

UNITED STATES
v.
OSCAR E. AND GARY K. ANDERSON

IBLA 83-498

Decided October 15, 1984

Appeal from decision of Administrative Law Judge E. Kendall Clarke declaring the Oklahoma City placer mining claim null and void. Contest CA-9639.

Affirmed.

1. Mining Claims: Determination of Validity -- Mining Claims: Discovery: Marketability -- Mining Claims: Marketability -- Mining Claims: Specific Mineral(s) Involved: Gold

For a mining claim to be valid there must be a discovery of a valuable mineral deposit within the limits of the claim. There has been a discovery where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

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

Where the Government contests a mining claim on a charge of lack of discovery, it is required to produce sufficient evidence to establish a prima facie case against the validity of the claim, and the burden of proof then shifts to the contestees to overcome this showing by a preponderance of the evidence. A prima facie case has been made when a Government mineral examiner testifies that he has examined the claim and found the evidence of mineralization insufficient to support a finding of discovery.

3. Evidence: Generally -- Mining Claims: Contests -- Mining Claims: Hearings -- Rules of Practice: Evidence -- Rules of Practice: Government Contests

In determining the validity of a mining claim in a Government contest, the entire evidentiary record must

be considered; therefore, if evidence presented by the contestees shows that there has not been a discovery, it may be used in reaching a decision that the claim is invalid because of a lack of discovery, regardless of any defects in the Government's prima facie case.

APPEARANCES: George S. Henderson, Esq., Auburn, California, for appellants; Patricia Cummings, Esq., Office of the General Counsel, U.S. Department of Agriculture, San Francisco, California, for the Government.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Oscar E. and Gary K. Anderson have appealed from a March 3, 1983, decision of Administrative Law Judge E. Kendall Clarke declaring the Oklahoma City placer mining claim null and void for lack of discovery of valuable minerals on the claim. The claim is located in the W 1/2 sec. 4 and E 1/2 sec. 5, T. 34 N., R. 11 W., Mount Diablo Meridian, within the Shasta-Trinity National Forest, Trinity County, California. The California State Office, Bureau of Land Management (BLM), initiated contest CA-9639 July 15, 1981, on behalf of the Forest Service, U.S. Department of Agriculture, charging, among other things, that there are not presently disclosed within the boundaries of the mining claim minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery.

After the contestees filed a timely answer and denied the charges in the complaint, a hearing was held before Judge Clarke on January 28, 1982, in Redding, California. The Judge concluded from the evidence at the hearing that the testimony of the contestant's expert witness constituted a prima facie case in support of the allegation that the contested mining claim is invalid because it is not presently supported by a discovery of a valuable mineral deposit. He found the contestees did not meet their burden of showing by a preponderance of the evidence that valuable minerals have been found within the claim, *i.e.*, that although the contestees had spent a great deal of time mining in the streambed, they had found only a small quantity of gold. He concluded that even though they hoped some day to, in the words of counsel for appellants, "strike it rich" (Tr. 156), this hope is not tantamount to a satisfaction of the customary test applied by the courts and this Board that a reasonably prudent man would be justified in expending his time and means with a reasonable prospect of success in developing a paying mine. Therefore, he declared the placer mining claim to be null and void.

The Government presented its case through the testimony of Emmett B. Ball, Jr., a mining engineer for the Forest Service and Ronald E. Bassett, Jr., who had been a lands officer for the Forest Service in the Shasta-Trinity National Forest. The following pertinent excerpts from the Judge's decision adequately summarize their testimony and exhibits:

Mr. Ball first visited the Oklahoma City placer mining claim in the summer of 1974 with Mr. Ron Bassett from the Forest Service District Office. Anderson, the present owner, did not own this claim in 1974, to Mr. Ball's knowledge (Tr. 12). Exhibit 4 is a photograph taken at the time of the visit in 1974 and shows a

