UNITED STATES
v.
RICHARD H. KINGDON
and
EDITH F. KINGDON

IBLA 78-104 Decided June 27, 1978

Appeal from decision of Administrative Law Judge Dean F. Ratzman dated October 31, 1977, declaring null and void two unpatented mining claims in Sierra County, California. CA-915.

Affirmed.

1. Mining Claims: Discovery: Generally

A discovery exists only where minerals have been found in quantities such that a person of ordinary prudence would be justified in the further expenditure of his labor and means with the reasonable expectation of developing a valuable mine.

2. Mining Claims: Discovery: Generally

When the Government through the testimony of an expert mineral examiner has alleged a lack of valuable mineralization, the burden of showing the contrary by a preponderance of the evidence shifts to the contestees.

3. Mining Claims: Discovery: Generally

Isolated showings of high sample values and assays will not, without more, support a claim of discovery.

4. Administrative Procedure: Administrative Law Judges -- Administrative Procedure: Hearings -- Hearings: Generally --Rules of Practice: Hearings

It requires a substantial showing of bias to disqualify a hearing officer in administrative proceedings or to justify a charge that the hearing was unfair.

APPEARANCES: Charles F. Lawrence, Esq., Office of General Counsel, U.S. Department of Agriculture, San Francisco, California, for contestant; Thomas W. Martin, Esq., Sacramento, California, for contestees.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Richard H. Kingdon and Edith F. Kingdon have appealed from the decision of Administrative Law Judge Dean F. Ratzman dated October 31, 1977, wherein he declared the Elizabeth placer mining claim and the Busy Bee placer mining claim null and void because of a lack of discovery of a valuable mineral deposit within the limits of either claim.

Appellants contend the decision is not supported by the evidence, and allege misconduct on the part of respondent's attorney, prejudice and bias of the administrative law judge, arbitrariness and prejudicial abuse of discretion on the part of the Judge, and denial of a fair hearing.

The Busy Bee and the Elizabeth Placer mining claims were acquired by contestees Richard H. Kingdon and his wife, Edith Kingdon, on February 24, 1972. Their grantor, Elizabeth C. Brown, derived her interest under a 1952 location. The Busy Bee placer is located within the SW 1/4 sec. 5, and the SE 1/4 sec. 6, T. 20 N., R. 9 E., and the Elizabeth placer is located within the SE 1/4 sec. 6, T. 20 N., R. 9 E., Mount Diablo meridian, Sierra County, California.

The contest which ultimately gave rise to this appeal was initiated at the request of the United States Forest Service by a complaint filed in 1974 and an amended complaint filed March 5, 1975. This complaint charged, in relevant part, that no discovery of a valuable mineral deposit has been made within the limits of either the Busy Bee or the Elizabeth placer mining claims and that the land embraced within each claim is nonmineral in character. Mr. and Mrs. Kingdon made a timely answer denying the charges. Hearings in the proceeding were held on October 27, 28, and 29, and November 1 and 2, 1976, in Yuba City and Sacramento, California, are reported in five volumes of transcript. A Forest Service mineral examiner, Henry W. Jones, was the Government's principal witness.

The decision below summarizes Jones' testimony as follows:

Mineral examiner Henry W. Jones examined the contested claims for the Department of Agriculture. He has a bachelor's degree in geology, is a Certified Geologist with the State of California, and has worked as a placer miner in California and Nevada. He was a mineral examiner for the U.S. Bureau of Mines for more than five years, and transferred to the Forest Service in 1958. Tr. I-35. He had conducted mineral examinations for the latter agency in Alaska and California over a period exceeding fifteen years. Most of his work in California in a twelve year period has been on gold placer claims. Tr. II-36. When Mr. Jones looked at the claims in October, 1972, Mr. Kingdon pointed out some of the corners. Mr. Jones was able to establish the boundaries of the Busy Bee and the Elizabeth in relation to other placer claims, and to depict them on an aerial photograph (Exhibit 8) which "shows quite well the various ponds, lakes, roads, buildings, and other features" on or near the claims. Tr. I-39. The lakes near the claims are on patented lands in portions of old channels where material was removed in mining that was performed more than 35 years ago. Exhibit 6; Exhibit E. Pits along the boundaries of the contested claims at some points are approximately 70 feet deep from the lip to the bottom. Tr. I-45. The stripping in the lakes depicted on Exhibit 6 has extended down to rock which may be bedrock. Gravel extends from the pit areas into the two claims both to the east and west -- the excavated area splits the Elizabeth into two parts and goes into the Busy Bee as a deep notch (which makes the Busy Bee look like an inverted "U"). Mr. Jones has "no way of knowing" how far the gravels extend into the contested claims. Tr. II-48. He found large piles of "tailings, perhaps" on the claims. Tr. I-46. Material has been piled up to a depth of fifty feet on one part of the Elizabeth. It lies at different depths at various locations on the claims, and the size of the trees growing on the piles indicates that they date back approximately thirty years. The intrusion of the worked area from the south is largely within the boundaries of the Gold Valley Placer Mining Claim, a patented property. The pit extends into a portion of the northern end of the Busy Bee. Exhibit 6; Exhibit 8. That part of the Busy Bee appears to have been mined. Tr. I-49.

On September 30, 1976, Mr. Jones found that a small pit, approximately six feet deep, had been dug on the Busy Bee claim, near the point designated S-02253 on Exhibit 6. That pit had been excavated at a time subsequent to his examinations in 1972 and 1973. Exhibit 18.

