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No.....

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

MULTNOMAH MINING, MILLING AND DEVELOPMENT COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

Upon Appeal from the United States District Court for the Eastern District of Washington, North Division.

A. G. ELSTON, Peyton Building, Spokane, Washington,
Solicitor for Appellant,

OSCAR CAIN, United States District Attorney, Federal Building, Spokane, Washington,

and

EDMUND J. FARLEY, Assistant United States District Attorney, Federal Building, Spokane, Washington,
Solicitors for Appellee.

COLE PRINTING COMPANY

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STATEMENT OF CASE.

This is an appeal by the Multnomah Mining, Milling & Development Company from a final decree of the United States District Court for the Eastern District of Washington, Northern Division, in a suit brought by the United States, to cancel two certain patents issued by the United States to the Multnomah Mining, Milling

& Development Company, for the Peabody and Wickman placer mining claims, on the grounds of misrepresentation and fraud on the part of the company in securing title thereto. The lands involved in this suit are located at the confluence of the Nespelem and Columbia Rivers, on the south half of the Colville Indian Reservation, in Okanogan County, Washington, and contain an acreage of approximately two hundred and fifty-seven and a fraction acres.

The Peabody placer claim, contains an area of one hundred and fifty-seven and a fraction acres and lies on both sides of the Nespelem River from a point near its confluence with the Columbia River (Exhibit No. 4) up the river for a distance of about one mile.

The east end of this claim is rocky and the river at the extreme east end has a considerable fall at a point just above where improvement No. 3, a ditch, leaves the river.

The Wickman placer, joins the Peabody on the north, and west and extends toward the eastern end of the Peabody, as far as corner No. 2 of the Peabody. North of the Wickman placer is a rocky bluff or hill sloping upward from the Peabody placer at about 45 degrees or more.

The surface of the two claims lie from ten to seventy-five feet above the low water level of the Columbia.

The Nespelem River, before it enters the Peabody claim, flows for miles through a crystalline and highly mineralized country, bearing gold among other minerals, and scattered through the country through which it flows are numerous quartz claims which have been established and worked for years, and shipping ore, which mines carry gold among other minerals.

The Columbia River, which flows past these claims on the southwest and has for years been known as a gold bearing stream and has long been mined by Chinamen and others for its placer gold.

These claims were located under the placer laws of the United States in the year of 1901 and 1902, that is, the Peabody was located in the year of 1901 and the Wickman in the year of 1902.

The Government charges that said locations and each of them were false and fraudulent, and that the patents issued therefor by the United States were secured by reason of the false and fraudulent representations of the company, in this, "That the said alleged mineral claims did not, at the time of location, or at the time the application for patent therefor, was made, contain *deposits of,* or *any gold.*" This is denied by the company and upon this charge by the United States and the denial of the company issue was formed. The testimony was taken before a master and from the testi-

mony so taken the court found for the United States as follows:

DECREE.

This cause came on to be heard on the ..... day of May, A. D. 1911, upon the report of B. B. Adams, Examiner heretofore appointed by this Court to take, transcribe and report the evidence and testimony in said case, and the Court having read and considered said evidence and the briefs of counsel for the respective parties hereto and being fully advised in the premises, it is

ORDERED, ADJUDGED AND DECREED, as follows, to-wit:

That those certain patents (being described in the bill of complaint herein), issued to the defendant Multnomah Mining, Milling and Development Company, a corporation, by the complainant, United States of America, on or about, respectively:

July 10, 1902 (*October 31, 1904*), covering and purporting to convey the following described premises, to-wit: The italics are ours.

Beginning at corner No. 1, identical with corner No. 1 of the location. A pine post 4½ feet long, 4½ inches square, set 2 feet in the ground, with mound of earth, scribed 1-680 U. S. L. M. No. 1, Moses Mining District.

Bears south 26 degrees 4′ east 115.95 feet. Thence N. 73 degrees 43′ W. V. 22 degrees 15′ E. 17'6. To Cor. No. 2. A cottonwood post 4½ feet long, 4½ inches square. Thence N. 59 degrees 46′ W. 3572. To Cor. No. 3. A cedar post 4½ feet long, 4½ inches square. Thence S. 48 degrees 30′ W. 1782.5. To Cor. No. 4, a cedar post 4½ feet long, 4½ inches square. Thence S. 85 degrees 03′ E. 291.2. To Cor. No. 5. A cedar post 4½ feet long, 4½ inches square. Thence S. 6 degrees 42′ E. 150. Intersect north bank Nespelem River 1000. Intersect south bank Nespelem River 1007.0. To Co. No. 6. A fir post 4½ feet long, 4½ inches square. Thence N. 88 degrees 34′ E. 2678. To Cor. No. 7. A cedar post 4½ feet long, 4½ inches square. The northwest corner of Eliza Ricard's fence, bears S. 75 degrees west 2.5 feet. Thence S. 75 degrees 43′ E. 2687.8. To Cor. No. 8. A post 4½ feet long, 4½ inches square. Thence N. 37 degrees 35′ E. 470. Intersect south bank of Nespelem River .510. Intersect north bank of Nespelem River 652.7. To Cor No. 1 and place of beginning, containing 157.173 acres. The above described premises being known and designated as the "Peabody Placer" mining claim. The name of the adjoining claims are the Wickman placer on the north and west, and an unknown lode claim on the east.

June 14, 1902, covering and purporting to convey the following described premises, to-wit:

Beginning at corner No. 1, identical with Cor. No. 2, Peabody Placer Survey No. 680. Multnomah, Mining, Milling & Development Company, claimant. A cottonwood post 4½ in. sqr., 2½ ft. above ground, with mound of earth scribed 1-686 in addition to the original markings, U. S. L. M. No. 1, Moses Mining District, bears S. 71 degrees 30″ E. 1816 feet. No bearing objects available. S. E. Loc. Cor. identical with corner No. 1, Survey No. 680 and corner No. 2, Survey No. 680. A post 4½ in. sqr., 2½ feet above ground, set in mound of earth N. E. Loc. Cor. No. 1 bears N. 26 E. 382 feet. Thence N. 50 5′ W. Var. 22¼ E. 6481.08. To Cor. No. 2. A granite stone 6″-9″-24′ long set 12 inches in ground, chiseled 2-686. Thence S. 44 48′ W. 600. To Cor. No. 3. A cedar post 4½ in. sq., 4¼ feet long, set 2 feet in the ground, scribed 3-686. Thence S. 30 58′ E. 3028.71. To Cor. No. 4 on line 3-44 Survey No. 680 at N. 48 30′ E. 782.5 feet from Cor. No. 4. A cedar post 4½ in. sq., 4½ feet long, set 2 feet in the ground. Thence N. 48 30′ E. along line 4-3 Survey Number 680 Peabody Placer, 1000. To. Cor. No. 5. Identical with Cor. No. 3. Survey Number 680. A cedar post 4½ in. sq., 4½ feet long set in the ground with mound of earth, scribed 5-686. Thence S. 59 46′ E. Along line 3-2, Survey No. 680, 2050. Intersect ditch 4 feet wide. Course 50′ W. 3572. To Cor. No. 1 and place of beginning containing 99.540 acres; said above described premises being known and designated as the "Wickman Placer" mining claim.

The name of the adjoining claim is the Peabody Placer, Survey No. 680, on the south. This claim is located about three miles south of the Nespelem postoffice, Okanogan County, Washington. Adjoining claim is the Peabody Placer on the south;

Are, and each of said above described patents is void and of no force or effect, and they are, and each of them is, canceled, set aside and held for naught, and the cloud on complainant's title to said lands, real estate and premises occasioned thereby is hereby cleared; and it is further

ORDERED, ADJUDGED AND DECREED that said defendant, nor any person or corporation acquiring any right, title or interest in and to said lands subsequent to the filing of the *lis pendens* herein, to-wit, March 14, 1908, has any right, title, interest or estate in said lands, real estate and premises, nor in any part or parcel thereof, and that the complainant, the United States of America, is the owner of, and entitled to the possession of, said lands, real estate and premises, and each and every part and parcel thereof, the same being situate in the Moses Mining District, Okanogan County, Washington, at the point where the Nespelem River joins the Columbia River:

That the complainant do have and recover from the defendant its costs and disbursements herein incurred.

Done in open Court this 17th day of July, A. D. 1911.

OPINION.

Rudkin, *District Judge.* This is a suit in equity by the Government to set aside the patents for the "Peabody" and "Wickman" placer claims, situate in the Moses Mining District of Okanogan County, Washington, on the ground that the claims do not contain deposits of gold, and that the patents were obtained through false and fraudulent representations. The history of the two claims is as follows:

The Peabody placer, containing 157.173 acres was first located on the 16th day of June, 1901, by F. O. Hudnutt and seven others; the location notice was filed for record in the office of the County Auditor of Okanogan County on the 8th day of July, 1901; the claim was relocated on the first day of July, 1902, by the defendant company, as successor in interest to the original locators; the notice of relocation was filed for record in the same office on the 10th day of July, 1902; application for patent was filed in the local land office at Waterville on the 26th day of November, 1902; the Receiver's final receipt or certificate of entry was issued on March 11th, 1903, and patent was issued by the complainant on the 31st day of October, 1904.

The Wickman claim, containing 99.540 acres, was located by T. B. Early and four others on the 14th day of June, 1902; the location notice was filed for record in

the office of the County Auditor of Okanogan County on the 3rd day of July, 1902; application for patent was filed in the land office at Waterville by the defendant as successor in interest to the original locators, on the 26th day of October, 1902; the Receiver's final receipt or certificate of entry was issued March 11th, 1903, and patent was issued by the complainant on the 31st day of October, 1904.

The rules of law governing suits of this kind are well settled and no useful purpose would be subserved by a review of the voluminous conflicting testimony taken before the Special Master. Four witnesses examined the claims at the instance of the complainant, and their testimony shows that the claims contain no deposits of gold, but are chiefly and highly valuable for other purposes. On the other hand seven witnesses for the defendant have testified that they have found gold in considerable and paying quantities on all parts of these claims, and I might add, at many other points covering a wide range in that vicinity. It is a significant fact, however, that although more than eight years have elapsed between the date of the original location of the Peabody claim and the date of the last hearing before the Master, the net result of all mining operations on the two claims is a few fine particles of gold in two or three small phials containing water and black sand. The claims extend for more than a mile on either side of the Nespelem river from its confluence with the Columbia

to a point above the falls; in crossing them the river falls upwards of one hundred and fifty feet, and the claims are valuable for both power and agricultural purposes.

After considering fully the location and character of the claims the haste with which they were passed to patent, their almost entire abandonment since that time, and all the facts and surrounding circumstances, I am fully convinced that the claims were initiated and perfected in fraud of the rights of the complainant, and equity and good conscience demand that patents so obtained should be set aside and annulled. Let a decree be entered accordingly.

ASSIGNMENT OF ERRORS.

And now on the 9th day of September, 1911, comes the said defendant by A. G. Elston, its solicitor, and says: That the decree in said cause is erroneous and against the just rights of said defendant for the following reasons:

I.

Because the evidence shows that title in and to the Peabody and Wickman placer claims was initiated and perfected in good faith in the manner and in accordance with the mining laws and the rules and regulations of

the Department of the Interior governing the acquisition of title to public lands valuable for their deposits.

II.

Because the evidence showed, that the said placer claims were appropriated from the public domain, subject to entry under the mining laws and the rules and regulations governing the appropriation of lands valuable for placer deposits, in good faith for the gold therein contained.

III.

Because the evidence showed that a *bona fide* discovery of gold in sufficient quantity to warrant a reasonable prudent man in expending his time and money in the development of the placer claims had in truth and in fact been made prior to the application for United States patent thereto.

IV.

Because the evidence showed that since patent to the said placer claims were secured from the United States Government the plaintiff has been as diligent as its financial conditions would permit and the magnitude of the prospect allow under its financial circumstances, in the development of the said placer claims in the manner in which they will have to be developed, that is, by hydraulic placer mining.

V.

Because the preponderance of the evidence clearly shows that the claims do contain deposits of gold and are highly valuable for their deposit of placer gold.

VI.

Because the Court erred in finding that the net result of all mining operations of the two claims were a few particles of fine gold in two or three small vials containing water and black sand.

VII.

Because the Court erred in finding that the claims are chiefly valuable for power and agricultural purposes.

VIII.

Because the Court erred in concluding, from the location and character of the claims and the haste to which they were pressed to patent, that the claims were initiated and perfected in fraud of the rights of complainant.

IX.

Because the Court erred in finding that the claims had been almost entirely abandoned since patent.

X.

Because the Court erred in finding that equity and good conscience demanded that patents obtained should be set aside and annulled.

XI.

Because the Court erred in that it did not hold that the complainant had failed by the preponderance of evidence to prove that the Multnomah Mining, Milling and Development Company had defrauded complainant of said lands or that there was any fraud perpetrated or attempted to be perpetrated upon the United States by defendant.

XII.

Because the Court erred in not finding that there was an actual discovery of gold on the claims.

XIII.

Because the Court erred in not finding that the ground covered by the patents sought to be cancelled was mineral in character and valuable for its placer deposits.

XIV.

Because the Court erred in not finding that the title of the defendant in and to said placer claims were initi-

ated and perfected in good faith in accordance with the mining laws and the rules and regulations of the Department of the Interior.

XV.

Because the Court erred in not dismissing the bill of complainant.

WHEREFORE, the defendant prays that said decree be reversed and that the said Court be directed to dismiss the bill of complainant herein.

ARGUMENT.

THE FIRST, SECOND, THIRD, FOURTH AND FIFTH ASSIGNMENTS OF ERROR MAY WELL BE GROUPED AND CONSIDERED TOGETHER, UNDER THE HEAD:

WAS THERE AN ACTUAL BONA FIDE DISCOVERY OF PLACER GOLD UPON THESE LANDS AND WAS THERE SUCH INDICATIONS OF MINERAL AS WOULD WARRANT A REASONABLY PRUDENT MAN IN EXPENDING HIS TIME AND MONEY WITH THE EXPECTATION OF FINDING GOLD?

We submit that the testimony of defendant's witnesses conclusively show such to be the fact. In this connection particular attention is invited to the testimony of witnesses Gilfillen, Kroll, White and Armstrong on

behalf of the appellant, which testimony is hereafter analyzed and discussed in connection with the testimony of the witness of the Government.

ASSIGNMENT OF ERROR NO. 6.

The Court evidently reached an erroneous conclusion considering the testimony of witness Kroll, who gave into court defendant's Exhibit "U" for the purpose of showing the character and not the quantity of gold taken from its placer claims. (See Record, page 834 *et seq.*) While it may be true that the claims have not yielded a profit in gold, such could not be expected, as according to the testimony of Armstrong, a civil and mining engineer of long experience, an expenditure of large sums of money is first essential in the installation of hydraulicking machinery before profitable mining operation can be carried on, and as appears from the testimony of witness Early and others, on behalf of the defendant, hereinafter considered, funds for the installation of such machinery were not available.

Mining history has shown that the development of a paying mine is a slow process. A little has to be done from time to time as the company or individual secures the necessary funds, adding to what has been previously done until such time as work can be carried on uninterrupted and with profit. If it were necessary that a paying mine should be developed before patent therefor

would be issued by the Government, and if the absence of a paying mine was sufficient for the cancellation of patents, the mineral wealth of the United States would forever remain concealed.

All that the law requires for a valid discovery, is such an indication of mineral as would warrant a reasonably prudent man in going ahead in an endeavor to find mineral in paying quantities and an individual or company is entitled under the law to have its mining locations patented to it, when it has shown a valid discovery and the requisite amount of development.

ASSIGNMENT OF ERROR NO. 7.

WERE THE CLAIMS VALUABLE BECAUSE OF WATER POWER POSSIBILITIES OR FOR AGRICULTURAL PURPOSES?

The testimony of Howland Stevenson, a witness examined in behalf of the Government, shows that the water power possibilities has fatal limitations for on page 786, he says "the river gets dry or nearly dry a certain portion of the year" (Rec. 786). His testimony is hereinafter considered at length and when taken in connection with the testimony of witness Armstrong on behalf of the defendant company conclusively shows that so far as the water power value of the claims are concerned it is practically of little value, excepting in connection with the mining claims of the company, so also

the finding that the claims were valuable for agricultural purposes. It is conclusively shown by the testimony as hereinafter set forth that these claims, the Peabody especially, were cut up in gullies, were rolling and had a very light soil, not susceptible of cultivation. Even admitting that there was situate on the claims a valuable water power and that the claims had agricultural values, such admissions do not change the situation in any way if the land is valuable for its placer gold.

In the case of United States v. Iron, Silver Mining Company (128 U. S. 685), the Supreme Court, speaking through Justice Field, said:

> "It may be, as contended, that Stevens was moved in his advice to Sawyer as much by the existence of valuable growth of timber on the land as by the existence of gold in the ground, and that the timber could be advantageously used by the Iron, Silver Mining Company. If such were the fact, it would not affect the applicant's claim to a patent. Probably in a majority of cases where a placer claim is located, other matters than the existence of valuable deposits of mineral enter into the estimate of its worth. Its accessibility to places where supplies and medical attendance can be obtained for the men engaged in working upon it, and timber secured to support the drifting or tunnelling which may be necessary; the facility with which water can be brought to wash the mineral from the earth, sand or gravel, with which it may be mingled; and the uses to which the land may be subjected when the claim is exhausted, may be proper subjects of consideration. A prudent miner acting wisely in taking up a claim, whether for a placer mine or for a lode

> or vein, would not overlook such circumstances and they may in fact control his action in making the location. If the land contains gold or other valuable deposits in loose earth, sand or gravel, which can be secured with profit, that fact will satisfy the demand of the government as to the character of the land as placer ground, *whatever the incidental advantages it may offer to the applicant for a patent.*"

This case presents a great many facts similar to the facts in issue in the case at bar and the attention of the Court is particularly invited thereto.

ASSIGNMENTS OF ERROR NOS. VIII, IX, AND X MAY ALSO WELL BE GROUPED AND CONSIDERED TOGETHER.

It should not be held against a company as indicating the value of or non-value of lands acquired under mineral laws, that patent is secured with more than ordinary urgency, for under the law, after patent is secured, further expenditure of money in assessment work is not necessary and the company or individual can then best begin to plan such permanent improvements as will tend to the development of the claim. The testimony in the case at bar shows, that the company after securing patent went to great expense in the excavation of a flume bed which had to be blasted from solid rock for the purpose of conveying water upon the claim in controversy, which water was essential to a profitable working of the claims.

ASSIGNMENT OF ERRORS XI, XII, XIII, XIV AND XV, INVOLVE THE SAME QUESTIONS AND MAY WELL BE CONSIDERED TOGETHER, UNDER THE SAME HEADING AS ASSIGNMENT OF ERRORS I, II, III, IV, AND V.

The Court in the case of the United States v. Iron, Silver Mining Company, *supra*:

> "We take the general doctrine to be, that when in a court of equity, it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake, in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and that it can not be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contract of private individuals how much more should it be observed *where the attempt is to annul the grants, the patents and other solemn evidences of title emanating from the government of the United States under its official seal.* In this class of cases the respect due to a patent, the presumptions that all the preceding steps required by the law *had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them or to correct mistakes in them should only be successful when allegations on which this is attempted are clearly stated and fully sustained by proof.*" (The italics are ours.)

FRAUD.

The United States, if it prevails in this action, must establish by clear and convincing proof, that a fraud was knowingly perpetrated by the company in the location of the lands in the application for patent therefor.

It must establish by a fair preponderance of evidence, not only that there was not a valid discovery of mineral, under the mining laws of the United States, but that fraud in the location and application for patent was practiced upon the United States by the company.

The lands in the Colville Indian Reservation were thrown open to exploration and purchase in July, 1898, under the mining laws of the United States, which laws permit the acquisition by location and patent from the Government of its public lands which are mineral in character.

WHAT ARE MINERAL LANDS?

In determining what lands are mineral in character, and what quantity of mineral they must contain to constitute them mineral lands, we can not be governed by the law because it fixes no limit, nor does it say, that it must be more valuable for mineral than for other purposes, but that they be valuable for mineral purposes and we believe that a true test of the right to secure patent from the United States for a tract of land under its mineral laws, is that it contains such indication of

mineral as would encourage the miner to claim and locate it in good faith as mining ground, and work and develop it in the reasonable expectation of finding mineral in paying quantities, and we believe the true rule to be not that the land must be valuable for exploitation, but that it be valuable for exploration.

The rule as laid down by the courts seem to be that there must be such indication of mineral as would warrant a reasonably prudent man in expending his time and money in the development of the claim. It is not necessary under the law, to entitle a man to secure patent for a tract of land under the mining laws, that he shall have developed a mine; a prospect can be patented under the mining laws; provided, the requisite expenditures have been made thereon and the patent issued by the Government is not an assurance that the land patented contains a mine, but is merely a protection to the locators assuring them that the fruits of his preceding years' labor shall not be disturbed by subsequent locators and that he shall have the uninterrupted right to continue his explorations to prove the land sufficiently valuable for exploitation.

WHAT IS A DISCOVERY?

Any deposit of mineral matter or indication of a vein or lode found in a mineralized zone or belt, within defined boundaries upon which a person is willing to spend

his time and money in following in expectation of finding ore, is the subject of a valid location.

Hayes v. Lavagnino, 53 Pac. 1030;
1 *Lindley, Mines,* 336;
Mining Company v. Cheesman, 116 U. S. 529;
Harrington v. Chambers, 1 Pac. 362;
Railway Company v. Migeon, 68 Fed. 811;
Burke v. McDonald, 29 Pac. 98;
Book v. Mining Co., 58 Fed. 106;
Shrieve v. Mining Co., 28 Pac. 315;
Larkin v. Upton, 114 U. S. 19.

In the case of Burke v. McDonald, 29 Pac. 98, the following instruction was requested in the Court below:

> "A lode, within the meaning of the statute, is whatever the miner could follow, and find ore. Under the requirements of the law, a valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following with the expectation of finding ore; and a valid location of a mining claim may be made of a ledge deep in the ground, and appearing at the surface, not in shape of ore, but in vein matter only." The Court modified the instruction by changing the word "willing" to "justified." The Appellate Court said, the word "justified" radically changes the whole meaning of the instruction. The question whether the miner is willing to spend his time and money is an entirely different one from the question whether he is justified in doing it. The former is a question to be answered by the miner himself, with or without advice as he may choose. The latter word would present a question for ex-

perts and for the jury to determine. The instruction was correct without modification. Harrington v. Chambers (Utah), 1 Pac. Rep. 375, approved in Eilers v. Bostman, 4 Sup. Ct. Rep. 432."