front end loader working on the bank as well as a large dredge in the creek. Mr. Ball next visited the claim in August 1975 when he was again accompanied by Mr. Ron Bassett (Tr. 14). On that date he met the Andersons. Gary Anderson showed him the west corner of the claim and described the boundaries. He noted other features such as buildings, a house, tool shed or storage shed, wood shed and outhouse (Tr. 17). At that time he saw a dredge in the river near the line that runs between the west corner and the north corner and there was a larger dredge in the backyard of the house. The one in the river was a three-inch dredge and the one out back of the cabin was a six-inch dredge (Tr. 18). He next visited the claim at the request of the Forest Service District Office in February 1979, again accompanied by Mr. Ron Bassett. No one was on the claim at that time (Tr. 20). On that visit Mr. Ball took a two-pan sample and panned it down to a concentrate, put the concentrate into a jar which he sent to the Metallurgical Laboratory in San Francisco for a free gold determination. The results of that sample are shown on Exhibit 5. At \$385.00 an ounce the gold value computed to \$2.20 per yard. At the time of that visit he saw no changes from the time he was there in 1975 except there weren't any dredges around. * * * He testified that there is about 400 yards of river running through the claim and that it is the east fork of the north fork of the Trinity River which in his opinion is not mineral in character.

* * * * *

On cross-examination Mr. Ball admitted that when he saw the dredges working was in August and the other visits were in the winter time when he saw no dredges and that dredging in the north fork of the Trinity River is not permitted in January and February without a special permit. Although Mr. Ball did not use a dredge, he did take quite a bit of time to dig two pans out of cracks and bedrock. He did not go into the stream to take any samples. His opinion that the mining claimant failed to meet the requirement of the mining law refers to the two-pan sample he took in February 1979 and looking around the claim the other times he was on it. His determination that the mining claim was not being held in good faith for mining purposes was based upon the fact that during the summer he observed the structures being used but didn't see any mining activity and he noted that there was a swing set and barbeque and a few things like that around. He testified further on cross-examination that in reaching his conclusion as to the invalidity of the claim that he considered the gravels in the stream bed as not being a deposit that could be worked on a commercial scale. Mr. Ball testified that he talked to people running the dredge shown on Exhibit 4 and that they had said that they were moving out because they weren't getting anything. He did not consider the pocket type deposit in his findings since there was not enough material to pay to work it (Tr. 68). In his opinion on a claim like the Oklahoma City placer

claim there really isn't any place to sample. In August 1975 he was told by the Anderson's that he could take no samples and after that he made no effort to obtain their cooperation (Tr. 70).

* * * * *

Mr. Ronald E. Bassett, Jr. was called as a witness for the contestant. Mr. Bassett was employed by the United States Forest Service at the time of the hearing on the Angeles National Forest as a District Ranger. * * * He visited the claim in 1974 as a result of a report of activity on the mining claim. He was concerned as to resource damages. At that time there was a Caterpillar tractor in the creek and a large dredge in the creek. At that time he found the claim was owned by the Pitzer estate (Tr. 77-79). He next visited the property in the late spring of 1975. At that time he met Gary Anderson. He visited the claim two or three times in the spring or early summer of 1975 (Tr. 83). He advised the claimants by letter that a mineral examination was to be made on August 21st. He was present when Gary Anderson told Mr. Ball that there would be no sampling. After this he recommended to Mr. Ball that they leave. The claim is located on a road that is normally in his travels and during the time since his contact with the Andersons he has passed the claim once or twice a month. He never saw any extensive evidence of mining in three or four years (Tr. 89).

(Decision at 2, 3).

Appellants presented their case primarily through the testimony of Gary K. Anderson who detailed his work experience on the Oklahoma City placer claim after he had purchased the claim from an estate. His testimony is summarized in pertinent part by the Judge as follows:

In 1975 during the dredging season he obtained a permit from the Fish and Game which was good from May until September (Tr. 99). He didn't know that any plan of operation was necessary and therefore did not file with the Forest Service. He did, however, file affidavits of assessment work from 1974 through 1981 (Tr. 101). The equipment he used to carry out his mining was a dredge. To get down to bedrock he used crowbars, hammers and sometimes winches to move rocks that were too big. Every year he used to leave the dredge at the cabin. The dredge itself was in the storage shed until a year or so ago when he had a few things missing so he figured he should take the dredge home when he wasn't using it (Tr. 102). He would usually put the dredge in the water as early as May. Jerry Miller, a friend of his, has done a lot of dredging on the claim. He was of the opinion that he didn't have to let the Forest Service take any samples. It was also his understanding that they were going [to] bring in a three-inch dredge and dredge for a period of a few hours. He did not remember receiving a written notice (Tr. 105). Mr. Anderson testified that he had success in dredging but he never sold any gold from the claims. * * * Mr. Anderson testified that a lot of

the gold that he has taken from the claim was made into jewelry and given to friends and relatives. Some of it was stolen approximately three years ago. His friend Jerry Miller also has some.