Because Mr. Kingdon did not designate specific sampling locations Mr. Jones exercised his discretion in selecting them. Tr. I-54. During a four day examination in the spring of 1973 he took nine samples that were sent to Metallurgical Laboratories, Inc. in San Francisco on June 4, 1973. When he panned the material to a concentrate he observed one to three "colors" per pan. Tr. I-114. For each sample he requested a determination of the free gold content by amalgamation; in addition, he asked for a fire assay of the composite of the tails of the samples submitted. Tr. I-57, 72. Because the contestees did not have pits for him to sample Mr. Jones tested the gravel that was exposed "as nearly as possible to the full extent." Tr. I-70.

Samples 02254 and 02255 were taken from undisturbed ground. Sample 02251 represents material that is "essentially bedrock in the creek bottom" which "didn't show any great depth." Tr. I-70. Samples S-02247 through S-02251 are from the Elizabeth and the remaining four are from the Busy Bee.

The reports showing the results of the 1973 assays for gold are Exhibits 19 and 20. Mr. Jones considers the gold content of the samples to be very poor. The gold values reported by the assayers were not sufficient to warrant working the contested properties on the present day market. Tr. I-101. The properties have no economic value as a mine. Tr. II-127.

Mr. Jones stated that the general practice of miners in earlier days was to mine placer deposits to their economic limits, and to leave material that was beyond those limits. Tr. I-99. In his opinion the "valuable part" of the channel shown on Exhibit E was mined out in the course of the earlier operation. Tr. I-101; Tr. II-4; Tr. II-124.

Upon cross examination Mr. Jones recalled that Mr. Clifford Sasselli, who was on the claims under a working arrangement with the lessees, has criticized the panning method utilized by Jones. The latter expressed the opinion that Mr. Sasselli was not sufficiently versed in sampling procedures to complain. Tr. I-110. Mr. Jones believes that a panning operation is somewhat more efficient than any mechanical type of gold recovery, and would give better results than a commercial recovery process. Tr. II-145-147.

The width of the channel area that has been mined is about 450 to 520 feet. Mr. Jones' testimony that there is

not a sufficient discovery to support the contestees' mining location is related to the present time, not to the time when the channel was mined to that extent. Tr. II-10. He concedes that there might have been a discovery on the Busy Bee at one time because the pit extends into that claim. Tr. II-11. However, in earlier days mining operations were "very much more economical" than they are at the present time. Tr. II-12. On the east side of the Busy Bee there are large exposed banks of original material. Mr. Jones has assumed that initiation of mining activity on the Elizabeth would entail the expense of taking off the gravels that were piled there by miners plus the removal of original overburden which is above a level that may contain gold values. The logical place for work would be the exposed banks of the Busy Bee. Tr. II-16. From his testing, and the reports which he has read, he assumes that stripping off 40 to 50 feet of original overburden, from a deposit of materials about 70 feet in total depth, would be called for. Tr. II-23-25.

The material stripped from other claims has been piled on one-third to one-half of the Elizabeth and on about one-fifth of the Busy Bee. On the portion of the Elizabeth which is unburdened by the piled gravels he found trees, forest dust, clay and soil, with no gravels exposed. Tr. II-35. He found the same condition on the disconnected one or two acre portion of the Elizabeth which lies to the east of the Gold Valley Placer.

Mr. Jones did not take a sample from the small pit that he found in September, 1976 at a location approximately fifty feet south of his sample site S-02253 (marked by a large green "X" in the western segment of the Busy Bee; Exhibit 6). He stated that he saw no purpose in sampling the clay exposed seven or eight feet down because in his experience gold values are not found in clay. Tr. II-39, 42.

The contestees' counsel brought up the question of clay and white quartz values when he cross-examined Mr. Jones. The latter did not consider the clay on the claims to have any commercial value, and indicated that information on quality and quantity, market sites and processing facilities is lacking. In his opinion all of the white quartz gravels in the Poverty Hill, La Porte and lowland areas are of similar nature. Tr. II-45, 46. About 60 or 70 per cent of the stockpiled overburden or tailings on the contested claims is quartz material. Tr. II-49.

Mr. Jones' highest yielding sample (02251) was from five pans obtained in a creek bottom near bedrock on the Elizabeth. There are ten or fifteen cubic yards of material at that location. Tr. II-128. At such a site the continuous washing process in the stream produces a concentration of gold. The values in the stream gravels ran from two to twelve times as high as those at other sample locations. Tr. II-91; Exhibit 21. He took the stream bed sample from "the only place that showed any degree of gravel whatsoever." Tr. II-93. The stream on the Elizabeth borders the gravel deposits that were placed on the claim by other mining operators. Tr. II-95; Exhibit 8.

The estimate given by Mr. Jones at the hearing of the quantity of gravel deposited on the two contested claims is 750,000 cubic yards. Tr. II-130. The quantity of gold per yard in those deposits indicated by his sampling is less than one-fifth of the cost per yard of recovery operations reported by a dredge operation in a nearby area. Tr. II-131. As to the value of the Elizabeth and Busy Bee to a reasonable, prudent person for mining purposes he stated:

> * * * You would have to . . . make a very precise study of the entire area, entire amount of gravel and the cost, more so than what I've stated here, in order to come up with some comparative costs for recovery. However, it would have to be in excess of, I would say, at least 50 cents before this could be economically recovered. Tr. II-132

According to Mr. Jones the contested claims could be mined most efficiently by the hydraulic method. However, that method is no longer utilized because of laws which control the damming of streams, and prohibit the use of streams to wash away debris. Use of a drag line and a washing plant would be possible, but the cost of the required equipment would be very high. Tr. II-142.

