Editor's note: Reconsideration denied by Order dated June 8, 1983; Decision sustained by Director -- two letters dated May 3, 1984 -- See 71 IBLA 298A th E below.

UNITED STATES
v.
LYLE O. COOK ET AL.

IBLA 83-34 Decided March 22, 1983

Appeal from decision by Administrative Law Judge L. K. Luoma, declaring the Dickey Quartz lode mining claim, the Sun Rise lode mining claim, and the Dickie Nelson placer mining claim null and void. Contest No. CA-5747.

Affirmed as modified; decision of Administrative Law Judge adopted.

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

   Where evidence presented by claimants shows that no significant amounts of gold have been produced either from a lode claim or placer claim over a period of 13 years, a prima facie case of invalidity is created.

2. Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally

   Mineral examiners are not required to blast or do any extensive discovery work beyond the workings exposed by the claimants. Where the examiner inspects these workings and takes samples at the points which appeared to have the most mineralization and, as near as possible, to be at a previously designated discovery point, and presents corroborated testimony and evidence showing the absence of any significant amount of gold in those samples, the Government has established a prima facie case of invalidity.

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

Where lode mining claimants fail to keep their alleged discovery point in a winze free of water, they assume the risk that the Government mineral examiner will not be able to verify the alleged discovery. In these circumstances, claimants may not object to any lack of representativeness of the samples.

4. Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally

Where placer mining claimants refuse to direct Government mineral examiners to representative placer material removed from their claim, and assert that their alleged discovery point is at the bottom of a deep hole in an active river beneath many large boulders, they admit that they have made no discovery on the claim. In these circumstances, the examiner is justified in taking no sample, since none could be representative, and his testimony about the claimants' admission is enough to establish a prima facie case of invalidity.

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

Evidence that a claim presents an interesting prospect with some potential for the eventual recovery of gold is insufficient to establish that the claim is not invalid.

6. Delegation of Authority: Redelegations -- Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally

The Department of the Interior, which retains the authority to enter freely and inspect mining claims, has redelegated this authority to the Forest Service as to lands within the boundaries of national forests. Agents of the Forest Service have the right to enter such claims at any time; no permission need be sought from the claimants.

APPEARANCES: George W. Kell, Esq., Modesto, California, for appellants; Wilbur W. Jennings, Esq., Office of General Counsel, U.S. Department of Agriculture, San Francisco, California, for the Forest Service.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Lyle O. Cook, Beverly Cook, Robert E. Riddell, and Patricia Riddell, owners of interests in the Dickey Quartz (or Dickie (Nelson)) lode mining claim, the Sun Rise (or Sunrise) lode mining claim, and the Dickie Nelson placer mining claim, have appealed the September 13, 1982, decision of Administrative Law Judge L. K. Luoma declaring these claims null and void. 1/

Judge Luoma's decision is an accurate and well-reasoned disposition of all relevant questions of fact and law, and we hereby adopt it as our own. However, we deem it necessary to comment further on some issues.

[1] The record shows, and Judge Luoma noted in his decision, that there was an absence of production of gold from these claims at any time during the period described in the testimony, dating back to 1968. Evidence of absence of production or sale from mining claims over a period of years is sufficient, without more, to establish a prima facie case of invalidity. United States v. Alaska Limestone Corp., 66 IBLA 316 (1982) (appeal pending); United States v. Barrows, 76 I.D. 299, 306 (1969). This rule reflects the principle that, in the varying economic conditions present during a period of years, the claims will be developed if there is mineralization on them and if it is commercially feasible to do so at a profit. Appellants' failure to produce and sell gold from the claims created a rebuttable presumption that there was no mineral on the claim which could be profitably marketed.

[2, 3] Independent of the above, we find, as did Judge Luoma, that the evidence presented by the Forest Service (FS), taken as a whole, did establish a prima facie case of invalidity. In June 1981, FS sampled the area that claimants had previously designated as their discovery point for the lode claim. The sampling procedure that FS employed was adequate. FS sampled the areas in the winze that appeared to have the most mineralization as near as possible to the previously designated discovery point, in view of the presence of water in the winze. Mineral examiners are not required to blast or do any extensive discovery work beyond the workings exposed by the claimants in order to satisfy the Government's prima facie burden. It is incumbent upon a mining claimant to keep his discovery points available for inspection by Government mineral examiners. Where he does not, he assumes the risk that the mineral examiner will not be able to verify the discovery of the alleged mineral deposit, and his argument that the samples taken by the examiner are not representative will be rejected. United States v. Anderson, 57 IBLA 256 (1981); United States v. Polashek, 57 IBLA 104 (1981), and cases cited. Any lack of representativeness of the samples taken from the alleged discovery point on the lode claim in June 1981 may be traced to appellants' failure to clear water out of the winze.

1/ Judge Luoma's decision also declared the interests of Vernon W. Whipple in the Diener's Hole placer mining claim null and void. (Contest No. CA-5790.) Whipple has not appealed.

The names of the three claims under contest have been spelled variously by the parties. We have adopted the names as spelled in contest complaint No. CA-5747.

[4] Appellants' agents also refused to direct Government mineral examiners to representative placer material mined from their alleged discovery point on the placer claim, both in May 1978 and June 1981. They simply indicated that their discovery point was at the bottom of "Diener's hole," an area completely covered by many large boulders and deep water. Since there was no available means of gaining access to the alleged discovery point, this indication was tantamount to an admission that no valuable placer material had been discovered on the claim at the time of these inspections. In these circumstances the mineral examiners were justified in not taking any placer samples, since none could be representative. The examiners' testimony about the admission was enough to establish a prima facie case of invalidity of the placer claim.

[5] Appellants' evidence failed to rebut FS' prima facie showing of invalidity. Appellants' own witnesses indicated that no significant amount of gold was produced from either claim for many years. Appellants established nothing more than the fact that Diener's hole and the El Garcia adit might be objectively viewed as interesting prospects with some potential for the eventual recovery of gold. Evidence showing only that further exploration might be warranted is insufficient to establish discovery. United States v. Smith, 54 IBLA 12, 14 (1981). Appellants' evidence amounts to little more than opinions that there must be gold on the claims and that it must be recoverable at a profit. The conclusions from this exercise are too uncertain and conjectural to overcome the plain implications of appellants' failure over 13 years to actually accomplish the profitable development of those claims.

Appellants assert that they are the successors to a mining claim located prior to the creation of the Tahoe National Forest in 1910. Accordingly, they conclude, FS was without authority to enter their claims or to restrict their use of the surface of the claimed lands. Judge Luoma opined in passing that appellants' argument "possibly may have some merit," but found it unnecessary to reach the question because the United States holds title to the claimed lands, thus giving BLM authority to issue a contest complaint, and the Department the authority to adjudicate the validity of the claims, regardless of who submitted the evidence in support of the contest.

We see no validity in appellant's contention. Appellants have consistently asserted that FS had no "jurisdiction" over the claimed lands and that its employees were, therefore, trespassers on their claims. They have evidently discouraged FS' employees from entering the claimed area, albeit without attempting to use any force. We wish to clarify that appellants had no authority whatever to restrict FS' access to these claims. Further, it is necessary to reach the issue because, if appellants were correct, their failure to cooperate with FS' employees in making their discovery points available might not properly lead to any evidentiary presumptions.

The linchpin of appellants' position is that the lands covered by its claims were not made part of the Tahoe National Forest, because they were effectively excepted from the operation of Presidential Proclamation No. 1071, July 28, 1910, 36 Stat. 2730, which included the surrounding area in the Tahoe National Forest. Appellants refer to the following language from the proclamation as exempting the claimed area:

> The withdrawal made by this proclamation shall, as to all lands which are at this date legally appropriated under the public

> land laws or reserved for any public purpose, be subject to and shall not interfere with or defeat legal rights under such appropriation, nor prevent the use for such public purpose of lands so reserved, so long as such appropriation is legally maintained or such reservation remains in force.

Appellants assert that their claims are the same as the Dickey Quartz lode mining claim, which was located in 1901, prior to this proclamation, and that the lands covered by it were "legally appropriated" on July 28, 1910. Therefore, they contend, under the cited language, these lands were exempted from inclusion in the Tahoe National Forest, as well as from all subsequent legislation and administrative agreements dealing with national forest lands.

Appellants' argument on this point is inapposite. In the context of this Presidential proclamation, the phrase "all lands which are * * * legally appropriated" does not refer to mining claims. This proclamation was issued under the authority of the Act of June 4, 1897, 30 Stat. 32, 36, which expressly provided that lands designated as forest reservations would remain open to mineral location. Thus, the withdrawal in the proclamation was automatically subject to any preexisting (or subsequent) mining claims, and it would have been unnecessary to include a provision preserving mining claims from the effects of the withdrawal. The savings provision refers instead to other types of entries under the public land laws that were foreclosed by the proclamation, probably including some types of homesteads, and timber and stone entries under the Act of June 3, 1878, 20 Stat. 89.