He first dredged on the claim in 1974 two weeks before he went into the wilderness area. The next time he dredged was in 1975. He has personally dredged anywhere from three or four weeks during the dredging period of three or four months (Tr. 122). He normally dredges from six to eight hours when he is working. In 1975 he used a six-inch dredge which he purchased for \$1,000. Jerry Miller has worked with him since 1979. Miller keeps the gold he finds. He doesn't know how much he has found. When they work together they work six to eight hours a day. He has not dredged the bank gravel (Tr. 127). However, he has panned on several occasions and has found small amounts of gold in each pan. Mr. Anderson testified that at times he has been up on the claim for three or four months at a time. He does not exactly know what years those were but he dredges frequently (Tr. 128). While he is on the claim he lives in a cabin. Sometimes his family comes up to live with him. He now uses a four-inch dredge that he has had since 1976. He paid \$400 for this dredge (Tr. 129). He testified that his normal work is that of a carpenter and he is paid \$11.50 an hour which he considers fair wages for his time (Tr. 135). In 1977, 1978 and 1979 he dredged off and on sometimes for weeks at a time, sometimes for a few days, six to eight hours a day. He never kept records of the days he dredged and the days he didn't (Tr. 141). He has not sold any of the gold that he has removed from the claim. He stated under questioning by his counsel that he hopes to someday strike it rich and his continuing dredging is based on his hope that he will one day strike it rich (Tr. 156).

(Decision at 4-5).

In addition, appellants presented the testimony of Gilman F. Welch and Edward William Campbell, area miners, who had seen Anderson dredging the claim. Welch testified he had seen gold in the pan and in the box and in jars on the table (Tr. 162). It was his opinion that this claim was better located than his own claims because it was at bend in the creek, a place where more gold would collect. He noted a 400-foot bank across the creek that has never been worked and he advised pursuing the exploration of this area (Tr. 165).

Campbell testified he owns the two claims above the Oklahoma City claim and he had seen Anderson regularly working the claim. He testified he had seen gold in the box, gold in jars, and gold in pans (Tr. 182). It was his opinion this was a good claim because there are lots of pockets of high channel in the area and he would advise pursuing exploration of the Oklahoma City claim (Tr. 186).

[1] A mining claimant must make a discovery of a valuable mineral deposit within the limits of a mining claim as a prerequisite to a valid

location. A discovery exists where minerals have been found on the claim which are of such a character that a person of ordinary prudence would be justified in further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This prudent person test has been refined to require a claimant to show that the mineral is "marketable," that is, that it can be extracted, removed, and marketed at a profit. United States v. Coleman, 390 U.S. 599 (1968); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).

Appellants contend the Judge erred in declaring the claim null and void, that the Government did not make out a prima facie case, and that the preponderance of the evidence substantiated a valid mineral discovery. In support of this argument they have submitted, in addition to a brief by counsel, the statement by the president of a mineral association, seeking to impeach the testimony of the Government mineral examiner. The main thrust of this document is an argument that the Government examiner did not take an adequate sample from appellants' claim. A similar argument is urged by counsel for appellants. Appellants object to evidence based upon the sampling done by the Government mineral examiner. Appellants disagree with the method of sampling used, contending the examination should have included dredging. Appellants, at the hearing, also objected to samples taken from the claim without their consent and objected to testimony based upon the type of sampling done.

[2] When the Government contests a mining claim on a charge of no discovery, it assumes the burden of going forward with sufficient evidence to establish a prima facie case of invalidity. Then the burden shifts to the claimant to overcome the Government's showing by a preponderance of evidence, and the claimant bears the risk of nonpersuasion. Cactus Mines, Ltd., 79 IBLA 20 (1984); United States v. Hooker, 48 IBLA 22 (1980); United States v. Bechthold, 25 IBLA 77, 82 (1976); United States v. Zweifel, 508 F.2d 1105 (10th Cir. 1975), cert. denied, 423 U.S. 829, reh'g denied, 423 U.S. 1008 (1976); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). The United States has established a prima facie case showing 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. Beckley, 66 IBLA 357 (1982); United States v. Taylor, 25 IBLA 21 (1976).