After a careful reading of the record below, including the transcripts and the various pleadings on appeal, we conclude that the foregoing is a fair and accurate summary of Jones' testimony regarding the contested claims. We would add to it only the fact that Jones, in describing his 1972 examination of the Elizabeth claim, conceded the availability of a "very fine gold" in the piled materials on the Elizabeth but found that this gold was present in "very limited quantity." Both of these conclusions were reached on the basis of a visual inspection of panned samples (Tr. II-57).

Immediately upon the conclusion of Jones' testimony, the Government called appellant Richard Kingdon as an adverse witness. Kingdon, together with his wife, owns various interests in various mining properties in the area, including interests in several placer claims which adjoin the Busy Bee and the Elizabeth, principally on the north and south sides of those claims.

Kingdon, who has a forestry degree from the University of California, was not present when the contested claims were located in 1952, but acquired these claims in 1972 while employed by the Forest Service as a forester administering timber sales contracts in the district where the contested claims lie. This collocation of interests prompted Judge Ratzman, in his opinion below, to observe obiter dicta, that,

> On the basis of a review of the regulations of the Department of Agriculture relating to employee responsibilities and conduct, Fed. Register Vol. 36 No. 8, January 13, 1971, pages 413-418, I conclude that his actions have resulted in a very serious conflict of interest. The cited regulations stress that an employee of the Department of Agriculture should maintain unusually high standards of integrity, impartiality and conduct in order to assure confidence by citizens in their Government. They require an employee to avoid any action, whether or not specifically prohibited by the conflict of interest regulations, which might result in or create the appearance of using public office for private gain, impeding Government efficiency or economy, losing complete independence or impartiality, or an adverse effect upon the confidence of the public in the integrity of the Government. There are trees on the two claims, and structures, including a two story house. It is obvious that to a member of the public there could be the appearance of conflict between Mr. Kingdon's private interests, acquired through the deed, and the performance of his Government duties.

The Kingdons, on appeal, take strong exception to this conclusion and argue that it is indicative of prejudice and bias on the part of Judge Ratzman, an argument which we address, infra. Mr. Kingdon stated, moreover, both below and on appeal, that discoveries existed on both of the subject claims as a result of the prospecting and mining efforts of his lessee Mr. Clifford Sasselli. He made the following statement concerning Sasselli's activity:

> I don't have any idea where the discovery points are. He [Sasselli] has not made any specific discovery points. He sampled the gravels from the areas on the Elizabeth and Busy Bee, and has run them, and I have assay reports introduced here that have corroborated findings that he's made. Tr. II-173.

The decision below briefly summarizes Sasselli's activity saying, "About 90% of Mr. Sasselli's work has been confined to the Twin claim, but some gravels have been sampled in the stream area of the Elizabeth and 'under the banks' on the eastern portion of the Busy Bee" (Tr. II-174).

Kingdon takes the position that the gravel which has been removed from the adjoining, patented claims and deposited on the contested claims has become his personal property. As noted above, however, he asserts that Sasselli has made a discovery on the claims based on mineralization quite independent of the gravel. As Kingdon stated below, "I said there was a discovery; however, the discovery is not based . . . on the material that was taken out of the patented claims and piled up on the located claims" (Tr. II-192). The decision below further details Kingdon's testimony stating that,

> He asserted that the last large scale mining operation terminated because of World War II. At the outset, hydraulic monitors were utilized to bring the banks down. As the mining proceeded the operators changed to a bucket line dredge. Tr. II-196. Mr. Kingdon presumes that the best values were in the area where the dredge was operated, but contends that they were not the only values, and that the claims were not mined out. Tr. II-197, 202.
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> Mr. Kingdon stated that by visual inspection it is obvious that the original (unexcavated) ground of the contested claims contains quartz, and "as such, it has value, and we are considering all of the possibilities for development in these areas." Tr. III-34. Offers to sell quartz or silicon have not been made and offers to buy have not been received.
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> Mr. Kingdon described methods that can be used to sample the original deposits under the estimated 750,000 cubic yards of deposited material:
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>> "Oh, we could run drifts underneath. We could run a drift under the surface, or sink a shaft through the material, or in areas where there is no material piled in order to sample or drill, or run a drilling operation to test it." Tr. III-50.

Despite the foregoing assertions regarding discovery on the contested claims, Kingdon admitted that he had not received any payment which he could identify as having come from either of the contested claims. Tr. III-10.