Even assuming arguendo that a valid mining claim was a "legal appropriation" within the meaning of the proclamation, appellants' position is no stronger. Although the withdrawal in the proclamation was "subject to" any legal rights, this language merely served as the President's affirmation that no valid existing legal interests would be foreclosed by the withdrawal. Since any valid legal rights could proceed to patent and thus ultimately bar their inclusion in the Tahoe National Forest, the devotion of the lands to this use was not absolute: it was "subject to" these rights.

However, the proclamation also clearly contemplated that the withdrawal of any lands affected by legal appropriations would cease being subject to these appropriations if they were not legally maintained. That is, if the appropriations were invalidated for any reason, the withdrawal would take effect absolutely, eo instante, without the necessity of any further action by the President. Presidential Proclamation No. 1071 withdrew these lands as part of the Tahoe National Forest, while recognizing that valid property interests clouded the absoluteness of the withdrawal so long as they were legally maintained. Compare Jack Z. Boyd (On Reconsideration), 15 IBLA 174, 81 I.D. 150 (1974). 2/

2/ Jack Z. Boyd (On Reconsideration), supra, considered the meaning of the phrase "subject to valid existing rights" in a withdrawal order affecting a homestead entry. This term is in common use today in statutes and public land orders to protect valid legal interests from the effects of subsequent withdrawals, in the same manner as did the pertinent language in Presidential Proclamation No. 1071. We held in Boyd that, even though the withdrawal was "subject to" a preexisting homestead entry, the withdrawal nevertheless attached to all the lands described, including the homestead entry, as of the date of the withdrawal.

The Department of Agriculture, through FS, its constituent agency, is authorized to administer the national forests. 16 U.S.C. § 521a (1976). Presidential Proclamation No. 1071 withdrew the lands covered by appellants' claims for inclusion in the Tahoe National Forest, subject to divestment only if existing legal rights led to patent. This limitation on the withdrawal was not so substantial as to remove these lands from general administration by the Department of Agriculture. 3/

In any event, the Department of the Interior retains ultimate administrative jurisdiction over the title to these lands, since title to them rests with the United States. A mining claim which has not gone to patent is not immune from attack and investigation. So long as legal title remains in the Government, it has the power to determine whether the claim is valid. Cameron v. United States, 252 U.S. 450, 459-60 (1920). The Secretary of the Interior is charged with seeing that invalid mining claims are eliminated, and the Department has plenary authority to administer the public lands and broad regulatory power as well. Best v. Humboldt Mining Co., 371 U.S. 334 (1963). The right to enter the claimed area freely and to inspect the claimant's workings there is an essential adjunct to the Department's authority. The claimant must keep his claim open to Government mineral examination. United States v. Gayanich, 36 IBLA 111 (1978), and cases cited.

[6] At all times in question, FS, Department of Agriculture, was authorized by a "Memorandum of Understanding" between it and BLM, completed on April 1, 1957, to take responsibility to conduct any necessary mineral examination of national forest lands and to recommend whether to initiate Government contests against mining claims. These lands were within the boundaries of the Tahoe National Forest during this period. Accordingly, FS was acting within its authority, as duly delegated from the Department of the Interior, when it entered appellants' claims to examine their mineralization, with or without their permission.

In any event, the record shows conclusively that most of appellants' activity on the surface of the claimed lands is associated with placer mining. The Dickie Nelson placer mining claim, which includes all of the lands covered by the older lode claim, was not located until 1968 (Tr. 128, 140, 533). Thus, there is absolutely no doubt that the placer claim is within the Tahoe National Forest, and there can be no gainsaying that FS had the right to enter the placer claim to investigate its validity. 4/

3/ Holding otherwise would create an impossible administrative situation where FS could not determine whether lands that are plainly within the borders of national forests are under its administration. There are literally thousands of mining claims on national forest lands, and many of them predate the setting aside of the land for inclusion in national forests. If we adopted appellants' position, we would have to hold that all such claims create inholdings in the national forests and that only BLM could enter these claims. The result would be to disrupt FS' orderly administration of lands within the borders of the national forests.

4/ Appellant also questions FS' authority to regulate their use of the surface of the claimed area. Since the placer claim was located after the effective date of the Act of July 23, 1955, 30 U.S.C. § 612 (1976), there is no bar whatsoever to FS regulating the use of the surface of the placer claim under its regulations, 36 CFR Part 252 (now 36 CFR Part 228). See

Appellants argue that the samples taken by FS on June 22, 1981, are not entitled to any weight because FS failed to comply with the terms of an agreement to conduct joint sampling on the claims. Judge Luoma's decision fully sets out the particulars both of the agreement and of FS' failure to comply with it. He agreed with appellants that FS did not comply with the clear terms of the understanding reached before him in December 1980. So do we. No satisfactory explanation was offered by FS as to why it failed to comply.

However, we also agree with Judge Luoma that appellants were not excused from cooperating with FS in examining the claims on account of FS' inexcusable noncompliance with his order to conduct joint sampling. FS notified appellants well in advance of its intention to ignore Judge Luoma's order, yet they failed to file a protest with him. Even though it was not conducted as directed, FS' sampling was sound and amply corroborated. In any event, even if we were to ignore the evidence from this sampling completely, the present record would still support a determination that the claims were invalid.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed and adopted as the final decision of the Department as modified above.

Douglas E. Henriques
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

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fn. 4 (continued)
United States v. Curtis-Nevada Mines, Inc., 415 F. Supp. 1373, 1379 (E.D. Cal. 1976), rev'd on other grounds, 611 F. 2d 1277 (9th Cir. 1980). The same court recently recognized FS' authority to manage the surface of these claims. United States v. Cook, Civ. No. 5-82-209 PCW (Order Sept. 24, 1982).

September 13, 1982

UNITED STATES OF AMERICA, Contestant v. LYLE O. COOK; BEVERLY COOK; ROBERT E. RIDDELL; and PATRICIA RIDDELL, Contestees	: : : : : : : :	Contest Number CA-5747 Involving the DICKEY QUARTZ CLAIM, also known as DICKIE (NELSON); SUN RISE, also known as SUNRISE, Lode Mining Claims; and the DICKIE NELSON, Placer Mining Claim
UNITED STATES OF AMERICA, Contestant v. VERNON W. WHIPPLE, Contestee	: : : : : :	Contest Number CA-5790 Involving the DIENER'S HOLE Placer Mining Claim

DECISION

Appearances: Wilbur W. Jennings, Esq., Office of the General Counsel, U.S. Department of Agriculture, San Francisco, California, for the Contestant; George W. Kell, Esq., Modesto, California, for the Contestees in CA-5747; and Vernon W. Whipple, pro se, in CA-5790.

Before: Administrative Law Judge Luoma

These proceedings arise under the General Mining Laws of 1872, as amended, 30 U.S.C. § 22 et seq., and are conducted in accordance with 43 Code of Federal Regulations, Part 4.

The United States of America, acting by and through the California State Director, Bureau of Land Management, Department of the Interior, and on behalf of the United States Forest Service, Department of Agriculture, issued complaints dated February 5, 1979, in contest number CA-5747, and February 7, 1979, in contest number CA-5790, charging (1) that a discovery of a valuable mineral has not been shown to exist on the mining claims named above and (2) that the land embraced within the claims is nonmineral in character. 1/ The contestees filed answers denying the charges and, in addition, contestees in CA-5747 alleged generally, as affirmative defenses, that the Forest Service lacks standing and is estopped from contesting the validity of the claims. Hearings on the complaints were held on December 17-19, 1980, and August 20-24, 1981, in Sacramento, California.

Consolidation of Contests

All of the claims named above, both in contest number CA-5747 (which hereinafter will usually be referred to as "Riddell") and contest number CA-5790 (which hereinafter will usually be referred to as "Whipple"), essentially overlie each other and substantially encompass the same area of land. The point of alleged discovery on both the Riddell and Whipple placer claims is a pool (variously called sink, sinkhole, or pothole) in the South Yuba River which flows across the southern portion of the claimed area. Riddell refers to this pool as Johnston's Sink and Whipple refers to it as Diener's Hole (Ex. 2; Tr. 12, 78, 141).

Accordingly, since the placer claims in both Riddell and Whipple involve virtually the same land and alleged discovery point, the two contests were consolidated for hearing and decision. 2/

1/ During the course of the hearings that followed, contestant withdrew the charge of nonmineral in character (Tr. 287-288).