In the light of the law applicable and the rule governing cases of this kind let us examine the testimony of the several witnesses on behalf of the respective parties, to see if a discovery was made.

TESTIMONY OF MESSRS. COLLIER AND GOODWIN.

The testimony of Mr. Collier shows that in the year of 1906, he and Mr. Goodwin were engaged in examining the gold-bearing banks and parts of the Columbia river on behalf of the Government; that they were present on the Peabody and Wickman placers for a period of part of two days (Rec. 59), that most of the time was devoted to the Peabody, about "three-fourths of the time" was devoted to the Peabody, "just about half a day, perhaps a little less," to the Wickman (Rec. 59). During this time they were occupied in measuring the falls by means of an aneroid which necessitated their traveling about two miles taking pictures of the falls; they also made a measurement of the flow of the river, which consumed at least "one hour." They further occupied a considerable time evidently in looking for evidences of the construction of a ditch on that portion of the land which was included within the land-slide testified to; and they

further made a detailed examination of the ditch upon the surface of the Wickman. The examination of the ditch was so minute that the witnesses testified that they observed that it was not puddled and did not show the effects of the presence of water therein. They further observed the mining claims to the north and commenced getting ready to leave the property before five o'clock on the day after their arrival upon the placers. They consumed some time in running the lines of the placers and had not come to the placers until about ten o'clock on the previous morning Further, this merely shows that whatever panning was done from the Wickman was done on the Columbia river, and complainant's "Exhibit 4" herein reveals the distance necessarily traversed by Messrs. Collier and Goodwin, and the time consumed in making the few trips testified to by them.

It is apparent, therefore, that these two witnesses did not have time to make a proper examination of the placers and did not make any sufficient examination to determine their gold-bearing character. The nature of the examination made by these witnesses is shown in the deposition of Mr. Collier (Rec. 66-67), where he testifies as follows:

> Q-86. How many prospect holes did you find on the Peabody placer?
> A. We found about six.
> Q-87. What diameter?
> A. They were about 6x6 approximately.
> Q-88. You panned them all?

A. We did not pan all of them, no.
Q-89. Why didn't you?
A. We did not have time to.
Q-90. Were you hurried?
A. We were somewhat hurried.
Q-91. Why?
A. We had some other claims to examine afterwards.
Q-92. There were gullies running through that placer, were there not?
A. Yes.
Q-93. Did you pan all of these?
A. Not all of them, no.
Q-94. You did not for the reason you have given, that you were hurried?
A. Yes.

It is shown that the first examination for gold was made in the improvement 1, discovery shaft at the northwest corner of the Peabody, and that panning was done at this point. Both Mr. Collier and Mr. Goodwin panned at this place, there being thus at least two panning devoted to this pit. They then (Rec. 130) went to improvement 2 shaft and again panned two pans of dirt from that pit. No further pannings were made upon the surface of the Peabody other than in "a little gulley" (Rec. 119) and at certain points upon the Nespelem river (Rec. 120).

This then constitutes the extent of their examination of the Peabody, an examination, we submit, wholly insufficient to prove or disprove the mineral character of the land.

From the point of entrance of the Nespelem river into

the Peabody placer to its point of flowing therefrom, according to complainant's "Exhibit 4" is a distance of more than one mile. Mr. Goodwin says that they panned "at four different places on the Nespelem river," and "two different places, I think, on the Nespelem river, not in any former improvement, and in two shafts and in one place that might have been a shaft or an improvement or cut." The witness further says that he "could not give the exact location of each particular panning," and "we did no panning on the Columbia, that is, with dirt taken from the shore line of the Columbia river" (Rec. 70). Apparently the pans taken from the Nespelem river, "the three or four pans," referred to by both witnesses, were taken, "a little nearer the Columbia river than the other end of it." This, apparently, was all the panning done along the banks of the Nespelem river and presents, it is submitted, a very cursorary examination. True, both witnesses testified that they examined dirt from the bed of the Nespelem river, but there is nothing to indicate the character of this examination or the number of pannings done from the bed of the rivers. It is certain the number of pits examined on the Peabody outside the examinations in the bed of the river and the three or four in the banks of the river did not exceed four in number, for upon cross-examination (Rec. 138) Mr. Goodwin testified as follows:

Q. How many pits did you examine on the Peabody did you say?

A. Three pits, and I recall one which might have been a pit; I don't know whether it was or not.

Judging from the sweeping examination testified to by Mr. Collier one would infer that the examinations made by these two gentlemen were most careful and comprehensive.

When the testimony of these two witnesses is analyzed, however, it appears that the number of panningss made for the purpose of discovering gold was not so comprehensive. For instance, Mr. Collier testified in his direct examination (Rec. 45) that "at several places on the edge of this bench there were gullies washed out by the water * * *. We took samples from these gullies and panned them and found no gold. These gullies should have contained some gold if there was any to be found in the soil of the bench, and our negative results on them show that there is very little, if any, gold to be found in the benches." Now any reasonable man would admit that an examination of a single spot in a single gulley of many gullies crossing this property, would not constitute a fair examination of the two placers with respect to their gold-bearing possibilities. Further, the average man, if he was reasonable would not conclude from such an examination that the entire property carried no gold. If of a fair mind, he might conclude that he, like other human beings, had made a

mistake in his pannings. Further, the average man, if he were seeking for the truth, would have made many other pannings and from the different gullies which he could find upon the properties and from the gravel which Goodwin says underlies the claims (Rec. 141). Most assuredly, had his examination been limited to one, such a person would have had an accurate recollection of that fact and would not have testified as Mr. Collier did in the general way shown by the quotations above. But it appears by his own testimony given thereafter (Rec. 45), that he was speaking of "gullies" rather than a single gulley that had been examined by him. But is is shown by the testimony of Mr. Goodwin (Rec. 138) that but one gulley had been examined by these witnesses.

Mr. Collier on cross-examination (Rec. 70), being asked whether he had panned any of the gullies, said, "In the gullies we did not pan at all."

This inconsistency between Mr. Collier's testimony in chief and his cross-examination is rather suggestive. The Court will notice (Rec. 45) that the witness not only testified to a general examination of samples from the gullies upon these placers, but also confirmed his testimony by placing in the record an argument that, inasmuch as these gullies did not contain gold when they panned them, their negative results "Showed that there is very little, if any, gold to be found on the benches"

(Rec. 46), the witness expresses his opinion most freely throughout his testimony, that neither the Peabody or the Wickman were valuable for placer mining purposes, it may be fair to suggest that these conclusions are as worthless as the one just specially referred to.

It appears, that in panning upon the Peabody at the various prospect holes, the witness, Mr. Collier (Rec. 48), found that "the dirt was left on the dumps of the prospect holes," after the original prospectors had made the holes. He says they examined the dirt that was left upon the dumps, took samples of it and washed it. Now, as but few pans of dirt were taken from the several prospect holes upon the Peabody it is fair to assume that they included the dirt from the dumps surrounding these prospect holes in the pans panned by them, from these various prospect holes. There is nothing in the testimony to deny this and the probability that they did so is very marked. There is no doubt that the dirt upon the dumps surrounding the prospect holes, as shown by the testimony hereafter referred to, had been there for many years, subjected to pounding by snow and rain. If, as suggested, such mixing was done, it is clear that the examination was not only inadequate in point of area covered, but was most careless and insufficient in point of manner of its doing, as the rain would naturally wash the gold remaining at the time of excavation back to virgin soil.

Referring particularly to the investigation of the Wickman placer, the full examination as revealed by the testimony of Mr. Goodwin, is as follows:

They examined improvement 1 discovery shaft, which is located at the northeast end of the Wickman placer (Rec. 115), the witnesses each taking a pan of dirt in this place and panned it in the Nespelem river, and in one pan they found two small colors (Rec. 130). Mr. Collier in his testimony, states that these two colors were found upon the Peabody placer (Rec. 97-98). They then examined the land in the vicinity of improvement 2 shaft, upon the same placer, which is located at the west end and of that placer, being, as shown by "Exhibit 4" in complaint herein, a distance of at least one mile from improvement shaft No. 1, just referred to. It is not clear from the testimony of Mr. Goodwin (Rec. 131) whether they took all their dirt at that place from "one particular pit" or whether they took it from "three differetn pits," for the testimony of Mr. Goodwin conflicts on this point. It will be observed in this connection that he first speaks (Rec. 130) of a hole of certain dimensions, then of three different pits, and finally on Rec. 131 he says, "I can not tell which *one* of the three it was." Apparently, however, in view of the questions just preceding this answer, they examined three pits and took their sample from one. However, the statement made before is true that these three pits or one pit, were at the extreme end, for Mr. Goodwin

states (Rec. 132) that they were "the farthest to the east that we found."

Nothing further appears in the testimony of Mr. Goodwin indicating any further examination of the Wickman in this particular, and the witness indicates, as shown before, that he did not know that they had panned any dirt from the improvement 2 shaft as shown upon complainant's "Exhibit 4."

Mr. Collier, after stating (Rec. 54) that their examination of the Wickman "covered the whole area," states (Rec. 54) that they "panned *several* of the prospect holes." Nothing further appears in the direct testimony of Mr. Collier relative to the number of pannings done upon the Wickman, yet, upon the basis of this examination, Mr. Collier gave his sweeping opinion that in his opinion gold could not be taken out of the Wickman claim in paying quantities. To further emphasize the statement that the examination of the Wickman was most inadequate, Mr. Collier testified (Rec. 70) that there were about six prospect holes on the Wickman placer, and that they panned about "two or three" of these prospect holes but did not pan in the gullies at all, nor did they pan along the shore of the Columbia river (Rec. 70).

Perhaps the insufficiency of this examination may have resulted from the mental condition of the witnesses. Being sent there for the purpose of examining these

properties and having complaints against them in mind, their minds being somewhat persuaded by the fact of their employment by the Government, analyzed the evidence presented to them in an argumentative way, with an inclination to place upon the property itself the burden of their prejudice. This biased attitude of manner is shown very clearly throughout the testimony of Mr. Collier (Rec. 43). After beginning the description of the soil within the limits of the Peabody placer, he readily draws the inference that the entire bench land rests on "a thin layer of gravel" and with partisan eagerness (Rec. 44) interpolates the statement "there is no gold that will justify mining operations." Further (Rec. 45) the witness makes the peculiar observation to his attorney, that the latter had omitted to ask him "a question that ought to have come in, I guess." He then (Rec. 45) makes a statement tending to show a very broad and complete panning examination of the Peabody placer, which we have shown never occurred. The witness further stated (Rec. 48) with reference to the dirt at the surface of one of the pits, that it had never been washed. This shows a willingness to have their judgment depended upon as to dirt which necessarily must have been pounded by many rains, and further on this head it indicates a willingness to represent to the Court that it was to be expected that the defendants had washed this dump dirt, when, as a matter of expressed admission by witness Collier, the only place

where the dirt could have been washed was in the waters of the Columbia and Nespelem rivers.

He further stated (Rec. 56) that the land was valuable for agricultural purposes but upon cross-examination he admitted that he had never farmed, and had never raised fruit in Washington, and that there was no traffic communication by railroad with these placers.

Again on page 53 is another peculiar suggestion to his counsel, and after stating that their examination had covered "the whole area of the Wickman," states gratuitously with reference to the south line of the Wickman placer, that it was "carefully surveyed" in order "to leave out of consideration a certain line of sand dunes." This in itself shows the mental attitude of this witness. He assumed at that time that because the south line of the Wickman placer did not go to the Columbia river there existed a suspicious circumstance operating against the defendant, but as is shown thereafter in the course of the hearing, the reason for the exclusion of this strip along the Columbia from patent depended altogether upon the requirement of law which prevented patenting more than a certain number of acres to each location represented, and that originally the Wickman placer did include up to the river and that the exclusion took place by reason of the law aforesaid at the time of the survey preliminary to the application for patent was made. The witness thus showed his readiness to draw

an inference against defendant. Further, his readiness to state conclusions and not facts, is apparent, for he says (Rec. 53) "that the soil of the Wickman claim is *presumably* of the same character as the bench land of the Peabody claim." The use of the word "presumably" indicates a tendency of the witness to testify to facts as known by him when, as we have seen, his examination of the Wickman was wholly inadequate to permit him to so testify. His statement (Rec. 54) that *"the ditch is constructed where the construction is easy,"* indicates, by its verbal phrasing, a mental attitude that had already convicted the witness of an absence of good faith for the ditch where constructed completely is, in part, in rock blasted out to make a flume bed. He again makes the same ready answer with reference to the unwisdom of a prudent man expending his time and labor upon these claims, and with reference to the value of the Wickman placer for agricultural purposes, and further that the land would be valuable for townsite purposes (Rec. 57). This last statement is similar to many more made by this witness. He was questioned upon this point in cross-examination (Rec. 80) and said that he believed "that there are some falls below (this property), some rapids below that are impassable," and that there was no railroad or electric line running to this point. When questioned as to the basis of his knowledge as to the value of this property as agricultural land,

he admitted (Rec. 81) that it was very hard to tell but that he supposed this land "would go toward the better mark" of $400.00 per acre, but admitted that it had the drawback of no railroad communication (Rec. 82). There is another significant fact which somewhat affects the testimony of Messrs. Collier and Goodwin. This appears in the deposition of Mr. Collier (Rec. 97-98). Before this Mr. Collier had testified that upon examining a certain pit, in one pan they had found two colors. This had come out on cross-examination, but nothing more. The witness had not testified to this on his direct examination. On re-direct examination, when asked by his attorney what area of the claim did these cover (Rec. 972, he stated (Rec. 98) that there was a small pay streak at that point on a part of the bench a great deal higher than the main bench of the claim, and that these two colors appeared in the little pay streak thereon, which, he says, "extended over about one or two acres of ground at that elevation. And he adds further (Rec. 98) that this ground is situated in the panhandle of the Peabody claim.

The fact that this witness refrained from disclosing the presence of this pay streak as he did throughout his direct and cross-examination is most significant. The answer was finally drawn out by the accidental question asked by his own counsel. Further, as bearing on the main issue of the case, as to the presence of gold upon

this property, it must necessarily be of potent influence. As shown by the witness, this pay streak of one or two acres in extent, was in the panhandle of the Peabody claim at a very high elevation. The conclusion of the witnesses, Messrs. Collier and Goodwin, that the gold could only be found upon the bed rock or clay, was here contradicted by a fact known by these two witnesses. It shows, also, that by some cause the fine gold in the form of a very fine pay streak, had been disseminated over and placed upon an area of at least two acres and at a very high elevation. Presumably then if the testimony of Mr. Collier upon this is to be believed, the lower benches were "progressively richer," than the upper, it must be true that the lower parts or part of the Peabody and Wickman placers would also bear gold.

The foregoing review of the testimony of Messrs. Goodwin and Collier shows the very cursory examination they made of the soil of these two placers.

TESTIMONY OF GEORGE W. COMERFORD.

We will treat the testimony of this witness briefly. It is so fully answered by the weight of the testimony adduced by defendant that its negative character can be left to the answering and rebutting effect of that testimony. The witness had been in Cripple Creek in 1895 (Rec. 158), but he "had practically no placer * * * experience there" (Rec. 158), and apparently his placer

experience in Nevada for "about 3 or 4 months" was of a cursorary nature (Rec. 159), and after that his experience was in Alaska (Rec. 159), where the gold found in placer ground is of such a large character that one can perhaps understand the point of view of this witness when dealing with the minute flour gold of the Columbia and the small gold particles of the Nespelem. One can also conclude that, perhaps, the personal glory assumed by this witness in having "$300,000 taken out under his supervision, personal direction and inspection" (Rec. 54) may have affected his idea of the value of these placers admittedly containing gold of much smaller size than he had been accustomed to in Alaska. He, however (Rec. 160), corroborates the testimony of the defendants given by Armstrong and others later, as to the heavy expense of the conduct of a placer by showing (Rec. 160) that his "expense in the operation * * * for six months' was approximately $40,000. This, although necessarily of a somewhat general application, seems to credit the defendant's testimony that it, with a treasury never showing more than a few thousand dollars, was justified in refraining from immediate and extensive construction work. (Most assuredly no inference can be raised against the defendant because work has not been pushed pending this litigation.) His real examination of the property was confined to one day and until three o'clock of the next, when, as he said, he "got disgusted and went home" (Rec. 175). His

mental attitude is well shown by that remark, and also by his remark (Rec. 176) that he "would like to find some showing when I start * * * but the condition of the soil and the placer was such that any person that had experience as an observing man would never look for gold there" (Rec. 176). Further, he manifests a caution in guarding his testimony that is peculiarly suggestive. Note on page 176 he said, "I would not be surprised but a man might find colors at a favorable——," and then he stopped. Also his observation of the sluice boxes and his failure to pan in their vicinity (Rec. 174). Involved in his action is his mental appreciation that he had truthfully and properly used the word "favorable," and his stopping at this point and subsequent explanation involved a practical admission that his own examination had not been made at "favorable" places. This witness was not certain that he had panned in any discovery shaft made by defendant, all that his testimony shows here is that he "panned from a hole that lay in that direction * * * from a hole that lay in that section * * * (Rec. 177). This, in view of the fact that his own testimony shows the presence of many holes on the property, and in view of the fact that many other persons had prospected there, renders very dubious the evidently biased admissions of the witness. When asked why he had not panned along the Nespelem (Rec. 176), said that he "was looking for gold where they had made development, and where they had

claimed development, taking their word for discovering it where they hit it." His examination is, therefore, far from fair; that it is wholly insufficient to indicate the facts as to the gold-bearng character of this property is shown by the fact that in his examination he did not get into the gravel. Apparently influenced somewhat by his knowledge that an "agricultural contention" was being- made, this witness was uncon sciously affected by the necessity of the presence of a loam soil. Further, he directed his examination to the end that he could testify that he did not find gold where the defendant said it found gold—and he would in this process charge the defendant with having claimed discovery of gold in holes, possibly, by his own testimony made by others and never explored by the defendant. This witness, it must be remembered, was the "last resort" witness used by the Government. The Government had used witnesses Collier and Goodwin and it had been admitted that their examination had been "hurried," and, therefore, this witness was sent to the property. Most assuredly he knew the status of the testimony, and that he was sent there *not* to find gold. Accordingly he examined holes which were in the general locality of the discovery holes, but *failed to examine the property generally to find whether it did bear gold.* Many years had passed over this property since these holes were dug—some had been there ten years before (see testimony of Kroll, Gilfillen and White),

and assuming, in order to give his examination its greatest force, that he did examine the real discovery hole, that he did not find any gold is not strange. The natural effect of the weather would be to wash the gold down. We are rather concerned in the other question—"Is there gold in the placers?" That was the matter which he should have investigated. He saw sluice boxes along the Nespelem, but he *"didn't pan there"* (Rec. 174). He didn't pan along the stream of the Nespelem (Rec. 174), although, as he must have known, any presence of gold there would indicate the probability of gold throughout this placer ground which has in this triangular delta or eddy, been formed by these two rivers. He says he "didn't examine the Nespelem in any way whatever" (Rec. 176). Nor did he pan in any of the ravines (Rec. 178), although it appears in the testimony of the witnesses generally that these ravines showed gravel and panned gold. Later witnesses show that there is on the south side of the Nespelem a bank of gravel, extensive and high, and, according to the testimony referred to hereafter specifically, shows gold in good quantities—but this witness avoided it. He says (Rec. 178), that he "didn't pan on the south side of the Nespelem." Apparently he avoided the big gulch, which is at the west end of the Wickman, but confined himself to places that did not answer to the description of "favorable" (Rec. 176). The testimony shows that the gravel crops out along the Columbia on

this property, and that gold is there, but he did not pan there. Now the Government is not concerned whether one man may not find gold where another claims he has found it—it is interested in and the issues of this case, are an investigation and solution of the question whether this property does contain gold. To place any weight upon this manner of investigation is to rely upon the merely conjectural. He may have done his duty as a partisan witness, and may have carried out his instructions, but he most palpably failed in his greater duty to examine this property in its "favorable" as well as unfavorable places, and to make an honest endeavor to find what such an examination would show as to the actual mineral value of the land.

The witnesses in attempting to make a suggestion which has nothing to sustain it except the assertion of his own opinion, impliedly concedes (Rec. 179) that this property could be hydraulicked and sluiced from the Nespelem waters.

The defendant, appellant herein, has tried to show to this Court a full and complete examination of all parts of this property. We have not confined our examination to any one part of this property. We have not confined our examination to the "grass roots," as phrased by one of the witnesses. Our explorations have covered the surface, the ravines, the gulches, the adjoining property to the south and east, the excluded strip,

the island in the Columbia, along the Nespelem, high and low, the shore of the Columbia, and we have shown by a careful examination the presence of underlying gold-bearing gravel throughout this whole property.

Contrasted with the futile, partisan and narrow limitation of this witness's examination, there is a marked difference, which must affect the credit to be given the different testimony.

Further comment on this witness' testimony will be made in connection with the testimony of later witnesses.

TESTIMONY OF HOWLAND VAN NESS STEVENSON.

This witness, who admitted on his direct examination that he was "generally what you might call an expert miner" (Rec. 772), involved himself in some contradictions during his testimony. Asked why he had not examined "along the Columbia" (Rec. 789) on the excluded strip, he says, "I was not on this land" (Rec. 789), while later on when asked the same question (Rec. 794), he said, "I didn't know there was any excluded strip there" (Rec. 794); then when pressed further as to why he didn't pan there, he gives this answer, "I didn't see any gravel there to pan" (Rec. 794), although he says he looked (Rec. 794) for gravel "there to pan" (Rec. 794).

We do not mean to say that this witness was falsifying deliberately. Experience will tell a lawyer that witnesses may draw conclusions, although they have not observed, and testify to their conclusions as facts, and may not realize meanwhile that they are not testifying to *the facts or to the truth;* further, many a witness will argue his testimony with the opposing attorney and not realize that he is not *narrating* the facts; further, there is the merely careless witness who deems his conclusions of the moment based upon a sufficient recollection, and he testifies as Mr. Stevenson did here—asserting, forgetting and contradicting. But this is true of such a witness—he is as undeserving of credit as is the lying witness.