Following Kingdon's testimony, Mr. Clifford Sasselli was called as a witness by the contestees. The decision below states that,

> After completing the ninth grade he [Sasselli] went into the Navy. He was discharged from that branch of the service in 1961 after serving four years. Tr. IV-4. He has worked as a carpenter, in the sheet metal trade, as a prospector, and in the diving business. He has prospected in South America on several occasions. During the years that he was prospecting in Bolivia and other countries he also worked as a merchant seaman. Tr. IV-6. He has been interested in the contested properties since 1968 or 1969. In 1972 and 1973 he worked at odd jobs part of the time, and spent the remainder of his time on the claims, building pieces of equipment and testing.
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> [He] has stayed in the buildings on the Elizabeth claim, acted as a caretaker, and accomplished assessment work since 1972. Tr. III-4. On exploring and testing the claims he has found some gold. Mr. Kingdon testified that Sasselli had presented one sample to the contestees for delivery to a laboratory for analysis. Tr. III-6. Mr. Sasselli made one payment of $50 under a lease provision which requires him to pay ten per cent of the gross value of metals taken from claims covered by the lease. Tr. III-8. However, Mr. Kingdon believes that most of the material associated with that payment came from the Twin, a claim not involved in this contest. Tr. III-10. Mr. Sasselli has not made payments of $1000 per year called for in an addendum to the lease and has not processed the quantity of gravels specified in that document. Exhibits K-1 and K-2; Tr. III-44. The equipment used by Sasselli in 1975 did not operate satisfactorily. In 1976 he changed to a "gravel pump type operation." Tr. III-3.
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> He built three suction dredges initially, and at the time of the hearing in 1976 had just completed equipment designed to pump gravel and carry out hydraulic excavation. He has a TD-14 bulldozer and has borrowed a backhoe. In his view, mining the claims by excavating hydraulically, (rather than using a bucket line dredge) would be the most efficient or "economic" method. Tr. IV-11.
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> Mr. Sasselli has taken samples from the Elizabeth claim by hand auguring, and from the Busy Bee by excavating material with the backhoe. He furnished a Beechnut

baby food jar of concentrated material to Mr. Kingdon for analysis. Some of the concentrate came from the Elizabeth and some from the Twin. Tr. IV-13. He is convinced that he "can now operate economically." Tr. IV-14, 23. He would work the entire deposit including the material that was placed on the Elizabeth. Tr. IV-17.

Four days before he testified Mr. Sasselli and mining geologist James Orr worked ground on the Busy Bee claim with a backhoe and small washing plant. This was done to "get one very good estimation" and to substantiate Mr. Sasselli's claims. Tr. IV-76. Values "that indicate several dollars to the yard" were found, according to Mr. Sasselli. Tr. IV-17. In discussing panning techniques he asserted that there are gold values in the clay and that successful panning of the material from the claims requires at least fifteen minutes per pan.

Mr. Sasselli intends to mine on the Twin claim first, and then move south onto the Busy Bee. Tr. IV-21. He asserted that he could work the Busy Bee at a profit with equipment he had assembled in 1976. He plans to mine for gold, silver and platinum. In addition, he foresees a bright future for silica.

Because of a lack of capital Mr. Sasselli has built his equipment, and has made mining accessories, out of used materials. He stated that in "bank mining" he had produced "seven to eight ounces of free gold" and many pounds of concentrate. That gold, obtained from the contested claims and two others, has been used as security for loans or "has been eaten up in assaying." Tr. IV-34, 41.

Most of Mr. Sasselli's mining activities through the years have been directed toward prospecting and research. When he put one hole down on the Elizabeth with an auger, he reached bedrock and found values that were enough to satisfy him that the ground was worth working. Tr. IV-38. He estimated that he had worked an average of 20 hours a week on the claims during a five year period.

The plans that Mr. Sasselli had in the fall of 1976 for working the contested claims did not differ substantially from the plans he had in 1973 when he agreed to a lease to process 30,000 cubic yards per year. Tr. IV-47. However, in 1976 he had completed a larger processing plant from salvaged material.

On the basis of trial runs made with "more or less measured amounts," Sasselli concludes that, "the ground is running in excess

of a dollar a yard." There are, however, no written records or proper quantitative assays to document his assertion, and this "dollar a yard" conclusion, like most of Sasselli's testimony regarding values and discovery on the contested claims, must be dismissed as wholly subjective and conjectural. Similarly, Sasselli's proposed plans for the development of commercial mining on the claim using salvaged equipment seem so tenuous, vague and improbable of accomplishment as to warrant little weight. See, infra.

Immediately upon the conclusion of Sasselli's testimony, Mr. James M. Orr, a mining engineer, was called as a witness for the contestees. As the hearing transcript and decision below both show, Mr. Orr was unquestionably qualified as an expert witness, and we note, with Judge Ratzman, below, that Orr has obtained,

> [A] degree in mining engineering from the University of British Columbia, a master's degree in geology from the California Institute of Technology, and has completed additional courses at other major universities. He has spent most of his life in mining work and teaching. He was head of the Mineral Engineering Department at the University of Alaska. Tr. IV-115.

Orr testified that, 4 days before the hearing, he took part in "a sampling at the Poverty Hill Mine" (Tr. IV-117). The sampling in question was made using materials taken from the side of a pit which Sasselli had dug on the south end of the Busy Bee, and the material, some 22 buckets in all, was washed through a long sluice box during a 4- or 5-hour period (Tr. IV-150). About 150 pounds of material was retained in the sluice box, and this material was panned until about 45 ounces of concentrate was left (Tr. IV-124). The concentrate itself was obtained by a manual panning procedure with Sasselli doing the preliminary panning and Orr doing the final work and bottling the end product in six bottles (Tr. IV-124). As the decision below notes,

> Mr. Orr stated that he had no reason to doubt that it was an "honest run" (not salted). Tr. IV-123. They obtained two bottles of concentrated material from the sluice box "where it discharges," and four bottles "where the gold went over first." Tr. IV-126. The two bottles contained fourteen ounces of concentrates, and the four bottles from the first part of the sluice contained thirty one ounces. On the basis of what he found in one of the bottles he concluded that there were .020 ounces of gold in 1.74 cubic yards, which amounts to about $1.38 per cubic yard (calculated using a value for gold of $120 per ounce). Tr. IV-128. He assumed that the jar he used contained one-sixth of the gold, but conceded that he "might be wrong one way or the other."