In this instance the Government's mining engineer, Emmett Ball, testified he had been on the Oklahoma placer claim on four separate occasions and had taken a two-pan sample in February of 1979. This sample when assayed showed 2.675 milligrams of gold which is equivalent to a value of \$2.20 per cubic yard with gold valued at \$385 an ounce. Ball, a mining engineer with over 30 years of experience, concluded from his visits to the claim, his samplings, and what he had seen on the claim, that he had not found anything of real significance, i.e., that a prudent man would not be justified in spending time, money, and effort in a reasonable hope of developing a paying mine (Tr. 33). This was accepted by the Judge to establish the Government's prima facie case of no discovery.

However, questions are raised by appellants concerning the quality of the Government's sampling techniques, in light of the fact the claimants

used a dredge in their mining operation, and considering the apparent lack of notice to the claimants in 1979 as to where and when the mineral examination was to take place. The Government asserted at the hearing that appellants would not cooperate for the claim examination. Over a 4-year period it is alleged that several attempts were made to contact appellants by mail and personal visits were made to arrange for appellants' presence at the mineral examination. The record establishes appellants refused in 1975 to allow Ball to take samples (Tr. 69-70, 86-87). There is no evidence that claimants subsequently received notice of the February 1979 sampling. Ball testified he personally did not contact the claimants. He examined the claims at the request of the Forest Service District Office (Tr. 48). Bassett testified that after 1975 he drove by the claim once or twice a month and went onto the site "a couple times" but never saw any evidence of mining. In response to appellants' assertion of lack of notice, the Forest Service submitted a letter from Bassett which states that during the 4-year period he "made numerous attempts, both formally and informally, to ascertain their whereabouts." ^{1/}

Bassett's claim, however, is denied by Anderson. Gary Anderson states on appeal that his address has been the same for 14 years and that he received no letters from Bassett (Rebuttal at 7). Anderson further states that he contacted the ranger station and that there was no record of any registered mail having been sent to him. Nor is there any verification in the record on appeal that such letters were sent and returned unclaimed. Even though appellants were uncooperative in the initial visit of 1975, the record is unclear, at best, whether appellants received prior notice and an opportunity to participate in the mineral examination of their claim 4 years later. As Anderson correctly points out on appeal, BLM Manual 3920.14 states the mineral claimant must be contacted in advance of the exam and afforded an opportunity to accompany the examiner (Rebuttal at 6). ^{2/}

Also, appellants perceive another weakness in the Government case in the examination method chosen by the mineral examiner, who pan sampled the claim in midwinter although he knew appellants had conducted a suction dredge mining operation in summer. There is, however, no requirement that the mineral examiner must duplicate appellants' mining methods to establish a lack of discovery. It is enough for the examiner to determine the best place, in his experience, to take samples from the creekbed and to wash them down to concentrate in order to assay the mineral content of the material. The examiner was not required to duplicate precisely appellants' extraction operation in order to show that it would not be productive. United States v. Knecht, 39 IBLA 8, 11 (1979).

^{1/} Govt. Exh. A, letter to U.S. Forest Service, Office of General Counsel, from Ronald E. Bassett, dated June 8, 1983.

^{2/} Section 3920.14 provides in pertinent part: "Contact with Mining Claimant. If a claim owner is known from a prior preliminary examination or other source, he must be contacted in advance of the examination and afforded the opportunity to accompany the minerals examiner during the field examination." See Field Handbook for Mineral Examiners at 28.

Where, however, the mineral examination was made without appellants' knowledge and participation, and at a time of year when a suction dredge could not have been operated on the claim, the mineral examination needs to be critically examined. This Board has previously questioned the probative value of limited pan-sampling techniques where gold dredging operations were known to be the primary means of mining, and indicated that under certain circumstances in these cases pan sampling may be insufficient to establish the Government's prima facie case. In United States v. Arbo, 70 IBLA 244 (1983), the Government mineral examiner refused to take samples using appellant's suction dredge although asked to do so by the claimant. In that case the dredge was working on the location and samples could have easily been taken in the area of the claimant's discovery points. The concurring opinion in Arbo observes that the pan sampling was questionable and its use by the examiner could have subjected the Government case to dismissal, had a timely motion to dismiss been made at the completion of the Government's case, and had appellant rested his case rather than choosing to proceed to present evidence. Id. at 253. The reason for finding failure to use dredging to be a weakness in Arbo, however, rests more upon the refusal of the Government examiner to use the offered dredge, than his failure to do so. Significantly, the examiner in Arbo rejected the use of a dredge under any circumstances, for a reason which indicated he had prejudged the claim and found it valueless.

