



U.S. v. MICHAEL R. MARK ANTHONY

180 IBLA 308

Decided January 12, 2011



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

UNITED STATES
v.
MICHAEL R. MARK ANTHONY
(PAUL G. SHEARER, INTERVENOR)

IBLA 2008-184

Decided January 12, 2011

Appeal from Administrative Law Judge Harvey C. Sweitzer's dismissal of a mining contest complaint challenging the validity of two lode mining claims within the Denali National Park and Preserve in Alaska. AA-71472.

Affirmed.

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

As a matter of determining whether the Government presented a *prima facie* case that there had been no discovery of a valuable mineral deposit on the date of withdrawal, the question is whether the testimony of the Government's witnesses, if standing by itself, unchallenged and unrefuted, would warrant the conclusion that there had been no discovery of a valuable mineral deposit on any of the claims in question on the date of withdrawal.

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

An administrative law judge may conclude that a mining claimant has overcome the Government's *prima facie* case on the basis of a mining plan or analysis that is different from the plan the claimant proposed. An administrative law judge properly conducts an independent evaluation of whether a prudent man would have a reasonable expectation that minerals could be extracted and sold from a mining claim at a profit.

3. Administrative Procedure: Rulemaking--Regulations: Force and Effect as Law

The Bureau of Land Management's *Notice of Policy on Mineral Commodity Pricing and Opportunity for Comment*, 65 Fed. Reg. 41,724 (July 6, 2000), was not promulgated following notice-and-comment procedures under the Administrative Procedure Act, 5 U.S.C. § 553(c) and (d) (2006). It is therefore a general statement of policy and not a substantive rule, and does not have the force and effect of law.

4. Administrative Authority: Generally--Administrative Procedure: Administrative Review--Delegation of Authority

In issuing the *Notice of Policy on Mineral Commodity Pricing and Opportunity for Comment*, the Assistant Secretary for Land and Minerals Management did not make a decision or adjudicate a dispute that determined rights or obligations of specific parties in a particular matter that would preclude review by this Board under *Blue Star, Inc.*, 41 IBLA 333 (1979), and similar cases. The Assistant Secretary does not have authority to issue policy statements that bind all other offices of the Department not subordinate to the Assistant Secretary, or other Departmental officers who hold delegations of authority equivalent to the Assistant Secretary's, without undertaking rulemaking under the Administrative Procedure Act.

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

Where (1) the market price of a mineral has been consistently rising before the date of withdrawal of the lands affected by a mining claim; (2) there was no futures market for that mineral on the date of withdrawal; and (3) the expected life of a mine would be quite short, it was proper to determine the mineral price (for purposes of determining the validity of the claim) by the average price for the month on the date of withdrawal rather than by an average of monthly historical prices for a period of years preceding the withdrawal.

APPEARANCES: Steven Scordino, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management; Paul G. Shearer, Lake Oswego, Oregon, *pro se*.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

The Bureau of Land Management (BLM) has appealed the April 29, 2008, decision of Administrative Law Judge (ALJ) Harvey C. Sweitzer in a mining claim contest against mineral patent application AA-71422, initiated by a complaint filed by BLM on behalf of the National Park Service (NPS) challenging, on a single basis, the validity of the Banjo lode mining claim, FF-54240, and the Pass lode mining claim, FF-54241, located in the Kantishna Mining District in secs. 5 and 8, T. 16 S., R. 17 W., Fairbanks Meridian, within the Denali National Park and Preserve and approximately 4 miles northeast of Kantishna, Alaska. In his 170-page decision (ALJ Decision), Judge Sweitzer concluded that both claims contained a discovery of a valuable deposit when the subject lands were withdrawn from mineral entry on March 9, 1972, under Public Land Order (PLO) No. 5179, 37 Fed. Reg. 5579, 5582 (Mar. 16, 1972). Judge Sweitzer accordingly dismissed the Government's complaint. For the reasons explained below, we affirm the ALJ Decision.

BACKGROUND

A. *Location and Mining of the Banjo and Pass Lode Claims*

The Banjo and Pass mining claims were located on July 27, 1928, and June 17, 1929, respectively, by Joe Quigley.¹ The Banjo lode claim consists of 20.026 acres, and the Pass lode claim is 20.102 acres. The claims are rectangular, oriented lengthwise in a generally northeast-southwest direction. The claims are contiguous end-to-end; the northeast boundary line of the Banjo claim is the southwest boundary line of the Pass claim.

As discussed in the ALJ Decision, in 1931, Quigley began tunneling into the Banjo lode claim and discovered a quartz-sulfide vein containing gold ore. During tunneling, Quigley suffered major injuries from a cave-in which ended his career as an underground miner. In 1937, the Quigleys optioned the Banjo and Pass claims to E. Fransen and C.M. Hawkins. Hawkins was one of a group who had formed the Red Top Mining Company in 1935. Fransen and Hawkins assigned their option to Red Top Mining.

¹ Quigley and his wife, Fannie, were pioneers and prominent characters in the colorful history of mining in the Kantishna Hills. See *Kantishna Gold! A History of the Kantishna Mining District*, at www.nps.gov/dena/historyculture/upload/Kantishna%20Gold.pdf.

Exploration on the Banjo Vein began in 1936. By 1939, a mill and other buildings had been constructed on the Banjo lode claim. An aerial tram was later constructed to carry ore from the mine site to the Banjo Mill. An underground mine, known as the Banjo Mine, began full-scale production in May 1939. During 1939 through 1941, it produced a total of 6,259.9 troy ounces of gold, as well as 7,113.8 ounces of silver, from 13,653 tons of extracted ore—which made it the largest lode gold producer in the Kantishna Mining District. In February 1942, the Red Top Mining president reported to the shareholders that a new working level had been developed 100 feet below the upper workings on the Banjo Vein in March 1941, and that the aerial tram had been moved down to this level in August. In all, three different adit levels were used. See ALJ Decision at 4-6 and hearing exhibits and transcript references cited.

In 1942, Federal Order L-208 shut down all gold mines throughout the country on the basis that gold extraction was nonessential to the war effort. As a result, Red Top Mining ceased its operations. For a variety of reasons, the Banjo Mine never reopened after World War II. Beginning in 1983, claimant Michael R. Mark Anthony (Mark Anthony) acquired almost all of the shares of Red Top Mining.

B. Subsequent Statutory Enactments, the Initial Mineral Examination, and the Patent Application

As noted previously, under PLO No. 5179, land encompassing the subject claims was withdrawn from mineral entry “subject to valid existing rights” on March 9, 1972. 37 Fed. Reg. at 5582. On December 2, 1980, the land upon which the Banjo and Pass claims are situated became part of Denali National Park and Preserve by enactment of section 202(3) of the Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371, 2382-83, 16 U.S.C. § 410hh-1 (2006).

NPS contracted with BLM to perform a validity examination on the subject mining claims in 1988, apparently in connection with a possible mining plan of operations. Ex. A at 5.² The initial field examination of the claims was conducted on July 12-14 and 23, 1988, by Donald W. Wirth, a geologist on detail from the BLM Montana State Office. Mark Anthony, the mining claimant, and also a consulting mining engineer, was present on the last day of the examination. ALJ Decision at 9 and hearing exhibits cited. Wirth recovered seven channel samples taken from three

² At the hearing, the exhibits of intervenor Paul G. Shearer (Shearer) were designated by letter or letter-number and include Exhibits A through AD. As explained below, Shearer is the successor to contestee Mark Anthony. The contestant’s (BLM’s/NPS’) exhibits were designated by number and include Exhibits (Exs.) 1 through 52.

hand-dug surface trenches and labeled them samples B-1 through B-3 and B-5 through B-8. ALJ Decision at 9; Ex. A at 22-30; Ex. 47 Vol. 1 at 26. No underground sampling was performed because all the adit portals had collapsed, the support timbers were rotted, and the workings were filled with ice and frozen mud. *Id.* In addition, Wirth collected two “grab samples,” samples B-4 and B-9. ALJ Decision at 9-10; Ex. A at 28, 36; Ex. 47 Vol. 1 at 26.