He said (Rec. 772) that he had acted for a great many people, but could not recollect the names of any companies (Rec. 817); he said (Rec. 776) that he "took a great many" pans from the ditch, but admitted later (Rec. 777) that he had taken but 9 pans in the whole length of the ditch (Rec. 777)—a distance of about a mile (as shown upon the plat in evidence). We note, too, that according to his testimony he did not take these pans from the gravel; of course the ditch is on the surface, so that it must be conceded that dirt taken from the ditch is not from these "favorable" places referred to, and avoided by Mr. Comerford. His testimony as to the pits or shafts tend to corroborate the witnesses for

the appellant that they were caved in, and to support our contentions that Comerford's examination of these pits was not an adequate test. Stevenson says (Rec. 777) "most of them (the pits) had been caved," and he evidently did not dig down to the gravel in the pits, for he says (Rec. 777) "there was no gravel there in any of the pits * * *" and he panned from some gravel on the dump of two of the pits, not stating how long this gravel had been exposed to the weather (Rec. 777). He evidently panned nothing but soil, for the "pits," he says, "were all in a very loose soil" (Rec. 778). Perhaps what he means is that they were caved in at the top, and he did not exert himself to dig through to the gravel. Assuredly, this examination of leached soil and gravel is not a proper test. His testimony as to his pannings along the Nespelem is fully met by the testimony of Kroll. If his panning there was as superficial as seems his work on the placers, it is not strange that he did not find gold. Something of the vagueness, generalization and the cursory manner followed by this witness in his examination of this property is further revealed in his testimony touching the fact of the Nespelem river flowing through a mineralized country (Rec. 808-811). He examined it for lodes, and he says (Rec. 811) "in the afternoon I went down along the bank of the river to look around," took a "cursory" look around (Rec. 811)—"Sunday afternoon I wandered down the banks of this river and took a look

around to see my surroundings'' (Rec. 811) and in this general way concluded that there was no mineralized lodes along the river. Further, he generalizes freely as to the number of days he spent on this trip. He says at one place ''3 to 4'' (Rec. 811), and then he says, ''I staid from 3 to 5 days,'' and ''I think it was 5 days'' (Rec. 779). One of these days was consumed looking for lodes (*supra*). His testimony that ''above the bluff there are ranches * * * agricultural lands'' (Rec. 780) is fully answered, so far as any inference that this water could be used for irrigating such lands, is concerned, by his own testimony that it is up hill from the placers to Nespelem (Rec. 796). He admits in connection with his agricultural land testimony, that he doesn't know how many acres there are (Rec. 796), evidently drawing his conclusions from a purchase of vegetables from a half-breed ''that drove a stage and had a ranch down there'' (Rec. 796), didn't know whether it was cultivated (Rec. 796). As to the use of irrigation his lack of knowledge is shown by his answer to the question (Rec. 796, ''Do they use irrigation there?''—''wherever they can get it'' (Rec. 797)—didn't know whether wheat or corn was raised, but was certain he grew vegetables, ''Because I bought them from him'' (Rec. 797), but was altogether ignorant of the acreage (Rec. 797).

The testimony of the witness is most unsatisfactory

as to the necessary yield of gold per cubic yard to render the property valuable. On page 802 he says that 10 cents would be necessary, while on page 804 he conceded he could run the ground "into the Columbia at 5 cents per cubic yard very easily" (Rec. 804), and further (Rec. 805), after his knowledge and confidence had been shaken by extracts from that text, he said doubtfully that, "I think that it would not pay at 2 cents per cubic yard." Further, the contradiction and unreliability of his testimony are shown by contrasting his concessions on cross-examination with his astounding statement (Rec. 785) that a paying quantity of gold would be "three cents a pan" (Rec. 785). This was emphasized by a succeeding question, "Three cents a pan?" Answer: "Yes, sir." Viewing this in connection with the other testimony of other witnesses that there were from 120 to 150 pans in a cubic yard, and that this witness said (Rec. 811) that there were from 130 to 160 to 166 pans in a cubic yard, it shows a looseness and shifting which shows his testimony to be unreliable.

His knowledge of the practical features of placer mining may well be doubted in view of his testimony (Rec. 806), which shows that he had once attempted to work a placer in Oregon—that he "fell down on it;" and apparently his chief work was in building a ditch and constructing a pipe, when the "water goes out" (Rec. 807) and they stopped. This was his only prac-

tical placer experience (Rec. 807) and covered a period of 50 days (Rec. 806).

The witness does show us something, for we succeeded in extorting from him that "if there was gold on these two placers" (he) "would say this was an ideal placer proposition." He says further, "I have never seen a property exactly like this, where they had water so convenient as this" (Rec. 786). He further corroborates the defendant's testimony by showing that at another time he had panned on a bar in the Columbia opposite this property and found gold (Rec. 789), and he testified that defendant's Exhibit "N" contained "very fine placer gold" (Rec. 788) * * * "Quite a lot" (Rec. 788). His testimony that the "Nespelem river up here gets dry or nearly so at certain portions of the year" (Rec. 786) would indicate that, for commercial power purposes, the water power has fatal limitations.

This witness, sent to the placer to strengthen the testimony of Comerford *et al.,* does not add anything to its weight, and shows the same weakness of observation, examination and qualification. He is fully met by the testimony of subsequent witnesses.

This, then, is the testimony upon which the Government relies for the cancellation of the patents involved in this case and it is contended that a more fragile case could not well be brought into court, as none of these

men made any sufficient examination of the property to determine its mineral value.

TESTIMONY OF G. S. WICKMAN.

Examining the testimony of G. S. Wickman, witness for the defense, we find he was on the placer in 1903, and "went over the placers thoroughly" (Rec. 185) and panned the ground and "found quite a string of it (gold) in the pan, perhaps an inch and a half long;" they panned on both the Peabody and Wickman and were there "from 9 to 10 hours" and also "panned at various places along the Nespelem river, from half a mile up the river, all the way along down to a little inlet * * * on the Columbia river" on the north side (Rec. 186) and also "on the Peabody placer away from the bank * * * at various places where they had sunk holes," and also in a gully that runs all through the Peabody placer (Rec. 186) and they "found gold in several pans" (Rec. 186); witness testified that he did "not" remember seeing a "blank pan" along the banks of the Nespelem river (Rec. 187); he further testified (Rec. 188) that the quantity found was "from 2 to 15 colors in a pan," getting the higher average on the river (Rec. 188); the witness was candid and truthful in saying (Rec. 189) that he "could not say" that he had panned the discovery hole, although they had "panned in various places around where the discovery

holes were'' (Rec. 189). Witnesses also, at this time (Rec. 191) (1903) panned upon the Wickman at ''the bank'' near Corner No. 4 and then over near Corner No. 2 (Rec. 191) and ''found colors in it'' (Rec. 192), the colors being observable to the naked eye; it further appeared that at this time two strangers were also panning upon the placers (Rec. 192).

There is one rather impressive feature of Mr. Wickman's testimony on this head—that he took some of the dirt to St. Paul and had it assayed (Rec. 194), and that as a result of the impression made upon this witness he invested more in the stock of the company (Rec. 195), and advised his friends and his brothers and members of his immediate family to invest (Rec. 196).

He testifies (Rec. 197) that he made a second visit in June, 1906, and found gold (Rec. 198), the pans containing from 2 to 8 or 10 colors; also that he panned there in September, 1908 (Rec. 199-200) and found gold (Rec. 200), the other members of the party also finding gold, finding ''in one pan ten colors that could be seen with the naked eye—one of them was quite a good sized flake'' (Rec. 200). He panned at this last time on the Nespelem, and on the north side of the river and found colors (Rec. 201). He describes the piece of gold found there—''two round pieces connected with a little neck across'' (Rec. 200). He also went upon the property in July, 1909, in company with Dr. Hudnutt and Mr.

White, both of whom also testify to the same facts (Rec. 201), and they panned on both sides of the Nespelem.

At this time he found colors (Rec. 201) and saw Mr. White discover a small nugget in his pan. This was on the Peabody placer, but at this time he also panned on the Wickman (Rec. 200) and taking some "* * * * * * gravel and some dirt and loam," he saw it panned, and colors found (Rec. 203) visible to the naked eye; he also found colors of gold in his own panning (Rec. 203).

His cross-examination on this head begins on page 219, Rec. He shows that he found colors on his first trip in 1903 in "every pan that I took out of the gravel" (Rec. 220), and that they found gravel "All along the banks;" that there were "little flakes of gold in the pan" (Rec. 220)—"a thin piece of gold."

In answering with reference to the pan in which there was a string of colors "an inch and a half long," he he said (Rec. 222) that that pan was not "phenomenal," "it was not extra." He told of panning in the Wickman (Rec. 223) and that they "found colors" "along the bank" and "some over in a hole" (Rec. 224). He testifies forcibly (Rec. 224) that on the Peabody there were always colors in the pan—"always when we took the dirt from the gravel. I don't think I ever saw a blank in any pan where we took the gravel" (Rec. 224) and, as was to be expected, the witness tes-

tified that "away from the river" they didn't get "as much gold as * * * along the Nespelem river" (Rec. 225).

The witness shows what is common to the testimony of all witnesses, that the Nespelem river runs through a highly mineralized belt (Rec. 225) before entering the placer, and (Rec. 226) that the presence of gold in the placers and in the hills and along the upper Columbia river (Rec. 227) was in his mind as circumstances indicating gold in these placers. The witness showed his candor (Rec. 229) in answering fearlessly that there was a good water power upon the placers in the falls of the Nespelem river (Rec. 229). As shown by all the witnesses, the presence of water at a height above placer ground is absolutely necessary to profitable placer operations, and defendants have never thought of, or contended in any way that these placers could be worked independently of the natural advantages of the water fall located upon them. That is equally important with the presence of gold in the ground, and "its use" in connection with its purely hydraulicking possibilities, for purposes collateral thereto, the generation of power necessary for the work upon the placers—would most assuredly be a contemplation within the mind of any rational person, and, within the law as laid down by the Supreme Court (United States vs. Iron Sil-

ver Mining Co., *Supra*), the fact that locators such as the defendants contemplate other uses of this power, would not be of material weight. The insinuations, frequently made by complainant's attorneys, that the defendants were greatly influenced by the irrigation possibilities of these placers, are certainly gratuitous, in view of the testimony on this head, referred to heretofore in the examination of the testimony of Messrs. Goodwin and Collier. This is supported by the testimony of the witness (Rec. 230) that when selling stock in the defendant company, he did not refer to the possibility of irrigating the property. No doubt, as shown by the mere fact that water will seek its level, the water from a height could be used to irrigate land lying at a lower level. It was not necessary for this witness to concede this fact (Rec. 231), so it is equally apparent that water in the process of seeking its level will make "water power" (Rec. 231) and "drive machinery and generate electricity" (Rec. 231).

Further, the witness (Rec. 320) developed the legal situation more accurately than it seems to exist in the Government's case, when upon being asked, 'How do you know it would be a paying proposition?" he answered, "I don't know as it would." Nor does any one know. All prospects are, at most, as said by Justice Brewer years ago, "mere guesses at the undiscovered bowels of the hills," and courts which do not take notice of the hazard of mining chances and determine the duties of

miners under the mining laws in view thereof, do not exercise their judicial duties properly.

This witness inferred from all these various examinations that, "When we panned it and found gold there in various places (my opinion), was that there was plenty of gold there and it could be gotten out profitably" (Rec. 236). In this connection complainant's attorney seems to insinuate that, because this witness had not himself worked out to a nicety and in detail the methods, machinery and processes to be used in hydraulicking this property, he could not have had in mind, or that he could not have had reason to believe (Rec. 236) that this property would hydraulic profitably. Counsel seemed to assume that, when witnesses stated on direct examination that he believed that "the property * * * contained gold that could be worked profitably," the witness was testifying as an expert, and seems oblivious of the true force of the witness's statement—*viz.*, that his non-expert belief showed the good faith of this officer of the defendant company.

The nature of the justification for this belief, whether dependent in part upon the statements of others who had a comparatively adequate (though perhaps not an expert knowledge) of mining hydraulics, or upon a personal examination of the property is a matter of indifference. Further, this is put beyond any doubt by the admission and testimony of the complainant's witnesses,

that in its hydraulicking feature this property was "an ideal placer proposition" (Stevenson, Rec. 802).

The foregoing testimony of Mr. Wickman, even uncorroborated, aided as it is by the narration of circumstantial incidents attending the various findings of gold, is sufficient to show the Court the remarkable character of the examination by the witnesses for the complainant, appellee herein.

TESTIMONY OF WITNESS GILFELLEN.

This witness lived in the Colville Reservation since 1899, and his continuous occupation has been mining. He has pursued the occupation of mining for 20 years in Alaska, Old Mexico and the United States, and in the States of Washington, Oregon, California, Colorado and Idaho within the United States (Rec. 259); that he had done gold placer mining in Alaska, Oregon, Old Mexico and in the State of Washington on the Nespelem, and Columbia rivers and at Cedar mountain (Rec. 260). That he had done hydraulic placer mining in the John Day basin in Oregon, and that during part of that time he had charge of the work in the John Day basin (Rec. 261); that during all of the second season he did panning and he showed by his examination (Rec. 262) that his experience there gave him a full knowledge of hydraulic placer mining. He then shows (Rec. 262) that he did placer mining by means of the hydraulicking

method in Old Mexico, and not only by the general character of his testimony on these pages, but also by his direct statement (Rec. 262) he shows that he was "familiar with all the processes involved in hydraulicking gold from placers;" that he did placer mining and prospected at Circle City and Birch creek in Alaska for 7 years, and that during that time he had property of his own and also worked the property of others; that while in Alaska he had done panning and sluice box placer mining (Rec. 263); and further testifies, as one would no doubt infer, that as a result of such experience he was able to "save the particles of gold," when he panned (Rec. 263); that after other mining experiences (Rec. 264) he went to the Nespelem in 1898, for the purpose of "prospecting for quartz and placers;" that "while following his occupation of miner at that time" (Rec. 264) he went upon the Wickman and Peabody ground; that at that time he was prospecting for placer gold and he prospected upon these properties; "we panned gold upon them" (Rec. 266). This was about 2 years before any of the defendants saw this ground.

The witness then shows (Rec. 266) that at that time they were there "somewhere from a week to ten days, camping on the ground and worked all over it, or nearly all over it" (Rec. 266). The witness then in detail testifies (Rec. 268) as to the panning done at that time and testifies that "we commenced down to the mouth of the

river and panned on both sides * * * about half a mile up on the river''—the Nespelem river,—showing further, that they had panned ''around about where the cabin stands and down on the flat and on the high gravelly bench on the south side'' (Rec. 268), and the witness shows (Rec. 269) that they found gold in the panning along the river, both ''fine gold and coarse gold,'' and that this gold was ''visible to the naked eye.'' The witness then shows that on the south side of the river along the Nespelem was ''very high bank of gravel for about half a mile up'' (Rec. 269) and that the height of that bank ''was fully 60 feet of gravel, that could be washed'' (Rec. 269). The witness further testifies (Rec. 271) that on the bank ''we panned a good many different places * * * near the stream'' and ''high up on the bank,'' and the witness shows that they found gold ''in nearly every pan we took out of the gravel bank'' and that the ''character of the gold in the gravel bank is generally coarse,'' that the witness found coarse gold and fine gold (Rec. 271).

Witness further shows that they ''panned on the north side of the Nespelem river,'' ''from the Columbia river,'' ''about half a mile up'' (Rec. 272) and *''we found gold right along when we got into the gravel.''* The witness also shows the presence of gravel by stating in this connection that ''we got into the gravel very near every place we tried,—we dug down until we got into the gravel'' (Rec. 272). That they panned in the

gulches on the Peabody and found "flour and coarse gold both" (Rec. 272), his attention then being directed to the Wickman placer; he testified that they panned upon the Wickman (Rec. 272) * * * "Along about the center of the claim and from the center to the Columbia river, the whole length of the Wickman property upon the river * * * to the lower end of the Wickman property," where, as shown by this witness (Rec. 273), "a deep gulch comes down;" that this panning included "any number of places along the bank where the bank had cut—along the gravel" (Rec. 273) and the witness shows the results of the panning along the Columbia river were that "we found gold every place that we panned down the Columbia river, where we went into the gravel,—*any place we found gravel we found gold*" (Rec. 274); that they found gold in the gulch referred to hereinbefore (Rec. 274).

The witness shows a rather significant fact in his testimony relative to this gulch in testifying (Rec. 274) that "the gulch in general is gravel * * *" and that "we didn't get to the bottom of the gravel. There was seven or eight feet of gravel generally that we were working in,—that we panned on." This in itself must be significant to the Court as it was to this miner and the defendants as to the quantity of the gold-bearing gravel present in these placers. The witness shows (Rec. 275) that the depth of the gulch was "35 or 40

feet'' and that the thickness of the gravel ''where it enters into the river (was) 25 or 30 feet of gravel'' (Rec. 275), that they ''panned the full length of the Wickman and found gold right along * * * both fine and coarse'' (Rec. 275).

The witness further testifies that, at that time they panned ''outside the limits of these placers'' * * * ''both above and on the Columbia river below them, panning an island out in the middle of the river * * * just opposite (the Wickman)'' and ''700 or 800 feet distant'' and ''we found coarse gold'' (Rec. 277). The witness shows that Mr. Peterson accompanied him upon this trip, and that in addition to the panning just referred to they panned at a point about 200 feet south of the ''south line of the Peabody placer'' Rec. 277) and found gold. The testimony of this witness shows that south of the Peabody placer, is a bar connected together with the Peabody placer, that it is called ''Condon's Flat;'' that it ''contains gravel and a little lake'' and that there was ''gold all through the gravel so far as we went;'' that we dug at the shore—high water mark of the lake and the gravel, and panned there and found gold'' (Rec. 278).

He shows also that they panned along the Columbia from the mouth of the San Poil river above these placers and panned along the Columbia until about 8 miles below the Nespelem (Rec. 278) and found both fine and

coarse gold. The witness illustrates his testimony by stating (Rec. 278-279) that their purpose in panning the Wickman and Peabody placers at this time was to discover whether there was enough gold there to pay for working by sluice boxing.

The witness shows that "about three weeks" before he gave his testimony he panned upon both placers and found gold on the Peabody, personally (Rec. 291), and also found gold on the Wickman. The witness further explains the reason why he did not work the property by hydraulicking (Rec. 293) was that at the time "I hadn't the money to furnish the material to go ahead with it."

Mr. Peterson and the witness were upon these properties with a purpose—they were looking for a place to use sluice boxes and this explains the thoroughness of the examination made by this witness in 1898. The witness shows throughout his testimony in chief, and particularly his cross-examination, that he was altogether at home in placer by hydraulicking. He gives it as his opinion (Rec. 285) that there was plenty of water upon these placers for hydraulicking purposes; that the "soil is adapted to hydraulicking; that the Nespelem, as far as I have seen—it, is straight, almost straight gravel and could be very easily hydraulicked" (Rec. 282), that "the Wickman and Peabody placers could be hydraulicked;" that the placers "are both well located

for hydraulicking'' (Rec. 284); that ''they are situated to have a good dump'' (Rec. 284) ''in the Columbia river.''

The witness then shows that he had prospected above the placers upon the Nespelem river (Rec. 280), that the Nespelem river runs through a mineralized country bearing gold, silver, copper and nickle (Rec. 285); that the Little Nespelem, a branch of the Big Nespelem, also ''runs through a gold, silver and copper country'' (Rec. 285); that this witness in prospecting, had found placer gold along the Nespelem river, ''about 13 miles above'' the placers in question (Rec. 285), that he had also prospected along the Little Nespelem and had found gold. The witness further shows that in 1898 and thereafter, it was the general reputation among the miners which ''seemed to be in general with all prospectors of the country,'' that in the Nespelem bar ''there was plenty of gold there to pay to work'' (Rec. 287).

The witness also shows that there was also a bar at that place called ''Stevenson's,'' which was ''somewhere in the neighborhood of about 6 miles above'' from these placers (Rec. 288); that this bar had been worked over as placer ground (Rec. 288); also referred to by Dr. Hudnutt, pages 525 and 526; that there was a bar below the Nespelem on the Columbia, *viz.*, ''Hopkin's Bar'' (Rec. 289) that had been worked and that there was

placer mining in 1898 on the Columbia river below the Nespelem, by panning and rocker (Rec. 290).

As a part of the direct testimony of this witness, and based upon an experience and knowledge revealed by his testimony that must be undoubted, this witness testified (Rec. 292) that in his opinion beyond the facts testified to by him relative to these placers "a reasonable individual would be justified in the expenditure of time and labor in the development of these two placers." Further, the witness states (Rec. 292) "that it would pay to spend money working there, it would pay,—a good paying institution," and the witness further answered affirmatively (Rec. 292) the question whether in his opinion these placers "could be worked in such a way as to render a reasonable profit."