In another case involving a gold dredging operation on the Trinity River, United States v. Williams, 65 IBLA 346 (1982), the Board affirmed dismissal of a contest complaint where the contestees' evidence of gold recovery by suction dredge overcame the Government's prima facie showing of no discovery:

The Government's case was based on evidence concerning only the insufficiency of techniques other than suction dredge mining to establish a marketable claim. Therefore, contestees' evidence of recovery by suction dredging, although certainly flawed by vagueness is adequate in the absence of evidence showing to the contrary.

Id. at 351.

An order in Williams subsequently denied the Forest Service's petition for reconsideration, which again asserted that suction dredging is not legitimate mining. The Board rejected this assertion:

[The Forest Service's] position that it need not address the economics of suction dredging was evident at the hearing and is now urged upon us as a rule of law. We reject it, and we emphasize that if [Forest Service] expects to successfully contest the validity of claims such as this one, it must meet its burden of showing, on a case by case basis, that such operations are not economical. It may be necessary for [Forest Service] to use a suction dredge to take sample tests at the claim in order to so demonstrate.

(Order dated December 3, 1982, at 2-3).

The thrust of claimants' arguments is that here the Forest Service relied on limited pan sampling without giving claimants the opportunity to be at the claim with their own dredge during the summer dredging season so that dredging samples could be taken. Viewed in the light most favorable to appellants, perhaps the Government's prima facie case was subject to attack and, as observed in Arbo, the contest complaint may have been vulnerable at the conclusion of the Government case to a motion to dismiss. No opinion concerning the correctness of this conclusion, however, need be made in this case. The record shows that appellants' counsel moved to dismiss at the proper time. The motion was denied by the Judge (Tr. 95). Appellants did not rest on their motion. They proceeded to present evidence. That evidence is now before this Board and may be considered for purposes of decision.

[3] Following the presentation of the Government's case, a contestee by timely motion may move to dismiss and then rest. If there were, in fact, no prima facie case to support an order finding invalidity by reason of lack of discovery, the fact-finder could be reversed on appeal. United States v. Winters, 2 IBLA 329, 70 I.D. 193 (1971). Where, however, the contestee goes forward with evidence following a motion to dismiss, that evidence must be considered as part of the entire evidentiary record and weighed on its merits. Then, though the Government failed to establish a prima facie case, any proof of record which supports the Government's case may be considered for purposes of decision. United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975). In this case, when contestees, who were represented by counsel, decided to go forward with evidence on the merits of the contest, they assumed the risk they might disprove their own claims. Their arguments concerning lack of notice and the adequacy of the examination by the Government examiner must now be reviewed in the context of the entire record. United States v. Taylor, *supra*. They are no longer in a position to argue they were unprepared to proceed by reason of lack of prior notice of the mineral examination or that they lacked opportunity to offer the examiner dredge samples. They must prevail upon the strength of their own case. United States v. Arbo, *supra* at 250; United States v. Noyce, 59 IBLA 268 (1981). Appellants have not met this burden.

Appellants' evidence offered at the hearing establishes the invalidity of their mining claim. Gary Anderson's statement showed that his mining activity was sporadic. He could not state when or for how long he had dredged his claim (Tr. 128). He indicated some of his dredging was done on an adjoining claim (Tr. 142). He presented some gold nuggets, but could not be sure when or from which claim they were taken (Tr. 107-08). He did not submit assays to counter the Government's evidence concerning the value of his claim, nor did he present any evidence of costs of extraction associated with the limited results achieved. Appellants' testimony at hearing proved there were no sales of gold from the claim (Tr. 106). Although he asserts his family and friends were all involved in the dredging operation, Gary Anderson was unable to calculate costs of equipment and labor or to show why this claim should be considered a prudent operation. His testimony establishes that no discovery has, in fact, been made on the claim.

The testimony of appellants' witnesses Welch and Campbell also contradicts appellant's assertion that a discovery exists on the claim. Their testimony establishes mineral exploration was in progress, and that circumstances encouraged a feeling on the part of these witnesses that appellants

should continue in the expectation of making discovery. The testimony of Welch and Campbell confirmed the claim has not progressed beyond exploratory work.