On July 19, 1989, Mark Anthony filed a mineral patent application for the subject claims, serialized as AA-71472. Ex. 8. *See* Ex. A at 5; Ex. 47 Vol. 1 at 1. The application claimed: “Ore is exposed on the Pass claim on the southern end of the claim where [it] joins the Banjo claim. The ore at the junction of the two claims is approximately 10 feet wide. Ore is also exposed on the Banjo claim on the northern end.” Ex. 8 at 2. In the application, Mark Anthony purports to be the owner of the subject claims, explaining that he “presently hold[s] a controlling interest in Red Top Mining Company.” *Id.*

As a result of the application, Wirth returned to the subject claims on July 17 and 18, 1991, to conduct a mineral patent examination. Ex. A at 5; Ex. 47 Vol. 1 at 4, 27. By this time, BLM had completed an on-the-ground mineral survey of the subject claims, Mineral Survey No. 2510. Ex. A at App. IV; Ex. 47 Vol. 1, Att. 1 at 14-21. During this second trip, Russell Kucinski, an NPS geologist, assisted Wirth in his fieldwork and sampling. Mark Anthony was present for the entire 1991 examination. However, the underground workings remained caved in and inaccessible. Tr. 640, 836, 845; Ex. A at 20; Ex. 47 Vol. 1 at 27. Fifteen channel samples were recovered, labeled B-1, B-2A, B-2B, B-3 through B-12, P-1, and P-2. In addition, two “grab samples,” samples M-1 and M-2, were taken from “chips” found in the mill. Ex. A at 36, App. III at 10-11; Ex. 47 Vol. 2 Att. 5 at 12-17.

Wirth detailed the findings and conclusions of his mineral patent examination for the subject claims in a mineral report dated February 4, 1994. Ex. A (Wirth Mineral Report). Wirth selected 14 of the 1988 and 1991 samples from which to calculate overall average gold and silver grades. Ex. A at 2, 47. Using measurements based upon his samples, Wirth determined that the portion of the Banjo Vein located on the subject claims contained 75,200 cubic feet of ore which, based upon a tonnage factor of 12 cubic feet per ton, converted to 6,267 tons of ore. *Id.* at 46. Wirth concluded that “minerals *do exist* on the Banjo and Pass claims in sufficient quantity and quality to justify a person of ordinary prudence in the expenditure of his labor and means with a reasonable expectation of success in developing or reopening this valuable mine.” *Id.* at 3 (emphasis in original). Wirth further concluded: “The subject claims are considered valid and qualify for issuance of mineral patents.” *Id.* BLM-certified mineral review examiner Donald D. Keill critiqued the Wirth Mineral Report and gave it his technical approval on February 28, 1994. Tr. 460-61,

863-865; Ex. A; Ex. M-4 at 1. On March 3, 1994, Kucinski, now the Mineral Examination Coordinator for the Alaska Region, NPS, provided administrative acknowledgment of the examination on behalf of NPS. Tr. 460-61, 553-54; Ex. A; Ex. M-4 at 1.

C. *The 1995 Supplemental Report, the Legislative Taking of Valid Unpatented Mining Claims in the Kantishna Mining District, and the Assistant Solicitor's March 1998 Memorandum*

A First Half-Mineral Entry Final Certificate (FHFC) for the subject claims was signed by the Secretary of the Interior, Bruce Babbitt, on January 5, 1995. Tr. 41, 262; Ex. M-1 at 4; Ex. 11. Upon review of the mineral patent package returned to BLM for further processing, the Director, BLM, did not concur with the issuance of the mineral patent because the Wirth Mineral Report did not address the question of whether the subject claims were supported by a mineral discovery at the time the lands encompassing the claims were withdrawn from mineral entry by PLO No. 5179. Ex. M-7 at 1; Ex. R. Because Wirth was retired, Kucinski prepared an August 8, 1995, Supplemental Report that did not involve any sampling of the subject claims but only analyzed the data with reference to the 1972 withdrawal date. 532, 568-69; Ex. B; Ex. M-5. On May 26, 1996, the acting BLM Director concurred with issuing a mineral patent and forwarded the package to the Office of the Solicitor for further review. Ex. R.; Tr. 264-65.

On November 14, 1997, while Solicitor's Office review was pending, Congress enacted Pub. L. No. 105-83, the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1998, 111 Stat. 1543, 1564-66. Section 120 of that Act provides in relevant part:

Notwithstanding any other provision of law, 90 days after enactment of this section there is hereby vested in the United States all right, title and interest in and to, and the right of immediate possession of, all patented mining claims and valid unpatented mining claims (including any unpatented claim whose validity is in dispute, so long as such validity is later established in accordance with applicable agency procedures) in the area known as the Kantishna Mining District within Denali National Park and Preserve, for which all current owners . . . of each such claim (for unpatented claims, ownership as identified in recordations under the mining laws and regulations) consent to such vesting in writing to the Secretary of the Interior within said 90-day period . . . Provided further, That the United States shall pay just compensation to the aforesaid owners of any valid claims to which title has vested in the United States pursuant to this section, determined as of the date of taking: Provided further, That payment shall be in the amount of a

negotiated settlement of the value of such claim or the valuation of such claim awarded by judgment . . . Provided further, That the United States or a claim owner . . . may initiate proceedings after said 90-day period, but no later than six years after the date of enactment of this section, seeking a determination of just compensation in the District Court for the District of Alaska pursuant to the Declaration of Taking Act, sections 258a-e of title 40, United States Code

Shearer claimed to have an ownership interest in the claims beginning in 1994.³ Both Shearer and Red Top Mining filed written consents to the taking within the prescribed 90-day period. Ex. E (Shearer consent dated February 12, 1998); Ex. F (Red Top Mining consent dated February 11, 1998). Thus, title to the Banjo and Pass claims vested in the United States on February 12, 1998. Consequently, the claims will not be mined in the future and patent will not issue. The question of whether the claims are valid (such that the patent applicant would have been entitled to a patent in the absence of the statutory taking) controls whether Shearer will be entitled to compensation for the taking of a valid unpatented mining claim under the provisos of section 120 quoted above.⁴

The Solicitor's Office review resulted in a memorandum to BLM from the Assistant Solicitor for Onshore Minerals dated March 25, 1998. Ex. 48 ("Sol. Memo."). The memorandum identified a number of legal insufficiencies in the patent application that "appear to have caused costs in the mineral report to be understated and revenue to be overstated, thereby casting doubt on whether the claimant has a valuable discovery." Sol. Memo. at 1. See Tr. 265-66, 653-54; Ex. Y-12; Ex. 47 Vol. 1 at 4.

Specifically, the 1995 Supplemental Report valued the claimant's labor at the 1972 Alaska minimum wage on the basis that the operation likely would have been a

³ Apparently, title disputes between Mark Anthony and Shearer were resolved by a settlement agreement they entered into in June 2000 to resolve several cases in the Alaska State courts, Nos. 4FA-93-2045, S-7963, S-7973, and 4FA-98-1250. The settlement agreement granted Shearer an option to purchase all of Mark Anthony's rights in the Banjo and Pass claims and the Banjo Mill facility. Upon Shearer's exercising that option, Mark Anthony conveyed all of his interest in these properties although his patent application remained pending, as discussed below.

⁴ In 2003, Shearer filed an action seeking compensation in the United States District Court for the District of Alaska. *Paul G. Shearer v. United States*, No. A03-0263 CV (JKS) (D. Alaska). On Dec. 2, 2005, the court granted the Government's motion to stay proceedings in that case until the Department has ruled on the validity of the claims.

family effort. The Assistant Solicitor found this to be error because prior precedent of this Board made it clear that “the prudent person test is an objective standard which requires that the labor of a claimant be valued at the same rate as for a person the claimant might hire.” Sol. Memo. at 2. He further opined that the “description of skills required for mining and milling operations [*i.e.*, drilling, blasting, and operating heavy machinery] is independent evidence that the tasks required are not the kind that one would expect to be performed by unskilled labor employed at minimum wage.” *Id.* at 3. The Assistant Solicitor further noted that the Wirth Mineral Report used a survey of labor costs that indicated that the value of labor was well above the minimum wage, and that it improperly discounted the lowest combined wage rate in the survey as a means of allowing for the employee to receive a percentage of profits. Had the lowest combined wage rate been used without discount, the result would have been that total estimated mining and milling costs would have exceeded estimated revenues. *Id.* at 4 and n.4. The Assistant Solicitor also noted that Wirth had based mining costs on the assumption that mine and mill workers would work 12 hours per day for 120 straight days without overtime pay. The Assistant Solicitor was of the view that this “does not reflect objective market labor costs” and that “BLM should consider whether a reasonable estimation of labor costs for this operation should include overtime costs.” *Id.* n.6.

The Assistant Solicitor further opined that the 1995 Supplemental Report erred in using average gold prices for all of 1972 (\$58.60 per ounce), which included the 9 months following the withdrawal. The Assistant Solicitor stated that IBLA precedent “makes clear that the value of minerals on the claims must be determined by prices at or prior to the date of withdrawal.” Sol. Memo. at 6. He noted that the mineral examiner “could have used the average price at the time of withdrawal (\$48.78) or he could have used an historical average for a period prior to the date of withdrawal.” He further noted that it could be argued that the February 1972 price (\$48.70) should be used because the March price includes 22 days following withdrawal. *Id.* n.8. The same principles applied to calculating the price of silver, although it accounted for only about 6 percent of estimated revenue. *Id.* at 7.