The cross-examination of this witness added to the strength of his testimony. It showed from its beginning (Rec. 293) that he was not only familiar with the mechanical phase of hydraulicking, but was thoroughly familiar, by reason of his extensive observation and experience by reason of having had charge of such work, with the actual process of hydraulicking. His detail testimony given upon cross-examination, shows very clearly that this witness was thoroughly conversant with placer mining by panning, sluice boxing, rocking and hydraulicking methods, and that his testimony with reference to the availability of the Peabody and Wickman

placers for exploitation is most convincing. Of course, in view of the fact that witnesses for the complainant, especially witness Stevenson, have admitted under cross-examination, that these placers present most admirable qualities; the testimony of this witness on this head is not necessary, but it has a value of its own in relation to his other testimony, inasmuch as it indicates the reason why this witness did not locate and placer mine this property in 1898. This witness was upon this property in March, 1898, before the Reservation was open to mineral location, and as testified to by him, he and his partner returned to it in July of that year, after the reservation was open to mineral location. The witness testifies without hesitation that they had in mind at the time of their first trip to the placers, to return to them after the Reservation was open inasmuch as they had been told that there was "sluice box diggings there (Rec. 327). There is in this situation, a most cogent circumstance. Here were two average men, and judging from the character of the testimony of this witness, men of more than average common sense and mineral knowledge, influenced by statements made to them with references to this property, examining it casually in March, 1898, holding the placer possibilities of this ground by sluice-box methods in their minds and intentions for several months, returning to it when the reservation was opened, and then prospecting upon it very thoroughly for a period of a week to ten days

before determining that it could be made profitable by sluice-box methods. We must believe the testimony of this witness upon this point. To this witness and his partner at least must be ascribed the conduct of rational men, and we find these two reasonable men influenced, as were the defendants in this case, by the mineral character of the surrounding country, of the Columbia and Nespelem, by the gold which these witnesses found upon the property, by the common reputation as to the presence of gold in this property, and by the topographical features of the placers with relation to the water, in such a way that it was only after a most careful examination that they determined that they could not make sluice-box mining profitable upon this property. It is to be noted, however, that the witness is confident and apparently was confident at that time that the property could be made to pay by hydraulicking. They had gone into that country with horse, pack-horses, tents and blankets, picks, pans and shovels, for prospecting purposes, but as is true in nearly all such prospecting trips, they did not have with them either mechanical facilities for hydraulicking or the money necessary for hydraulicking. The witness states (Rec. 309) that "the reason is I didn't have money to go ahead and put in a dam and get pipe for to hydraulic it." Further, it would have required lumber, a dam, hose, a pipe and a giant (Rec. 310), and as shown elsewhere in his testimony, would

have required the employment of other labor, inasmuch as two men were insufficient for the working of a hydraulicking proposition (Rec. 321). The witness stated (Rec. 321) in connection with this, that "it is a slow operation for two men to go ahead and we didn't have the money to hire more." The item of expense for pipe alone, as shown on page 324 of Record, would have been a very considerable, for witness shows that the amount of pipe required would have been "in the neighborhood of somewhere close to 3000 feet" and 3000 feet of iron pipe would have cost a considerable amount of money, especially after adding to it the cost of freight and overland transportation by wagon to this point so far remote from the railroad transportation. Therefore, the failure of this witness and his partner to undertake, the, to them, gigantic undertaking of hydraulicking this property has no significance and does not in any way weaken the value of this witness's testimony under this head. The witness shows that in the John Day basin, he had placer mined profitably "upon three-month seasons" (Rec. 293) and that they moved soil there "under a 50-foot head," which soil was much more difficult to wash than would be the soil upon the property in question (Rec. 343). Furthermore, in drawing a comparison between the John Day basin placers, which this witness testified had been worked profitably at 6 cents per cubic yard (Rec. 343), this witness showed that on the Nespelem placers "there is more water, the water can be

used steadily here the whole year round, while there we only used it about three months in a year," and further stated that on the Nespelem placers there was "a bigger head of water" (Rec. 344). The witness further shows (Rec. 337) that the soil of the Wickman and Peabody placers is "adapted to washing very easy with water * * *, is very easily washed off" (Rec. 337). The witness further shows (Rec. 338) that while 6 cents a cubic yard was "sufficient for hydraulicking" it was "not for sluice boxes," which verifies our former conclusion on this head. The fact that the witness did not sluice box this property does not indicate that in his view, the property was not a favorable hydraulicking proposition. The witness states (Rec. 316) "I have hydraulicked where the estimate was only 6 cents (a cubic yard) and made good money at it," and he states on the same page "if you find anywhere there is a hydraulicking proposition, if you find 5 or 6 cents a yard it is enough."

The witness shows throughout his testimony on cross-examination that this property was admirably adapted to placer mining. His testimony shows the presence of enormous quantities of gravel throughout the placers, showing in all the ravines and along the Columbia river, in the deep gulches that open into the Columbia river at the end of the Wickman placer, in the various prospect holes dug by this witness and his partner, and espe-

cially in the 60-foot (Rec. 318) gravel bank on the south side of the Nespelem river, the prospecting done by this witness and his partner shows gold in the gravel wherever it was prospected, sometimes being the flour gold of the Columbia, and at other times the more coarse gold of the Nespelem; from this witness's testimony it is fair to infer that this Nespelem bar probably formed in the past by the conjunction of the Nespelem and Columbia rivers and by the action and effect of prehistoric glaciers, has had placed within its mass during the centuries which have passed, a considerable body of gold, and from his testimony and the testimony of all the witnesses for the defense, it is safe to assume that this gold in fine particles permeates the entire mass of this placer with perhaps the exception of the silt soil which covers at least a portion of the placer in a thin layer, and which appears to have been that which witnesses for the government examined rather than the gravel. From his testimony, as well as by concessions of other witnesses for the complainant, these bars, with the flow of water from the Nespelem, are without question ideal placer locations, so admirably adapted to hydraulicking that anyone with even a knowledge of the fundamental features of hydraulicking would at once determine that this property was admirably located for hydraulic-mining; added to this is the general reputation among miners relative to this property, that it would bear gold and that reasonable men, whose busi-

ness was mining, seriously and carefully examined this property with the purpose of attempting to mine it in a manner admittedly less profitable than would be the hydraulicking process; further adding the testimony of this witness relative to successful placer mining under less favorable circumstances at Stevenson's ranch about 6 miles away, and at various points on the Columbia, and the further fact of the highly mineralized character of the Nespelem and its branches and the country through which it flows, and the further fact that among other minerals, gold appears in quartz mines adjacent to these claims; further adding the testimony of this witness with reference to profitable hydraulic mining in the John Day basin under much less favorable circumstances upon a yield of 6 cents a cubic yard—considering these various phases of testimony, one must concede the reasonableness of this witness's faith in this property, and one must also justify the defense in believing that this property possesses valuable possibilities.

The witness testified that the amount of gold lost in hydraulicking was about 1 per cent of the flour gold and that hydraulicking was an economical method of mining (Rec. 300). The attention of the Court is directed to this at this time for the reason that hereafter it will be shown conclusively by the testimony of other witnesses that the quanitiy of gold found in this property was much more than sufficient to pay 6 cents per cubic

yard, and that therefore this defendant was and is justified in its belief that the Nespelem properties did constitute valuable placer gold properties.

The attempt of the Government to create a mountain as to an orchard upon Condon's field, was rendered altogether futile by the testimony of this witness (Rec. 335) where he states "there is a few scrub trees around the house," and in answer to the inquiry "What would you call it—an orchard—you wouldn't call it an orchard?" the answer came "I don't know as I would, for last summer he went and tore up a lot of the trees there and said they didn't bear now; a few of them did." As a matter of fact, the attitude of the mind of this witness is the attitude of mind of the defendant company and its officers. This, with reference to the availability of these placers for agricultural purposes, is well illustrated by the testimony of the witness (Rec. 337) when asked whether Stevenson's place was sage brush land, he responded, "I suppose it was, I don't know, I am not a farmer and I don't know anything about farming (my business is mining)." Some of the defendants—all of them, as is shown in their testimony, were engaged in mining as their sole occupation, and although they are a mining corporation, like all mining corporations, it enables them to do all kinds of business in all parts of the Western Hemisphere, their sole activities were mining activities, either quartz or placer, and

there is an entire absence of evidence—not even a scintilla of evidence appears—to show that the defendant or its representatives have in any way attempted to use or considered this property other than in a way adapted to mining.

L. K. ARMSTRONG'S TESTIMONY.

When the Court has read the testimony of this witness, there can be no doubt as to the placer mining possibilities of this property. He spoke from 20 years' practical experience in his profession as a mining engineer (Rec. 655), and from placer mining in the Black Hills, in the Swauk District in Washington (Rec. 656) and at various other places (Rec. 658). He has had actual charge of hydraulicking operations (Rec. 656), had examined placer properties in Montana, Idaho, Washington, Oregon and British Columbia (pages 659 and 660), and his testimony, direct and cross, shows conclusively that he is the master of his profession; that he is a member of the American Institute of Mining Engineers and of the Canadian Mining Institute (Rec. 660). He was upon the property in question three days and made a careful examination of the property, by panning both placers. His testimony shows very clearly that this property is most favorably located for mining, that it is composed of a tremendous over-burden of gravel, and that from every standpoint it is ideally located and adapted to placer hydraulicking (Rec. 667).

The witness shows that in the Swauk District (Rec. 658) the cost of mining was ten cents per cubic yard, while in Southern Oregon (Rec. 659) the cost was "about 5 cents per cubic yard." The witness, after showing prior examinations of other placer properties as an expert "for the purpose of reporting to other people on the advisability of investment" (Rec. 659) and of this property, gives it as his estimate that these placers could be worked at "not to exceed 4 cents per cubic yard" (Rec. 670). This is fully substantiated by the testimony of complainant's witness, Stevenson, referred to hereinafter. He disposed of the inference sought to be created by complainant that the improvement ditch No. 3 running across these two properties was intended for irrigation purposes, by showing (Rec. 671-672) that this ditch was "available for placer mining purposes upon these two placers," and by showing its proper presence in a scheme of placer mining upon these properties (Rec. 672).

The witness after showing satisfactory experience in panning shows that he panned on this property (Rec. 672) and found gold (Rec. 672), that he weighed 17 of the colors found by him and they weighed "a trifle over one cent" (Rec. 673) and "three of these pieces weighed one-half cent" (Rec. 673), and that the average pan gave "12 particles" (Rec. 673). The complainant, it has been shown heretofore, had testified that there were 150 pans in a cubic yard. Upon the basis of this aver-

age the estimate made by this witness that the value of this property per cubic yard would be 12 cents is a reasonable estimate (Rec. 674). This is shown in the examination of this ground by this witness and professional thoroughness in marked contrast with the cursory examination of certain of the witnesses for the complainant. Witness Comerford, for instance, says (Rec. 176) the mere "condition of the soil and the place was such that any person who had experience or an observing man would never look for gold there" (Rec. 176), while this witness traversed the whole property in detail, examined the ditch in detail, the ravines, the gulches, the banks, the gravel in natural and artificial exposures, personally panned "on the ground 12 pans" (Rec. 624) and "superintended the panning of about 40 more pans (Rec. 624 * * *. I was not only present but I saw it done." Moreover, this witness spent three days on the claims (Rec. 636) making this examination. He had assistance and was not "hurried," as were Messrs. Collier and Goodwin, according to their testimony heretofore referred to, but made a most careful examination.

This careful examination showed that "the greater part of them (the placers) was underlaid with gravel— * * * *I believed it to be equally true as to both claims" (Rec. 700); which gravel, the witness shows (Rec. 703) if in "large banks or

gravel deposits'' (Rec. 703) can be ''most economically worked by hydraulicking'' (Rec. 703). The witness shows (Rec. 674) that at one point on the Nespelem there was a gravel bank ''more than 75 feet high'' and establishes the fact by a photograph (Defendant's Exhibit ''K''; Rec. 674 and 675), and that ''the bench was made up almost wholly of gravel except at specific points'' (Rec. 717).

As reflecting upon the omission of the defendants to do more than they had done towards equipping the property with a hydraulicking outfit, the testimony given by the witness (Rec. 737) in connection with the testimony of Wickman, discussed heretofore, frees the defendants from any suspicion. He shows under a searching cross-examination (Rec. 735) that the cost of such equipment as was considered installing was very large, that the flume, a part of the bed of which the defendants had already blasted from the rock, would cost about 40 per cent (Rec. 738) of the whole; that such a flume was necessary (Rec. 738); a trestle (Rec. 738) and bridge work would cost ''at least 25 per cent of the cost of the flume'' (Rec. 739), and the witness says that he did not include the trestle and bridge work in his estimate (Rec. 739), and he did not include the expense of the improvement ditch already constructed (Rec. 740), although he did include the cost of connecting it over the ravines (Rec. 740), the sluices would add to the cost over $1000.00 (Rec. 744), and

about 3000 feet of iron pipe at more than $2.50 per foot would be necessary (Rec. 742), the minimum number of feet being 3000, and the minimum price being $2.50 per foot (Rec. 743), two gates $300.00, a standpipe, over $300.00 (Rec. 743), two giants, five air escapes $125.00, lighting plant for night work (Rec. 744-745) $500.00, power plant for sawing lumber (Rec. 750) about $2500.00 installed (Rec. 751), building and shops and tools (Rec. 751), "half a dozen buildings—might be more" (Rec. 752), including "blacksmith shop and repair shop" (Rec. 752)—all these at "five to eight hundred dollars apiece" (Rec. 752)—all this expense when measured against the cash in the possession of the company as shown by the testimony of the treasurer, Wickman, shows very clearly why this company followed the usual history of nearly all mining companies in this and the adjoining states—*i. e.,* proceeded slowly, hampered by its lack of money, and rendered cautious, as even miners are, by the knowledge that in addition to this large expenditure, there must ensue a long period of time when the cost of operation would be very large. In view of this handicap, this defendant is to be commended for proceeding in the way in which it did—blasting out the flume, preparing the dam, and preparing the foundation for a small power plant whereby the company would be enabled to do the preliminary construction work necessary in the course of equipping the property for hydraulicking.

Much has been made of the possibilities of power development and distribution from the water power, always by way of insinuation (Rec. 749). This witness disposes of this (Rec. 749) where he says, that such a thing would not be possible from the water power "and operate the placer" (Rec. 749); "I do not see where there would be water to do it with" (Rec. 750).

Something of the placer possibilities of this property is revealed by this witness when he shows (Rec. 733) that there are "a good many million cubic yards," and "over ten years" (Rec. 750) work to work up this ground, working by day, and also at night by the light furnished by the lighting plant.

It is apparent, too, that the defendant has at all times had *bona fide* in mind the exploration of this property as a placer, for it appears (Rec. 768) that the company had "under the instructions" of the witness "and independent of them * * * made numerous and various widely separated examinations of this property" (Rec. 768) and furthermore, he had suggested and the company had "intended to sink holes in the ground and take samples" (Rec. 769), all of which is corroborated by Dr. Hudnutt's testimony later. The fact that this defendant had consulted this expert mining engineer in this way, is significant of the good faith and fair hopes of the defendant in this matter. .

Beyond doubt, we are justified in claiming, this

witness establishes the presence of gold in this property by a personal investigation, the hydraulicking feasibility of these placers by an abundant supply of water, their location, and the possible profitable working of the property by reason of the nature of the gravel deposits underlying this property; he further shows the relevancy of the work done by the defendant, the scheme of hydraulicking these placers, and adds to the expert and non-expert testimony already in the case, the weight of his professional opinion that ehese placers can be worked profitably.

TESTIMONY OF JOSEPH KROLL.

John Kroll, a rancher at Coulee City, who also owns three quartz claims at Nespelem (Rec. 823) and who had mined since 1880, testified (Rec. 824) that he had been acquainted with the Nespelem country for 11 years, that he had had experience with gold placers in Wyoming and Montana and had "prospected a good deal on the south half of the Colville Reservation" (Rec. 824). He testified that he first was on the ground covered by the placers in question "October 1st, 1898," prospecting, and had at that time prospected from "below the mouth of the Nespelem" (Rec. 825) to "some 30 miles above" (Rec. 825) and at that time "panned along the Nespelem river from the falls down to the mouth and found some good results" (Rec. 826)

and "down the Columbia * * * past the property" (Rec. 827) and "found good results" (Rec. 827). "Gold colors." He was upon this property at that time from October 15th to November 11th, and in his pannings along the Nespelem he said that he "found from 1 to 18 colors of flour gold" (Rec. 828). He says candidly, "I didn't count the colors, simply they were there and I didn't count them" (Rec. 827). Despite the volunteered statement of witness Comerford that no observing man would look here for gold, this prospector of years of experience stopped on this property and he says, "my intention was to find gold there and make a location" (Rec. 828), and he did locate on the property, making three locations on the property, the Sunrise, Monday and Ditto, on October 13, 14 and 15, 1898, the witness refreshing his recollection by a book memorandum made at the time (Rec. 829). He intended to work these locations, but was unable to do so because he did "not have the means" (Rec. 830), although he went to Farr Bros. at Keller and applied to them for assistance. The circumstances of this narrative shows its truth. The witness collected gold from these claims at this time (Rec. 831). He had panned upon the property before locating (Rec. 864) and after locating, he did "some prospecting * * * on the claims that I located" (Rec. 846). The witness found that to get the water on the placers he "had to get this water out through a hard granite point * * * (as it was) too

expensive'' (Rec. 859). The witness speaking of his panning in 1898 said, ''I could find gold, actually there was a string in the pan probably six inches of this flour gold—it is just like flour and you can see a yellow streak of it, but you can not count the colors'' (Rec. 845).

The witness then showed (Rec. 832) that he had panned ''last October (1909) ''about eight pans'' on this property and found gold (Rec. 832) on the Nespelem and on the Columbia, and in all but two or three he found gold from one to six colors in a pan. Furthermore, the witness gave into court defendant's Exhibit ''U'', containing the gold which he had found in those ''five or six pans (Rec. 834), the witness saying that 45 of such colors would make a cent, which at 150 pans to the cubic yard, and one to six colors per pan would yield from a lowest possible minimum of 3½ cents to 21 cents per cubic yard.

Adverting to the testimony of Mr. Stevenson, which the witness had heard (Rec. 837), the witness said that ''it is almost impossible for a man to pan down the Nespelem river without finding colors'' (Rec. 837). The witness in the same connection said, that ''a man could possibly pan twelve pans and miss it if he would take from the top gravel'' (Rec. 737). This, together with his partisan attitude, explains why witness Stevenson did not find gold. Kroll's testimony as to his earnest efforts to exploit this property in 1898-1899, and the

circumstances of his testimony—the note book, the Farr Bros. application, the proffer of gold actually found upon his last trip—and the careful examination made in 1898, the responsible and unbiased character of the witness, urge us to give his testimony full credit.

The attempt to fix upon this defendant a fraudulent irrigation scheme upon these placers as alleged agricultural ground is fully met by this witness (Rec. 835). Attempts to farm it had been made in 1898, with a result of "nothing" (Rec. 835); and on the adjoining land of Condon's an attempt had been made to raise grain, but, in the language of the witness, "didn't raise it" (Rec. 836). There is no other "agricultural land" near this property "save across the Columbia, distant 5 or 6 miles" (Rec. 836). The witness said (Rec. 855) that the upper part of the placers was too coarse and sandy to raise agricultural products. He shows that on Condon's field adjoining the soil contains "some black soil" (Rec. 857), that there is a kind of "sheep grass" growing there, and a poorer kind upon this property, and that apparently the only garden stuff grown near Nespelem is for the use of the owners (Rec. 858). Apparently the suggestion that this land is capable of agricultural use is based upon rather conjectural grounds. As bearing upon the value of the gold found by this witness (Rec. 751); *i. e.,* one-half cent in eight pannings, this would more than make this property valuable for it

would show a result of 10 cents per cubic yard, as 2 or 3 pans were blank, much more than is necessary according to the estimates of the cost of hydraulicking this property by even Stevenson and by the other witnesses, to justify exploiting this property.

The inference sought to be created elsewhere that the gold in evidence must have been "salted" or surreptitiously placed or added to is again made (Rec. 852), and is squarely met by the witness (Rec. 851) where he says "I could not pan down there (down the river) without finding something," and by his testimony that the 30 to 50 colors of gold present in the small bottle referred to, had been found by him, placed by him "in the bottle" (Rec. 851-852), and that he had had sole charge of it and them ever since (Rec. 852).

We suggest that here is a reasonable man, of apparent thrift, and with practical mining experience who did controvert squarely the broad and ready conclusions—statement of witness Comerford that no observing man would look for gold here, and who, by finding gold, shows either that the "search" for gold made by Messrs. Collier *et al.,* was hurried and hasty, as is admitted, or that it was superficial by reason of partisan conclusions or by reason of a lack of knowledge of local conditions necessary for them to make an intelligent series of panings. This man's testimony is true and it justifies this defendant.

TESTIMONY OF THOMAS B. EARLY.

Mr. Early has been engaged as a miner for about 35 or 40 years, in Colorado, Utah and New Mexico, and in Washington (Rec. 382)—placer mining in Summit County, Colorado. He was upon the property in question in 1900, and in 1901 prospected them for gold (Rec. 384-385), having previously heard favorable reports of them and of the Nespelem region (Rec. 385), panning along the Nespelem and obtaining gold (Rec. 389); also panning at the time on the north side on the "first bench above the river" (Rec. 390), the "particles of gold" found being "bright and pretty good size" (Rec. 391) and averaging "five or six colors" (Rec. 392); he panned on the Peabody at this time at a depth of about two feet found in the one pan taken therefrom "three or four colors" (Rec. 393). He also, at the time, panned three or four days, principally on the Peabody placer (Rec. 393) and prospected also on the south side of the Nespelem (Rec. 393). It appears that he "panned 50 or 100 pans" at this time, getting "several particles of gold in nearly every pan" (Rec. 408) and after location, he panned "400 or 500 pans practically" (Rec. 409) during the month he was there. "I was panning every day more or less right along" (Rec. 409). He also panned on the Wickman as well, "three or four days" (Rec. 408) and found gold (Rec. 408). The witness thought the property "would pay to work" (Rec. 411)

and after "panning it to make sure it would be a pay" (Rec. 411) after location, he came to the conclusion that "by getting the water on the ground it was good property" (Rec. 411). It is noted, too, that, after locating, this witness did not rest,—he made a most extensive panning examination of between 400 and 500 pans to see whether it was worth while continuing to hold the property. The great, overwhelming majority of lode claims, which have been patented, have not paid; but their locators and patentees, and the locators and patentees of the Nespelem bar, have been justified in relying upon the appearance of things and *if mineral indications were present the patents were valid.* This witness found colors in the shafts sunk on the Wickman and Peabody (Rec. 434) and in the ditch, five in one pan and seven in another (Rec. 437) in the discovery shaft of the Wickman where he found gravel (Rec. 439). He panned "all over the bar * * * the whole thing, the Wickman and Peabody placers * * * (and) the excluded strip (to the Columbia)" (Rec. 473-474). And he said that he had at that time made up his mind that "if it was handled properly it would pay with the amount of water and the advantages of being worked" (Rec. 474). This witness was sanguine at one time that the property could be "worked by ground sluicing" (Rec. 447-448), although the scheme naturally favored by all was the much better and more effective hydraulicking method. This, however, shows, in a strong

way, the candor of this witness and the faith of this old prospector and miner in this property.