Prior to the date of the above-described sampling, Orr had twice visited the contested claims and panned samples from the Busy Bee, the Elizabeth, and from the Twin (Tr. IV-131, 132). The first of these samplings was made on the east side of the Busy Bee where Sasselli, using a backhoe, had dug a 9-foot pit. Orr collected several shovels full of material, put them in a plastic garbage bag, and tagged the sample for later analysis. The second of the "exploratory" samples was taken from the 3-foot swimming pool pit on the Elizabeth. Eight more samples taken from the claims yielded some colors, and concentrates from two pans were sent to the Metallurgical Laboratory in San Francisco for analysis (Tr. IV-138). Orr stated, in reference to these preliminary samplings, that the best colors he obtained were from sample No. 8 which was taken from the Twin claim which is not affected by the contest (Tr. IV-140).

Mr. Orr's opinion as to the values present on the claims appears to be based largely upon the results of the sampling which he conducted at the washing plant which Sasselli constructed on the Busy Bee. As noted, supra, the samples processed at this location were taken from the pit which Sasselli dug on the south end of the Busy Bee. It was this sampling that evidently gave rise to Orr's opinion that, "the ground will run a dollar and a half" (Tr. IV-140). In this connection, the opinion below notes that,

> Upon cross-examination Mr. Orr agreed that "larger more course [sic] gold" will be collected at the head of a sluice box, and finer gold will settle at the base. Tr. IV-156. The jar he selected for analysis was from the head or top. In normal operations one would expect the material to be richer up there. The difference can be substantial. Tr. IV-157.
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> When Mr. Orr re-inspected the plastic bag which under his determination contained .112325 grams of gold (Exhibit R), he conceded that it contained some black sand and, significantly, "a piece of amalgam" -- gold affected by mercury, probably from the earlier dredging operation. He did not think that amalgam would form in native tailings. Tr. IV-160. It is possible that tailings had run over into the location where they had excavated and sampled. Tr. IV-161.
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> Mr. Orr did not attempt to make a determination of the quantity of gravel on the contested claims. Tr. IV-164. For sampling purposes he would set up a washing plant and run a hundred yards at one location and "see where it goes and run another hundred yards and so on." Tr. IV-167, 170. In his opinion there is a discovery, but he would recommend further investigation of the Busy Bee. He does not have much knowledge of the Elizabeth.

> Tr. IV-169. As a professional man he would want to "do some more investigation" before he committed his own money to either of the contested claims. Tr. IV-170. [Emphasis added.]

In addition to Mr. Orr's testimony, contestees called as a witness Mr. Robert Oyster, the son of one of the miners who operated in the area of the contested claims during the 1935-1940 period. Oyster himself had done some work on his father's job site in the years 1938-1940, and his testimony closely parallels the detailed information provided in Exhibit J, an old report which describes the mining on the Poverty Hill properties. The majority of the testimony which he offered relating directly to the Busy Bee and the Elizabeth concerned his recollection of some sample drilling on the claims during the pre-World War II years which yielded promising values (Tr. III-91-92). He also stated that some actual commercial recovery had taken place on the Busy Bee, and that the values thus encountered on the claim were the richest values mined by the Oyster group in all of their operations at Poverty Hill (Tr. III-89).

The above-mentioned sample drilling, according to Oyster, showed values "almost" as high as the gravels which were being commercially processed at that time (1939-1940) on the other claims (Tr. III-91). He stated that the center channel contained the richest values, but that the east bank was richer in mineralization than the west bank (Tr. III-96). Evidently no written record or analysis exists concerning these test holes, and Oyster's recall concerning the drilling appears to be somewhat hazy. When questioned about the values recovered from certain of the holes, he replied, "It is really too long ago for me to give you a tip," and, when asked if he could mark on a map the approximate location of the test holes he answered, "You know, I'm not sure" (Tr. III-93), and was obviously hesitant about the particulars of his recollection. Oyster stated, however, that he dug an outhouse pit some 300 yards east of the main channel and found gold-bearing gravel there.

Mr. George Page of Hayward, California, was the final witness for contestees. As the decision below notes,

> He is a chemist, physicist and professional appraiser. He has experience in practical mining and has worked with a staff of mining engineers and geologists. He visited the contested claims four days prior to the commencement of the hearing. He observed the exposed deposits, panned gravels on both claims and visually inspected the concentrates. Tr. V-7.
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> Mr. Page maintains a laboratory in Hayward, California for the development of silicon crystals and other high temperature materials.

Mr. Page visited the Poverty Hill area claims at the request of contestee, spending about 7 hours sampling and evaluating the mineralization on the Elizabeth and Busy Bee. His opinions about the values present on the claims were extremely enthusiastic, especially with respect to the quartz deposits on the claims. As Judge Ratzman noted:

> Quartz is one of the most abundant minerals in the world. The United States depends on foreign imports for hyperpure quartz. Tr. V-16. Mr. Page commented upon the abundance of silicon and rarity of pure quartz. He has concluded that there is a "major amount of deposit" of quartz on the Busy Bee and Elizabeth "which would be in the 99 percent purity or better." Tr. V-17. When he was asked whether that quartz had value he responded that it is a most important asset and "virtually a national asset." He did not state that the quartz material has a value at the present time. He said that because of the presence of quartz the "properties would justify extensive exploration and setting up a pilot plant in trying to develop products from the quartz." Tr. V-20.