2/ Contestee Whipple sued Contestee Riddell, et al. in the local courts to determine ownership of the claimed area. This litigation ended with a decision of the Court of Appeal of the State of California, Third Appellate District, 3 Civ. 19224, in favor of Riddell. This probably disposes of any interest Whipple may have had in the claimed area. However since it is not in my jurisdiction to determine title between competing claimants Whipple was allowed to remain as a contestee.

Affirmative Defenses - Jurisdiction

Contestee Riddell presented extensive argument challenging the authority of the Forest Service to exercise management or control over the land covered by the mining claims and to initiate any action seeking to invalidate them. This argument is based on a chain of title which would show that the land was entered under the General Mining Laws prior in time to inclusion of the area in the Tahoe National Forest. Riddell contends that, when the Forest was extended into the area, his claims were excluded from the Forest by virtue of their having been previously found to be mineral lands, and that consequently the claim area remained as an enclave of entered public domain within the Forest. Apparently Riddell does not seriously challenge the jurisdiction of the Bureau of Land Management nor of this tribunal (see Tr. 874-879; posthearing brief of Riddell, p. 47, 11 23-28).

While Riddell's argument is intriguing and possibly may have some merit, it has no legal effect on the instant proceeding. Without question the United States holds legal title to the land and therefore the Bureau of Land Management has authority to issue a complaint challenging the validity of the claims at any time before patent has been issued. Cameron v. United States, 252 U.S. 450 (1920). It is equally clear that this tribunal has jurisdiction to hear and issue an initial decision on the issue of validity. United States v. Wood, 51 IBLA 301 (1980). It is immaterial whether the testimony and evidence submitted in support of the complaint comes from experts of the Forest Service, Bureau of Land Management or any other agency of the government, or from experts in the private sector. Many mining claim validity determinations are made in private contests before Interior's tribunal in which evidence both pro and con is presented solely through experts and other witnesses of the private sector. For example, see Duguid v. Best, 291 F.2d 235 (1961), cert. denied, 372 U.S. 906 (1963); Sedgwick v. Callahan, 9 IBLA 216 (1973).

Accordingly, there is no need here to make a finding on whether the land covered by the claims is a part of the Tahoe National Forest or a part of the public domain.

Issue

The determination of these proceedings revolves around the basic issue of whether a discovery of a valuable mineral deposit has been shown to exist on each of the claims.

Applicable Law

Before analyzing the evidence presented it might be well to set forth the law applicable to the basic issue of discovery and burden of proof. To obviate the need for paraphrasing I will cite from recent decisions of the Interior Board of Land Appeals:

> A discovery of a valuable mineral deposit is essential to the validity of a mining claim located on public lands of the United States because the mere staking of a claim conveys no rights to the claimant until there is also shown to be discovery of a valuable mineral deposit within the limits of the claim. 30 U.S.C. § 23 (1976). Under the "prudent man test," a discovery of valuable minerals under Federal mining laws exists only where the minerals found are of such a character that a person of ordinary prudence would be justified in the further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine. United States v. Coleman, 390 U.S. 599 (1968); Chrisman v. Miller, 197 U.S. 313 (1905); Castle v. Womble, 19 L.D. 455, 457 (1894). This prudent man test has been complemented by the "marketability test" requiring a showing of marketability, that is, a showing that the mineral in question can be presently extracted, removed, and marketed at a profit. United States v. Coleman, supra; Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).
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> Mineralization that only warrants further prospecting or exploration in an effort to ascertain whether sufficient mineralization might be found to justify mining or development does not constitute a valuable mineral deposit. A valuable mineral has not been found simply because the facts might warrant a search for such a deposit. Barton v. Morton, 498 F.2d 288 (9th Cir. 1974); United States v. Porter, 37 IBLA 313 (1978). In order to have a valid mining claim, valuable minerals must be exposed in sufficient quantities to justify development of the claim through actual mining operations. United States v. Marion, 37 IBLA 68 (1978).
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> United States v. Day, 56 IBLA 300 (1981).
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> In evaluating a mineral deposit geologic inference may be used where the deposit has been adequately physically exposed. However, it cannot be used as a substitute for evidence sufficiently showing the existence of an ore body or bodies necessary to warrant a prudent man to

develop a valuable mine. United States v. Chambers, supra. United States v. Edeline, 39 IBLA 236 (1979). See also Henault Mining Co. v. Tysk, 419 F.2d 766 (9th Cir. 1969); Before geologic inference may be used to project the value of a mineral deposit, it is necessary to determine whether there exists a vein or lode bearing minable material to justify any inference at all. * * * To establish the existence of a valuable mineral deposit on a lode claim there must be evidence of continuous mineralization along the course of a vein or lode; the mere showing of disconnected pods of mineral concentration, even of high values, does not satisfy the test. United States v. Chambers, supra at 47; United States v. Marion, 37 IBLA 68 (1978); United States v. Arizona Mining and Refining Co., 27 IBLA 99, 105 (1976); United States v. Ramsher Mining and Engineering Company, Inc., 13 IBLA 268, 273 (1973).

United States v. Whitney, 51 IBLA 73 (1980).

The "prudent man test" is met generally where it appears that mineralization on the claim has been physically exposed and the evidence shows that the mineral deposit is probably valuable enough to yield a fair market value in excess of the costs of extraction, removal, and sale. United States v. Edeline, 39 IBLA 236 (1979); United States v. Kiggins, 39 IBLA 88 (1979); United States v. Melluzzo, 38 IBLA 214 (1978).

United States v. Downs, 61 IBLA 251 (1982).

The prudent man test is an objective not a subjective standard. The value that an ordinary person would expect to receive for his labor must be taken into account, while the willingness of a claimant to subsist on unusually low remuneration must be disregarded. United States v. Slater, 34 IBLA 31, (1978); see also United States v. Reynders, supra at 136; United States v. Arcand, 23 IBLA 226, 231 (1976); United States v. Heard, 18 IBLA 43, 48 (1974); United States v. Stocker, 10 IBLA 158, 160 (1973); United States v. White, 72 I.D. 522 (1965), aff'd, White v. Udall, 404 F.2d 334 (9th Cir. 1968).

United States v. Whitney, supra.

When the United States contests a mining claim, it has assumed only the burden of going forward with sufficient evidence to establish a prima facie case of the charges in the contest complaint; the burden then shifts to the contestee to refute, by a preponderance of the evidence,

the Government's case. United States v. Hooker, 48 IBLA 22 (1980); Hallenbeck v. Kleppe, 590 F.2d 852 (10th Cir. 1979); United States v. Springer, 491 F.2d 239 (9th Cir. 1974), cert. denied, 419 U.S. 834 (1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

The United States has established a prima facie case of the invalidity of a mining claim when a qualified Government mining engineer testifies that he has examined the claim and found the mineral values insufficient to support the discovery of a valuable mineral deposit. United States v. Robert L. Taylor, 25 IBLA 21 (1976).

It is the duty of the mining claimant whose claim is being contested to keep discovery points available for inspection by Government mineral examiners. Mineral examiners have no affirmative duty to search for indications of a discovery on a mining claim, nor do they have to go beyond examining the discovery points of the claimant. The function of the Government's mineral examiners is to examine the discovery points made available by the claimant and to verify, if possible, the claimed discovery. United States v. Bryce, 13 IBLA 340 (1973). Where a claimant fails to keep his discovery points open and safely available for sampling by the Government's examiner, or declines to accompany the examiner to the claim, he assumes the risk that the Government examiner will be unable to verify the alleged discovery of a valuable mineral deposit. United States v. Knecht, 39 IBLA 8 (1979); United States v. Bechthold, 25 IBLA 77 (1976).

United States v. MacLaughlin, 50 IBLA 176 (1980).

If the Government fails to present a prima facie case, a contestee by timely motion may move to have the case dismissed and then rest. The contest complaint would then properly be dismissed because there was no prima facie case making an evidentiary basis for an order of invalidity by lack of discovery, and no other evidence in the record to support the charges in the complaint. Cf. United States v. Winters, 2 IBLA 329, 339-40, 78 I.D. 193, 197 (1971).

If, however, the contestees go forward, even after filing a motion to dismiss, and present their evidence, that evidence must be considered as part of the entire evidentiary record and weighed in accordance with its

> probative values. Therefore, even if the Government has failed to make a satisfactory prima facie case, or if its case is weak, evidence presented by contestees which supports the Government's contest charges may be used against the contestees, regardless of the defects in the Government's case.
>
> United States v. Clarion W. Taylor, Sr., 82 I.D. 68 (1975).