The placer experience of this witness before going to Nespelem had not been extensive, perhaps,—"three seasons" in Colorado (Rec. 383), his work being "doing a little of everything" (Rec. 416), "shoveling bedrock and running gravel into the flumes, and so on" (Rec. 416) and "all kinds of work excepting I had nothing to do with hydraulicking" (Rec. 416). But the essentials of a good hydraulicking proposition are so well known, the process of operation so simple—at least to one who has had the opportunity of a short observation and who possesses average mental faculties—that anyone could say after a most casual observation of these placers, that they possessed most excellent hydraulicking features. So that we must conclude that this witness, though not an expert in running hydraulics, was qualified to determine the hydraulicking possibilities of this property—qualified equally one must conclude with the complainant's witness, Stevenson, who, after one visit, concluded that it had ideal hydraulicking features.

Nor is it a necessary element or pre-requisite to the reaching of this conclusion by this witness that he should have determined a definite and final campaign for the hydraulicking of this property, with *the one* of various possible starting places for hydraulicking in mind—with exact size of giant, hose, flume and pipe figured to

an exactitude in inches. The very fact that this witness did not come into court with a finely worked-out scheme, developed in minute details, for the hydraulicking of this property, adds weight to his testimony, for note how it articulates with those other circumstances of this case, which must have affected this witness's inclination to work out such a plan, he was a "superintendent"—the facts show nothing more than the "boss" of mining laborers, Dr. Hudnutt was manager, Mr. Armstrong was the engineer to whom all these matters would be referred finally, and their financial conditions had always been such that the company had not come to that last day (which comes finally prior to the actual execution of any work or task) when it must determine the question of whether the pipe should be 6 or 8 or 9 or 10 inches in size, the giant of one or another dimensions, the flume of planks 14 or 16 feet long, nor had the time came when they must determine—that which all the testimony shows is a matter of indifference in view of the several possible places available—the exact spot, geographically, at which they would first squirt the water from the "giants."

A further attitude taken by the complainant, at the hearing involves equivocal positions. After this witness had testified that, in his former experience he had "had nothing to do with the hydraulicking" (Rec. 416) complainant's attorney contended that he had shown him-

self "incompetent" to testify to "hydraulicking" (Rec. 416).

If the ditch which crosses the two placers had no proper relation to the improvement of this property and to its development as placer ground, the representatives of the defendant when they offered it, in the patent application and proceedings, openly and candidly, as an improvement for mining purposes were inviting this litigation. That it has its relation is clearly shown by the testimony of the several witnesses. So of the flume bed; so of the fact of the box sluicing along the creek. It was possible for this witness to testify, if he so desired, and without the possibility of being controverted by the Government, that this box sluicing had been done before "the investigation of this case" (Rec. 421), but the witness answered candidly that the time had been, "a year ago last spring" (Rec. 421) "after the investigation in this case" and that they had "never worked it any since," the reason probably being that everyone appreciated that the hydraulicking was the only practical method, as ground sluicing doesn't handle dirt as "cheaply" as hydraulicking. However, they found gold during this sluicing with these sluice boxes which, it is shown by complainant's witnesses, were found along the Nespelem on the placers.

But despite the fact that this witness was not called upon to devise a detailed scheme for the hydraulicking

of this property, he explained repeatedly the simple method of hydraulicking this ground. Counsel's examination was most unsatisfactory, and it is impossible to understand sometimes whether he is asking the witness as to a detailed plan actually by the witness, or as to a plan which might be adopted. The witness also answered counsel, as inexperienced witnesses do most frequently without noting the turn of the question from one meaning to the other, but his testimony shows most clearly that he was not an expert placer miner—just "a practical miner," that he had never planned a hydraulicking system for the placers in detail, and we concede most truthfully that he had never decided the question which complainant's counsel seems to think so momentous, the size of the iron pipe (whether 6 or 8 etc. inches), the exact length of the flume, the number of gates, the size of the "giants" or the exact spot where hydraulicking would begin. This was not his workers "several times" and that the company was at work; the evidence shows that he and the defendants were sensible enough to have in mind the necessity of consulting engineers (see Testimony of Armstrong) and these matters, it must be obvious, were not a nature rendering any particular decision of particular moment.

The testimony of this witness shows the reasons why the property had not received more development "for the want of funds" (Rec. 510). He shows how this lack of money compelled the reduction of the force of

heavy expense in its lode claims and tunnel. His testimony on this head in connection with that of Wickman as to the finances of the company and of Armstrong as to the cost of hydraulicking equipment, shows most clearly why this company has not done more development of this property. Further, this litigation would also probably have its natural deterring effect upon the expenditure of the money of the corporation upon this property. It is clear that nothing was developed in the testimony of this witness or in this case to indicate that he had any purpose of irrigating this land.

TESTIMONY OF CHARLES M. WHITE.

Mr. White, a resident of Nespelem and engaged in mining there for ten years (Rec. 347), and who had come to the Nespelem country ten years ago (Rec. 347). Before this he had had experience in placer prospecting on the Sixes river in Oregon (Rec. 347), and later on, in May, 1900, together with a Mr. Nichols and Mr. Brown, he had panned upon the property in question (Rec. 348), panning on the north and south side of the Nespelem river (Rec. 348) and found gold—"coarse gold and some fine gold" (Rec. 349), the pans running "from 1 to 15 colors," and "sometimes more" (Rec. 349). They also panned up on the level part of the Peabody (Rec. 350), panned in the ravines and "found gold" (Rec. 350), the average of colors being "about 6

or 7 colors to the pan'' (Rec. 350). They panned the surface of the Wickman and in the gravel of the Wickman (Rec. 351) finding more gold in the gravel than on the surface (Rec. 351) and not finding many colors on the surface (Rec. 351). They sunk one shaft on the now Wickman placer to determine the presence of gold the ''gravel that shows on the river bank'' (Rec. 351), went down 14 feet, found gravel, and found gold in that gravel (Rec. 352). They also found gold in the gravel in the ravines (Rec. 350). He panned about 50 pans (Rec. 353) at this time, and he and his companions located three claims upon this property, south of the Nespelem (covering that part which has the high bank of gravel), one on the ground now covered by the Wickman and the third on the Peabody (Rec. 354). He showed those indications of underlying gravel (Rec. 354-356) along the Nespelem, in the ravines and along the Columbia, testified hereafter by other witnesses, and as shown above, showed the presence of gold in this gravel wherever it was exposed, either naturally or artificially. The surface being covered with sand, his testimony that little gold was found on the surface is most creditable. He shows the mineralized character of the country through which the Nespelem river runs (Rec. 356).

He panned at a later date (Rec. 357) on the Peabody and got gold (Rec. 357) panning north of the cabin and on the south side of the Nespelem ''7 pans'' (Rec. 357),

and he says "I got gold"—"found gold in all of them" (Rec. 358). Being shown defendant's Exhibit "A", he identified the gold contained therein as gold found by him on the Nespelem placer, the "largest one * * * on the north side of the Nespelem * * * a little above the cabin * * *. The small one * * * on the south side". (Rec. 359). The testimony of Wickman corroborates this last evidence. Counsel for complainant attempted, on cross-examination, to weaken the effect of this part of witness's testimony by leading the words of the witness into statements which might permit the gratuitous suggestion that Dr. Hudnutt or Mr. Wickman had "salted" the pan, but the witness's testimony (Rec. 372-373-374-375) shows that all parties were busily engaged in independent pannings at this time, and that witness White first discovered the presence of these small nuggets. In this case defendant has brought to the court evidence of independent witnesses, who were especially equipped by reason of past personal prospecting upon this property to speak from a knowledge acquired at a time when there could have been no temptation to bias. Too, there appears in the testimony of this witness an unusually strong circumstantial, corroborating fact to verify his testimony—*viz.,* what he saw of this property persuaded him (as well as his two companions) to locate placer claims upon this property, and to file his location notice (Rec. 353) after having staked it (Rec. 353). They were looking for box

sluicing at the time and finally determined the property could not be worked profitably by box sluicing (Rec. 366), and as they didn't have the money necessary for hydraulicking it (Rec. 368) they abandoned the claims (Rec. 367), although he thought at that time and now (Rec. 371) that "with the water they have got there, it is my judgment it would pay" (Rec. 370). This witness made the obvious and necessary reply to the inquiry why they had not located a larger area, that twenty acres "is all the law allows" one person to locate (Rec. 377). Here is, as shown elsewhere, the conclusive answer to the criticism that the patent did not cover the "excluded strip" along the Columbia, as shown elsewhere, when the survey was made before patent, this excluded strip, although located, made the total area too large (to the extent of its area), and area of placer ground to be located by the number of locators, and therefore the survey lines were drawn to accord with the law giving to each locator no more than his legal 20 acres.

The testimony goes far to sustain the belief of the defendants and of all these witnesses that gold is diffused throughout the whole mass of these placers under the sand at the surface—that, like the placer at Stevenson's, formerly profitably worked out at an elevation above the Columbia of perhaps 75 feet, and only about 5 miles away from these placers, that these placers have had deposited in them the gold now found there, at a

time when natural conditions permitted the deposit of gold at such an elevation. This is borne out by the testimony of Collier, especially to the finding of gold on the benches and terraces above the Columbia.

TESTIMONY OF DR. F. O. HUDNUTT.

This witness, a regular physician, had engaged in mining and prospecting intermittently since 1884, and continuously for the nine years last preceding the giving of his testimony (Rec. 516) had gone into this country in '84 (Rec. 516) prospecting for "quartz and placer" (Rec. 517), being there about two months, he found gold in panning, on that trip, on the sand bars of the Columbia (Rec. 518). He located a quartz claim in Cedar Canyon district, and "became manager of the mine to open it up" (Rec. 518). The next year from Eureka, California, he prospected across the Siskiyou range for placer, but "mostly for quartz" (Rec. 520), going thence to Cornucopia camp north of Baker City (Rec. 520), not doing any placer prospecting at that time (Rec. 520), and in 1890 or 1891 he went into the Okanogan and Similkameen, prospecting for quartz and placer gold (Rec. 521) on the north side of the Similkameen river and "various places" (Rec. 521), finding some gold, being on this trip about 3 or 4 months; thence on a prospecting trip to the Bear Paw mountains in Montana for "quartz placer (Rec. 521), and to Butte, thence

to Logan, thence "into a camp in the Wasatch range in Utah, thence to Cripple Creek, prospecting—this being 1893 or 1894 (Rec. 522). He then went to Clear Creek, Colorado, and "brought out" a gold placer, and remained there all summer (Rec. 522); thence prospected on Mount Blanco, Colorado, for about 2 or 3 weeks (Rec. 523) and then placer mined (presumably prospecting) "all over" Summit Co., Colorado (Rec. 523). He then organized a prospecting company, and went into Idaho, Big creek and Snake river, did some panning, "saw some (gold) there" (Rec. 523). Then again he organized a prospecting company and went up to the Nespelem, this time they stopped at Stevenson's Ferry, where other testimony shows as does this witness's testimony, that a placer had been worked out, this being on the Columbia about 6 miles from the property in question. The witness walked over the placer at this time, which was about 10 to 15 acres in extent. He at that time talked to Mr. Stevenson, and was told that he had seen them working the bar (Rec. 526) and that he, Stevenson, had "shipped out their gold" (Rec. 526). This is relevant and of some weight as showing the knowledge and belief of this witness and of Early, relative to the gold bearing qualities of the immediate neighborhood of the property in question. It further adds to the intrinsic possibility that the same apparently continuous deposit of gold may have extended at least six miles further down the Columbia. Further this witness

shows that even at high water this worked-out placer ground is "30 to 40" feet above the river, and at low water perhaps 60 feet. Now the same Columbia River flows past the bar upon which is located the Multnomah placer. Both placers—the worked-out ground at Stevenson's bar and the Multnomah—are upon bars adjacent to the river. The river, or some cause, placed gold at an elevation of 30 to 40 to 60 feet above its present flow upon the Stevenson Bar, and it is manifestly most improbable that the Nespelem Bar could have been passed by without receiving a like deposit of gold. This fact of gold found so near, and at such an elevation above the river in the Stevenson Bar, shows most conclusively, we think, the inherent probability of gold being found at like elevation in the Nespelem Bar, and by this probability fortifies the testimony of all the witnesses for the defendant, that they have found gold at the height of the upper parts of the Nespelem Bar as well as at those "more favorable localities" spoken of by witness Comerford, along the river. Further, testimony of witness Collier, before adverted to, shows that the finding of gold even in the upper terraces of the Columbia, is not of infrequent occurrences, and that the lower terraces (among which might be classed the Stevenson and Nespelem Bar) were "pregressively richer" than the upper terraces. So that in this region and along this river even a 60 or 80 foot elevation above the river is a matter of indifference in

respect to the probability of gold deposits upon a bar at that elevation above the water, especially as it receives the gold also from Nespelem and tributaries which flow through a mineralized country.

Passing over the property in question on this trip, he was upon the property in July or August of that year (1900), and saw at that time placer location stakes upon this ground (Rec. 528(. In this he corroborates the testimony of Gilfillen and White. In 1901 he did his first panning on the property and found gold (Rec. 529). The bar had been located at the same time as the "Peabody" (Rec. 529) and "covered practically all of the bar" (Rec. 530), and included the "excluded strip along the Columbia" (Rec. 530), the Peabody at that time as located being co-extensive with the present Peabody and Wickman placers and the excluded strip. Later in June, 1902 (Rec. 531), the Wickman was located, and the Wickman placer, as originally located, also included "the excluded strip * * * took everything to high water mark on the Columbia river." That this is true is shown conclusively by defendant's Exhibit "E," the plat of the original location. Further, the location notice in evidence shows conclusively also that there were but five locators; the law is that but 20 acres of placer can be located by each locator, and the area of the Wickman as patented, shows that it contains 99.54 acres. Further, the plat of this placer

shown on complainant's Exhibit "4" shows that the original location corner at the southwest corner of the Wickman was 728 feet southwest of the Corner No. 3, as at present fixed. These facts without verbal testimony would establish this, but we have the testimony of this witness as well as that of Early, that the reason this strip was excluded was (Rec. 532) that "upon surveying it was found to contain over 100 acres, which is the limit that five persons could locate, therefore it had to be cut off on one end or the other, or one side or the other, and it was cut off from there" (Rec. 532). This agrees with the testimony of Early and further is a necessary deduction from the evidence in the number of names of locators on the location notice.

In May, 1902, he panned both sides of the Nespelem, down the Columbia, on the excluded strip (Rec. 533), gulches on the property, panning on both placers, and finding gold, fine gold and larger pieces (Rec. 533). At this time the secretary of the company, Mr. Peabody, was with the witness and he also panned and found gold (Rec. 533). It appears, too, that Mr. Peabody was "excited over the gold and told (the witness) * * * to secure patent as soon as pssible on the ground (Rec. 535). He panned over the entire property, finding gold in such measures that his opinion, affected also by his general knowledge of the mineral character of the country (Rec. 535-536, 538) was that

this was favorable placer property. His testimony as to the presence of gravel in all parts of the property and especially on the north strip along the Nespelem, sustains the testimony of the other witnesses in this case.

THE TRUE ISSUE IN THIS CASE, AND THE ONLY ONE, IS SIMPLY A QUESTION OF FACT,—WAS *there gold on these claims, and was gold discovered by the claimants and others, as set forth in the affidavits made in support of the application for patent to these claims, or, is it true, as alleged in the complaint of the Government, that each and every one of them so presented and filed with the local Land Office as evidence and proof to sustain said application for patent for said alleged mineral claims, were false and fraudulent in this,*—"that these claims did not at the time of these affidavits were made, or at any other time, contain a deposit of, or any gold, all of which was by the respective persons making said affidavits, and defendant well know when said affidavits were made."

The burden of proof is upon the Government. It must establish by a preponderance of evidence the truth of the above allegation. The equities of the United States appeal to the conscience of the chancellor with no greater or less force than to those of a private individual under like circumstances The Government must prove first, that the defendant's representatives

swore falsely, and second, that they knew they swore falsely when they presented their application for patent. Has the Government proven this? We contend that it has not, and wish to show three reasons at least why it could not be and why it was not proven by the witnesses for the Government in this case.

First. The actual time occupied by the witnesses for the Government in panning and prospecting the ground was too limited to prove the mineral or non-mineral character of the ground.

Second. The extent of the examination made by them was still more limited, and the acreage examined would neither prove or disprove the mineral character of even one acre of the claims, let alone the entire claims. On the contrary, Collier testified that there was a pay-streak upon these claims, and as the law requires only one discovery for every 160 acres, the case fails by the testimony of their own witnesses.

Third. The character of the ground chosen for examination by the witnesses of the plaintiff was in most, or many, cases, that least likely to contain gold, yet all the witnesses, except Stevenson, referred to found some gold.

TIME.

The time occupied by Collier and Goodwin (see page 134), according to the testimony of the latter, occu-

pied about one and one-half days. During this time, they identified the stakes and boundaries of over 257 acres of land; they examined the water power and its fall with aneroids; they took the flow of the river (see page 122) and found that it was 50 cubic feet of water in 20 seconds of time, or 2½ cubic feet of water per second of time. They examined a ditch about a mile long, examined the Nespelem River from the falls down to the Columbia, over a mile in length. Their examination of the Wickman Placer, of approximately 100 acres, occupied in the neighborhood (see page 135) of four hours, and, according to Mr. Goodwin (see page 131), they panned from three pits evidently two pans each, carrying them to the river, while Mr. Collier says (see page 70): "I think we panned two or three pits." In the gullies and along the shore of the Columbia they did not pan at all. And this constituted the "careful examination" of the entire claims; for Collier says (see page 70), "we did not pan in the gullies at all, nor along the Columbia River," the reason being probably that gravel was there, and no reference is made by either one that the extensive and comprehensive examination of approximately 100 acres of ground consisted of anything more than the panning of five or six pans, mostly silt and sand, from the prospect holes on these claims—less than 1-25 of a cubic yard. In other words, the amount of dirt which was panned from the claims, and from which this placer was arbi-

trarily decided to be non-gold bearing and worthless as a placer property, could be taken from a hole less than one foot square and two feet deep.

While on the Peabody placer, beginning at a little below the falls to the mouth of the Nespelem, their examination along the bank and in the sand and dirt was confined to four different places. This would average something like one panning every quarter of a mile, and this, with the addition of two or three pannings from the pits (see pages 116-118-119), comprised the total examination of the Peabody placer by Messrs. Collier and Goodwin, comprised their examination of over 157 acres of land, although they spend much time in examination of the water power and other parts of the scenery of the placers.

Mr. Commerford testified that in his examination of the Wickman placer, he bored six holes with a post auger which was 8 inches in diameter; that he took the dirt from the sides of six holes, in a loam soil (see page 167) "nothing gravelly about it," he says. This would make, or equal, a tract of ground 24x16 inches in diameter; as there are 43,500 square feet in an acre, he prospected in the silt, sand and clay of the Wickman placer, according to his testimony, a hole represented by an area of 2 1-3 square feet, beside he scraped the sides of the prospect holes in the silt and sand. This, then, comprised the extent of his careful exam-

ination of nearly 100 acres. On the Peabody Placer he bored one hole eight inches in diameter a short distance, when he struck a rock and quit; he also took the dirt from two prospect holes and two others, which had been dug (by whom no one knows), which were badly caved in, sacked it and took it to the river and secured the concentrates by panning (see page 164). This constituted his entire examination of over 157 acres on the Peabody placer, yet he found some gold; but he did not pan near the Nespelem river, nor in any of the gulches on either placer, nor on the south side of the Nespelem river, therefore, his careful and extensive examination of over 157 acres of ground which this defendant company had thoroughly prospected in the gravel and found gold in numberless places, was to be confiscated because on a space of ground that would not comprise one-eighth of one cubic yard, he failed to find pay dirt.

CHARACTER OF THE GROUND.

It is significant that in the entire testimony of the witnesses for the defendant, that each one spoke of finding gold in the gravel. Gilfillen (page 271), "we found gold in nearly every pan we took from the gravel bank"; page (272) "we dug down until we got into the gravel"; (page 274) "any place we found gravel, we found gold"; (page 275 "we panned across the line on

the Wickman where it was run down so we could get through the sand easier and get into the gravel."

Witness White (page 351) "sunk a shaft fourteen feet in May, 1900, to determine whether we could strike gravel that shows on the river bank, found gravel." (page 352) "Found gold and located three claims; this was ground now occupied by the Peabody and Wickman placers. (page 355) "The ravines on Wickman and Peabody placers on lower part are gravel, on upper part sand.

Early (page 408) "three or four days before locating found particles of gold in panning the dirt and gravel, panned 50 to 100 pans." "Panned *the gravel* and some of the top surface."

Wickman (page 189): "Q. State nature of soil panned? A. Mostly gravel."

Dr. Hudnutt (page 542): "I panned the top of the ground where there was *gravel.*" (Page 583 "I could decide from former prospecting on the bar that outside of the *gravel* the colors would be few and far between."

While Cummerford testified (page 116) "that with the exception of two or three caved-in holes, that his pannings were of silt and sand, nothing gravely about it." He also testified in regard to the bar on which are situated the Peabody and Wickman placers (page 174), as follows: "There is no indication of any condition

that would lead any person to believe that the land contained a deposit of gold or placer gold."

While Mr. Collier, the Government geologist, speaking of the bar on which these claims are located, says (page 77): "The Nespelem bar is formed by the Columbia river, and was probably formed there at a time when the ice gorged the Columbia down below. These materials that make up the clay were deposited there to a considerable heighth in the valley of the Columbia. Then the Columbia ice got away and the Columbia returned to its former channel and at one time it flowed about on the level of this upper bench that I spoke of and cut off that wide bench back to the foot-hills. It is known that the Columbia has cut down further in its present channel and left the bench above.

Q. The bench upon which the Wickman and Peabody placer are located are then of river creation?
A. Are of river origin; yes, of Columbia river origin.
Q-176. Did you investigate any of the upper benches or bars, or whatever you call them?
A. I investigated them, yes.
Q. What was the result so far as the presence of gold was concerned?
A. The result was that I got less gold the higher up the river I went on the benches. In one or two instances where there was a small stream, I got some pretty good gold high up, over a thousand feet above the river (page 77).
Q. The lower benches are richer than the upper benches? (Page 78.)
A. They are.