With respect to the purity of the quartz deposits on the contested claims, Page testified that he had conducted "wet chemistry" analysis of certain quartz samples taken from the Elizabeth (Tr. V-44), and that these tests had shown the sample to be "99 and a half percent purity upwards" (Tr. V-52). He qualified this estimate, however, saying, "If you were going to go into ultrapure silicon, I think it would be prudent to examine the thing for boron." He admitted to having no knowledge about the boron content of the sample, and added that such an analysis, "would be a manufacturing step that you'd be probably undertaking to determine the ultimate degree you're going to purify it to" (Tr. V-53). As the decision below states, Page,

> suggested that quartz should be color-selected, and then the commercial possibilities should be explored. In his view the quartz material warrants an engineering investigation. Tr. V-23. He would expect to find quartz of a high degree of purity in the virgin ground as well as in the overburden. Tr. V-26.
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> Upon cross-examination Mr. Page testified that he spent about seven hours on the Busy Bee and the Elizabeth, as contrasted to many months expended in evaluating other placer properties. He observed cliffs on the Busy Bee, and deposits of gravel and the stream on the Elizabeth. He does not know, but suspects, or would say there is a reasonable probability, that the gravels will extend back into the Elizabeth. Tr. V-34.

> In Mr. Page's opinion more information is needed, not to prove the property, but to "determine extent and nature of values to work out a plan of operation." Tr. V-36.

Although the better part of Page's testimony was made in reference to quartz and silicon deposits, he also found gold values at several locations on the claims noteworthy,

> At two sample locations Mr. Page found gold quantities to be very outstanding. At other locations he found eight to ten colors per pan with an occasional flake. In addition, he selected white rocks which have the appearance of pure quartz from the two claims. Tr. V-13.

Mr. Michael Owens, the last witness called in the 5 days of evidentiary hearings, testified as a rebuttal witness for the Government. As the record below states, Owens is, "a zone mining geologist who has a bachelors and masters degree in geology from the University of Tennessee * * *. He has worked for several corporations as a mine geologist and an exploration geologist. Tr. V-71." Judge Ratzman summarized Owens' testimony as follows,

> Using a fourteen power hand lens he had examined the material in Exhibit R, which Mr. Orr had obtained from a sample. He estimated that 70 per cent of the material is gold and amalgam, and 30 per cent consists of "non-gold minerals." He has found that gold and other minerals having a specific gravity higher than five will be concentrated in the upper ten per cent of a sluice box. Tr. V-76, 81. Very fine fragments of the heavier materials may be found in the lower riffles. Tr. V-81. He discussed Mr. Orr's calculations as follows:
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> > * * * as I recall Mr. Orr obtained six bottles of concentrate; that he worked one of them from the upper portions to obtain his material; that he then multiplied by six to obtain the values. Well . . . by doing so he has salted himself. His values are higher than they should be. * * * The lower portions of the sluice box will be much leaner. * * *.
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> This is strong criticism by an employee of the contestant but the facts which he has recounted are not in dispute.
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> [1] As noted, supra, the amended complaint which gave rise to this contest charged that
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> > A. There are not disclosed within the boundaries of the mining claims minerals of a variety subject to the

mining laws, sufficient in quantity, quality, and value to constitute a discovery.

B. The land embraced within the claims is nonmineral in character.

The decision below does not reach the allegation raised by part B of the complaint, that the lands at issue are nonmineral in character and, thus, the only issue presented on appeal is whether the record before us warrants the finding that the Government sustained its allegations that claimants have failed to make a valuable mineral discovery on the disputed claims.

As this Board has held on many occasions, a discovery exists only where minerals have been found in quantities such 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. United States v. Maley, 29 IBLA 201 (1977); United States v. Arcand, 23 IBLA 226 (1976). 1/ This rule, known as the "prudent man test" was first enunciated in Castle v. Womble, 19 L.D. 455, 457 (1894), and was given approbation by the Supreme Court on several occasions, e.g., United States v. Coleman, 390 U.S. 599, 602 (1968); Best v. Humboldt Placer Mining Company, 371 U.S. 334-335 (1963); Chrisman v. Miller, 197 U.S. 313, 322 (1905). As a refinement to the prudent man test, the so-called "marketability test" has been added. As stated in Coleman, supra: "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." 390 U.S. at 602. Present marketability at a profit is necessary. As stated in Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971), the "marketability test" requires claimed minerals to possess value at the time of their discovery. A location based on speculation that there may be at some future date a market for the discovered mineral cannot be sustained. 447 F.2d at 83.