Evidence Presented

The claims are located on the South Yuba River approximately five miles east of Washington, California. As indicated above all three of the claims essentially overlie each other and substantially encompass the same area of land. Riddell's Dickie Nelson lode claim almost totally encompasses Riddell's Sunrise lode, the only significant difference being that the Dickie Nelson lode has additional width. The only lode discovery point claimed by Riddell is an adit and winze in the southwest corner, usually called the El Garcia adit, which would serve both claims. Riddell's Dickie Nelson placer has boundaries identical to the Dickie Nelson lode. Whipple's Diener's Hole placer claim has a squared-up configuration which essentially overlies the Dickie Nelson placer. The alleged point of discovery for both placers is the same pool, sink or sinkhole in the South Yuba River (Ex. 2). For purposes of convenience and clarity the claims will be referred to hereinafter in most instances as the lode claim and the placer claim.

There are a number of surface improvements and pieces of equipment located within the bounds of the Dickie Nelson claim, all north of the South Yuba River. These include a tractor for moving heavy materials, a trommel for processing stockpiled gravels, a sluice box with 45 lineal feet of riffles to process material from the trommel, a settlement tank at the end of the riffles, a circulating tank with pump, a cone crusher, an eight-inch dredge to move gravels, a stiff leg derrick with winch and 50-foot boom for raising gravels from the sinkhole, a 50-foot conveyor for transporting gravel materials from the stockpile to the trommel, a shaker table for processing materials, two amalgamating tables for processing fine materials from the settlement tank, a large winch and electric motor to haul lode materials from the El Garcia adit across the river to a stockpile, a 75 KW diesel generator to power the different machinery, a dump truck for hauling gravels from the derrick site to the stockpile, a fire truck with a pumper for fire protection, a trailer mounted welder, a compressor to run an air drill, a 160-foot wood flume for fluming water to by-pass the sinkhole,

and sundry other electric and gas pumps, winches, pipes, hoses, tools and hardware. In addition to this equipment there are a number of cabins and sheds of a semi-fixed nature and generally quite a number of mobile campers and trailers used for living quarters.

The Lode Claim

> The only mining improvement on the lode claim is what is referred to as the El Garcia adit, located in the southwest corner of the claim, south of the South Yuba River. The adit is an opening in an almost vertical cliff, with the floor about 20 feet above the level of the river and extending approximately 80 feet (Ex. 45) into the mountain. Some distance inward the tunnel forks to the left and right. At the fork to the left is a winze extending downward from the floor of the adit on a 60-degree slope to a depth of about 24 feet. The winze is approximately eight feet in diameter.
>
> A mineral examination of the claim was made on October 25, 1977, by Mr. Henry W. Jones, a mining engineer then employed by the United States Forest Service. He was accompanied by Mr. William L. Haire, the district resource officer for the United States Forest Service, and by several members of a group associated with contestee Riddell. Mr. Jones prepared a sketch of the claims (Ex. 2) which shows the location of the adit. He was told by Riddell's representatives that their point of discovery was inside the adit at the bottom of the winze. They pointed out no other discovery points and he concluded that the adit and winze constituted the discovery point for Dickie Nelson lode as well as for the underlying Sun Rise lode. Mr. Jones found no evidence of other openings which would indicate lode values on the claims.
>
> Mr. Jones said he went down the winze about 24 feet. He observed a quartz vein 24 inches wide exposed down the length of the southeast wall. He took what he first called a grab sample of broken vein material at the bottom of the winze, sacked and marked it as sample AFS 1990, and later submitted it for assay for gold and silver. He later called it a chip sample which he obtained by beating off particles of rock across the width of the vein structure near the bottom of the winze. The assay return (Ex. 41) shows .005 ounces of gold per ton of material tested, calculated by Mr. Jones to be worth $2.50 per ton at a gold price of $500 per ounce. He stated that value represents only the 24-inch width of the vein whereas an actual mining width would have to be about five feet. This would dilute the value in half. While not giving an estimated mining cost Mr. Jones said it would be very expensive to mine that particular area.

Mr. Jones re-examined the claims, once on May 3, 1978, when he completed his mapping as shown on Exhibit 2, and again in December 1980, when he was shown a stockpile of broken rock lode material, which he estimated to be about two tons, located near the center of the claims. Near the stockpile was a small crusher and ball mill, both unmounted and unpowered. He didn't think the ball mill could be used for crushing purposes.

Based upon his examination of the lode claims, Mr. Jones expressed the opinion that a prudent man would not be justified in expending time, money and effort with a reasonable hope of developing a paying mine.

Contestee Riddell presented the testimony of three of his associates, Messrs. Elmo DeDeaux, Robert Poteet and William Ryder, who personally observed Mr. Jones' activites in sampling the winze. Mr. Ryder carried a tape recorder and recorded conversations and sounds that occurred. According to their testimony, Mr. Jones made an effort to chip across the vein in the winze using a 48-inch pry bar, belonging to Riddell, which was lying in the adit. After striking the vein a number of times without success in removing any material from the hard vein, Mr. Jones was heard to say, "To hell with it" and threw the bar aside. The tape which was received in evidence (Ex. H) records approximately 17 successive ringing sounds, such as steel striking hard stone, followed by Mr. Jones' voice saying, "To hell with it." The gist of their testimony is that Mr. Jones did not cut a chip sample from the face of the vein but merely picked up some loose rock material which he had assayed as sample AFS 1990. Contestant offered nothing to rebut this part of the evidence.

At the conclusion of the first session of the hearing the parties agreed to perform a joint sampling of the El Garcia adit and to produce the results at the second session. For reasons explained later the joint sampling was not done. However contestant did resample the adit.

On April 8, 1981, Mr. Richard Harty, a mining geologist employed by the United States Forest Service, visited the claims for the purpose of looking over the workings and to observe the general topography and geology. After studying the transcript of the first session of the hearing and the previous mapping and having observed the workings, he decided that the only significant working involving lode deposits which should be sampled was the El Garcia adit. He was given no further information by contestees as to where sampling should be done.

He next visited the claims on June 22, 1981, accompanied by contestant's counsel and other employees of the Forest Service. He again examined the adit and prepared a map of it (Ex. 45), which shows a quartz vein two and one-half feet wide running the length of the adit. It also shows that the winze at that time was flooded to within one foot of the drift. He took four samples inside the adit. The first one was taken across the two and one-half foot width of the vein at a point six feet in from the portal. The second one also was across the width of the vein, at a point 68 feet in from the portal, near the end of the adit. Sample three was taken from rock below the vein and sample four from rock above the vein. He took the last two samples to provide a sampling average for a mineable width, which would require about five feet. All of the samples were chipped with hammer and moil, forming a zig-zag channel about one inch wide and from one-half to one inch deep. The sample materials were sacked, weighing from 3.9 to 6.2 pounds, and submitted for fire assays of gold and silver. Based upon the assay report that was returned (Ex. 50) the gold value of the vein material is $7.81 per ton with gold priced at $411 per ounce. Mr. Harty estimated that there were approximately 2,000 tons of material available for mining at that price. He estimated mining costs to be from $60 to $70 per ton. Mr. Harty stated that in his opinion a prudent man would not be justified in the further expenditure of his time and means with a reasonable expectation of developing a profitable mine.

Over the years between 1974 and 1980 contestee Riddell did blast sampling of the vein that runs the length of the adit. No sampling was done of the winze. According to the testimony of Mr. Robert Riddell they would at various times drill and blast material from the vein in the west wall of the adit at random points from 10 to 40 feet back from the entrance. He estimated the amount of material blasted at any one time would be about one cubic foot, not exceeding 100 pounds. Mr. Riddell's brother, Frank, would select the points for blasting and perform the blasts. He was assisted in this by Mr. Tomasito Garcia, a member of their organization. The material blasted would be transported by cable across the river and stockpiled near the center of the claim. From this material Mr. Robert Riddell would select certain rocks, usually the size of an orange or grapefruit, and bring them to the U.S. Bureau of Mines or private assay companies for assaying. The results of this assaying are contained in Exhibit T, in evidence. The top sheet of that exhibit, marked T-a, is a summary

of the individual reports contained in the exhibit. The summary, which lists 30 separate assay items, and the individual reports were reviewed on behalf of contestees by Mr. Richard Leatherman, regularly employed by the U.S. Army Corps of Engineers as a civil engineer. He is also a licensed geologist and licensed engineering geologist in the state of California. He concluded that the samples assayed averaged either 3.4 or 3.5 ounces of gold per ton of the material assayed. Based on a gold value of $400 per ounce as shown on the exhibit the average value of all samples would be $1,372.40 per ton of the sample material. According to contestee Riddell line items 15, 17 and 18 of the exhibit are assays of samples of rock purposely selected because they contained visible gold. These three average about 23.16 ounces of gold per ton, calculating to $9,264 per ton of material. He agreed that these samples are not representative of the value of the vein structure. As to the rest of the assays he stated that they are representative of the rock in place. If we were to eliminate these three samples, the remaining 27 samples would average 1.24 ounces of gold with an average value of $496 per ton of material.