Appellant's evidence offered following their motion to dismiss establishes they have failed to make a discovery but hope to do so if they are allowed to further work the claim. Thus, Gary Anderson hopes "to strike it rich someday" if he continues dredging (Tr. 156). But evidence which only tends to show that further exploration might be warranted is insufficient to establish discovery. United States v. Smith, 54 IBLA 12, 14 (1981). Appellants' testimony establishes conclusively the lack of discovery of a valuable mineral deposit on their claim. Their complaints concerning inadequacy of the Government mineral examination therefore lose their force. Since appellants' evidence effectively establishes the invalidity of their claim, the Judge correctly declared their claim invalid.

Therefore, 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.

Franklin D. Arness
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge

ADMINISTRATIVE JUDGE HARRIS CONCURRING:

I believe the Administrative Law Judge properly declared the mining claim null and void in this case because appellants failed to establish the discovery of a valuable mineral deposit. However, what is troublesome in this case is the examination procedure adopted by the Forest Service.

In August 1975 both Ball and Bassett visited the claim. The purpose of the visit was to make a mineral examination (Tr. 14). Appellants were on the claim that day and appellant Gary Anderson showed Ball the corners of the claim and described the boundaries (Tr. 15). There was a dredge in the river that "had been run slightly," and there was another dredge in the yard of the house on the claim (Tr. 18). Ball testified that he took no samples that day because claimants refused to allow sampling (Tr. 19). When questioned as to his normal response under such circumstances, Ball stated that occasionally he tries to persuade the claimants to allow him to sample or if they say "we haven't got anything opened up, we're prospecting, sometimes I say okay, when you get something opened up we'll come back and see you" (Tr. 20). ^{1/} Ball recounted that in this case he "left it up to the District to work out something with them" (Tr. 20).

Even though he drove past the claim a few times, Ball did not return to examine the claim until February 1, 1979, when requested to do so by the District (Tr. 20, 55). Bassett accompanied him during the examination (Tr. 20). The claimants were not present. Ball took one two-pan sample (Tr. 21). Dredging in the river running through the claim was not allowed in January and February without a special permit (Tr. 45). Ball made no attempt to contact the claimants at the time he did his February 1979 examination (Tr. 48, 70). Although there was no opportunity for Ball to get instructions from the claimants on where the best place to sample might be in this case, he stated that he ordinarily seeks the advice of the claimants because "[i]t's to their advantage" (Tr. 63).

Bassett testified that on August 21, 1975, he and Ball visited the claim to conduct a mineral examination. He had discussed the possibility of such a visit with appellant Gary Anderson "a month or two prior to that" (Tr. 86). He also stated that claimants were notified by certified mail of the date the examination was to take place, and that Gary Anderson signed a certified mail receipt for the letter (Tr. 86). Bassett stated that between 1975 and 1980 he passed by the claim once or twice a month and on a couple of occasions he got out of his truck and walked down along the river. He never saw anyone nor did he see any evidence of mining (Tr. 89).

Gary Anderson testified that after 1975 he was not approached by anyone concerning examination of the claim (Tr. 105). He stated that he used various dredges to mine the claim during the summer months from 1976 to 1979.

On appeal in response to appellants' claim of lack of notice, the Forest Service submitted a letter from Bassett to counsel for the Forest

^{1/} Previously, Ball related that O. E. Anderson told him that "they were just prospecting, they really hadn't found anything yet" (Tr. 19).

Service in which Bassett stated that he "made numerous attempts, both formally and informally, as to their whereabouts. I asked around locally and sent both regular and registered mail to their last known address with no positive results." Bassett's statement, however, is denied by Gary Anderson. He states on appeal that his address has been the same for 14 years and that he received no letters from Bassett. Anderson further states that he contacted the Ranger Station and that there was no record of any registered mail having been sent to him (Rebuttal at 7).

The question raised by the facts in this case is whether the Government's case is fatally flawed because of the failure to notify appellants of the 1979 examination. Appellants argue that it is, and that the BLM Manual at section 3920.14 states that if the mineral claimant is known, he must be contacted in advance of the examination and afforded an opportunity to accompany the examiner. ^{2/}

In this case claimants were notified prior to the 1975 visit that there would be a mineral examination of their claim; however, they refused to allow sampling. Although Bassett asserts that on numerous occasions he tried to contact the claimants, they were not informed of the 1979 mid-winter inspection. The mineral examiner stated that he made no attempt to do so. Regardless of any assertions by the Forest Service of attempts to reach claimants, the record is clear that the Forest Service did not allow claimants an opportunity to participate in the 1979 sampling.