The Government, in a mining claim contest, carries the burden of going forward with a prima facie showing that no valuable mineral discovery has been made. Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959). Such a prima facie case is established when a Government mineral examiner samples and evaluates a claim and gives his expert

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1/ With regard to the sand and gravel deposited on the contested claims, we note that the value of common varieties of sand and gravel not locatable under the mining laws cannot be considered in the evaluation of the value of gold to determine whether there has been a discovery of a valuable deposit of gold on the claim. United States v. Silverton Mining & Milling Co., 1 IBLA 15 (1970), aff'd sub nom. Multiple Use, Inc. v. Morton, 504 F.2d 448 (9th Cir. 1974).

opinion that there are no values on the claim which might constitute a discovery under the "prudent man" test, described supra. United States v. Hunt, 29 IBLA 86 (1977); United States v. Bechthold, 25 IBLA 77 (1976). In the case before us, the opinion of the Government mineral examiner, Henry F. Jones, that the claimants had failed to make a valuable mineral discovery on the Busy Bee or the Elizabeth was clearly sufficient to establish the contestants' prima facie case. Bechthold, supra.

[2] When the Government has made its prima facie case, the burden of going forward with the evidence shifts to the contestees, who must show by a preponderance of the evidence the existence of a valuable mineral deposit sufficient to support discovery. Foster v. Seaton, supra; John L. Maley, supra. Thus, the testimony of the Government's mineral examiner placed upon the contestees the ultimate burden of proving discovery, or, stated conversely, the burden of disproving the Government's case. United States v. Springer, 491 F.2d 239, 242 (9th Cir. 1974).

Contestees, in the proceeding below, sought to demonstrate discovery through the testimony of various witnesses beginning, as described supra, with that of the claimant, Richard Kingdon. Kingdon appeared to have scant personal knowledge of the claimed discoveries, and testified that he had arranged for the actual work on the claims to be conducted by his lessee, Clifford Sasselli.

Sasselli, for his part, has been living on the contested claims since 1971 (Tr. IV-8) and has yet to produce anything resembling commercial scale mining; this despite his assertions that the claims encompass "very valuable ground" (Tr. IV-17) for gold deposits and that they include an "incredible deposit" of valuable silica. Sasselli testified that he is ready now to commence commercial operations and predicts profitable results. We find, however, that Sasselli's expertise is questionable, especially in light of his highly improbable expectations for profitably pumping the discarded tailings and overburden left by the Oyster mining group, supra, on the Elizabeth (Tr. IV-10), a plan which must be examined in the light of the twin facts that (a) the overburden was dumped on the Elizabeth because the Oyster group could make no profitable use of it, and (b) Sasselli's proposed operation would process gravels in virtually the same manner as Oyster did in the 1930's (Tr. IV-10). Sasselli's expertise is further belied by his plan to pump the entire bank on the eastern side of the Busy Bee, a method which the Oyster group abandoned as unprofitable in 1939, switching to a process in which the overburden from the banks was removed to a point 25 feet above bedrock to expose the values in the lower levels (Tr. III-80).

Our examination of the record leads us to agree with the Judge's conclusion below that:

> Mr. Sasselli has mechanical skills and enjoys living in a scenic and unpopulated area. He has not shown that he has experience in moving and processing large quantities of gravels. My impression is that his presence and puttering on the claims have served only to provide a gloss that something is happening there. [2/]

As the U.S. Court of Appeals for the 10th Circuit held in the case of United States v. Zweifel, 508 F.2d 1150, 1156 (10th Cir. 1975),

> If mining claimants have held claims for several years and have attempted little or no development or operations, a presumption is raised that the claimants have failed to discover valuable mineral deposits or that the market value of discovered minerals was not sufficient to justify the costs of extraction. E.g., United States v. Humboldt Placer Mining Co., 8 IBLA 407 (1972); United States v. Ruddock, 52 L.D. 313 (1927); Castle v. Womble, 19 L.D. 455 (1894).

[3] Mr. James Orr, whose testimony followed Sasselli's at the hearing below, addressed most of his comments to the sampling which he and Sasselli took at the sluice box site erected by Sasselli. Orr estimated on the basis of his sampling, that the ground on the claims will run "a dollar and a half a yard," but admitted that he had not distinguished between samples taken at the upper end of the sluice box and those collected at the bottom. Orr conceded that the "larger, more coarse gold" will collect at the head of a sluice box, and the finer gold will settle at the base (Tr. IV-157). As the Government's rebuttal witness, Mr. Owens, commented, this failure to distinguish samples resulted in a value per yard estimation in which Orr "salted" his own sample.

Thus, while some of the values produced in the Orr/Sasselli sampling might appear high, they do not necessarily reflect the overall character of the mineralization on the disputed claims. Isolated showings of high values or high values determined without proper regard for the quantity of material processed and concentrated will not support a claim of a valuable discovery. United States v. Coleman, supra; Bechthold, supra; Maley, supra.

Mr. Orr testified further that he did not attempt to determine the quantity of gravel on the Busy Bee and the Elizabeth and was not asked to evaluate the property. He indicated, however, that he would investigate further before spending his own money on the claims.

2/ At the time of this writing, Sasselli has enjoyed a 5-year stay on the public domain.

Where a finding of mineralization is sufficient merely to justify further exploration, it does not establish discovery. Chrisman v. Miller, supra; United States v. Walls, 30 IBLA 333 (1977). Furthermore, the quantity as well as the quality of available ore, moreover, should be taken into account in the evaluation of the value of a mineral deposit. United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975). In light of the foregoing, well established principles of public land law, we find that Mr. Orr's testimony was wholly insufficient to overcome the prima facie finding of no discovery established by the testimony of the Government's mineral examiner. The subsequent testimony of Robert Oyster and George Page, supra, on behalf of contestees was, likewise, insufficient to preponderate over the Government's prima facie case.