The Assistant Solicitor additionally opined that BLM needed to evaluate whether historical mineral grades of the ore mined would be more indicative of values (*i.e.*, mineral grades) at depth than the mineral examiner’s surface samples, particularly in view of the apparent prohibition by the NPS on Mark Anthony’s using his own equipment to sample at depth during the 1988 and 1991 examinations and its apparent failure to provide equipment for sampling. Sol. Memo. at 7-8.

The Assistant Solicitor also addressed apparent contradictions in information regarding the March 1972 operational status of the Banjo Mill, which had been built in 1939 and had been out of operation since 1942. Although Mark Anthony had told the examiner that the mill was in good working condition in 1972, there were

reasons in the record to doubt that assertion, particularly since interest in gold mining near Kantishna apparently did not begin to revive until 1972. Sol. Memo. at 9. The Assistant Solicitor stated: “In light of these discrepancies, it appears that BLM should require some documentation of the operational status of the mill on the Banjo claim prior to March 9, 1972, before relying on that [claimant’s representation] in its economic analysis.” *Id.*

For these reasons, together with additional considerations that need not be discussed here, the Assistant Solicitor returned the patent application to BLM for further consideration.⁵ The Alaska State Office, BLM, forwarded the Solicitor’s Memorandum to the Alaska System Support Office, NPS, and requested that it address the legal insufficiencies and errors identified in the Assistant Solicitor’s memorandum. Tr. 881, 885-86, 893; Ex. 52.

D. The 1999 Mineral Examination

The matter was assigned to Bruce A. Giffen, an NPS geologist whose primary responsibility was to conduct mining claim validity examinations in Denali National Park. Tr. 265, 467, 524; Ex. 1. Giffen was instructed not only to address the insufficiencies and errors identified by the Assistant Solicitor’s memorandum, but also to completely reexamine and resample the claims and prepare a new mineral report. Tr. 580-82; Ex. 47 Vol. 1 at 4.

Giffen conducted his field examination of the claims on August 3-5, 1999. Tr. 93-94, 181; Ex. 47 Vol. 1 at 5-6, 27. John Burghardt, an NPS Certified Mineral Examiner, and Bob Strobe, an NPS Surveyor, assisted Giffen in his field examination. Tr. 78; Ex. 47 Vol. 1 at 6, 27. Mark Anthony was present during the entire field examination. *Id.*

Because all of the adit portals remained caved in during the 1999 examination and there was no access to the underground workings, the field examination was again limited to collecting surface samples. Tr. 94; Ex. 47 Vol. 1 at 23, 27-28. During the field examination, considerable effort was spent locating the three 1988 trenches and four 1991 trenches from which Wirth collected his samples. Tr. 92; Ex. 47 Vol. 1 at 27. However, neither Giffen nor Mark Anthony was able to locate the southwesternmost sample trench from the 1988 examination, and Mark Anthony

⁵ The Assistant Solicitor’s Memorandum did not mention the taking under section 120 of Pub. L. No. 105-83 that was effective only 6 weeks before the date of the memorandum. It is not clear whether the Solicitor’s Office was aware of the taking, but its analysis of the issues, which directly pertained to the validity of the claims, would not have been affected in any event.

found no mineralization southwest of what was labeled the Banjo #2 Trench during the 1999 examination. Tr. 92-93; Ex. 47 Vol. 1 at 27-28.

Giffen recovered a total of 31 channel samples: five from the Pass #1 Trench (P9901-P9905), nine from the Pass #2 Trench (P9906-P9914), eight from the Banjo #1 Trench (B9901-B9908), and nine from the Banjo #2 Trench (B9909-B9917). Exs. 25; 26 at 3-7; 47 Vol. 1 at 29-32. In addition, one grab sample was recovered from the mill tailings. Tr. 111; Ex. 47 Vol. 1 at 28. Each of the claims was traversed on foot during the field examination, and geologic mapping performed by previous investigators was confirmed. Ex. 47 Vol. 1 at 28. Giffen also toured all of the buildings on the claims with Mark Anthony, including the Banjo Mill. Ex. 47 Vol. 1 at 28. Photographs were taken of the sample sites, mill equipment, claim corner monuments, and buildings. Tr. 176-77; Ex. 47 Vol. 1 at 28.

Giffen prepared a mineral report, issued on April 17, 2002, detailing his findings and conclusions regarding the mineral patent examination of the subject claims. Ex. 47 Vol. 1-4 (Giffen Mineral Report). BLM Certified Mineral Review Examiner Robert C. Fisk reviewed the Giffen Mineral Report and gave it his technical approval on April 29, 2002. Kucinski also reviewed and acknowledged the report on behalf of NPS.

In his report, Giffen explained that he was examining whether the Banjo and Pass lode claims each contained a discovery of a valuable mineral deposit, *i.e.*, whether there was a reasonable prospect of success in developing a paying mine, as of three dates: (1) the March 1972 withdrawal date; (2) the January 1995 date the Secretary signed the FHFC; and (3) the April 2000 date when the contestee last supplied information in support of his patent application. Ex. 47 Vol. 1 at 2. Giffen carefully outlined the visual observations from the field examination, the assay results for the samples obtained, and the limits and expectation of mineralization within the two claims. He estimated the recoverable materials based upon historic values from 1972. Giffen then evaluated a mining and milling operation based upon the information obtained from Mark Anthony. He attempted to verify all of the cost information provided. As a result, he formulated three cost scenarios to compare with the anticipated revenue. For a more detailed discussion, *see* ALJ Decision at 9-37.

The Giffen Mineral Report ultimately concluded:

Minerals have not been found in sufficient quality and quantity on the Banjo and/or Pass lode claims such that a person of ordinary prudence would have been justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine in 1972.

Ex. 47 Vol. 1 at 1. Giffen did not further analyze whether there would have been a reasonable prospect of success in developing a paying mine in January 1995 or April 2000.

E. The Contest and the Hearing Before the ALJ

On July 21, 2003, BLM filed a complaint on behalf of NPS contesting the validity of the Banjo and Pass claims. The complaint alleges that sufficient minerals had not been exposed within the boundaries of the claims to constitute a valid discovery on the date the land was withdrawn from mineral entry under PLO No. 5179.

The complaint named Mark Anthony as contestee, but additionally identified intervenor Shearer and Red Top Mining Company as individuals or entities who “may assert an interest in proceeds from the sale, lease or rent of the claims as set forth in the Settlement Agreement dated June 2000 between Michael Mark Anthony, Paul Shearer, Red Top Mining Company and the surviving directors of Red Top Mining Company in the Alaska state court cases numbered 4FA-93-2045, S-7963, S-7973, and 4FA-98-1250[.]” Complaint at 1.⁶ On August 15, 2003, Mark Anthony filed an answer in which he admitted that he is the owner of the subject claims and denied the allegations of the complaint. On August 29, 2003, Shearer additionally filed an “Answer,” separate from Mark Anthony, in which he denied the allegations of the complaint and requested the opportunity “to participate in any hearing granted to Contestee Michael R. Mark-Anthony to present additional evidence.”

A hearing was held in Anchorage, Alaska, on August 8-11, 2005, and June 12-14, 2006. Mark Anthony did not appear at the hearing. Shearer appeared *pro se* and submitted evidence in support of the validity of the subject claims; he also filed a post-hearing brief.

⁶ Shearer’s right to intervene in this matter arises from his interest in the two mining claims, as discussed above. Noting that “[a]ll issues of the Banjo and Pass have been settled between Paul Shearer, Mike Mark Anthony, and Red Top Mining Company,” Shearer suggested that “the reason the Red Top Mining Company and Mike Mark Anthony are not at this hearing I presume, is that they acknowledge through those settlements that any interest that they may have had whatsoever . . . they have assigned . . . or conveyed to Paul G. Shearer.” Tr. 521-22. Thus, Shearer alone remains interested enough to assert the validity of the Banjo and Pass mining claims in this contest. However, the patent application remains in Mark Anthony’s name because under 43 C.F.R. § 3862.5-1, transfers subsequent to the filing of the patent application are not considered pending resolution of the application.