Q. What is the reason in your opinion?

A. In my opinion it is because the river has worked over the upper benches to concentrate the gold again on the lower benches.

Q. This glacier period and perhaps volcanic period, does that have anything to do with the Columbia river gold?

A. It had a very little to do with the gold, I think. At the time the glacier was there there was a great deal of material, of course, brought into the Columbia river, and a large part of it has been removed since. That material probably carried some gold. All that gold is perhaps concentrated upon the lower bars now.

Yet on page 61 he says, in reply to a question as to what elevation above the Columbia he found the gold on the Peabody placer, replied: "about 140 feet above the Columbia." This would indicate that the pay streak which he stated covered from one to two acres (page 98) was deposited there either by the Columbia river, or that it came from the mineralized quartz veins lying adjacent to the north and west.

No prospector, miner or mining man would consider the examination by these witnesses of any practical importance as to deciding the auriferous or non-auriferous character of these bars, excepting possibly Mr. Collier's relating to the discovery of the pay-streak covering about two acres.

It is well known, however, that an old river channel or the former bed of a river in a gold-bearing country is much sought after by experienced and successful

prospectors in all parts of the world, and this, according to Mr. Collier's testimony, is what the bar which makes up the Peabody and Wickman placers formerly was, an old river channel or bed of the Columbia river.

CONCLUSION.

I.

When the testimony of the defense is reviewed, one must be impressed with the fact that an actual *bona fide* discovery was made, and that the defendant, in locating and patenting the claims acted in good faith, impelled by the presence of placer gold therein in such quantities as when the availability of a water supply, dump grounds, and character of the material to be washed is considered, made it an ideal placer proposition for hydraulicking. The government failed to produce convincing evidence sustaining the charge of fraud or in any way impeaching the good faith of the defendant company. The examinations of the ground made by complainant's witnesses was too superficial, as is shown by their narration of the manner in which the investigation was conducted, to prove or disprove the mineral value of the land, and as the burden of proof is on the Government the proceedings must fail.

II.

Proof of the agricultural value of adjoining lands could most readily have been produced from the neighborhood, but here, too, the government failed. Exact proof of the potential horse-power present in the Nespelem Falls could have been had, had the government so desired. The flume bed is from 120 to 150 feet higher then than the power foundation. Collier testified, page 43, to 175 ft. fall, and Goodwin, page 121, to the same fall, and that there was a flow of 50 feet in 20 seconds of time, or 2½ cubic feet of water per second of time, which with the fall would develop only about 40 horse-power.

III.

Perhaps it may seem unreasonable to the Government that a company which apparently never had $7,000 in its treasury at any given time, should be delayed in pursuing the further development of the placer property at a probable initial expenditure of $30,000 to $50,000 for equipment, and that it could meanwhile preserve its lode claims by doing its assessment work thereon. The conduct of defendant in this respect after the obtaining of patent, is paralleled daily in the history of many mining companies and in business generally under similar financial stress, and is explained by the fear of adversing which was threatened (see pages 585 and 586.) While an equipment much less

costly might work the gravel profitably, Mr. Armstrong's plan was for a very large complete plant, using part of the water from near the upper falls for the giants, and the lower ditch for sluice water after, as on page 769, a more complete estimate had been made of the remote portion of the Wickman placer, which was intended as shown. (See page 546.)

IV.

That this property is valuable as a gold placer is almost a matter of demonstration. It is evident that, if the gold in this property averages much less than is indicated by the testimony of any of the witnesses for the defendant, this property is most valuable. But, assuming that this is not established as an ultimate fact, it has been shown conclusively that gold was present and is present in this property in such quantities as to justify these defendants in believing them worthy of exploitation for gold. The witnesses for the Government as well as the witnesses for defendant agreed that the Nespelem and Columbia river flowed through a mineral country, and that the formation was an andesite or diorite, both of which are gold bearing rocks.

Dr. Hudnutt testified on page 538, that there are 81 quartz claims within three miles from the recent survey of these placers, to the north, which, when considered with the testimony of Collier that the placers were the

old bed of the Nespelem and Columbia rivers, is strongly indicative of the good faith of the locators in believing that these claims possessed valuable mineral, which belief was strengthened by prospecting in the gravel underlying both these claims and finding gold.

V.

It is not believed that a further citation of authorities to support the contention of the defendant that the trial Court should be reversed, is necessary. The case of the United States v. Iron Silver Mining Company, *supra,* should be decisive, yet it might be well to consider the case of the Aspen Consolidated Mining Company v. Williams, 23 L. D. 34, as throwing some light upon the views of the Department of the Interior upon questions of this kind. That case presents a great many features similar to the case at bar, and after reviewing the testimony of the several witnesses on behalf of the plaintiff and defendant, the Honorable Secretary of the Interior Smith, said:

> "In view thereof I am unable to escape the conviction that the land in controversy contains valuable mineral deposits such as the mining statutes declare to be 'free and open to exploration and purchase.' There can be no question that gold has been discovered on these claims, nor do I think there can be any reasonable doubt, upon the whole evidence, that it exists in sufficient quantities to justify men of ordinary prudence in the further expenditure of money and labor in their development (Castle v. Womble, 19 L. D. 445). Consider-

able money and labor were expended by the original owners, who appear to have been men of ordinary prudence, and much larger expenditures have been made by persons composing the Aspen company, who appear to be business men of character and standing. All parties admit that in placer mining the richest deposits are generally found at bed-dock; and in this case the heavy preponderance of the evidence points, in my judgment, irresistibly to the conclusion that the working and development of these claims will disclose valuable deposits of mineral, and that in this respect the locations are such as are entitled to the protection guaranteed by the mineral laws. True, no active mineral operations have been carried on by the company since its purchase, and much is attempted to be made of this fact. The record discloses, however, that nearly the entire claim is covered by conflicts, and that, so to speak, almost every foot of the ground has been or is being stubbornly contested. Under such circumstances it would seem impossible for the company to carry on active and expensive mining operations until the conflicts have been adjusted. Active mining operations are not essential in order to establish the mineral character of the land (Johns v. Marsh, 15 L. D. -96), and such a requirement under the circumstances of this case would be wholly unreasonable."

We submit that the Government has wholly failed to establish by a preponderance of or by any evidence, its allegations of fraud on the part of the defendant, appellant herein, and therefore the decision of the Court should be reversed and the action dismissed.

Respectfully submitted,

A. G. ELSTON,

Attorney for Appellant.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

MULTNOMAH MINING, MILLING and DEVELOPMENT COMPANY, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLEE

STATEMENT OF CASE.

The lands which are the subject of this litigation are located in the vicinity of the confluence of the Nespelem and Columbia rivers on the south half of the Colville reservation in Okanogan county, Washington. The two claims lying together constitute one body of land adjacent to and under the waters of Nespelem falls. The Peabody placer location takes in both sides of the Nespelem river from a point above the lower falls of said river to where it empties

into the Columbia, about one mile southwest of the lower falls (Exhibit 4). Within six hundred feet from the east end of the Peabody claim, where the Nespelem river enters the boundary line of said claim, there is a fall of water in said river of approximately one hundred and seventy-five feet (Rec. 43). There is a volume of water flowing in this river estimated at three thousand miner's inches. These claims, as the record shows, are similar in nature to certain fruit lands situate in the same relative position as those lands to the river, where such lands are valued from one to four hundred dollars an acre.

The surface area of the Wickman placer claim is mostly level land, being described as a sandy loam soil on the surface (Rec. 53), the substantial part of which lies between seventy and ninety feet above the bed of the Columbia river. The western portion of the Peabody claim is similar to the land of the Wickman, mostly level, except along the banks of the Nespelem, where there are sand and gravel beds and where the land abruptly slopes toward the water of the river. All of the surface lands north of the Nespelem river upon both the Peabody and Wickman claims lie considerably below the dam situate at Nespelem falls on the Peabody claim, and the waters of said river, diverted at the falls, could be readily conveyed upon all the bench lands of both claims, while the power of the water falls of the Nespelem river is estimated at a capacity of approximately ten thousand horsepower, undeveloped (Complainant's Ex. 10, p. 13).

These lands on this river, including its falls, were located by the appellant company as placer gold mining claims upon the sworn evidence of the appellant's agents and representatives that the same were valuable as mining lands; that gold had been discovered thereon, and that said lands contained deposits of gold. Relying upon these representations and the good faith of the appellant, the government issued patents therefor. Appellee contends that these representations were false and fraudulent, and were known by appellant company to be false and fraudulent when made. Appellant in its answer (Paragraph 7, Rec. 30-31), after traversing the allegation of the complaint and admitting in substance that the representations were in fact made as therein alleged, contains this denial:

"Defendant denies that it knew of its own false and fraudulent acts described in the complaint. * * * Defendant alleges, moreover, that all of said acts and doings were done in good faith and in the belief that all of said things were true and without any knowledge of their falsity." (Rec. 31).

We think this extract from the defendant's answer presents the gist of the issue in this case. First, appellant relies upon the truth of whatever representations it made in procuring the lands; and, second, if it should develop that their statements and representations were false, it still hopes to escape the consequences of its acts by the alternative that it did not know of its own fraudulent acts. The issue squarely presented, then, is that of fraud—were the

claims initiated and perfected in fraud of the rights of the Government?

ARGUMENT.

TO ENTITLE ONE TO LOCATE LANDS AS PLACER GOLD MINING LANDS, THERE MUST HAVE BEEN DISCOVERED GOLD IN SUCH QUANTITIES AS WOULD JUSTIFY A PRUDENT PERSON IN EXPENDING LABOR AND CAPITAL IN WORKING AND DEVELOPING THE SAME FOR GOLD .

At the outset, we think we are justified in laying down the legal proposition that in order to entitle a citizen to locate lands of the United States as placer gold mining lands, mineral must be found there not only by "colors in the pan," but there must have been discovered gold in such quantities as would justify a prudent person in expending labor and capital in working and developing the same for gold.

As was said by Mr. Justice Brewer in the case of Chrisman vs. Miller, 197 U. S. 313, reading at page 323:

"There must be such a discovery of mineral as gives reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral, or, if it be claimed as placer ground, that it is valuable for such mining. * * * There was not enough in what he claims to have seen to have justified a prudent person in the expenditure of money and labor in exploitation for petroleum. It merely suggested a possibility that the ground contained oil sufficient to make it 'chiefly valuable therefor.'"

See also:
Lindley on Mines, vol. 1, page 609;
Castle vs. Womble, 19 L. D. 455, 457.

It is the contention of the Government that it is overwhelmingly established by the evidence in this case that these so-called placer lands do not now, and did not at the time appellant, through its officers and agents, located and procured patents to the same, present such indications in mineral as would justify a prudent person expending labor and capital in their development for gold or in working the same as placer mines in any manner whatsoever, and there was no legal and bona fide discovery of gold thereon.

THOROUGH EXAMINATION AND CAREFUL PRACTICAL TESTS MADE BY APPELLEE'S WITNESSES SHOWS NO INDICATION THAT THE LANDS CONTAINED A DEPOSIT OF PLACER GOLD.

That the statements and representations were made by appellant, its officers and agents, to the effect that these lands contained gold deposits is not disputed, but on the contrary they still contend that it does now, as it did then, contain the gold deposits. We shall, therefore, at once proceed to call the attention of the Court to those matters of evidence contained in the record showing that those statements were false and that no gold deposits in paying quantities were in fact found upon these lands.

Testimony of F. M. Goodwin.

In the fall of 1906, F. M. Goodwin, acting as the agent of the General Land Office, at the instance of the Secretary of the Interior, in company with one Arthur J. Collier, visited the lands in question for the purpose of making an examination of same to ascertain whether or not these claims possessed value for placer mining purposes (Rec. 109). After carefully examining all surface indication, the topography of the land, the water of the river, measuring its flow and the height of the falls, Mr. Goodwin and associates proceeded to test this soil by panning the same for gold. They first examined Improvement one, discovery shaft, on the Peabody claim (Comp. Ex. 4). As the result of that careful examination Mr. Goodwin gave the following testimony:

A. This was a pit about six feet square at the top, and perhaps eight or ten feet deep, as I recall it.

Q. What did you do toward testing the ground for it, and so on?

A. Well, we cleared off the dirt that had fallen down so as to get a solid bank, to a solid bottom, and took samples of the dirt in gold pans and took them down to the Nespelem river and panned it.

Q. What was the result of the panning?

A. Neither Mr. Collier or myself found any colors in those sands. (Rec. 116).

Referring again to the same examination of this number one discovery shaft, he testified:

A. The hole extended—the hole at the top extended through a clay soil and according to my recollection it went down into gravel formation. This particular pit.

Q. That particular one?
A. Yes, sir.

They further proceeded to an examination of what is designated as Improvement 2, discovery shaft (Complainant's Exhibit 4) on the Peabody location, and the result of that examination is given in Mr. Goodwin's testimony as follows:

Q. State how you got the dirt that you panned from this shaft No. 2?

A. I would like to state in that connection that in all the panning that I did on this trip and on these claims, Mr. Collier and I took our dirt at the same time and mine was taken under his direction as well as my own judgment—in other words, we worked together in taking our samples, and we first cleaned out the loose dirt and all the loose stuff so as to get solid formation as near as we could.

Q. Virgin ground?
A. Virgin ground.

* * * * * * *

A. (Cont.) Then we would sample it. After we had taken our pans from the side of the pit we would sample it from the top down.

* * * * * * *

A. (Cont.) We would take it from the bottom, we would carefully take a small strip across the bottom. (Rec. 118).

It also appears from Mr. Goodwin's testimony that he made various pannings and samples from the formation along the Nespelem river, upon which, as the Court will see, the defendant lays so much stress as to the discoveries made in those formations, and as a result of that examination he testified (p. 119 of Record):

Q. When you say river, please state which?

A. Nespelem river. We also panned some dirt taken next to the clay deposit which crops out along the Nespelem river.

Q. Along the Peabody claim?

A. And which also crops out on the Columbia river to the west—west of the Wickman claim.

Q. With what result?

A. With no result in either case. We also then cleaned out a place in a little coulee or gully that runs down in a somewhat northerly and southerly direction across—a place, a gully or coulee, and we panned some dirt from that point. We got no colors in any point on the Peabody placer claim in all of our panning.

* * * * * * *

A. We examined three of the pits that we found there—one had been a very small one and may have been a wash out. The other examinations were confined to holes that we dug ourselves, or from the river. We panned at four different places on the river.

Q. When you say river, you mean the Nespelem river?

A. I mean the Nespelem river. (Rec. 120).

Witness Goodwin further testified to examinations made upon the Wickman placer claim at the same time, having in view the same purpose. Improvement one discovery shaft of the Wickman claim (Complainant's Exhibit 4) was in like manner carefully examined, and the result is given in Mr. Goodwin's testimony (Record 130), part of which is as follows:

Q. In what manner did you test the hole, if at all, for the purpose of seeing whether the ground carried gold?

A. Mr. Collier and I both took a pan of dirt from this cut, the same as we took it at other places

in the manner already described, and panned it in the Nespelem river.

Q. Did you take undisturbed soil?

A. Yes, sir, from the sides and bottom of the hill, as I recall it, or from the back end of the hole where we could get it solid, down to the bottom.

Q. You panned it, did you say?

A. Yes, sir.

Q. With what result as to finding gold?

A. In one pan we found two small colors. The other was a blank.

Q. That is pretty close to the Peabody placer line?

A. That is very close to the line running between corners 2 and 3 of the Peabody placer.

As to the examination of one of several pits dug upon the surface of the Wickman placer, Goodwin testified as follows:

A. It was seven feet by five feet in size and about fourteen feet deep—twelve to fourteen feet deep.

Q. What examination did you make of it for the purpose of testing it?

A. I could not state whether it was that particular pit or not. We found six different pits of approximately the same size on the Wickman placer and I could not tell which particular pit now we dug our dirt to pan—out of which particular pit.

Q. Did you take it from all.

A. We took it from three different pits.

Q. But you do not recall which pits those were?

A. I don't, except they were of those six.

Q. What did you find, gold?

A. We found no gold.

Q. You sampled them and panned them, the same as you did the others?

A. Yes, sir. (Record 131).

As a result of his general examination as to

the placer gold upon these claims, Mr. Goodwin stated that from his experience in testing placer lands for gold he found no indications that these lands were valuable for placer mining. From his entire examination, it appears that but two colors were found, and these were barely discernible with the naked eye, and that it was necessary to use a microscope to distinguish from the black sand.

Testimony of George W. Comerford.

The Government produced the witness George W. Comerford, he having had experience in testing grounds as to their value for placer mining purposes since 1896 (Record p. 157), whose knowledge of the methods used in determining the presence of gold in loose soil or placer grounds can not be questioned. In April, 1909, at the instance of the complainant, he visited these lands for the express purpose of ascertaining by practical tests and general examination whether or not the same carried gold or were valuable for placer mining purposes. As the best means of conveying to the Court the result of Mr. Comerford's examination, we take the liberty of quoting from his testimony appearing in the record.

Referring to the examination at Improvement 2, shaft on the Wickman, he testified: (Record p. 162).

A. It lay to the northwest of the end of the ditch, improvement 2 on the plat. The hole is in the coulee or gully, some clay, a little, very little gravel, that is sand, no gravel at all, but sand. I prospected the shaft for the nine feet by scraping down the sides after cleaning off the face, having a gold pan at the bottom and scraping into the pan

and mixing the dirt, sampled it, then taking out of each pan approximately two double handfuls of dirt. I sampled the shaft the entire nine feet that way.

* * * * * * *

A. Nine feet down, yes, sir. I had with me a post auger.

Q. A post hole auger?

A. Yes, sir, about 8-inch bore I think—that is right, an 8-inch bore, and I bored into the bottom of that shaft 6 feet and 8 inches and sampled that 6 feet and 8 inches as I went down. All the dirt I sacked and carried with me. Working east and a trifle to the north of that I sampled another shaft. That shaft was 9 feet and 6 inches deep, good walls and bored there 5 feet and 6 inches deep in the bottom of the shaft and sampled each and every other shaft similarly. A trifle eastward and south of the line shown as improvement No. 3 or ditch I found another shaft. That shaft was in a bad shape and caved in to a certain extent, and sampled, well as far down as the bottom, and dug down in the waste that had fallen in and put the auger below 7 feet in the bottom of the hole. Traveling still eastward and south of the line indicating the ditch I sampled another shaft. This shaft was in very bad condition. I sampled the walls of the shaft to the depth I could and I bored down close to the wall and right under the cribbing that was there.

Q. Do you remember how far you went down?

A. I remember the cribbing was nine feet and the auger hole was four feet below the cribbing. These notes were all made instantly at the time of doing the work. Working eastward a little yet—

MR. BLAIR: Now describe the cribbing,—describe what you mean by cribbing?

A. The cribbing is, with reference to this hole, boards that were put there to retain the walls and assist the walls, it is the timber that was put in. Working southwest from the point marked on ex-

hibit No. 4 as being corner No. 5 of the Wickman, and No. 2 of the Peabody, there is indication of a shaft having been sunk there, but it was caved in and impossible to prospect it. By the side of this shaft I sunk then an 8 inch auger hole to the depth of 8 feet and prospected and sampled each six or eight inches as I went down.

In close proximity was another hole that was caved in that I sunk an auger hole in to a depth of 8 feet and prospected it the same as the other. In the vicinity of improvement No. 1 of the Peabody I found 2 holes there side by side. They were 12 feet and 13 feet down. I prospected them to that depth.

Q. How did you prospect them?

A. From the walls, and from the—I didn't sink the auger hole very deep there as it went against the rock and I think I will stop there.

Q. Did you sink it to the rock?

A. Yes sir. Then in the vicinity of improvement No. 2 I found—

Q. On what claim?

A. On the Peabody. There is a shaft there that was badly caved in and impossible to get into, but the dirt thrown out of the shaft was on the rim of the shaft and I sampled the dump of the shaft and also at another point not far from there and a little south of that there is another shaft there that was caved in and I sampled the dump of that shaft.

Q. What did you do with the dirt or stuff that you took out of these placers. How did you test them and how did you sample them?

A. The dirt taken out of the shaft that time I sacked in two gunny sacks and loaded it on a couple of ponies that I had there and took it over to the camp there and took them down from the camp and I washed the dirt by panning at the Columbia river, saving the concentrates we found that might be in the dirt. The dirt taken from the vicinity of corners 3 and 5 of the Wickman and Peabody we took to the Nespelem river. That was also sacked and hauled over

there in a buggy and I panned that and washed it out in the Nespelem river.

Q. What did you find?

A. I found some,—very little, black sand, but nothing, no showing, no gold whatever visible to the naked eye from all the dirt taken from the Wickman placer and no gold visible to the naked eye taken from the Peabody placer with the exception of the dirt taken from the shaft nearest—from the bottom of the shaft nearest to the Nespelem river. There I saw one color, but it was so small that I can only describe it by saying that it was about as small as the smallest dot that you could make by touching your pencil point.

MR. BLAIR: No gold visible to the naked eye from the Wickman?

A. None whatever. That one color was the only gold that I saw taken in any of my prospecting over there on the claims.

Q. Did you use the best method and the best effort that your experience suggested to ascertain whether or not there was gold on those claims?

MR. BLAIR: I object to the question as immaterial, whether or not he did is a matter to be decided, but not in detail and not his conclusion as a witness.

A. I did, and I used extraordinary care in panning and sampling, the samples that were taken.

MR BLAIR: I move to strike the answer.

Q. Now further test of the ground there, you say, did you make any concentrates?

A. I saved all the concentrates from my pannings and put them into a jar I had, keeping the 3 samples, kept the samples separate and brought them all with me to Spokane.

Q. Did you number them?

A. I did, yes sir.

Q. How did you number them?

A. 1, 2 and 3.

Q. How much for instance of your original dirt was concentrated into samples No. 1, how many pounds?

A. About 180 pounds of dirt constituted sample No. 1 of concentrates,—was concentrated into one sample.

Q. How many pounds of original dirt did you concentrate into sample No. 2?

A. There is between 140 and 150 pounds of dirt concentrated into that sample.

Q. And how much dirt did you concentrate into sample No. 3?

A. From 65 to 70 pounds.

Q. What did you do with those samples which you say you numbered 1, 2 and 3?

A. I delivered them to Mr. Webster.

Q. M. F. Webster?

A. M. F. Webster, for the purpose of making an assay and ascertaining the value of the concentrates.

Q. He is connected with C. M. Fassett's assaying establishment in the city?

From this careful examination made by Mr. Comerford, the practical tests made of the ground, and from his general inspection of the lands, he gives it as his conclusion, based upon his knowledge and experience, that "there is no indication of any condition that would lead a person to believe that the lands contained a deposit of placer gold."