Mr. Leatherman himself took no samples nor had any assays run. He estimated that mining costs would be $75 to $100 per ton if done by contestees and their participants, or about $200 if done commercially. Based upon his examination of the sample results done by others he was of the opinion that the claim would satisfy the prudent man test of discovery.

Other than the specimen samples, contestees have not had any gold production or sales from the claim. According to contestee Riddell they have done no processing of the lode other than exploratory work and assaying of samples.

The Placer Claim

As indicated above the only claimed placer mineralization occurs as gold to be recovered from gravels at the bottom of the pool or sinkhole in the south Yuba River. Purely for the sake of convenience and not for giving any special technical meaning to the term, the formation will hereinafter be referred to as "the sinkhole". It lies at the base of a waterfall in the South Yuba River, forming a natural dam or barrier which catches gravels that move downstream during flood stages of the river. According to contestees any gold carried downstream by these gravels would settle in the

bottom of the sinkhole and would be prevented from moving downstream by the natural barrier. The surface area of the sinkhole is approximately 180 feet long parallel to the flow of the stream by 80 feet wide, with a normal water depth of about 40 feet.

Contestees have a derrick positioned on a bluff above the sinkhole which is used to operate a clamshell for removing gravels from the sinkhole and hoisting them to high ground to a point shown as "bunker" on Exhibit 2. On his May 3, 1978 visit to the claim, Mr. Jones took a placer sample, AFS 3654, of the gravels stored near the bunker which he believed he had observed the previous year being dredged from the sinkhole. He concentrated two pan samples of assorted gravels and sand down to black sand which he examined for gold specks. None were visible. He placed the black sand concentrate into a baby food jar and submitted it to a laboratory for assay by amalgamation. The assay report (Ex. 42) shows a gold content of .004 milligrams which Mr. Jones described as being almost nonexistent and having a dollar value of only $.0048 per yard, based upon a gold price of $500 per ounce.

Mr. Jones was told by representatives of contestee Riddell that the gold values were at the bottom of the pool which was totally inaccessible to him. They also showed him a stockpile of material, which he estimated to contain 1,200 yards, which they said was removed from the pool and hauled by truck the previous year. No attempt was made by Mr. Jones to sample this stockpile.

Based upon his examination Mr. Jones gave the opinion that a prudent man would not be justified in expending time, money and effort on the placer claim with a reasonable hope of developing a paying mine.

Mr. Harty examined the claim on his visits on April 8 and June 22, 1981. He stated that he intended to sample material currently being removed by the clamshell from the sinkhole. He was denied this opportunity because contestees refused to operate the clamshell during his visits. He observed the sinkhole, filled with water, which he estimated as being 110 feet long by 85 feet wide. He found no placer material surrounding the sinkhole which could have been sampled. He also observed some gravels laying around the property, some in barrels, but had no way of determining where they came from. They could have been road gravel or they could have been placer gravels. Mr. Harty explained why he took no placer samples:

> There was no operation going on, nothing that I could distinguish as having come out of this pool or Diener's Hole, so called, nor anything on the surface that I could identify as having had come out of there, no operation going on. There was, as I said, no visible gravel upstream or downstream from that Hole and the Hole is extremely deep. No one could get down there to take samples so it would be easier to explain why I didn't take one than try to take one and explain why I did.
>
> (Tr. 679)

Regarding the stockpile of gravel his testimony, in answer to a question by contestees' counsel, was:

> Q. I can see you might have some problems but are you seriously suggesting that there's any where else in the vicinity that that gravel and apparent placer deposit material could have come from except from that Hole in view of the fact that there's a clam there operating, a truck going back and forth and a trommel there with a, this pool down below it? Any other place?
>
> A. No I would assume that gravel probably did come from the Hole. The problem that I had of course, and I asked Mark I believe and the people there, everybody had no comment, but the question was did you work that gravel and take out the gold and is this the rejects or is this your original gravel, is this your discovery, is this got any relationship to this mining claim or is this something you hauled in with a truck to work on your road or you know. I had no idea and to take a sample I wouldn't have a representative sample of anything. If I had been told this material came out of the pit and this is our discovery and that particularly if I'd been there when that clamshell was working and watched it come out of that Hole then I would say that's representative but other than that there's no sense taking a sample if you don't know what the sampling is for.
>
> (Tr. 732-733)

He also gave the opinion that the prudent man test of discovery had not been met.

Contestee Riddell presented the testimony of several witnesses. Mr. John Withrow, one of the associates in Riddell's mining venture, is the crane operator who operates the derrick and clamshell in removing gravels

and boulders from the sinkhole. He has long experience as a machinist and machine operator. He estimated that over a period of the last three years he spent about 365 days operating the clamshell removing material from the sinkhole. The material would be unloaded from the clamshell into a three yard dump truck which would haul the material to the stockpile. He estimated that he had moved 5,000 yards of material to the stockpile during that time. During the haul along the road the material would be jolted which would cause some of the finer materials to settle in the bed of the truck. During a period of three or so months in 1980, on instructions from Mr. Riddell, he followed the practice of sweeping out the truck bed and panning the sweepings down to black sand. He made about 15 such sweepings, each one yielding about a gallon of material. The black sand which he recovered from panning these 15 sweepings were placed in a jar which was more than a pint but less than a quart in size. He gave the jar to Mr. Riddell for assaying.

Mr. Riddell brought the jar of black sand to the U.S. Bureau of Mines Research Center in Reno and requested it be assayed for gold. He received an assay report, dated March 31, 1980, which shows a gold content of 45.25 ounces per ton of the black sand material that was submitted (Ex. T-b). Mr. Riddell stated that, other than the truck bed sweepings, no samples have been taken or assays made of the material in the stockpile. In fact, he said it would be very difficult to get a representative sample of the gold values in the stockpile. Mr. August Waegemann, a consulting civil engineer, who testified on behalf of contestee Riddell, agreed that there is no practical way to gather a satisfactory sample for assay from either the overburden, the stockpile, or from any material which has so far been exposed.

Mr. Riddell stated that no gold has been processed, shared or sold from the stockpile or any part of the placer deposit. He said the weight of the gold so far recovered from the sinkhole would be insignificant.

Mr. Leatherman estimated that the stockpile contains about 4,000 yards of placer material available for processing of black sands and gold and that the sinkhole contains an additional 6,000 yards to be removed for stockpiling. Based upon his past experience he would expect the present stockpile to yield 10 pounds of black sand concentrate per cubic yard, similar to that which was assayed at 45 ounces of gold per ton, giving the stockpile a gold value of a half million dollars.

Furthermore, he would expect the material yet to be recovered from the sinkhole to produce around 35 pounds of concentrate per cubic yard, giving it a gold value of 2.7 million dollars. These dollar figures are based on a gold value of $560 per ounce. On the basis of this information Mr. Leatherman's opinion was that the placer deposit meets the prudent man test of discovery.

Mr. Paul Smith, president and co-owner of the Seneca Gold Mining Company located on the north fork of the Feather River, which is actively engaged in placer mining, testified that he has been involved in mining for 35 years and was the foreman for the Sun Rise Investment Corporation which conducted the original placer mining operation on the sinkhole in 1962 or 1963. He said they flumed the river and de-watered the sinkhole by pumping out about 45 feet of water. They set up a recovery plant and began processing gravels through it, operating for a period of two months or better. As the foreman he never had an opportunity to determine what percentage of concentrate was recovered from the gravels nor what the assays ran. He doesn't know whether any gold was recovered or sold. He stated that he doesn't think it would be practical to mine the sinkhole without de-watering the pool because of the large boulders that are there. One would first have to drill and shoot the boulders before being able to get at the gravels. As to the probable value of the mineralization in the sinkhole he said he could only give a "guesstimation" and believes that's the best anyone could say. However, if given the opportunity, he would like to further develop the sinkhole.

Contestee Whipple offered no testimony on the issue of mineralization on the placer.

Riddell's Plan of Operation

According to the testimony of Mr. Riddell, the placer and lode claims are co-owned by contestees Riddell and Cook. They purchased the property in August, 1968, as lode claims, and in 1974 they filed an amended location establishing the placer claim over the lode property. Rather than raising addition capital Riddell and Cook elected in 1970 and 1971 to set up a cooperative system whereby they invited about 22 participants, who made no investment, to contribute their time in doing work on the claims. The time spent by each participant is recorded and when the development of the claims is completed to the stage of being a paying proposition each participant will be remunerated by sharing actual gold recovered on a percentage basis.