F. *The ALJ Decision*

Acting on the principle that absence of production from a mining claim for an extended period of time is sufficient to establish a *prima facie* case of invalidity, Judge Sweitzer found the fact that operations on these claims were not resumed between the end of World War II and the 1972 withdrawal date established “at least a weak *prima facie* case of invalidity.” ALJ Decision at 40. Judge Sweitzer did not address whether the Giffen Mineral Report established a *prima facie* case. The burden then shifted to the proponent of the claims, in this case intervenor Shearer, to establish the validity of the claims by a preponderance of the evidence.⁷

Judge Sweitzer observed that “there is no dispute that the quartz Banjo Vein containing gold and silver ore had been exposed within the limits of each claim prior to that date.” ALJ Decision at 46. Therefore, the questions were (1) whether the commercial value of the mineral deposit would exceed the cost of extracting, processing, transporting, and marketing the minerals, and (2) whether the expected revenue from each claim would exceed the operating costs of mining, processing, transporting, and marketing the particular deposit on that claim plus that claim’s proportionate share of the capital costs attributable to the combined mining operation. *Id.*

1. *Commercial Value of Recoverable Minerals on the Date of Withdrawal*

First addressing the value of recoverable minerals on the date of withdrawal, Judge Sweitzer analyzed both the quantity of minerals that would be recoverable and the price they would have obtained in 1972.⁸

a. *Quantity of Recoverable Minerals*

Beginning with the volume of ore in the subject claims, Judge Sweitzer compared Giffen’s estimate of a total remaining ore reserve of 2,460 tons with Wirth’s estimate of 6,267 tons. The difference was primarily a function of differing opinions as to the ore strike length on the claims, as determined by the distance between the

⁷ Judge Sweitzer first analyzed and rejected several legal and equitable arguments Shearer offered for disregarding the Giffen Mineral Report and estopping the Government from relying on that report. ALJ Decision at 41-46. Shearer has not disputed the ALJ’s analysis of these arguments on appeal, and we need not discuss them further.

⁸ In summarizing Judge Sweitzer’s decision, we will change the order of discussion slightly to keep all elements relevant to determining the quantity of recoverable minerals together.

sampling trench farthest to the northeast on the Pass claim (the Pass #1 Trench) and the sampling trench farthest to the southwest on the Banjo claim. According to Wirth, the farthest southwest sampling location was the site from which samples 1988 B-1, B-2, and B-3 were taken. (It is referred to as the “1988 B-1 Trench.”) According to Giffen, the farthest southwest sampling location was the 1999 Banjo #2 Trench, which was approximately 50 feet northeast of Wirth’s location of the 1988 B-1 Trench. Thus, Giffen believed that the strike was only approximately 150 feet long, while Wirth estimated it at 200 feet.

Judge Sweitzer determined that Giffen had misidentified the “upper adit” on the Banjo claim, the reference point from which the location of the 1988 B-1 Trench was measured in Wirth’s notes and report. Judge Sweitzer agreed with the position of the 1988 B-1 Trench on Wirth’s maps, which made it the trench farthest to the southwest. Therefore, he determined that Giffen had not sampled the strike to the southwest beyond the 1999 Banjo #2 Trench. ALJ Decision at 46-54. Taking note of a larger reserve attributed to a longer strike length, and comparing what had been extracted according to the mining records with what was reported regarding the apparent depth and limits of mineralization recoverable in a surface mining operation, *id.* at 54-58, Judge Sweitzer found that the weight of the evidence indicated total ore reserves of approximately 4,245 tons (2,166 tons in Resource Block A, the 294 tons assumed by Giffen in Resource Block B, and 1,785 tons in the Resource Block B Extension). *Id.* at 58.

Shearer and his expert witness agreed with the Giffen Mineral Report’s use of historical mill-head grades of 0.6281 ounces of gold per ton of ore and 0.7138 ounces of silver per ton of ore, and with a dilution factor of 10 percent to the mining process and the mineral grade assigned to the dilution material (0.0389 ounces per ton (opt) in recoverable gold and 0.3431 opt of silver). ALJ Decision at 59-60. Judge Sweitzer found it reasonable for Giffen to apply the historical mill-head grades to Resource Block A. He further concluded that the same grades should be applied to the Resource Block B Extension because the fire-assayed surface samples of coarse gold from the 1988 B-1 Trench do not accurately represent the gold values present and may not accurately represent the grade of mineralization at depth. *Id.* Consequently, Judge Sweitzer calculated that a total of 4,669.5 tons of ore reserve was available, which would be expected to contain a total of 2,605.9 ounces of gold and 3,051.6 ounces of silver. *Id.* at 61.

Judge Sweitzer then considered the mill-head gold and silver recovery rates. Stating that Shearer had presented no evidence contradicting Giffen’s reported recovery rates, he applied those rates to determine the total number of ounces of recoverable gold and silver for each resource block. Giffen determined that

0.67 percent of the gold and 35.57 percent of the silver would be lost as tailings. Accordingly, the ALJ calculated a total of 2,588.4 ounces of recoverable gold and 1,966.1 ounces of recoverable silver. ALJ Decision at 73-74.

Judge Sweitzer then calculated the quantity of gold and silver expected to be recovered “based upon a plan to mine the maximum amount of ore possible in a single mining season” with portions of the ore vein on the two claims each contributing half of the ore to be mined. ALJ Decision at 74. The ALJ noted that there was no dispute that the two contiguous claims should be developed together as part of a single operation, which would spread the fixed capital costs over a larger base. *Id.* He further observed that the “evidence focuses on the costs of mining the subject claims in a single season or less,” and that the plan he described was what “a prudent miner would follow.” *Id.* The ALJ explained that the mining season was limited to approximately 122 days (June through September) because of the October through May seasonal closure of the only access road to the claims through the Denali National Park and Preserve. *Id.* at 75. He further determined that only 3,060 tons of material (consisting of 2,754 tons of ore and 10 percent (306 tons) of dilution material) could be mined during a single season, not the estimated 4,245 total tons of ore reserve in the two claims. *Id.* Thus, in the ALJ’s view, a prudent miner “would concentrate his mining efforts on the portions of the Banjo Vein that have the highest grade mineralization,” *id.*, and therefore would “mine half of the 2,754 tons of ore from Resource Block A within the Pass claim and half from the Resource Block B Extension within the Banjo claim This translates to the removal of 1,377 tons of ore from each claim.”⁹ *Id.* at 76. Applying the accepted grades/recovery rates for ore to be extracted (0.6281 opt for gold and 0.7138 opt for silver) as well as for dilution material (0.0389 opt for gold and 0.3431 opt for silver), he concluded that “[a]fter milling, 99.33% of the total gold, or 1,730.02 ounces of gold and 66.43% of the silver, or 1,375.63 ounces of silver, would be recovered in one mining season.” *Id.*

⁹ The “Resource Block B Extension” to which the ALJ refers is the “50-foot extension of mineralization to the southwest of the Banjo #2 Trench” on the Banjo claim. ALJ Decision at 58. This is the portion of the ore vein that Giffen had assumed did not exist because he had concluded that the 1988 B-1 Trench was located east-northeast of the 1999 Banjo #2 Trench, as explained more fully below, rather than where Wirth had located it southwest of the 1999 Banjo #2 Trench. “Resource Block B” is the portion of the vein on the Banjo claim with its southwestern boundary terminating at the 1999 Banjo #2 Trench. Tr. 100; Exs. 24, 25, 29; ALJ Decision at 29.

b. Mineral Prices in 1972

The price per ounce of gold that could have been obtained on the withdrawal date was heavily disputed. After discussing the March 1998 Assistant Solicitor's Memorandum which found that the \$58.60 per ounce price used in the 1995 Supplemental Report (the average price for all of 1972) was erroneous, Judge Sweitzer noted that in July 2000, while Giffen's mineral examination was still pending, BLM had issued a policy on analyzing the economic marketability of a mineral deposit during a mining claim validity determination. *Notice of Policy on Mineral Commodity Pricing and Opportunity for Comment*, 65 Fed. Reg. 41,724 (July 6, 2000) ("Mineral Pricing Policy"). BLM stated it "will use the following steps to determine the price of mineral commodities when analyzing the economic marketability of a mineral deposit in determining the validity of a mining claim" for all unpatented mining claims, including those located on lands administered by BLM and NPS. 65 Fed. Reg. at 41,725. The policy provided:

To determine the mineral commodity price to use on any specific marketability date, the mineral examiner will begin with an average of the commodity price of the mineral for the month in which the marketability date occurred. The examiner will then average that price together with: (a) the monthly average commodity prices for each of the 36 months before the marketability date; and (b) the monthly average commodity futures prices for each of the 36 months after the marketability date. To obtain monthly figures for futures prices, the mineral examiner will use the highest volume quarterly futures prices for each of the three months covered by that quarter.

Id. In this case, where the claim was located before the withdrawal of the land from mineral entry, the "marketability date" is both the date of withdrawal and the date of the mineral examination. *Id.* The policy also contained an exception for situations in which futures prices were not available:

In instances where a publicly-traded mineral has no futures prices available on the market, the mineral examiner will average the monthly average commodity price for the month in which the significant marketability date occurred with the monthly average commodity prices for each of the 36 months before the marketability date. The mineral examiner will average a total of 37 numbers in this instance. If quarterly futures prices are available for any of the 36 months following the marketability date, the mineral examiner will average the available futures prices on a monthly basis with the monthly average commodity price for the month in which the significant marketability date occurred

and the monthly commodity prices for each of the 36 months before the marketability date.