Mr. Comerford's examination shows that he carefully and laboriously took samples of this earth and loose material from as many as ten different shafts, at different depths, down the sides of the shaft and the bottom, and then by means of an auger bored still further into the bottom of these shafts, bringing up the material from *bed rock*, carefully sacking and

sampling the same and taking it to the river for panning. *These examinations, extending practically over the entire surface ground of these claims,* could furnish no more accurate or convicing evidence or tests to demonstrate the presence of gold in this soil if, in fact, gold was there to be found.

Not relying, however, upon the result of his own panning and examinations and his own opinion or eye sight, as the defendants have entirely seen fit to do, but in order to make assurance doubly sure, Mr. Comerford carefully saved the concentrates or sand resulting from his numerous pannings upon these alleged placer grounds. He brought these concentrates to a competent and responsible assaying concern in Spokane, to-wit: C. M. Fassett & Co., where the same were assayed and tested by one, M. F. Webster, an experienced chemist and assayer (Record p. 180). For the result of this examination and analysis of the concentrates aforesaid, we refer the Court to Mr. Webster's testimony contained at pages 181 and 182 of the record.

This material so tested, sampled, panned and analyzed by the best methods known, in an honest effort to ascertain the true mineral constituents of this soil, was all taken from and in fact represented the true character of every form of soil which could be found upon the entire body of land which *this defendant still has the temerity to contend contains valuable gold deposits which can be secured with profit.* But we are content to submit the good faith of this claim of defendant upon this unmistakable proof as shown

by the tests of these concentrates, *it being demonstrated that out of one ton of earth as assayed, the highest value found would be, .00147 of one dollar, and from this test we submit to the Court whether such values would justify a prudent person in expending labor and capital in the development of such lands for gold by any process whatever.*

Testimony of Arthur J. Collier.

The testimony of Arthur J. Collier, of Washington, D. C., a geologist and mining expert and who had been in the employ of the United States Government in these capacities since 1898, who accompanied F. M. Goodwin, the witness above referred to on the trip of inspection to these lands in August, 1906, was taken by deposition, which is filed in this case and has been published pursuant to stipulation between counsel.

We respectfully invite the Court's careful examination of this deposition in strong corroboration of Mr. Goodwin's testimony above set forth, and for the additional reason that Mr. Collier was especially qualified to make this investigation and his testimony shows a careful and conscientious effort to ascertain the true character of this land (Rec. 39). After giving in detail a description of the claims, the manner in which they proceeded with the examination of the properties, Mr. Collier testified, in his deposition (Rec. 45), as follows:

Q—22. Please state whether or not you examined the bed of the Nespelem river for gold?

A. We did.

Q—23. With what results?

A. We examined the bed of the Nespelem river and found no gold at all in the river bed. We took pans from the gravel and sand in the bed of the river, washed them, and found no gold. We took pans also from the low benches at the sides of the river and found no gold in them either.

His deposition showed that they then proceeded to examine the bench lands, taking samples from the discovery pits in several places and finding no gold in them; also at the edge of the benches and along the gullies which had been washed out by water, where they took samples from these gullies and panned them for gold, but finding none. In regard to this examination of the gullies he stated:

Q—25. You stated that the sides of these gullies would show gold if the land contained gold, please explain that?

A. If the land contained any gold these gullies should act as sluices in which some of the soil would wash down to the river. In washing down to the river the gold would be left behind in the beds of the gullies, while the light materials would be washed on into the river. (Rec. 46).

Based upon his experience and the examination of these lands, Mr. Collier did not hestitate to give it as his opinion that these lands were not valuable for mining purposes.

The examination of the Wickman claim, as disclosed by his deposition, substantiates and strengthens the testimony given by Mr. Goodwin, and the candid, fair and open manner in which Mr. Collier testified to finding gold colors at other places, twenty-five miles up to one hundred and fifty miles away from these

claims along the Columbia river, shows no effort on his part to exaggerate or in any way color the true conditions, as is shown by his answer to the following interrogatory (Rec. 100).

Q—19. In selecting spots for your examination on the Peabody and Wickman claims, by what were you governed?

* * * * * * *

A. We were governed in the first place by the prospect holes which the claimants had dug on the claims. One of these prospects holes was marked "discovery pit," and asserted that the discovery of gold had been made there. We, of course, necessarily panned in that hole and panned in other holes situated about similarly to it. We panned along the river and selected the gravel next to the bed rock in order to see if there was any possibility of there being gold there. We also panned in the sides of the creek to see if there was gold there, and also panned in the little gullies that ran down to the creek. We selected the pans always with a view to giving the claimants any benefit of any doubt that there might be as to the value of the claims.

Based upon his experience and the examination of these lands, Mr. Collier also did not hestitate to give it as his opinion that these lands were not valuable for mining purposes.

Testimony of Howland V. Stevenson.

Mr. Howland V. Stevenson, a man of over thirty years experience in mining, covering nearly all the states of the Union where mining operations are conducted and familiar with what is known as the Nespelem country in the state of Washington, made a most thorough examination not only of the pits on the lands but of the gravel and sand bars along the Nes-

pelem river. Much stress is laid by appellant upon the gold bearing properties of the gravel and sand bars along this river, and for this reason we invite the attention of the Court to his testimony (Record 771). His purpose in visiting these claims at the instance of the Government was to make an examination by practical tests to ascertain whether or not gold was there in paying quantities, and the results of his investigation may be gleaned from the following extracts from the record (Rec. 777):

Q. What other examination did you make to ascertain whether there was any gold in either of these placers?

A. I examined all of the pits or shafts that I found on these two placer claims, most of them had been caved. On two I found some gravel lying on dumps,—on two of them, here close to the river, a little ways back from the river, and I took several pans from off that gravel, on both of these pits and there was no gravel there in any of the pits.

MR. BLAIR: What?

A. No gravel there in any of the pits and only on the two pits did I discover any gravel lying on the surface, that looked as if it had been taken out of these pits. The other pits were all in very loose soil. In all of these pits I took pannings and in not a single one, nor in the gravel of the two pits that I just mentioned did I find any gold whatsoever.

Q. Do you know about how many pits there were in all that you refer to, if you can, give it about correct?

A. About ten.

Q. Ten what?

A. Ten pits.

Q. Did you make any surface examination of the claims?

A. I followed the river from where this dam was down the canyon and to its mouth.

Q. That is the Nespelem river?

A. The Nespelem river, for quite a distance, the river is in a rocky canyon and is very steep, quite a great fall there and when the river gets down to where it is flatter, I examined several bars, gravel bars, *on both sides of the river and the banks of the river on both sides,* and I took in the neighborhood of thirty pans of dirt along there, I think it was thirty-two, I would not be positive as to that amount, and I found in numbers—in numbers of those pans, I found a considerable black sand, more or less, and some garnets, but not in a single pan did I find a single trace of gold, that is placer gold, visible gold to the eye or to the glass.

Mr. Stevenson's testimony shows that he visited the lands prepared to make a thorough examination. He had proper pans, pick, shovel, sacks for sampling and collecting the material, and beginning his examination at the dam, as testified to by him, down both sides of the Nespelem river to the mouth and up upon the surface of both the Wickman and the Peabody claims, in all of the pits and excavations which had been made by the defendant, or its officers, and purporting to have been discovery shafts, and then carefully along both sides of the ditch designated as Improvement 3 Ditch, on Exhibit 4, as well as in the gullies and every place where, according to his statement, there was any indication that the gravel or soil contained mineral, resulting in an absolute failure on his part to discover any trace of gold.

Appellant in its brief has devoted considerable space in attempting to make it appear to the Court that the examinations made by the several witnesses for the Government had not been thorough or made

with an honest endeavor to ascertain the true condition of these lands. From the testimony of these witnesses it must appear to the Court that the examinations were most exhaustive and the kind which would be calculated to discover the gold bearing properties of these claims if any there were. The surface of the lands was examined, the pits and excavations known as the discovery holes were examined, the gravel and sand bars were examined, and all without results.

A CAREFUL EXAMINATION OF THE TESTIMONY OF APPELLANT'S WITNESSES WILL SHOW IN THE FINAL ANALYSIS THAT EVEN FROM SUCH TESTIMONY GOLD WAS NOT FOUND IN PAYING QUANTITIES.

While the witnesses on behalf of appellant testified to finding gold in a great many places yet it will appear even from their testimony that in the final analysis it is admitted that it is only by the hydraulic process of placer mining if at all that gold could be produced in paying quantities, and then only by enlarging upon the peculiar advantages offered by the use of this great and valuable water power upon the lands. In fact the examination of appellant's witnesses was devoted largely to an effort to establish that appellant intended to develop the lands in question by means of the hydraulic process of placer mining.

But it is palpably evident from the circumstances and testimony in this case that this proposed hydraulic method was never seriously within the defendant's contemplation and they did not intend to install such a

system. In this connection, as indicating the want of good faith of the defendant, we think it sufficient to call the Court's attention to the facts as shown by the record that none of the witnesses, who were vitally interested in this project, gave satisfactory evidence or explanations as to how their proposed plan or system of hydraulic was to be put into operation.

Seven witnesses were examined, each of whom claims to have seen gold in the pans of earth taken from these properties. Each one of these witnesses, the Court will find, is either directly interested in the appellant company, or has been in its employ. We know of nothing which prevented appellant, if its contention is true that gold values are so easily discernible upon these lands, from having secured competent, honest, disinterested mining men, or other persons, to go upon these lands who might have brought to the examiner on the hearing evidence not so palpably colored and weakened by the interest which is apparent of every witness the appellant has produced.

Testimony of G. S. Wickman.

Of this character, we refer to the testimony of G. S. Wickman (Rec. 183), who was the treasurer of this company, was named as a locator of each of the claims and also an incorporator of the company, and while he was a locator and incorporator, as aforesaid, at no time had he ever visited the claims until the year 1903, when in company with Dr. Hudnut, the general-manager, he witnessed the panning of soil or sand upon these claims for several hours. He had

never panned for gold prior to that time, yet claims that he found colors easily upon panning the sand. It appears from his testimony that in every instance where he claims to have seen valuable indications of gold in this soil, either Dr. Hudnut, Mr. White or Mr. Early, or those directly interested in holding these lands, were present and furnished him with the information upon which he based his opinion as to their value.

One White, it was claimed, who was taken to the lands after this suit was started, for the purpose of getting evidence, testifies to the discovery of a nugget during one of his pannings, and Mr. Wickman testifies that he saw the nugget in the pan, but the circumstances under which this remarkable discovery *was made must convince us that this was a foreign substance and not a common characteristic of the soil of these claims.* Regarding the manner in which Wickman observed this value, he testified (Rec. 202).

A. Mr. White called me and we went over and he had a nugget in his pan.

Upon another occasion Mr. Early finished a pan which Mr. Wickman was attempting to operate. Regarding this he testified (Rec. 222).

Q. Why did not you finish it?

A. Because Mr. Early made the remark, you have got a damn good pan there—you will spill it out— and took the pan away from me and finished it.

Some inference was attempted to be drawn from this examination that a valuable assay certificate had been procured as the result of his pannings, but the Court will search the record in vain for any evidence

to prove that the colors which Wickman testified as having gathered were of any value whatever, and the evidence upon which his opinion as to their value was based, evidently came from what the others told him, who were with him upon the ground.

Testimony of J. R. Gilfellen.

The witness Gilfellen gave testimony of gold discoveries at numerious places upon these claims. From a careful examination of his testimony, we conclude that his statements in this respect are not only highly improbable, but seem to us absolutely absurd. He had been in the employ of the defendant company "quartz mining" (Rec. 259) and had lived at Nespelem for about ten years. In the year 1898, he had been prospecting over the entire country tributary to the Nespelem and Columbia rivers in that vicinity. Everywhere, according to his testimony, he panned, gold was discovered as defined by him, both fine gold and coarse gold. With apparent ease he was able to obtain gold colors visible to the eye without the use of the glass, not only upon these lands, but along the strip of land to the southwest of the Wickman claim, which, it will be seen, for some reason, the defendant in locating, failed to include in its location. From 1898, when he was prospecting in this locality, until three weeks prior to giving his testimony, he had not panned for gold upon any of the lands involved in this suit. His testimony indicates that at the time of his prospecting, he was searching for ground suitable for sluice box placer mining. The apparent inconsistency

of his testimony will be seen by an examination of the record, where he testifies as to the result of his examination and the reasons given by him for not locating upon the lands. (Rec. 319).

Q. Now you were pretty well satisfied the first time you went up there in 1898, in July, I believe you said,—you said you were pretty well satisfied that that was a gold claim?

A. Yes, a good claim for hydraulicking.

Q. Hydraulicking it?

A. Yes sir.

Q. It was not a paying proposition to pan, was it?

A. No sir.

Q. And you were not looking for a hydraulicking proposition, were you?

A. No, sir, looking for sluice boxes..

Q. Sluice boxes?

A. Yes sir.

Q. That is by shoveling it into the sluice boxes and turning the water on and by putting the water on to flow through the sluice boxes?

A. We shoveled it into the boxes while the water is going through.

Q. Why couldn't you do it up there—why couldn't you work the sluice boxes up there? There is fair water and fair everything else?

A. Because it takes too many men.

Q. A sluice box proposition is perfectly feasible up there so far as the physical features are concerned, —that is you have the water and force and place for the boxes and dirt and all that sort of thing, but I understand you to say you could not make money out of sluice boxes?

A. No sir.

Q. That is right,

A. That is right.

Q. Make more money out of sluice boxes though than you could out of panning, couldn't you?

A. Yes—by rocking or using a long tom, same condition, sluice boxing, rocking, panning, and using a long tom.

Q. You could not mine up there profitably by a long tom or rocker or panning or sluice boxes, could you?

A. No, not to make any profit out of it.

Q. Now you said you thought it was a place a man would be—a reasonable man would spend his labor and time in developing it for the purpose of securing gold, didn't you?

A. For the purpose of hydraulicking.

Q. Well you had the time didn't you?

A. How is that?

Q. You had the time?

A. Yes we had the time.

Q. You had the labor?

A. Partly.

Q. What do you mean by that?

A. It is a slow operation for two men to go ahead and we didn't have the money to hire more.

Q. Did you make a very careful thorough examination when you went up there in July 1898?

A. We made a thorough reliable examination and we were satisfied ourselves.

Q. You were entirely satisfied of the character of the land?

A. Yes sir.

The witness also testified that the lands could only be profitably mined by hydraulicing and gave it as his reason for not using that method that he did not have the means. We especially call the Court's attention to the seemingly careless and superficial examination which this witness gave the lands compared to the laborious and painstaking method used by the witnesses for the complainant in its effort to ascertain the truth. This witness, with apparent ease and at a

depth of eighteen inches, was able with the naked eye to discern colors in every pan of earth or gravel with which he experimented, and yet, the record of his testimony will show the careless and indifferent manner in which he made this examination. At page 330 of the record, appears the following:

Q. How many holes did you say you dug there?
A. We dug a number. I don't know how many.
Q. Two or three?
A. More than that.
Q. How big holes were they?
A. They were little, just so we could get the gravel out.
Q. A foot or two feet or six feet or what?
A. Something about two feet.

It appears that shortly before giving his testimony when he expected to be called as a witness for the defendant, he made an examination of these lands, upon which he testified as follows:

Q. Then did you go into,—when you went up there three weeks ago, did you go into the holes or the discovery shafts or anything?
A. No sir.
Q. Didn't see any?
A. Yes I saw some there.
Q. Didn't go into any?
A. No. They had been caved in and filled in with dirt and it would be a whole lot of work to get down into gravel and find anything at that time we were there.
Q. How deep are those holes?
A. I didn't see.
Q. Didn't pay any attention to them.
A. No.

Yet this is the character of testimony upon which appellant relies to show that the surface lands, as well

as certain gravel beds along the water, contained valuable deposits of gold. It was this witness who testified, when asked to define the difference between fine and coarse gold (Rec. 322):

"Coarse gold is gold you can see with the eye, and some of it is so you can pick it up even and drop it in the pan and it will rattle, as big as No. 4 shot."

It is significant that this witness, after all his valuable discoveries, abandoned the claim at a time when he could have taken it, without even placing a stake thereon. From the numerous discoveries of fine and coarse gold he claims to have made, and having had an opportunity three weeks before the hearing to give some tangible evidence of his discoveries, he was unable to produce any of the results sufficient to be dignified as an exhibit in this case.

Testimony of C. M. White.

Of the same character of evidence is that given by one C. M. White (Record 346). This witness had also been in the employ of the defendant company "quartz mining," having never engaged in placer mining. For some reason this witness was procured by Hudnut, the general-manager and Wickman, the treasurer, to go to the claims shortly before the hearing for the purpose of panning for gold, yet he does not hesitate to give his opinion that these lands were valuable for hydraulic mining, but were not valuable for sluicing and panning.

In regard to the value of his opinion upon this subject, we quote from the record (page 371):

Q. Ever do any hydraulic mining?
A. No sir.
Q. What is that?
A. No sir.
Q. I understand you Mr. White that you don't know anything about the cost or anything about the practical working of hydraulicking so far as expense is concerned?
A. No sir.
Q. And you don't know how much dirt can be made to pay or how much there has got to be in a yard to pay or anything like that?
A. No, sir.

The witness White is the party who found the alleged nugget near the Hudnut cabin at the time the witness Wickman was present and claimed to have seen it. We fail to see from this witness' qualifications, as shown by his testimony, what induced Hudnut to call upon him to make an examination of these lands; but it appears that Hudnut and Wickman drove to the town of Nespelem where they procured Mr. White, and requested him to go to the Nespelem river and pan for gold. Arriving there he was furnished pick and shovel, which were found in the Hudnut cabin and was requested to prospect for gold. The record shows that Hudnut and Wickman were present, saw him do the digging, were close at hand while the panning operation was being performed. The result of that panning was phenomenal, as it appears that the nugget was discovered soon after his work began. This alleged discovery, the evidence shows, was made at a place elevated about fifty to seventy feet distant from the river and about fifteen feet above the water and was found within eighteen

inches from the surface. The place where this nugget was discovered seems to contradict the statements of other witnesses, claiming that gold is found in the gravel at bed rock, while this substance seems to have been found near the surface.

Counsel on re-direct, asked witness White whether or not Hudnut or Wickman, being close at hand, threw this ngget into the pan (Record 376), which was, of course, denied. But from the manner in which this discovery was made, the circumstances surrounding the employing of White, the furnishing of the tools, the proximity of this discovery to the Hudnut cabin and the fact that nearly all of these colors of an unusual nature which it is claimed were discovered, were found in that same vicinity, we think the Court will readily see there were methods more ingenious and of a shrewder nature by which these nuggets could have been rendered accessible when needed.

Testimony of Thomas B. Early.

Thomas B. Early, superintendent of the defendant company, (Rec. 381), and resident of the town of Nespelem, who was one of the locators of each of the claims involved, as well as an incorporator of the company, and who staked the claims which were afterwards patented to the defendant, gave testimony as to gold discoveries having been made by him. After the Government began its investigation into the validity of these patents, in the summer of 1908, this witness superintended sluice box operations upon the claims for a month and a half without any results whatever

in value so far as the record shows. According to his testimony, the most flattering results of this box work in 1908 are described by him at page 503, of the Record, which we quote:

Q. Where did you yet the dirt from?
A. Along the Nespelem creek.
Q. Along the bank of the river?
A. Yes sir.
Q. Do you know how many colors were found in the black sand?
A. Well there was one little run that time that we counted 27 colors.
Q. You saved them did you?
A. Some of them we did, yes sir, that is, I saved them in a bottle, put them in a bottle.
Q. What is that?
A. Saved them and put them in a bottle, the black sand.
Q. You haven't got them now with you.,
A. No sir, not here, I gave them to the Dr. the manager of the company.

Thus he disposed of the entire fruits of the work of a month and a half in sluicing and these twenty-seven colors, alleged to have been turned over to Doctor Hudnut, general manager, have not been produced and no reference has been made to them as an exhibit, and no attempt is made by Doctor Hudnut to corroborate this statement, and we are forced to conclude respecting this witness' testimony the same as the others already referred to, that his statements as to gold discoveries are unwarrantedly enthusiastic and grossly exaggerated; for it seems that without much effort he also was able to find eight and nine colors in nearly every pan which he defined as "fine specks of gold, particles, heavy gold" (Record p. 433) "gold

that will rattle in the pan." And as a reason for not saving any of them he testified as follows:

Q. Did you save any of these colors that you have been describing?

A. Yes I saved some of them, a great many of them.

Q. What is that?

A. Saved some of them.

Q. I suppose ordinarily they were not saved were they?

A. Well I don't know whether the Dr. has some of them now or not.

Q. I am talking about your panning?

A. Well that is what I panned, my own panning, —that is you mean the last panning?

Q. No I don't mean the last panning.

A. No, not the first panning.

Q. I mean they were not saved prior to the commencement of this suit, I will say?

A. Well yes, once in a while we saved them.

Q. I hardly think that will answer my question.

A. Well we saved some of the larger.

Q. What is that?

A. I saved some of the larger particles.

Q. But ordinarily they were not saved, were they, generally?

A. Well generally—

MR. BLAIR: I object to the question as having been answered.

Q. Is that right?

A. Well when we would wash a pan of dirt and count our colors we would throw it back in the creek. It is true we didn't intend to save them, we would look at it and count it.

It appears that this witness was the original locator who staked the claims, and it was attempted to be shown that originally the claims took in the bank and

sand bars along the Columbia river, to the southwest of the Wickman location (see complainant's Exhibit 4). This location was afterwards amended so that the bank and bars along the water of the river were excluded from the location. Early, being superintendent, locator and part owner, was interested and ought to have known why this strip was excluded, but he professes repeatedly in his testimony not to know and to have no knowledge why the engineer, in the amended location, excluded that strip. He testified that he had prospected along the banks and gravel of the excluded strip aforesaid, and had found coarse particles of gold; that it was along there that the value showed the strongest, and it would seem that if the present contention is made in good faith that they proposed to work these lands by an hydraulic process, this portion of the ground which they excluded would have been more valuable and could have been worked with less expense than higher up, which they retained in the location. We think it highly improbable that this witness did not know, or that he had forgotten, the reasons entertained by these men for excluding the lands along the water and retaining the bench lands above.