In embarking on the project, one of the first things they intended to do was exploratory work in the El Garcia tunnel to see whether or not the quartz was carrying any values. Upon consultation with engineers, including Messrs. Waegemann and Leatherman, who both gave testimony at the hearing, they decided to approach the sinkhole first, clean it out and use the capital therefrom to do exploration on the lode. As to progress of work on the placer, Mr. Riddell responded to questions of his counsel:

> Q. Will you tell us first of all whether the operation at the present time is processing the material in the stockpile uh, on a experimental basis or on a production basis?
>
> A. It's still in experimental basis, in fact, we're not working that right at this moment. In other words, I think you said currently. We're devoting our efforts and manpower right now into removing the boulders from the sink while we have a chance before we have to take the flume out and let the water back in.
>
> Q. And you believe that is the matter most pressing and urgent at this time?
>
> A. It has to be yes, because of weather conditions and --
>
> Q. And once you get enough material up on the ground you'll be able to work substantially the year around with a shaker table and the table that you've described here for the, what's this, uh, amalgam table?
>
> A. Amalgam table, the silver plating part of it could be worked year 'round, yes. Because we do have it underneath the shop area shelter but the processing system for this, the trommel, the conveyor, the riffle, the settlement tank, the circulating pond and that portion of it would be able to work most of the year but there are going to be times this winter that we'll have to stay clear of that too because I'm sure the water will freeze in the circulating pond and the gravels themselves getting wet with the rain and then freezing would be hard to move and it would be impractical to utilize it or to run it during that type of a condition.
>
> (Tr. 1147-1148)

Regarding their approach to the lode, Mr. Riddell stated, in answer to questions by his counsel:

Q. Uh, now you've had some, like ten years to look back on what you've done so far, are you satisfied with the approach that you took in the development of these claims?

A. Well I had my reservations obviously I'm not a mining engineer or geologist and that was one of the reasons we sought out the services of Mr. Leatherman, had him come up and look it over and give us his advice and explain to him what our plans were, how we planned to proceed and his, the end result of his advice was keep on doing what you're doing your headed in the right direction.

Q. Now on the hindsight that you have up to the present time, do you also feel that you are headed in the right direction?

A. Well with all the problems we're entailing I'm beginning to wonder. I suppose we could have spend more time in hard rock and developing that further to have something that we could be processing, the fact is that we devoted, all we did in the hard rock was to go in and do some blast sampling to see if there was any gold in the ore which we found out there was. Once we satisfied ourself with that we only go back and fill in there when we are not, do not have a priority situation in the development of the sink.

Q. So you've put the hard rock development aside in favor of the sink?

A. Yeah.

Q. Well from a developmental standpoint do you feel that's the way to proceed?

A. Well it has to be in our situation because we're limited with funds. We have to work with what we've got and what we've got left after taxes and neither one of, Mr. Cook nor myself are wealthy people. We're just working people so in order to develop or exploit or do further exploration in the hard rock we'd have to get up a core drill and get equipment, probably one piece of equipment would cost $50,000 to $60,000 and --

(Tr. 1064-1065)

In answer to his counsel's question on how the decision of Castle v. Womble, supra, entered his decision to go ahead with the property, Mr. Riddell said:

> Well that was one of the reasons why we did some early exploratory work in the tunnel adit across the river to determine whether or not there was gold in the quartz. Once we determined that we were satisfied. We didn't know what the extent of it was, what the value was, we still don't.
>
> (Tr. 1179)

Discussion, Findings and Conclusions

This proceeding manifests a continuing atmosphere of non-cooperation, suspicion, distrust and animosity between the U.S. Forest Service and contestee Riddell's group. This was evidenced by the testimony of witnesses, their actions during mineral examinations and by the conduct and statements made by their respective counsel. On the one hand the Forest Service believes that the claims are primarily being held to provide private recreational facilities in a prime area for the Riddell group and their families, rather than for good faith mining purposes. Early in the hearing Mr. Haire expressed this belief (Tr. 73). Toward the conclusion of the hearing he expanded on this belief (Tr. 1267-1270). On the other hand the Riddell group believes that the Forest Service has no jurisdiction over the claim area because in their opinion the land was under valid mineral entry prior to inclusion of the area into the Tahoe National Forest. Therefore the forest rangers and mineral examiners were dealt with as trespassers and little cooperation was extended them in their attempt's to verify the claimed discoveries. As a result of this atmosphere the initial verifying examinations of both the lode and placer claims turned out to be virtually useless. Mr. Jones' sample AFS 1990, taken from the lode was clearly nothing more than a grab sample of loose material lying near the bottom of the winze. A representative sample of the exposed quartz vein was not taken at that time. The assay of that sample, AFS 1990, is of little evidentiary value and cannot be a basis for giving an opinion on the prudent man test. Accordingly, no weight is given to Mr. Jones' opinion on the prudent man test.

Similarly the assay of sample AFS 3654, taken by Mr. Jones from gravels stored near the bunker, can hardly be viewed as reliable evidence of what gold values might be recovered from the gravels lying in the bottom of the sinkhole. However, Mr. Jones had no physical means of extracting gravels for sampling from the sinkhole without the cooperation of the Riddell group and use of their equipment. Under these circumstances Mr. Jones' opinion on the prudent man test is entitled to some weight.

When it became obvious that the evidence of mineralization of both the lode and placer fell far short of serving as a basis for an informed decision on validity or invalidity of the claims, the parties were asked to return to the claims and accomplish a joint examination by their respective mineral examiners. This they agreed to do (Tr. 599) and the hearing was continued to await the results of the joint examination.

At the commencement of the second session of the hearing the parties announced that a joint sampling had not been accomplished. What developed was that the Forest Service did make a new, independent examination of the lode and placer claims, using different personnel from those who conducted the first examination, and that contestee Riddell obtained no new evidence on mineralization, electing to stand on the evidence previously presented. Because of the need for obtaining additional evidence of mineralization especially through the joint sampling procedure, I feel it important to quote from the transcript the explanations offered by counsel:

> JUDGE LUOMA: Now at the close of the last hearing the parties were given the opportunity to go back to the property and make a joint examination. Has that been accomplished?
>
> MR. KELL: No it has not.
>
> MR. JENNINGS: Your Honor, as you know from having received copies of the correspondence the Government made every effort to implement the agreement that had been agreed to at the conclusion of the December hearing and claimants have withdrawn from that, in my opinion, without adequate justi -- or any justification whatsoever other than spurious allegations about misconduct and so on. And the Government did go ahead and on June the 22nd as we indicated did conduct a mineral sampling and, we, during the course of this proceeding, want to submit the evidence relating to that.
>
> JUDGE LUOMA: Mr. Kell, the contestees have not, uh, been associated with the re-examination nor have they adduced any evidence is that correct?
>
> MR. KELL: I informed Mr. Jennings that we would not participate in any sampling of the ores on the property on the terms which he was attempting to dictate to me. Uh, and how that arose I'd like to give you a little background on it.
>
> * * *
>
> MR KELL: I did not reply to his letter because I want my statement on the record.

* * *

MR. KELL: (A)t the conclusion of the last hearing we had a discussion in which you very clearly outlined what you meant by a joint sampling and in which I joined. There was a meeting of the minds. I had no doubt in my mind as to what you meant by a joint sampling, the record discloses that. Nevertheless, Mr. Jennings wrote to me on May 15, 1981, and in his letter described what he meant by a joint sampling. He says in his letter on the second page, middle of the page, "Our mineral examiner would like to take samples from the adit across the stream from the pool (if the claim boundaries show it is located within the claims). He would also like to take samples in the winze below the adit, provided it has been de-watered and in his opinion is safe. He would like to take representative samples of the gravels within the pool and will do so if the clamshell is in operation. Claimants and you are welcome to observe the sampling procedure, but from a sufficient distance to assure the court there is no possibility of either party influencing the value of the other party's samples." So what he's contemplating is a separate sampling not a joint sampling. He goes on, "Claimants may take comparable samples from any area that the Forest Service mineral examiner samples." In other words we can follow behind and do what we want to do and he's going to do what he want's to do. "Indeed, claimants may sample any area they wish to sample on the claims, but our mineral examiner reserves the right to take his own samples in that area." Clearly not a joint sampling. "If there are any areas of particular interest to claimants, indicative of a mineral discovery, these should be pointed out to our mineral examiner. His purpose is to determine if sufficient mineral values are present within the boundaries of each claim, in sufficient quantity and quality to show a valid discovery within the meaning of the mining law. The assistance of you and your clients will be appreciated. To facilitate implementation of the court's order for joint sampling we are prepared to agree to joint sampling any time between June 15 and July 15. To meet the court's direction, however, sampling must commence not later than July 13. Thus, if we have been unable to agree upon procedure and a time by July 9, we will proceed unilaterally. If I have not received a response from you by June 1, we will proceed unilaterally at a date most convenient to the Government." In a subsequent telephone conference I told Mr. Jennings that it was not my view that this, that this could constitute a joint sampling. Certainly it did not accord with the discussion here in court before conclusion, before adjournment of the case. He let me understand that there was no, that there could be no change in his position. I told him I would confer with my clients and let him know if there was, if we were willing to join with him in his unilateral proposal

and my clients of course rejected the proposal and that constituted our refusal. We later had a conference, a telephone conference in which I told him so. Now in view of what could only be interpreted by my clients as deceit on the part of Mr. Jennings with reference to several incidents that occurred previously and in view of his insistence upon perverting the clear meaning of the term joint sampling as it had been defined here in our conference at the conclusion of the hearing last December, I we had no alternative but to withdraw from any stipulation with Mr. Jennings. It would have been prejudicial to my clients interests had they submitted their entire case upon such a procedure so we object, we contend that Mr. Jennings and his representative entered the claims as trespassers on June 22, they were so informed at the time. We did not participate and we will object to the receipt of any assays purportedly gathered as a result of that visit to the property.