Id. at 41726.

Judge Sweitzer noted that Giffen did not follow the Mineral Pricing Policy on the stated ground that futures prices were not readily available before 1998 and that relying on 36 months of futures prices was inappropriate where the duration of the hypothetical mine was to be for less than one season. Judge Sweitzer further noted that Giffen did not explain why he did not follow the Mineral Pricing Policy's alternative method where no futures prices are available and instead relied upon a 3-year straight average price (for 1970, 1971, and all of 1972) of \$45.42 per ounce. ALJ Decision at 64 (citing Ex. 47 Vol. 1 at 45, 54).

The Government contended that under the Mineral Pricing Policy, the price used should be the average price for the 36 months up to and including March 1972 (the month of withdrawal), which was \$39.66 per ounce.¹⁰ ALJ Decision at 64. Shearer argued first for the higher price used in the 1995 Supplemental Report (\$58.60, the average price for 1972). The ALJ rejected that position on the ground that "[t]he case law makes clear that the value of a mineral deposit on the withdrawal date can be determined based only on mineral prices actually achieved on or prior to the withdrawal date." *Id.* at 67.¹¹ In the alternative, Shearer argued for the monthly average price at the withdrawal date, which was at least \$48.33 per ounce, on the ground that using the average price for the 36 months up to and including the month of withdrawal would artificially reduce the price that could be expected. *Id.* at 67-68.

Judge Sweitzer first held that he was not bound by the Mineral Pricing Policy because it "was not promulgated with the procedural protections provided for regulations" and therefore did not have the force and effect of law. ALJ Decision at 68 (citing *Beard Oil Co.*, 105 IBLA 285, 288 (1988), and *United States v. Kaycee Bentonite Corp.*, 64 IBLA 183, 214 (1982)). He then held that applying the policy to determine the mineral value based on an historic range of prices would be inappropriate in the instant case because at the time of withdrawal, gold prices were on an upward trend, and the evidence indicated good reason to believe that prices would continue to increase in light of the newly-established private gold market.

¹⁰ This was close to, but not quite the same as, the method specified in the Mineral Pricing Policy for situations in which no futures prices were available.

¹¹ Citing *Collord v. Department of the Interior*, No. 94-0432-S-BLW at 23 (D. Idaho Aug. 27, 1996); *United States v. Crowley*, 124 IBLA 374, 376 (1992); *Moon Mining v. Hecla Mining*, 161 IBLA 334, 351 (2004).

Hence, he concluded, it would not be reasonable to expect that the price would return to a level of \$39.66 per ounce during the short life of the mine. *Id.* at 69-70. He found the appropriate price to use to determine the value of the gold on the date of withdrawal was the average monthly price for March 1972, which ranged from \$48.33 per ounce to \$48.78, depending on the price source. The ALJ decided to use \$48.33 per ounce, the lowest of the reported average prices, because he found that Shearer had demonstrated discovery of a valuable mineral deposit even using that price. *Id.* at 71-72.¹²

Applying the gold price of \$48.33 per ounce and the silver price of \$1.60 per ounce, Judge Sweitzer found:

The withdrawal date value of the 1,730.02 ounces of gold that could be recovered in one mining season would have been \$83,611.87 and the value of the 1,375.63 ounces of silver that could be recovered in one mining season would have been \$2,201.01. Therefore, on the withdrawal date, the total value of the recoverable mineralization to be mined by the 2,754-ton operation would have been \$85,812.88, with each claim containing recoverable mineralization valued at half that amount, which is \$42,906.44.

ALJ Decision at 76-77.

2. *Costs of Extracting, Processing, Transporting, and Marketing*

Judge Sweitzer then considered the costs of extracting, processing, transporting, and marketing. He noted that none of the parties had estimated the costs of the particular mining scenario he believed a prudent miner would follow, but he took the view that “the costs of such an operation can be projected based upon the parties’ estimates.” ALJ Decision at 77. After discussing some of the differences between Giffen’s and Wirth’s cost estimates and applying cost estimates to the Resource Block B Extension, *id.* at 78-81, Judge Sweitzer addressed specific cost elements.

¹² The ALJ also was of the view that the March 1972 price should be used for silver as well as for gold. Because the only evidence in the record for the monthly price of silver in March 1972 was the \$1.60 per ounce noted in the Assistant Solicitor’s Memorandum, the ALJ used that figure. ALJ Decision at 72. Neither BLM nor Shearer appears to dispute that price in this appeal.

a. Cost of Labor—Wage Rate

The first cost component considered was the wage rate for mine and mill labor. “The Government contends that Mr. Giffen appropriately relied upon a 1972 wage rate of \$4.54 per hour, plus a burden rate of 18.59%, in determining the costs of mine and mill labor on the withdrawal date.”¹³ ALJ Decision at 81. Shearer argued that “a much lower 1972 wage rate of \$2.60 per hour, including burden, is the appropriate wage rate based upon three letters which Contestee provided to Mr. Giffen before completion of his Mineral Report.” *Id.* After reviewing the parties’ arguments, Judge Sweitzer held that the record supported a wage rate based upon the average of the rates stated in the letters Mark Anthony had provided to Giffen, but with an 18.59 percent burden added to those rates (as the Government advocated), rather than included in them. He therefore took the average of \$3.15, \$2.96, and \$3.36 (instead of \$2.66, \$2.50, and \$2.83) and concluded that “a total effective hourly wage rate, inclusive of burden, of \$3.16 is appropriate for use in determining the labor costs of mining and milling the subject claims on the withdrawal date.” *Id.* at 94. (That equals a base wage rate of approximately \$2.6646 per hour, plus the 18.59 percent burden.)

b. Cost of Milling

The next component considered was the cost of milling the ore. One element of this cost was capitalization of mill equipment. Shearer asserted that the Banjo Mill, as well as the nearby Red Top Mill, were both in working order on the withdrawal date and, accordingly, capital costs for mill equipment should not be included in the cost analysis. The Government argued that neither mill was operational and, therefore, mill capital expenses were necessary. After reviewing the relevant statements, reports, and testimony, Judge Sweitzer found the evidence showed that the Red Top Mill was not constructed until the year following the withdrawal date, and the Banjo Mill was not operational on the withdrawal date. ALJ Decision at 101, 108. Thus, Shearer “failed to meet his burden of proving by a preponderance of the evidence that there would have been no mill capitalization costs on the March 16, 1972, withdrawal date.” *Id.* at 108. Shearer submitted no evidence to dispute Giffen’s estimate of costs for refurbishing or replacing Banjo Mill components and equipment (including supplies), and Giffen’s estimate of the

¹³ “Burden,” a term used in the Giffen Mineral Report, represents the “cost of employees beyond basic wages, *i.e.*, the benefits package. Burden includes mandatory items such as state and federal unemployment tax, Social Security tax, Medicare tax and Worker Compensation Insurance.” ALJ Decision at 90 n.18 (quoting Ex. 47 Vol. 1 at 68). In his calculations, Giffen used a burden rate that included the Alaska average workers compensation, the Alaska average unemployment, and the 1972 Social Security rate. Ex. 47 Vol. 1 at 70; Tr. 198-99.

associated hours of labor. Judge Sweitzer adopted them. ALJ Decision at 110-11. However, Judge Sweitzer reduced Giffen's estimate of labor costs for refurbishing the mill based on the lower wage rate, and further held, contrary to Giffen, that a preponderance of the evidence indicated that the Banjo Mill did not need major reconstruction in 1972. *Id.* at 113. Consequently, the ALJ reduced Giffen's total cost estimate for refurbishing the mill from \$15,473 to \$9,432.58. *Id.* at 114.

Judge Sweitzer then reviewed the estimates for mill operating costs, finding that Shearer did not provide adequate evidence to refute Giffen's estimate for equipment operating cost and supplies cost.¹⁴ ALJ Decision at 119. He did, however, reject Giffen's analysis for labor cost for mill operation for two reasons. First, the ALJ believed Giffen's hourly wage rate was too high, as previously determined. *Id.* Second, he agreed with Shearer and accepted Mark Anthony's representations to Giffen that only three, and not four, employees were needed to operate the mill, and rejected Giffen's conclusion that four employees would be required. The principal reason for that conclusion was that the Banjo Mill's crusher could generate enough fine ore in 8 hours to meet the mill's ore processing capacity of 36 tons in 24 hours and would not need to be operated during the second 12-hour shift. *Id.* at 119-21.

Multiplying the daily equipment, supplies, and labor costs by the 85 days the mill would operate in one season (after refurbishing), the ALJ concluded:

This results in a total mill equipment operating cost of \$6,320.60 (\$74.36/day x 85 days), a total mill operating supplies cost of \$1,282.65 (\$15.09/day x 85 days), and a total mill operating labor cost of \$9,669.60 (\$113.76/day x 85 days). Adding these figures results in a total 1972 mill operating cost of \$17,272.85, which is \$6.27 per ton (\$17,272.85/2,754 tons).