Testimony of Dr. F. O. Hudnut.

The testimony of Doctor F. O. Hudnut requires (Rec. 515), perhaps, more consideration than that of any witness defendant has produced. He was the dominating force in this enterprise from its inception. He was the general-manager of the defendant company; was a locator of each of the claims and an incor-

porator of the company; he acted as the defendant company's representative in preparing proofs and filing applications for patent of these lands. He was called as a witness by the defendant and many pages of the record are devoted to detailing his wide and varied experience as a miner and prospector from the year 1884 until 1900, when he arrived in the Nespelem country with T. B. Early, his associate. After detailing generally his experience in finding particles of gold as the result of his pannings upon these claims, and in a most general way as to his belief in their value, he was asked by counsel for appellant to give the reasons prompting him to the belief that these lands were valuable for placer mining. Counsel made no effort to have this important witness detail the methods or care used by him in determining the value of his alleged gold discoveries, and it seems astonishing that this witness showed no disposition to be specific or fair in his testimony in chief, but upon the most general statements his conclusion was drawn that the lands were valuable and upon his production of certain alleged placer gold, contained in defendant's Exhibit "F," which this witness positively stated was placer gold taken from the Peabody claim, he was turned over for cross-examination. Regarding this Exhibit "F," he testified as follows (Record p. 550):

Q. Doctor I call your attention to this bottle containing what seems to be a black substance and ask you what there is contained therein?

A. Well it is black sand that was taken out of the Peabody placer, with gold in it.

MR. BLAIR: I ask to have this marked defendant's Exhibit "F."

Exhibit was so marked.

Q. Was that gold found upon the Peabody?
A. Yes, sir.

MR. BLAIR: I offer in evidence defendant's Exhibit "F."

MR. AVERY: I object to it on the ground that it is incompetent and that there is yet no foundation for admitting it in this case as evidence to prove or disprove any of the issues in this case.

MR. BLAIR: That is all.

Referring to exhibits, we call the Court's attention here that this witness was excused without any production of the bottle alleged to have been handed him by Mr. Early, containing twenty-seven colors. He was excused without attempting to corroborate the testimony of White, whom he had procured to prospect and who found the alleged nugget. These matters peculiarly within his knowledge, counsel did not venture to touch upon, and if the testimony of this witness had been concluded at that point, it would have resulted in an absolute fraud upon the Court, as will be seen by the following testimony given by this same witness on cross-examination, regarding this Exhibit "F," positively indentified by him as gold found upon the Peabody placer (Record 622):

Q. Doctor, calling your attention to defendant's "F," which is a bottle containing some sand, and I assume colors—where did you find these?
A. On the Peabody placer.
Q. You did find it, did you?
A. Yes, sir.
Q. Personally?
A. Yes, sir.
Q. When did you get them?

A. I should judge about 4 to 6 weeks ago, maybe 7. I could not state.

Q. Who was with you at the time?

A. Mr. Armstrong and Mr. Gay.

Q. Who is Mr. Gay.

A. A man who was prospecting there on the placers.

Q. Did you get them all yourself or did Mr. Gay and Mr. Armstrong get some of them?

A. Mr. Gay and Mr. Armstrong got some of them.

Q. How long has Mr. Gay been prospecting there?

A. Mr. Gay?

Q. Yes, sir.

A. He has been working on the placer proposition for two months and a half.

Q. Working for the company?

A. Yes, sir.

Q. Prospecting it?

A. Yes, sir.

Q. You were not with him all the time, were you?

A. I was not.

Q. He got some of those in your absence?

A. He did.

Q. Then when you say that you got all of them personally, that is not exactly true?

A. I mean that I got it from others, not that I panned there personally.

Q. You mean you personally took some of this stuff from Mr. Gay?

A. I personally took some of it from him and personally panned some of it.

Q. And Mr. Gay gave you some of it?

A. He gave me some of it, yes, sir.

Q. This is the result of Mr. Gay's panning for several months?

A. No, sir.

Q. How do you know?

A. Well because from the fact that that was

the result of—I don't know, perhaps 2 or 3 days or such a matter.

Q. I mean that about Mr. Gay?

A. Yes, I know.

Q. How do you know when Mr. Gay got it?

A. Well he stated about the time he got it.

Q. You instructed Mr. Gay to go up there and pan, didn't you?

A. I told Mr. Gay to go down there and prospect all over, prospect the Wickman and Peabody placers.

Q. But you don't know of your own knowledge whether Mr. Gay got that on the Peabody or Wickman or where he got it do you?

A. He worked on the Wickman and Peabody placers and then I had him prospect some ground that was entirely off the placers to see how it prospected.

Q. I just want to get down to the proposition that you don't know anything about where Mr. Gay got this?

A. I have to take his word for it.

Q. Mr. Gay is not here, is he?

A. No, sir.

Q. Is he still up in Nespelem?

A. I think he is in Nespelem. I don't know. I didn't bring that as indicating anything except a sample of the character of the gold.

Obviously, this particular exhibit must be excluded from consideration as utterly incompetent evidence and inadmissible for any purpose. It was put in on direct, however, without explanation or qualification, this witness at first, even upon cross-examination, adhering to his statement that he personally found it on the Peabody claim. This must illustrate to our minds the extremes to which defendant has been driven in scraping together a few gold colors as evidence, while at the same time they would have

us believe that gold is easily to be found upon these placer claims.

Upon cross-examination, this witness, Hudnut, evidenced a disposition to be unfair in avoiding and refusing openly and without reserve to answer the simplest questions concerning his inspection of these lands upon his first trips there in 1900, 1901, prior to their location, although professing to have been prospecting for quartz and placer mines at that time, being over these lands, made no effort, until 1901, to prospect the same for placer gold. In the latter year, in company with Early, he claims to have first prospected them, but his recollection is vague and uncertain as to the result of his investigation at that time, the very time when he was locating upon the Government's domain and taking up valuable lands as placer claims. Regarding his demeanor in this respect, we refer to the following (Record 568):

Q. You weren't there again in 1900, were you?
A. I don't have any recollection of it.
Q. When were you next there?
A. In 1901.
Q. What time of year?
A. I cannot state what time of the year I was there, excepting I was there soon after the location was made in June, one time. I don't think I was there at any other time. I would not say positively that I was there before that.
Q. You do not recall whether you were but that one time or not?
A. I could not state positively.
Q. How long were you there at that time—what part of the day?
A. Well long enough to look over the ground in June—look over the ground.

Q. Does that mean a day or more or less?

A. Well practically, taking into consideration the distance that it takes to go from one place to another, back to our camp. It is a hard two or three hours trip to get up there.

Q. Who was with you then?

A. Mr. Early.

Q. Did you pan any on that time?

A. Panned at the mouth of the Nespelem as I remember it.

Q. Whereabouts at the mouth?

A. Both sides I think. I am not positive, but I think both sides.

Q. That was on the Peabody?

A. That was on the Peabody, yes, sir.

Q. Did you get any gold at that time?

A. Yes, sir.

Q. Colors that you call gold; particles of gold?

A. Particles of gold, yes, sir.

Q. Do you remember how many you got?

A. I could not say, no, sir.

Q. They were small particles were they not—the smallest particles?

A. I could not state in regard to them.

Q. You don't remember anything?

A. I could not state. I know we got gold there. That is all I can state. I could not state the size of the particles of gold as regards to that matter.

Again in 1902, the witness Hudnut claims to have panned for gold upon these lands and his recollections as to the results that year are equally as unsatisfactory and inaccurate (Record 571). Every year since their location as placer claims he stated that he had panned there to "corroborate" his opinion as to their value (Record p. 452). Yet as a result of all his tests and investigations he failed to give explicit, definite information as to where he had panned or what the

results of his efforts were in values, and in none of his annual investigations had he taken the trouble to go into any of the discovery shafts upon the property, back from the river (Record 582), the very place where the discovery would be made, if at all.

The testimony of this witness, as all the witnesses on behalf of appellant, while claiming to have discovered gold on these claims, shows the same lack of results. Like the others, he made no examination of the discovery shafts, the very place, as the term indicates, where the gold must have been discovered if at all, but limited his search to the bed of the river. There is a total lack of recollection of what he found except that he says he found gold there.

Testimony of Joseph Kroll.

The testimony of Joseph Kroll (Rec. 819) we shall not discuss in detail; it is of the same general character as the others. This witness, having worked for the company, was requested by Hudnut to pan upon these claims for gold. He produced Exhibit "U" as the result of his entire work, which he testified was pannings gathered from both the Nespelem and Columbia rivers. It seems that he confined his operations entirely along the Nespelem river and did not go upon the surface of the claims, which he termed "among the grass roots," saying that he did not think any gold could be found on the surface; he did not pan along the ditch upon the Wickman, saying that "it would not be any use." He further testified that this Exhibit "U," which he claims contains thirty to fifty colors, part of which was gathered

along the Columbia river and part along the Nespelem river, was worth about one-half a cent, and did not know what part of it came from the Columbia river.

APPELLANT'S WITNESSES SHOW INCONSISTENCIES AND A TOTAL LACK OF DEFINITE RESULT.

A review of the testimony of appellant's witnesses shows that they were biased, unfair, evasive and inconsistent. To sustain their contention it was necessary for them to resort to a theory which in itself shows that the lands are chiefly valuable for the water that it contains. Conscious of the weakness of their own position relative to the amount of gold contained in the soil, while testifying to numerous discoveries of gold, all of the witnesses make it plain that they deemed it necessary to have recourse to a most highly perfected system of hydraulic placer mining if gold was to be produced at all in paying quantities. Evidently relying upon the proposition of law that if gold can be produced at a profit, the law is satisfied, irrespective of whatever incidental advantages it may offer, they have laid great stress upon the proposition that with the advantages offered by this great water falls it is possible to produce gold in paying quantities, where none could be profitably secured without this incidental advantage. In other words, they impliedly admit that ordinarily, with the small amount of gold claimed even by them to have been discovered, mining operations could not be successfully carried on, but they say in substance that

by evolving a gigantic and perfect system of hydraulic placer mining, by the aid of the advantages peculiar to these claims, it is possible to conceive the scheme to be feasible.

We believe the rule to be that the Court must first find that there was gold in paying quantity in these claims before the method of development can be taken into consideration; but, however that may be, it must appear plain to the Court that even that system of development was considered by appellant to be impracticable. Counsel for appellant, in attempting to explain the damaging circumstance that there had been a total omission to develop the claims after patent, at page 74 of his brief, says:

"As reflecting upon the omission of the defendants to do more than they had done towards equipping the property with a hydraulicking outfit, the testimony given by the witness (Rec. 737) in connection with the testimony of Wickman, discussed heretofore, frees the defendants from any suspicion. He shows under a searching cross-examination (Rec. 735) that the cost of such equipment as was considered installing was very large, etc,"

and then proceeds to detail the enormous expense which would be required to install the hydraulicking system, which, it is admitted, is the only method, if at all, by which gold could be mined. This, when taken into consideration with the testimony on behalf of the Government that a careful examination had been made and no gold found and that the claims are valuable for other purposes, and the further fact that as a result of upward of eight years of so-called mining operations only a few fine particles of gold

in two or three small phials containing water and black sand has been produced, must make it appear plain that appellant never intended to operate the claims as a placer mine, and that if the gold was anything at all it was the "incident," and not the water an incident to the gold mine.

OTHER CIRCUMSTANCES.

There are other circumstances in this case which appear clearly from the evidence, but which we do not deem necessary to discuss in detail. We refer—

1. To the change in the articles of incorporation. In September, 1902, the company executed amended articles of incorporation, giving the company power, among other things, to acquire lands for townsite purposes and right-of-way for ditches, canals, water courses and reservoirs; to contract for and maintain electric franchises, maintain and operate sawmills, etc. If the company in good faith intended to develop these properties as placer mines, why the necessity of amending these articles to include those things for which it is conceded the property is valuable.

2. Defendant ceased all operations or work immediately upon receiving its patents. The record shows that ditches were incomplete, shafts abandoned, the only work being upon the flume and power house.

3. The fact that appellant devoted its entire energies and capital to the working of its quartz properties located in that vicinity.

4. It appears that all of the efforts exerted by the defendant to hold these claims have been instituted

since this litigation was begun, and no gold which could be dignified by the name of evidence, no assays, engineer's reports or disinterested proof of these lands being valuable as placer claims, have been produced.

7. The insignificance of the exhibits introduced by the defendant as placer gold taken from these claims, when compared with the magnitude of its proposed operations and the great values of gold alleged to be in this soil, is apparent.

8. The repeated refusal and failure of appellant's witnesses to produce its prospectus and printed literature, from which is shown very plainly the intent and purpose with which these lands were obtained.

9. The indisputable fact that the lands in question are more valuable for irrigation and water power than for any other purpose.

10. The fact that these claims were located in 1901 and 1902, and rushed to patent in 1904, when work ceased thereon, while they continued to do their assessment work on their quartz claims, in the same vicinity, which were not patented; all of which, when take in connection with other circumstances, tends to show that appellant was not acting in good faith.

PRINTED LITERATURE CIRCULATED BY THE COMPANY IN EXPLOITING AND ADVERTISING THE PROPERTY SHOWS REAL INTENT AND PURPOSE FOR WHICH THE PROPERTY WAS ACQUIRED.

But if it were necessary to have further evidence of the real intent and purpose for which the lands

were obtained, the literature printed and circulated by the company would supply that want. On the first day of the hearing before the master counsel for complainant requested the production of the prospectus issued by the company. It was then announced that anything of that nature in their possession would be produced. No effort was made by appellant or its witness to comply with this request to produce the literature, although the request was often repeated and ample time and opportunity given appellant to comply therewith, had they so desired. The real motive in withholding this printed literature will be readily observed by the Court by referring to complainant's Exhibit No. 10, which, by the industry of the Government's counsel, was secured and placed in evidence. We quote briefly from Exhibit No. 10, but respectfully refer the Court to the contents of the entire exhibit for a more complete exposition of the company's enterprise.

LAND IRRIGATION AND WATER.

The method of intensified farming and horticulture as now carried on in the West are so little comprehended, so new, and results so marvelous that many people do not comprehend, or if told do not believe the actual facts regarding the profits attached to it. Lands above and below Wenatchee, which six to eight years ago sold at from $8 to $100 per acre, are today held at from $500 to $3,000 per acre. This would be unbelievable were it not for the fact that at these phenomenal prices, they pay interest at from 10 to 30 per cent, nor is it alone here, but all along the basin of the Columbia the peculiar conditions of soil and climate create the most favorable conditions known for the production of all kinds of fruit in addition to garden products; these conditions

permit the most intense crops and the highest product per acre known; the profits are without precedent; as an example, Mr. E. L. Stewart on the Columbia sold last year from six acres $6228.90 worth of apples, giving him a net profit of $4,313.75, or 10 per cent on $7,100.00 per acre. Lands have advanced during the last four years southwest of us, and east of us, from $100 to $200 per acre each year. Mr. D. C. Henny, supervising engineer of the United States Reclamation Service, says: "TWO DAYS' MINIMUM flow of the Columbia river produced more water than the ANNUAL run off of all the streams in the famous section of California in which lie Los Angeles, Santa Barbara and San Bernardino." He further says, speaking of irrigation on the benches and low lands adjacent to the Columbia, "It can hardly be doubted that in the future a large part of the flow of the river will be lifted to adjoining lands by pumps operated by WATER POWER which can be obtained from the side streams," etc.

This statement comes from the highest authority on irrigation, its methods and feasibility, in the United States. Any company so situated as to be able to irrigate land on the Columbia basin by water power or otherwise, have an immense fortune in their grasp, absolutely certain, and safe. (pp. 6, 7, Complainant's Exhibit 10.)

Twenty-three years ago the writer, bound for the new Coeur d'Alene mines, camped in the pines below where the Monroe street bridge now spans the Spokane river; the spray drifted into his face as he looked at that swirling, foaming mass of green and white translucent splendor, worthless to mankind then as a flint arrow-head. "Spokane Falls," it was then a straggling village of 2,500 people; today Spokane, the Inland city of the Northwest, its population 90,000, bank clearances for 1907 over $300,000.000. The falls are harnessed; 16,000 H. P. operates all machinery and lights the city, operates 95 miles of city street car line, and 280 miles of electric lines. Power is transmitted to the Coeur d'Alene mines 100

miles away via line through Coeur d'Alene Indian reserve, and runs the drills, compressors, tramways, hoists the ores and conveys it to the concentrators, whereby $23,000,000 worth of metals are added yearly to the world's supply. Should you ask any citizen there what made such prodigous growth and wealth possible in such a brief period, he will point to the blue mountains in the distance and say, "There are our treasure vaults with untold millions, HERE IS POWER. Around us the grain fields, averaging 30 bushels of wheat in 1907 per acre, and the irrigated fruit lands with the world's market reaching for them, pine and lumber at hand and above us the sunshine of perfect days." There is nothing here but sane, sober truth. It is the MINERAL, THE TIMBER, THE SOIL, THE IRRIGATED LANDS, and THE WATER POWER that makes Spokane. The same conditions elsewhere will produce like results, modified only by the extent and richness of territory that is tributary. The Northwest, then, with its unparalleled advantages of climate, timber, water, new and undeveloped land, presented the most promising field for securing the best paying properties. The next thing was to secure a strategic point from which, as a central pivot, the most of these would be adjacent and tributary. We found it, as I said, in the south half of the Colville reserve, open at that time only to mineral entry, but on March 22, 1906, the bill was approved opening it to settlement. The surveys and allotments are nearly completed, and upon appraisement of the land about 1,400,000 acres will be open for settlement. Take the map and look at our position geographically at the mouth of the Nespelem river. What does position count for? Everything!

* * * * * * *

Again we say position is everything. What operates to produce results in large things will, in a lesser degree, in small things; so with our company, whose history we have traced from its beginning, we have acquired and own the gold placers and bench

lands on the Columbia, and up the Nespelem valley above the falls, together with boat landing and mill sites, nearly all of which is patented. We have acquired the great WATER POWER of the Nespelem river, constructed a dam across it above the falls with head gate, flume, etc., and are now blasting from the solid rock space for a flume so large that we can, if desired, turn the entire river into our power plant, getting a fall of 157 feet of the entire river in 600 feet of distance. (pp. 10, 11, Complainant's Exhibit No. 10).

With the opening of the reserve and the installation of a power plant an impetus will be given this camp that will start the drills on scores of properties. Even now three companies are calling for power, for electric drills, for hoists and compressors. We cannot furnish it, but we are straining every nerve to be able to do so in the near future.

The Court will no doubt profitably examine in this connection Complainant's Exhibits 11 and 12, being of the same character of literature issued at the instance of the defendant company. It will be observed that no reference is found in this literature to the gigantic placer operations proposed by defendant's witnesses; no stress is laid upon the value of their alleged placer claims. The only value seemingly worthy of any emphasis being the location of their properties with reference to the water power and the availability of this water power for irrigation and power purposes. This evidence, coming as it does from the appellant company at a time when it felt at liberty to tell the truth, must appear to be the most satisfactory evidence of the real motive, the real intent, the real purpose in procuring these lands.

FRAUD FULLY ESTABLISHED.

Lurton, J., in the case of Mudsill Mining Company vs. Watrous, 61 Fed., reading page 171, says:

"Fraud, it is said, must be proven, and not presumed; yet fraud, like all other questions of fact, may be, and in most cases is, made out by circumstances from which the main fact is inferred. No witness has been introduced who testifies that he saw this metallic silver intruded into these bags of samples; yet circumstances so strong in their nature may be produced as to satisfy the mind and conscience that the guilty man is pointed out."

Viewed in the light of the law on the question of fraud, there is an air of improbability surrounding the whole of appellant's case, from which the thinking mind must conclude that the testimony of appellant's witnesses, judged by those standards by which courts weigh and consider evidence, is tainted, colored and artfully concocted, if not absolutely corrupt. And it seems to us that this inference of fraud in this case will arise, not alone from the fact that the lands in question did not bear gold and appellant knew it, but from the fact that they still strenuously maintain that gold is there.

CONCLUSION.

In conclusion will say that the following, among other things, clearly appears from the records:

1. That four witnesses testified on behalf of the Government, all of whom had made a thorough examination of the property, examining the discovery shafts by removing the loose dirt that had caved in

and getting samples from the sides and bottom, examined the sand and gravel bars of both the Nespelem and Columbia rivers, as well as the soil of the surface of the claims, all without results.

2. That the witnesses for appellant, all of whom are vitally interested in the claims, while testifying to finding gold in many places, always in the last analysis show conclusively that the gold discovered, if any, was not in paying quantities; all make it plain that the only method considered by them at all feasible was the hydraulic process of placer mining, and to render that feasible, according to their own theory, it was necessary to dwell so largely upon the great value of the water that it appeared even from their own theory that they considered the water of great value.

3. The printed literature of appellant company was intended to and did tell the real purpose for which these lands were obtained; the statements in which are true not only because appellant said so at a time when it felt disposed to tell the truth, but because it is borne out by every circumstance in this case.

In its opinion (Rec. 865) the lower Court says:

"It is a significant fact, however, that although more than eight years have elapsed between the date of the original location of the Peabody claim and the date of the last hearing before the Master, the net result of all mining operations on the two claims is a few fine particles of gold in two or three small phials containing water and black sand. The claims extend for more than a mile on either side of the Nespelem river from its confluence with the Columbia to a point above the falls; in crossing them the river falls

upwards of one hundred and fifty feet, and the claims are valuable for both power and agricultural purposes.

"After considering fully the location and character of the claims, the haste with which they were passed to patent, their almost entire abandonment since that time, and all the facts and surrounding circumstances, I am fully convinced that the claims were initiated and perfected in fraud of the rights of the complainant, and equity and good conscience demand that patents so obtained should be set aside and annulled."

We submit that the opinion of the Court as above expressed is fully sustained by the record in this case and the judgment should be affirmed.

Respectfully submitted,

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EDMUND J. FARLEY,
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