I do not find, however, that lack of notice itself requires dismissal of the contest complaint. Although it is disturbing that the Forest Service would feel compelled to examine this claim in mid-winter without notice to claimants, that fact is best examined in the context of the evidence presented in the case. In that regard the Department stated as follows in United States v. Smith, A-30888 (Mar. 29, 1968) at 4-5:

The Department was recently confronted, in United States v. Thomas C. Wells, A-30805 (January 8, 1968), with a similar charge to that made here, that the Government's case was defective by reason of the failure of the Government's examiner to notify the mining claimant in advance of his intention to examine the claim. In that case we pointed out that there are obvious advantages in a joint examination by the Government's examiner and the mining claimant in the obtaining of meaningful evidence and that the failure of a Government examiner to attempt a joint examination results in a weakening of the Government's case. Nevertheless, we concluded that this defect in procedure was not fatal to the Government's case. [Footnote omitted.]

^{2/} Although BLM initiated the contest complaint in this case, it did so at the request of the Forest Service. The Forest Service is authorized to conduct mineral examinations of claims in national forests. United States v. Oneida Perlite Corp., 57 IBLA 167, 88 I.D. 772 (1981). The procedural guidelines of the BLM Manual do not regulate the conduct of the Forest Service; however, it is clear that proper procedure for any agency conducting a mineral examination would include notification of known mineral claimants.

The Department further stated in Smith that in reaching its conclusion in Wells it explained the nature of the prima facie case required by the Government in contesting a mining claim based on lack of discovery and the burden of the claimant to overcome that case by a preponderance of evidence.

The Department concluded in Smith that the Wells reasoning was "applicable here with even greater force, for, whereas in the Wells case there was a clear conflict between the mineral values found by the Government's examiner and those claimed by the mining claimant, here there is not." Id. at 5.

Where there is a failure of notification, as in this case, the record should be examined to determine the extent of prejudice, if any, to the claimant. See United States v. Grigg, 8 IBLA 331, 339, 79 I.D. 682, 685-86 (1972). Thus, the failure to notify and any related prejudice to the claimant must be considered in assessing the evidence in the case.

Herein, the claim was examined without notice to claimants. The mineral examiner limited his sampling to a two-pan sample, even though he knew that dredging was the mining method utilized on the claim, and that dredging was prohibited at the time of sampling, except by special permit. At the conclusion of the Government's case, counsel for appellants made a motion to dismiss. The Administrative Law Judge denied the motion.

Did the Administrative Law Judge properly deny the motion in this case? The evidence at that point showed a failure to notify the claimants of the 1979 examination during which the Forest Service took a sample which showed low gold values. But it also established that in 1975 claimants refused to allow sampling on their claim. The Forest Service mineral examiner testified that there was no discovery. Under the circumstances denial of the motion was proper; however, the prima facie case was substantially weakened by the lack of notice, and it was subject to being easily overcome. 3/

In this case appellants failed to present any persuasive evidence that they have a discovery of a valuable mineral deposit on their claim. Although gold has apparently been extracted from the claim, Gary Anderson testified that he had never sold any gold from the claim. Appellants' mining endeavors on this claim appear to be, as characterized by the Administrative Law Judge, a recreational pursuit. In regard to lack of notice of the 1979 mineral examination, appellants did not show that they were prejudiced in any way by this failure.

3/ In a concurring opinion in United States v. Arbo, 70 IBLA 244, 251 (1983), I stated that in that case the Government failed to establish a prima facie case because the Government mineral examiner refused to take dredge samples with the claimant's dredge or otherwise dredge sample the claim after being requested to do so by the claimant. In this case Gary Anderson testified that it was his understanding that the 1975 examination was going to involve dredging by the Forest Service "for a period of a few hours" (Tr. 105). He further stated that "I've dredged long enough to know that by sticking any size dredge in the creek and dredging for a matter of hours is not a valid test of anything" (Tr. 106).

For these reasons, I concur that the Administrative Law Judge properly declared the claim null and void based on all the evidence of record.

Bruce R. Harris
Administrative Judge

83 IBLA 183