claim held 18,000 cubic yards of gravel per acre, assuming a 12-foot depth, which he estimated would make available 200,000 yards of fairly constant value gold bearing gravel, allowing for value variations of 20 percent, plus or minus (Tr. 52, 53).

When the Administrative Law Judge rendered his decision he used mining costs of 72 cents to \$ 1.06 per cubic yard, which he said was the witness' testimony at the second hearing at Tr. 3 (Dec. p. 3). This was error. The witness only said that he had presented evidence of such costs at the previous hearing. In fact he had not done so. His repeated, firm, testimony throughout that hearing was to a mining cost of 70 cents to 80 cents per yard (Tr. 28, 29, 30, 46). The witness did mention at one point that by using a different approach he had calculated a cost of "around one dollar a yard," but it is obvious from the testimony that he had disregarded that calculation in favor of the 70 cents to 80 cents figure. 4/

By the time the Administrative Law Judge rendered his decision the price of gold had risen to \$ 176.30, a fact of which the Judge took official notice. He therefore recalculated the economics of an attempted development using the arbitrary price of \$ 170 per ounce of gold, and found that with a mining cost of 70 cents per yard, the claimant could anticipate a loss of 6 cents per yard!

The case presented is one in which the potential profit or loss remains, in my mind, an open question, with the probability of loss appearing slightly greater than the probability of profit.

4/ Had Suchy troubled to make an item by item analysis of the mining cost when Gold Placers, Inc., extracted and processed the 630-yard sample in his presence, he would doubtless have been able to provide more accurate evidence than the rough estimates of mining costs generally, which he could not even recall correctly at the second hearing.

Good management--the ability to achieve high production while holding costs down -- would almost certainly result in an acceptable profit in this instance, whereas poor management would assure a loss.

Finally, the time-honored test of the mythical "prudent man" must be applied in this case in its proper perspective. We are dealing here with a claimant that is a gold mining company possessed of all the necessary equipment, labor, knowledge and experience to mine this deposit, and which is actually engaged in mining a similar deposit within a few yards from the boundary of the contested claim, as demonstrated by the apparent ease and speed which enabled the appellant (not Suchy) to cut and process the 630-yard sample. It is my thesis that the operators in these circumstances would be imprudent if they elected not to undertake development of the claim, being ideally situated to do so.

The company's prudence in either proceeding with development or removing its men and equipment without attempting development must be measured by what a person of ordinary prudence, not necessarily a skilled miner, would be justified in doing, Chrisman v. Miller, 197 U.S. 313, 322 (1904). In performing this test, our theoretical "prudent man" cannot be just any specific person of ordinary prudence in his own present circumstances, but rather he must be placed in the same or similar circumstances as the mining claimant whose prudence is being tested. This is the way the "prudent man test" has always been applied in the law of torts, and for good reason. Unless the hypothetical prudent man is placed in the same or similar circumstances as the persons whose prudence is being tested, other and different factors are introduced which influence the result.

For example, let us suppose that the New Discovery claim is inherited successively by an elderly, widowed, impecunious housewife in Des Moines, an advertising executive in New York, and an abalone fisherman in San Diego, all persons of ordinary prudence, none skilled as miners. In their own circumstances, probably none of them could prudently make a decision to undertake the development of a mine on this claim. But any of them, given a seat on the board of directors of Gold Placers, Inc., with men and equipment on the spot mining a very similar deposit on adjacent land on two sides, would be well justified in voting to proceed with the development of the claim. The difference in circumstances involves a difference in risk, and the assessment of the degree of risk is the critical consideration in the exercise of prudent judgment.

In Chrisman v. Miller, *supra*, the Supreme Court emphasized that, "The facts * * * should be such as would justify a man of ordinary prudence * * *." In my opinion the claimant would be justified in undertaking development of the New Discovery claim on the basis of the facts presented.

* * * * *

I am obliged to note that the foregoing portion of this dissenting opinion was prepared at a time when the world market price for gold was considerably higher. In the interim the price of gold has declined sharply, lending support to the majority's revised analysis. However, it is fair to note that this decline in world gold prices has been influenced by such factors as large public sales of gold from national treasuries and by the International Monetary Fund. During the pendency of this appeal the price of gold rose from around \$ 170 per ounce to a high of \$ 197.50, then fell to about \$ 129, rose again to about \$ 142, sustained this price for several months, and then declined to its present low.

In light of this volatile fluxuation and the artificial and uncertain aspect of the forces which are currently suppressing the price, and the high unit value of the commodity itself, 5/ I am yet unwilling to declare that this claim does not contain a valuable mineral deposit within the intended meaning and purpose of the mining law.

Edward W. Stuebing
Administrative Judge

5/ This refers to the fact that the presence of only a relatively minute amount of additional gold in the 630-yard sample would have altered the decision. A single nugget probably would have been sufficient.