Robert Oyster, while asserting that sample drilling on the contested claims had yielded rich values, stated that these values were "almost" as high as those encountered on the adjoining claims during the period 1939-1940. As the decision below notes, the Oyster group, which was evidently well capitalized and equipped, incurred an overall loss in 1939, a modest profit in early 1940, and a substantial loss in May, June, and July of 1940. (See Exhibit J, p. 16, et seq.) It is difficult to glean, from these facts, the conclusion that a profitable operation can be conducted by using the Oyster group's hydraulic mining method on claims which show values "almost" as good as those found on the unprofitable claims. In this connection, we concur with Judge Ratzman, who echoed the ruling of the court in Zweifel, supra, with his conclusion that "[b]ecause the claims have been held for more than twenty years since they were located and the locators and their successors in interest have attempted little or no development, the presumption is raised that the recoverable value of existing minerals has been insufficient to justify the costs of extraction."

Mr. George Page offered testimony, the value of which is limited at the outset by the fact that he spent "about seven hours" in evaluating the Busy Bee and the Elizabeth claims. Page admitted that further exploration would be necessary before the commencement of gold placering operations (Tr. V-36). The major part of Page's testimony, however, concerned the quartz/silica mining possibilities which the property presented, and his testimony as to the potential profitability inherent in these deposits was ultimately inconclusive and speculative. As the decision below comments, Mr. Page's testimony was, indeed, "carefully hedged." His evaluation of the property is rife with enthusiastic statements about "definite commercial possibilities" (Tr. V-23), but at no point would he state that the mineralization on the claims could be extracted and sold at a profit, and his testimony falls far short of establishing a discovery. A representative response appears during the Government's cross-examination as follows:

> MR. LAWRENCE: Is it your custom to make reports and values of property on the basis of seven hours walking over it?
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> MR. PAGE: Some situations I think you can, Mr. Lawrence, but it certainly wouldn't justify -- you wouldn't want to be able to say I'm going to make XYZ dollars of recovery. This isn't quantitative but qualitatively this property is a massive property.

As set out in United States v. Taylor, supra, and in United States v. Hines Gilbert Gold Mines, 1 IBLA 296 (1975), systematic evaluations of both the quantity and quality of mineralization present on a mining claim are necessary components in the economic equation which comprises the "prudent man" test of Coleman, supra. With regard to Page's testimony, we note, finally, that he never offered a conclusive opinion even with respect to the quality of the quartz/silica deposits, but ultimately conceded that if you were going to go into ultrapure silicon, "I think it would be prudent to examine the thing for boron." See, supra.

Appellants have made reference to several statements and rulings by the administrative law judge, e.g., the possibility of Mr. Kingdon's conflict of interest through ownership of an unpatented mining claim within the National Forest in which he was employed, which, they assert, reflect a prejudice inherent in the proceeding below which rises to the status of a breach of their rights to either constitutional or administrative due process.

[4] It requires a substantial showing of bias to disqualify a hearing officer in administrative proceedings or to justify a charge that the hearing was unfair. United States v. Converse, 72 I.D. 141 (1965), aff'd, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969). United States ex rel DeLuca v. O'Rourke, 213 F.2d 759 (8th Cir. 1954). The allegations of appellants fall far short of the substantial showing required to support the charge of bias in the hearing officer. 3/

3/ The appellants' present allegations of bias and prejudice on the part of the Administrative Law Judge hardly agree with their expressed attitude at the conclusion of the hearing (Tr.-V, 85-86), where the transcript reflects the following:

"MR. MARTIN: I would like to make one statement for the record, your Honor.

"THE COURT: All right.

"MR. MARTIN: On behalf of Mr. and Mrs. Kingdon, I'd like to express my appreciation for the manner in which this hearing has been conducted. I feel that you've been most fair and learned in your rulings on the evidence and that we feel everything has been -- we

The Department of the Interior has been granted plenary power in the administration of the public lands. Its authority to determine the validity of a mining claim in an administrative proceeding is well established. Until the issuance of a land patent, legal title to a mining claim remains in the Government, and this Department has power, after proper notice and upon adequate hearing, to determine the validity of a mining claim. Due process in such a case implies notice and a hearing, but it does not require that the hearing be in the courts, or forbid the inquiry and determination by this Department. Best v. Humboldt Placer Mining Company, supra. We find the charges of appellants, on appeal, to be wholly without merit and find that the due process rights of appellants were, in no way, impaired in the course of this contest proceeding. They were given ample opportunity to present evidence in support of their claims.

We find that the Judge accurately weighed the evidence and correctly found that no discovery or a valuable mineral deposit exists within the limits of either the Elizabeth or the Busy Bee placer mining claims.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Judge Ratzman that the Elizabeth and the Busy Bee placer mining claims are null and void is affirmed.

Douglas E. Henriques
Administrative Judge

I concur:

Edward W. Stuebing
Administrative Judge

I concur in the result:

Joseph W. Goss
Administrative Judge

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fn. 3 (continued)
have been afforded a due process literally as well as the general sense of the word. Thank you, sir.

"UNIDENTIFIED SPEAKER: Your Honor, although I wasn't an attorney of record, I am the attorney of Mr. Sasselli, and I would like to join in that expression of appreciation.

"THE COURT: I thank you. That is the effort that I make in these cases.

"The hearing session is concluded.

"(Whereupon the hearing was then concluded.)"