ALJ Decision at 122.

¹⁴ In estimating the mill operating costs, Giffen assumed that there would be a total mill feed of 2,706 tons, comprised of 2,166 tons of ore from Resource Block A, 294 tons of ore from Resource Block B, and 10% dilution. He determined that at a capacity of 36 tons per day, the mill would have to operate for 75.2 days in order to process the 2,706 tons of mill feed. Based upon these assumptions, Giffen determined that the 1972 mill equipment operating costs are \$5,590, or \$2.27 per ton, the 1972 cost of mill operating supplies are \$1,135, or \$0.46 per ton, and the 1972 labor operating costs are \$19,431, or \$7.90 per ton, for a total 1972 mill operating cost of \$26,156, or \$10.63 per ton.

ALJ Decision at 115 (citations omitted).

c. Cost of Mining

In evaluating the mining costs, Judge Sweitzer first examined the equipment needed for the proposed operations—namely, a drill, a bulldozer, and an hydraulic excavator. Giffen did not find that Mark Anthony possessed the equipment needed for the proposed mining operation at the date of the withdrawal, and, in any event, Mark Anthony was not the claimant of record in 1972 whose equipment ownership would be relevant. ALJ Decision at 123-24. Therefore, the ALJ included the rental cost of such equipment in the mine capital cost estimate. The ALJ rejected Shearer's capital cost estimates for mining equipment, finding that they were unsubstantiated. He found that Giffen's mine capital cost estimates were based on extensive research and were corroborated by independent testimony or documentary evidence. *Id.* at 125-32. He adopted Giffen's cost estimate for renting heavy equipment, recalculated it on a per-ton-of-ore basis, and applied it to the 2,754-ton operation to arrive at a rental cost estimate of \$10,768. *Id.* at 133.

The ALJ also adopted Giffen's estimate for equipment purchase cost (for fuel tanks, a magazine, and other equipment and a 4x4 one-ton work truck). After taking resale value into account, he found a total equipment cost of \$942. ALJ Decision at 135. Judge Sweitzer then applied Giffen's estimate of the cost to mobilize and demobilize the rented heavy equipment. *Id.* at 137. Judge Sweitzer evaluated the remaining cost factors, adopting Giffen's estimate for operating costs to construct an access road (\$12), recognizing both parties estimated 32 hours of labor to develop the mine. Judge Sweitzer also included 28 hours of labor to disassemble the mine operation, which had not been estimated by either party. However, he applied the \$3.16 per hour wage rate to calculate cost of labor for mine development (\$101.12) and mine takedown (\$88.48). *Id.* at 138. Judge Sweitzer's analysis produced an adjusted mine capital cost estimate of \$15,488.74, as compared with Giffen's cost estimate of \$13,173. *Id.*

With regard to mine operating costs, Judge Sweitzer generally adopted Giffen's estimates "because unlike [Shearer's] estimates, they are based upon published cost guides and other independent sources; hence, they are more credible." ALJ Decision at 139. Adjusting for variables including the hourly wage rate, he estimated the total operating cost to be \$6,450.62. *Id.* at 146.

Judge Sweitzer then evaluated the capital and operating costs of providing room and board to the mine and mill workers, referred to as "camp costs." ALJ Decision at 146-54. He then examined administrative costs, concentrate transportation costs, refining/smelting costs, and the cost of capital (finance charges to operate), agreeing with Giffen that this was a proper cost item. *Id.* at 154-64. However, the ALJ declined to consider increased costs as a result of lost time and

reconstruction of an aerial tram because these costs were not estimated. *Id.* at 165-66.

Judge Sweitzer therefore concluded that the following is an acceptable estimate of costs had these two claims been mined in 1972: Mill capital, \$9,432.58; mine capital, \$15,488.74; camp capital, \$615.36; mill operating, \$17,272.85; mine operating, \$6,450.62; camp operating, \$3,998.58; administrative, \$920.12; concentrate transportation, \$5,050.80; refining/smelting \$9,804.24; and cost of capital, \$2,301.04; for a total mining cost of \$71,334.93. ALJ Decision at 165.

3. *Expected Profitability of Mining the Subject Claims on the Date of Withdrawal*

Judge Sweitzer surmised that Resource Block A and the Resource Block B Extension would be mined at equal cost. Noting that each claim must bear a proportionate share of the costs, he remarked that “the expected revenue from the 1,377 tons of ore to be recovered from each of the subject claims by the 2,754-ton operation must exceed one-half of the total estimated capital and operating costs, or \$35,667.47.” ALJ Decision at 167. Based upon his estimates of value and cost, Judge Sweitzer found that mining the Banjo and Pass mining claims would have been profitable: “[O]n the March 16, 1972, withdrawal date, the expected value of the recoverable gold and silver on each claim would have been \$42,906.44, or \$31.16 per ton, thus leaving a per claim net profit of \$7,238.97, or \$5.26 per ton. This results in an anticipated 20.3% return on the original investment (\$14,477.94 profit/\$71,334.93 investment).” *Id.* He further maintained that the expected profit margin would likely be greater “given the numerous assumptions made herein which certainly or arguably overestimate various costs of the 2,754-ton operation.” *Id.* at 168. Judge Sweitzer enumerated 12 assumptions in which he adopted Giffen’s estimates, stating that resolution of those disputed estimates was unnecessary because the adoption of Giffen’s estimates still would not result in mining costs greater than the ascertained value of recoverable mineralization. *Id.*

In conclusion, Judge Sweitzer ruled that “[t]he preponderance of the evidence therefore establishes that a discovery of a valuable mineral deposit did exist within the boundaries of each of the subject claims on the withdrawal date. Therefore, the [Government’s] charge to the contrary should be dismissed.” ALJ Decision at 169.

ANALYSIS

BLM argues that the ALJ overestimated the quantity and value of minerals on the claims and underestimated the costs of mining, milling, etc., on several grounds. BLM therefore maintains that Shearer did not overcome BLM's *prima facie* case. We address first BLM's arguments regarding alleged misapplication of the burden of proof, then its arguments regarding the alleged overestimation of the value of the mineral reserves, and finally its arguments regarding the alleged underestimation of costs.

I. *Applicable Law and Burden of Proof*

The mining law opens to location and ultimate patent public domain lands in which "valuable mineral deposits" are found. 30 U.S.C. § 22 (2006). Thus, to be valid, a mining claim must be supported by the discovery of a valuable mineral deposit within its boundaries. *See, e.g., Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335 (1963); *Cameron v. United States*, 252 U.S. 450, 459 (1920); *Barrows v. Hickel*, 447 F.2d 80, 82 (9th Cir. 1971). Such a deposit exists where minerals are found on the claim of such quality and in such quantity that a person of ordinary prudence is justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. *United States v. Coleman*, 390 U.S. 599, 602 (1968); *Chrisman v. Miller*, 197 U.S. 313, 322-23 (1905); *United States v. Miller*, 165 IBLA 342, 355 (2005); *Castle v. Womble*, 19 L.D. 455, 457 (1894).

In *Coleman*, the Supreme Court refined the prudent person test and held that "profitability is an important consideration in applying the prudent-man test," and that the supplemental marketability test requires a showing that the mineral deposit can be extracted, removed, and marketed at a profit. *Id.*¹⁵ It is not required that the claimant be engaged in a profitable mining operation, or even that commercial success be assured: "[A]ctual successful exploitation need not be shown — only the reasonable potential for it." *United States v. Gillette*, 104 IBLA 269, 274 (1988).¹⁶ For lode claims, there must be evidence of continuous mineralization along the

¹⁵ *See also United States v. Martinek*, 166 IBLA 347, 406 (2005); *United States v. Miller*, 165 IBLA at 355; *United States v. Garcia*, 161 IBLA 235, 245 (2004); *United States v. Clouser*, 144 IBLA 110, 113 (1998); *In Re Pacific Coast Molybdenum Co.*, 75 IBLA 16, 29, 90 I.D. 352, 360 (1983).

¹⁶ *See, e.g., Barton v. Morton*, 498 F.2d 288, 289, 291-92 (9th Cir. 1974); *United States v. Miller*, 165 IBLA at 355; *United States v. Gunsight Mining Co.*, 5 IBLA 62, 69 (1972), *aff'd*, *Gunsight Mining Corp. v. Morton*, No. 72-92-TUC-JAW (D. Ariz. Sept. 11, 1973).

course of a vein or lode; the mere showing of disconnected pods of mineral concentration, even of high values, does not satisfy the prudent person test. *United States v. Newman*, 178 IBLA 174, 183 (2009); *United States v. Whitney*, 51 IBLA 73, 85 (1980), *aff'd, sub nom. Hernandez v. Watt*, Civ. No. 81-35 (D. Mont. Sept. 15, 1982).