* * *

JUDGE LUOMA: Mr. Jennings do have any response?

* * *

MR. JENNINGS: In a telephone discussion I explained to him what I had in mind and my mineral examiner had in mind as far as the joint sampling was concerned. We did not want to take one sample and mix the contents of the sample into a bag and then split the bag because of the concern that there would be a larger particle in one half than the other and therefore I suggested, and it's documented in the letter that's been read and I want to be sure that all this correspondence is part of the record in the proceeding. My concept was that each examiner would take a sample and that right along side the other would take a sample and each would watch the other doing their work and then each independently have an assay made on their sample and that's the way I explained a joint sampling. And I think that's the proper method of doing this. That's all.

MR. KELL: Directly contrary, however, to what we agreed on here in court and not joint by any sense of the word since each party was then able to control what was done with the material following the removal from the mine. If it had been jointly done it would have been jointly taken, jointly taken to the, the samples would have been jointly taken, the sample would then have been jointly delivered to the assayer and the assay report would have issued to each of the parties.

* * *

> MR. JENNINGS: Your Honor, I'd like to say one thing. I started in April of this year to try and work out an agreement on a procedure. The letters that are in the file will show that and I got no response other that a brief, terse, uninformative refusal and I got that on the eleventh hour at that, some personally delivered on the day before the event that was to take place. There's no discussions about this and the record shows it. We tried and we tried for several months to get cooperation and didn't.
>
> MR. KELL: Now I have made my statement. The record speaks for itself. You stated what a joint sampling consisted of. It was essentially what you're saying here. Nobody could have left this courtroom with any doubt to what was meant by the words "joint sampling." My friend proceeded on a expedition of his own.
>
> (Tr. 610-611, 613-620)

These explanations by counsel demonstrate the continuing lack of cooperation that exists between the parties. I agree with Mr. Kell that the restrictive ground rules for the re-examination imposed by Mr. Jennings did not conform to the stipulated agreement to conduct a true joint sampling. On the other hand I cannot accept that as giving contestees valid grounds for refusing to operate its equipment so that contestant could obtain samples of the gravels in the sinkhole. Nor can I accept that as a valid reason for contestees' failure to obtain its own samples of the gravels of the placer, as well as its own samples which would be representative of a mining width of the quartz vein in the lode.

The Lode Claim

> In making the re-examination of the El Garcia adit Mr. Harty followed standard professional procedures in cutting his samples and obtaining assays which reveal the mineral values contained in a mineable width of the rock in place. The assays show a value far below the cost of mining the material. His examination makes credible his opinion that a prudent man would not be justified in spending time and money with a reasonable expectation of developing a profitable mine. This constitutes a prima facie case of invalidity of the lode claim.
>
> Countering this evidence are the numerous high value gold assays produced by contestees. While they undeniably show the presence of gold in the selected samples blasted from the quartz vein, there is no way to equate them to the diluted value of a cross section of a mineable width of the quartz vein. Contestees had

ample opportunity to channel cross-section samples at whatever intervals they deemed appropriate to prove that the high values did in fact persist throughout the extent of the vein and that it would be profitable to mine and recover them. This they elected not to do. Under these circumstances I have no alternative but to conclude that contestees failed to overcome contestant's prima facie case of invalidity.

The Placer Claim

In making the re-examination of the placer Mr. Harty was denied access to the gravels in the sinkhole. He had no means to excavate them without the cooperation of contestees. Though they had the equipment and operator available contestees refused to extract gravels from the sinkhole which Mr. Harty was desirous of processing for assay. He gave a credible explanation of why he didn't attempt to sample the existing stockpile of gravels. This was buttressed by the testimony of contestees' own engineering consultant who said there was no way to gather a satisfactory sample for assay from the materials exposed so far.

This falls squarely within the rule expressed in United States v. MacLaughlin, supra, that "(w)here a claimant fails to keep his discovery points open and safely available for sampling by the Government's examiner, or declines to accompany the examiner to the claim, he assumes the risk that the Government examiner will be unable to verify the alleged discovery of a valuable mineral deposit."

Accordingly, the contestant established a prima facie case of invalidity against the placer deposit. While a prima facie under this rule is obviously very weak, the evidence produced by contestees in this proceeding is such that it supports the contestant's charges of invalidity. United States v. Taylor, supra. The only direct evidence presented on gold recovery was the random sweepings of the truck bed over a period of time. While the assay of the small amount of black sands so recovered is very high, there is no way from the evidence presented to equate the value to a yard of gravels that may lie at the bottom of the sinkhole, nor to the existing stockpile. In drawing this conclusion I am not unmindful of Mr. Leatherman's estimate that the stockpile would yield 10 pounds of high value black sand concentrate per yard and that the remaining gravels in the sink hole would yield 35 pounds. With all due respect to his expertise I can only regard this as pure

speculation since no attempt was made to run any actual tests on neither the stockpile nor the remaining gravels in the sinkhole. If such tests had been made they might have lent credence to the estimates. Contestees have had ample time and facilities to run such tests and their failure to do so leads to a strong inference that the mineralization present is not sufficient to support a profitable mining venture. International Union (UAW) v. National Labor Relations Board, 459 F.2d 1329 (D.C. Cir. 1972).

Both Deposits

The unique sinkhole with its apparent capability for collecting gravels coming downstream from a known gold producing area undoubtedly makes it an interesting prospect. However, the results achieved so far by the exploratory activities of contestees do not add up to a present discovery of a valuable mineral deposit. Similarly, their exploratory activities and random selected sampling of the quartz vein seem sufficient to raise interest in doing further exploratory work to determine if the lode could be developed into a paying proposition. The testimony of Mr. Riddell, above, indicates his acknowledgement that they are still engaged in exploratory activities as opposed to actual development of a paying mine or mines. Under the rule of United States v. Day, supra, and cases cited therein, this falls short of having proved the existence of a valuable mineral deposit which would constitute a present valid discovery.

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

ORDER

The Dickey Quartz Claim, also known as Dickie (Nelson); the Sun Rise, also known as Sunrise, lode mining claims; and the Dickie Nelson and the Diener's Hole, placer mining claims, are declared invalid.

L. K. Luoma
Administrative Law Judge

May 3, 1984

George W. Kell, Esq.
201 E. Rumble Road
Suite A-2
P.O. Box 6805
Modesto, California 95355

Dr. Mr. Kell:

Your petition dated July 7, 1983, asking the Secretary to review and reverse the decision of the Board of Land Appeals in the matter of United States v. Cook, 71 IBLA 268 (1983), was referred to me for response. I have had a thorough review made of the matter. The results are set forth below.

On March 22, 1983, the Board of Land Appeals affirmed the previous decision of Administrative Law Judge Luoma, holding that the Sun Rise lode mining claim and Dickie Nelson placer mining claim were null and void because of lack of discovery of a valuable mineral deposit. United States v. Cook, supra.

Subsequently, you filed an "appeal" to the Director, Bureau of Land Management (BLM), seeking reversal of the Board's decision. Since the Director of BLM had no authority to review a decision of the Board of Land Appeals, the filing was referred to the Board for consideration. The Board treated the "appeal" as a petition for reconsideration of its March 22, 1983, decision on June 8, 1983, after considering the arguments raised in the submission, it issued an order declining to grant reconsideration. On July 7, 1983, you petitioned the Secretary, again seeking reversal of the Board's decision.

The Board of Land Appeals was established as a quasi-judicial body in the Office of Hearings and Appeals, with jurisdiction to decide administrative appeals for the Department, as fully and finally as might the Secretary. 43 CFR 4.1, 4.1(b)(3). Thus, your clients' administrative remedies were exhausted when the Board issued its decision in United States v. Cook, supra on March 22, 1983. 43 CFR 4.21(c). The case cited in your petition, Davis v. Nelson, 329 F.2d 840 (9th Cir. 1964), concerning administrative appeals to the Director, Bureau of Land Management, and, thereafter, to the Secretary, involved a Departmental appeal procedure that has not been in effect since 1970, when it was superseded by the establishment of the Office of Hearings and Appeals.

This matter has been before the Board on two occasions. All of the contentions raised in your petition have been addressed, expressly or impliedly, either by the Board or by Judge Luoma, whose decisions was adopted and made a part of the Board's decision. Nevertheless, I have reviewed and shall address each contention in turn.

You assert that the tract book of the Sacramento District Land Office demonstrates conclusively that your clients' mining claims are not part of the Tahoe National Forest, and that this fact proves the lack of jurisdiction of the Forest Service to enter these claims. The Board held that, by Memorandum of Understanding dated April 1, 1957, the Department of the Interior redelegated its own authority to make mineral examinations on unpatented mining claims situated within the boundaries of the national forests, which authority you have not challenged, to the Forest Service (FS), U.S. Department of Agriculture. Since your clients' claims are within the boundaries of the Tahoe National Forest, the Board held that FS had full authority to enter them at all times in question in order to conduct mineral examinations. United States v. Cook, supra at 273. There is no doubt that these claims are situated within the boundaries of the Tahoe National Forest. Thus, the Board's holding that FS had authority to enter these claims applies irrespective of what the land office tract book may have shown about the status of the lands.

You state that the Board's conclusion that the Memorandum of Understanding gave FS the authority to enter unpatented mining claims located within the national forests in order to facilitate the management of these lands "disregards 100 years of Congressional intent." Agreements for cooperation between agencies of the Federal Government are legion. I cannot agree that this Memorandum of Understanding disregards 100 years of Congressional intent.

You point out that your clients had conducted a "production operation" on the claims in previous years. The Board and Judge Luoma recognized this fact, but concluded that the evidence failed to show that this operation had resulted in a discovery of minerals on the claim. United States v. Cook, supra at 271, 289-91, 297. It is well established that merely conducting mining operations on a mining claim does not support its validity; there must be a cognizable discovery of valuable minerals, as explained by the Board and Judge Luoma in their decisions. My review does not show a discovery of minerals on the claim.

You assert that the mineralization of the winze was never in issue. However, the Board found that you clients had designated the winze as their alleged "discovery point" for the Dickey Quartz and the Sun Rise lode mining claims. United States v. Cook, supra at 270. You did not dispute this finding or indicated that there was a different discovery point. In my view, the presence or absence of mineralization in the winze was directly at issue in determining the validity of these lode claims.

You challenge the Board's findings about samples presented into evidence by FS, asserting that none was taken from the winze. The Board stressed in its opinion that the samples taken by FS mineral examiners in June 1981 were taken only "as near as possible to the previously designated discovery point [i.e., the winze], in view of the presence of water in the winze." Thus, it is true that these samples were no taken from the winze itself. However, it is also true, as the Board held, that "[a]ny lack of representativeness of the samples taken for the alleged discovery point on the lode claim in June 1981 may be traced to [your clients'] failure to clear water out of the winze." Therefore, the FS mineral examiners could not reach the alleged discovery point for the lode claims. United States v. Cook, supra at 270.

You name Henry Jones, former FS mineral examiner, as "a proven perjurer" and assert that the Board "accepted the testimony of a perjurer without at least showing in the record that it has done so." Neither Judge Luome's decision nor the Board's decision relied on any samples taken from the winze by FS Mineral Examiner Jones in October 1977. In fact, Judge Luoma's decision expressly disclaimed reliance on a "grab sample" taken by Mr. Jones at that time and noted that Jones did not take a representative sample of the alleged discovery point. United States v. Cook, supra at 292. The decision relied on other evidence which amply showed on absence of a valid discovery. It should be emphasized that neither decision named Mr. Jones "a perjurer," and I must stress that this is your choice of words.

Finally, you imply that the question of the sampling of a stockpile placer material that had been removed from the sinkhole was ignored. Judge Luoma's decision, which was adopted by the Board, carefully considered results of sampling of this material both by your clients and FS, and concluded nevertheless that no discovery had been established. The conclusion by Judge Luoma and the Board that the stockpiled placer material did not contain enough mineral to constitute a qualifying discovery is amply supported by the testimony of your client, Robert E. Randall, that no gold has been processed, shared or sold from the stockpile or any part of the placer deposit, and that the weight of the gold recovered from the sinkhole was insignificant. United States v. Cook, supra at 288.

The Board has reviewed this matter on two occasions and has fully adjudicated the issues you have presented. In addition, I have reviewed the Board's decision in light of your petition and have determined that there are no extraordinary circumstances in this case which would justify any action by the Secretary or me to alter this decision.

If you are aggrieved by the Department's decision, you may exercise your right to seek judicial review in a court of competent jurisdiction.

Sincerely,

Donald R. Tindal
Director

cc: AUSA Riddell
LLM Director
SOL IBLA R/F (2)
ES

PREP:DHUGHES:dlh:5-2-84:235-3750:Exec.Control No.54420

May 3, 1984

Mr. Robert E. Riddell
P.O. Box 5747
Montana, California 94037

Dear Mr. Riddell:

Your communication dated August 12, 1983, to the Secretary of the Interior requesting additional review of the decision of the Board of Land Appeals in the matter of United States v. Cook, 71 IBLA 268 (1983), has been referred to me for response. In response to your communication and one from George Kell, I have made a thorough review of the matter.

On March 22, 1983, the Board of Land Appeals affirmed the previous decision of Administrative Law Judge Luoma, holding that the Sun Rise lode mining claim and the Dickie Nelson placer mining claim were null and void because of lack of discovery of a valuable mineral deposit. United States v. Cook, supra.

Subsequently, you and the other claimants filed an "appeal" to the Director, Bureau of Land Management (BLM), seeking reversal of the Board's decision. Since the Director of BLM has no authority to review a decision of the Board of Land Appeals, the filing was referred to the Board for consideration. The Board treated the "appeal" as a petition for reconsideration of its March 22, 1983, decision. On June 8, 1983, after considering the arguments raised in the submission, it issued an order declining to grant reconsideration. On July 7, 1983, your attorney, George Kell, petitioned the Secretary, again seeking reversal of the Board's decision.

I have today written to Mr. Kell to advise him that the Secretary has declined to take jurisdiction in this matter. A copy of the letter to Mr. Kell is enclosed for your information. The contentions raised in your communication have been addressed in the letter to Mr. Kell, as well as in the decisions issued by the Board and Judge Luoma. Nevertheless, I have reviewed and shall address each contention in turn.

The Board held that the Forest Service (FS), U.S. Department of the Agriculture, had authority at all times in question to enter your unpatented mining claims to conduct mineral examinations, since the claims are situated within the boundaries of the Tahoe National Forest. United States v. Cook, supra at 273. Thus, even though the lands are, as you admit, "on BLM lands under the Department of the Interior," FS had the authority to enter them and conduct mineral examinations of them. The reasons for this conclusion are fully set forth both in the Board's decision and in my letter to Mr. Kell.

Mr. Robert E. Riddell

You imply that the Department is estopped from challenging the validity of your mining claims because on January 7, 1977, the California State Office, BLM, issued a decision notifying you that it had "no objection to placer mining operations" on your claims. That decision, as you noted, was issued pursuant to 30 U.S.C. § 621(b) (1976), governing placer mining in areas withdrawn for use as power sites. BLM's decision was not a determination that your claims were valid; it was simply an interim determination that placer mining operations would not substantially interfere with the intended eventual use of the lands as a power site. As such, the decision did not impart validity to your claims.

In any event, as the Board held in United States v. Cook, supra at 273, the Government, through the Department of the Interior, retains the power to declare unpatented mining claims on Federal lands invalid so long as title to the lands on which they are located is retained by the Government. There is no doubt that your unpatented claims are situated on lands whose title is retained by the Government. Thus, the Department has the authority to adjudicate their validity.

This matter has been before the Board on two occasions and it has fully addressed the issues you have presented. In addition, I have reviewed the Board's decision in light of your communication and have determined that there are no extraordinary circumstances in this case which would justify any action by the Secretary or me to alter this decision.

If you are aggrieved by the Department's decision, you may exercise your right to seek judicial review in a court of competent jurisdiction.

Sincerely,

Donald R. Tindal
Director

Enclosure

cc: AUSA
LLM
SOL
ES
Director
IBLA R/F (2)

PREP:DHUGHES:dlh:5-2-84:235-3750