Where a claim is located on land withdrawn from mineral entry, it must be supported by a discovery of a valuable mineral deposit at the time of withdrawal as well as at the time of the contest hearing. *Hjelvik v. Babbitt*, 198 F.3d 1072, 1074 (9th Cir. 1999); *United States v. E. K. Lehmann & Associates of Montana, Inc.*, 161 IBLA 40, 44 (2004).¹⁷ The United States retains the authority under the mining laws to determine, at any time prior to patent, whether there was a discovery of a valuable mineral deposit on either of those key dates. In doing so, the Secretary properly fulfills the duty to see that “valid claims [are] recognized, invalid ones eliminated, and the rights of the public preserved.” *Cameron v. United States*, 252 U.S. at 460.¹⁸ The Supreme Court explained in that case:

A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims. But no right arises from an invalid claim of any kind.

Id.

As noted, the complaint BLM filed on behalf of the NPS contested the validity of the claims “on the sole basis that minerals were not found within the limits of these claims in sufficient quantities or qualities to constitute a discovery of a valuable mineral deposit on March 16, 1972, the date when the land encompassing the claims

¹⁷ See also *United States v. Pass Minerals, Inc.*, 168 IBLA 115, 122 (2006); *United States v. Miller*, 165 IBLA at 356-57, and cases cited; *United States v. Hicks*, 162 IBLA 73, 76 (2004), and cases cited.

¹⁸ In this appeal, since BLM only challenged and Judge Sweitzer only addressed the existence of a discovery at the time of withdrawal, we need not address the existence of a discovery at the time of the hearing. We note, however, as we held in *United States v. Taylor*, 19 IBLA 9, 26 (1975), “[i]f there has not been evidence presented on an essential issue, or issues, dismissal of the contest will not fulfill this Department’s obligation to act ‘to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved.’ *Cameron v. United States*, 252 U.S. [at 460].”

was withdrawn from mineral entry.” ALJ Decision at 1. As Judge Sweitzer noted, if a claim is not supported by a discovery of a valuable mineral deposit at the withdrawal date, “the land within its boundaries would not be excepted from the effect of the withdrawal. Thus the claim could not thereafter become valid even though the value of the deposit increased due to a change in the market.” *Id.* at 39 quoting *United States v. Journigan*, 59 IBLA 393, 403 (1981) (citing *United States v. Rogers*, 32 IBLA 77, 84 (1977); *United States v. Garner*, 30 IBLA 42, 66 (1977)). When the Government contests a mining claim based on a charge of lack of discovery of a valuable mineral deposit on the withdrawal date, it bears the initial burden of going forward to establish a *prima facie* case in support of that charge, whereupon the claimant has the ultimate burden of persuasion to overcome that case by a preponderance of the evidence. See, e.g., *Hallenbeck v. Kleppe*, 590 F.2d 852, 856 (10th Cir. 1979); *United States v. Miller*, 165 IBLA at 356. The burden is different, however, for the proponent of the claim when a contest is filed as the result of a patent application. In such a situation, it is well settled that the Government must make a *prima facie* case that there is no discovery of a valuable mineral deposit, and that, upon such a showing, the claimant must establish that the claim is valid, even apart from the issues raised in the *prima facie* case. See *United States v. Rannells*, 175 IBLA 363, 379-80 (2008), and cases cited.

[1] It is well established that in a mining claim contest, the Government establishes a *prima facie* case that a claim is invalid when a mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery on the date of withdrawal. *United States v. Rannells*, 175 IBLA at 380, and cases cited. This Board has explained:

As a matter of determining whether the Government presented a *prima facie* case, the

question is whether the testimony of the Government’s witnesses, if standing by itself, unchallenged and unrefuted, would warrant the conclusion that there had been no discovery of a valuable mineral deposit on any of the claims in question. How that testimony looks in the light of the testimony of expert witnesses for the opposing party relates solely to the question of whether the contestee has demonstrated a discovery by a preponderance of the evidence. Cf. *Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959).

United States v. Martinek, 166 IBLA at 405, quoting *United States v. Larsen*, 9 IBLA 247, 256 (1973), *aff’d*, No. 73-119 (D. Ariz. Sept. 24, 1974).

In this case, as noted previously, Judge Sweitzer found that “[t]he fact that operations on the Banjo Mine were not resumed during the more than 25 years that passed between the end of World War II and the March 16, 1972, withdrawal date” was “sufficient to establish at least a weak *prima facie* case of invalidity.” ALJ Decision at 40. Judge Sweitzer did not consider whether the Giffen Mineral Report established a *prima facie* case. In our view, Giffen’s extensive and detailed mineral report is more than sufficient to constitute a *prima facie* case of invalidity based on the absence of a valuable mineral discovery on the date of withdrawal. Importantly, Shearer does not argue otherwise. Thus, Shearer, as proponent of a discovery on these claims, bears the ultimate burden of persuasion that they are supported by a discovery.

BLM argues that the ALJ misapplied the burden of proof by improperly devising his own mining plan to show that the mine operation could be resumed profitably. SOR at 9. Thus, in BLM’s view, Shearer “did not preponderate since he did not even think of this mining plan.” *Id.* Shearer acknowledges that the ALJ Decision is based on his selection of “a hybrid mining plan that did not exactly match the proffers of either the mineral examiner or Shearer.” Answer at 15. However, Shearer argues that the reserve estimates, mining method, and operating and capital costs the ALJ used “all drew upon the data provided by the parties.” *Id.* He asserts that “[a]s long as the parameter values which formed the basis of the ALJ’s mining plan can be supported by a preponderance of the evidence submitted at the contest, then the determination of validity based upon a hybrid plan can be sustained.” *Id.*¹⁹

[2] The question here is whether an ALJ or this Board may conclude that a mining claimant has overcome the Government’s *prima facie* case on the basis of a mining plan or analysis that is different from the plan the claimant proposed. We answer that question in the affirmative. The ultimate question in a mining claim contest in which the Government charges lack of discovery of a valuable mineral deposit is whether, after both the Government’s and the claimant’s submissions, the preponderance of the evidence shows that a prudent person would have a reasonable expectation that minerals could be extracted and sold at a profit. The ALJ evaluates that question independently; he is not restricted to a choice between the claimant’s specific plan or nothing. In *United States v. Willsie*, 152 IBLA 241 (2000) (cited in the ALJ Decision at 74), we held:

As we have stated, in reviewing the evidence in a mining contest we must focus on what a prudent miner would do to obtain a maximum

¹⁹ Shearer also argues that the Board could also affirm based on either of two alternative plans that he suggested which, he asserts, “would increase efficiency and profitability by using the additional gold reserves in adjacent claims in the vicinity” or using an additional mill known as the Red Top Mill. Answer at 9.

return and then judge whether this is sufficient to satisfy the prudent man standard, including the marketability component. *Since the standard is objective, it does not depend on what the claimants actually planned to do. See United States v. Coleman, supra at 602; United States v. Rice, 73 IBLA 128, 140-41 (1983); United States v. Harper, 8 IBLA 357, 369-70 (1972).* In applying that standard, we will assume “proper management” of the mining venture. *See Converse v. Udall, 399 F.2d 616, 623 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).*

152 IBLA at 271 (emphasis added). We therefore reject BLM’s argument.

II. *Extent and Value of Mineral Reserves*

A. *Estimate of Recoverable Reserves*

BLM argues that Judge Sweitzer overestimated the gold reserves available for mining. BLM maintains that the Giffen Mineral Report’s lower estimates, which would not be adequate for a profitable operation, more accurately depict the actual situation. *See SOR at 29-45.*

1. *The ALJ’s Consideration of Samples B-1, B-2, and B-3 from the 1988 Field Examination*

BLM first points to the fact that in the 1999 field examination, Mark Anthony was unable to find the southernmost sampling point from the 1988 field examination, the 1988 B-1 Trench, or otherwise expose mineralization southwest of the 1999 Banjo #2 Trench. BLM relies on this Board’s holding in *United States v. Chappell, 72 IBLA 88, 93-94 (1983)*:

It is the duty of mining claimants 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 claimants. The function of the Government’s examiners is to examine the discovery points made available by the claimants 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 on 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. Russell, 40 IBLA 309 (1979), aff’d sub nom. Russell v. Peterson, Civ. No. 79-949 (D. Ore. June 23, 1980)*;

United States v. Knecht, 39 IBLA 8 (1979); *United States v. Bechthold*, *supra* [25 IBLA 77 (1976)].

On this ground, BLM argues that “the Government can expect that Claimant to be able to expose the discovery points at any point before patent.” SOR at 33. Consequently, in BLM’s view, the ALJ was barred from considering the 1988 B-1, B-2, and B-3 samples, taken from the 1988 B-1 Trench, as evidence of the extent of the ore strike, and, therefore, improperly determined the length of the ore strike to be approximately 200 feet rather than 150 feet and improperly included the asserted resources in the “Resource Block B Extension” in his calculations. SOR at 32-34. At the same time, however, BLM acknowledges: “The Board has never answered the question of whether a Claimant needs to keep a discovery point exposed when the claim has to be re-examined due to errors in the first examination.” *Id.* at 32.

The situation in the instant case is not similar to *Chappell*. In that case, the claimant did not accompany the mineral examiners in their field examination of uranium mining claims. The examiners observed an old adit on one of the claims, from the sides of which they cut channel samples and whose radioactivity they measured by scintillometer. Neither test showed significant uranium presence. The claimant later argued that the examiners might have obtained better samples from the adit had they cleared out the detritus and sampled from the bottom rather than the sides. The Board rejected that argument: “As pointed out above, the responsibility for keeping discovery points open for sampling by the Government examiner is on the claimants, and the examiner is not required to reopen buried discovery points or to make discovery for the claimants.” 72 IBLA at 95.

In the instant case, there is no dispute that the 1988 B-1, B-2, and B-3 samples were taken from the 1988 B-1 Trench, and that those samples showed mineralization at the point from which they were taken. The issue is Giffen’s belief that the 1988 B-1 Trench was not located where Wirth depicted it. In this case, unlike *Chappell*, Shearer has not asserted that BLM failed to uncover evidence of mineralization that it would have uncovered had it conducted its examination differently. There is no precedent of which we are aware that compels the ALJ or this Board to ignore the findings from the 1988 B-1 Trench, or pretend that samples taken from that site during the 1988 examination did not reveal mineralization.

Further, the fact that neither Giffen nor Mark Anthony found the 1988 B-1 Trench during the 1999 field examination 11 years later does not imply that there is no evidence of gold-bearing ore southwest of the 1999 Banjo #2 Trench, if in fact the 1988 B-1 Trench was located where Wirth said it was. It was proper for the ALJ to resolve the factual question of the location from which the 1988 samples B-1, B-2, and B-3 were taken, and he violated no legal principle in doing so.

2. *The ALJ's Finding Regarding the Location of the 1988 B-1 Trench and Inclusion of Reserves in the Resource Block B Extension*

BLM argues that the ALJ erred in concluding that the 1988 B-1 Trench was located where Wirth located it in his report, *i.e.*, approximately 50 feet southwest of the 1999 Banjo #2 Trench. *See* Ex. A at 30 (Fig. 5). The Wirth Mineral Report stated for the 1988 sample site B-3: "Upper adit lies S. 22° W., 80 feet from sample site." Ex. A at 27.²⁰ The map of the sample sites in Wirth's report, Ex. A at 30 (Fig. 5), reflects this. One of the accompanying photographs taken during the 1988 examination shows Wirth's colleague, Jim Gruber, standing by "the upper adit, Banjo adit." Ex. A at 24. The photograph shows a discovery post and the collapsed timbers of the adit portal. The "Upper Adit Banjo Vien [sic]" marked on the map of collection sites in the Wirth Mineral Report, Ex. A at 30, is the portal of the adit at the 3,130-foot elevation level.

Giffen, after he and Mark Anthony had failed to find the 1988 B-1 Trench where Wirth depicted it, concluded that the "upper adit" referred to an adit at the 3,220-foot elevation level. He therefore placed the 1988 B-1 Trench to the east-northeast of the 1999 Banjo #2 Trench. Exs. 13, 23, 24, 47 Vol. 1 at 24, 27, and 47 Vol. 2 Att. 4. (Fig. 6). *See* ALJ Decision at 48-49.

The ALJ rejected Giffen's position on grounds including (1) Wirth could not have been referring to the 3,220-level adit in his 1988 notes because he did not know of its existence until 1991 when he dug the 1991 Banjo #1 Trench. *See* Exs. 22c, 47 Vol. 1 at 27;²¹ (2) Wirth's map of the sample collection sites marks the 3,130-level adit as the "upper adit"; (3) the photograph with Gruber at the adit portal was taken in 1988 and had to be the 3,130-level adit portal; and (4) each sample was assigned a number at the time of collection. ALJ Decision at 49-53.

In disputing the ALJ's conclusion and arguing for Giffen's position, BLM first speculates that Wirth did not take the samples along the ore vein in the same order as their numbered sequence. SOR at 37. BLM further asserts that the ALJ erred in concluding that the photograph of the "upper adit" in the Wirth Mineral Report, Ex. A at 24, shows the 3,130-level adit and not the 3,220-level adit in the photograph taken by Giffen in 1999, Ex. 22c, contending that these two photographs may show the

²⁰ Wirth's field notes identified the "North/upper adit" as "S 22° W 80' from sample site B-3." Ex. 47 Vol. 2 Att. 5 at 23.

²¹ The 1991 Banjo #1 Trench is the same as the 1999 Banjo #1 Trench, from which additional samples were taken in Giffen's 1999 examination. *See* Exs. 22c, 47 Vol. 1 at 27, and 47 Vol. 2 Att. 4 (Fig. 6).

same site. SOR at 38. Shearer argues that Giffen failed to find the 1988 B-1 Trench because he was looking, according to his testimony at the hearing, “approximately 50 feet south of the Banjo two trench,” Tr. 92, rather than on a bearing of S. 60° W., where Wirth’s map showed it. Answer at 31-32. Shearer also quotes from the ALJ Decision at 52-53. Answer at 32-33.

We find BLM’s arguments unpersuasive and contrary to the record. The text of the Wirth Mineral Report, as well as the accompanying photograph captions, indicate that the 1988 samples B-1 through B-3 and B-5 through B-8 were taken in sequential order. Ex. A at 22-29. BLM’s argument that Wirth’s map of sample sites from the 1988 and 1991 examinations, Ex. A at 30, does not show the locations of samples B-4 and B-9 overlooks why these two samples were not plotted on the map. Gruber, Wirth’s colleague in the 1988 examination, took sample B-4 as a “grab sample” from the remains of an ore chute from the upper workings down to the mill level, not as an excavation sample. Ex. 47 Vol. 2 Att. 5 at 8.²² Why it was assigned the number B-4 is not explained,²³ but the fact that the grab sample was assigned number B-4 does not imply that the numbered sequence is different from the order in which the excavation samples were taken. Sample B-9 from the 1988 examination also was a grab sample, from the surface at the same site as samples B-5 and B-6. Ex. A at 28; Ex. 47 Vol. 2 Att. 5 at 9. See ALJ Decision at 9-10; Ex. A at 28, 36; Ex. 47 Vol. 1 at 26. Wirth stated that it “was not plotted since it only represented a couple inches.” Ex. A at 36. Why it was assigned number B-9 is not explained, but the assignment of that number again does not imply that Wirth took the samples from the ground in a different order than he numbered them. He easily could have returned to the B-5 and B-6 site after taking samples B-7 and B-8. BLM’s speculation that Wirth took the samples in an entirely different order than their assigned numbers, and the inference drawn therefrom that Giffen correctly concluded that the 1988 B-1 Trench was far to the northeast of where Wirth located it, are unsupported in either logic or the record.

In addition, BLM’s argument that the photographs in Ex. A at 24 and Ex. 22c show the same site strains credulity beyond the breaking point. The 1988 photograph of the “upper adit” to which Wirth referred, Ex. A at 24, shows a collapsed adit portal entrance going into the hillside, with a discovery post adjacent to it. The 1999 photograph, Ex. 22c, shows the 1991 Banjo #1 Trench, re-sampled in 1999. This shows a trench dug into the ground at a much flatter location than the 1988 photograph. Further, the rotted timbers shown in the 1991 photograph are well beneath the surface of the soil, and there is no indication of an adit portal

²² The document incorrectly spells “chute” as “shoot.”

²³ There are a number of possibilities. For example, Gruber could have joined Wirth and given him the grab sample after Wirth took samples B-1 through B-3 and before he took samples B-5 and B-6.

entrance at this site. Indeed, Giffen's caption to the closeup photograph of those timbers, Ex. 22d, refers to them as "support timbers" that "likely indicate the extent of the mining stope in this area." In other words, those timbers appear to be underground support timbers that indicate the extent of tunneling at that point. We find nothing in these photographs that indicates that Exs. 22c and 22d could show the same site as Ex. A at 24. There is also no indication in the record that the 1991 Banjo #1 Trench was dug before 1991. We agree with the ALJ that the evidence demonstrates that the "upper adit" to which Wirth referred was the 3,130-level adit portal, not the adit tunnel later discovered at the 3,220-level as Giffen maintained.

Further, the fact that neither Giffen nor Mark Anthony found the 1988 B-1 Trench during the 1999 field examination does not imply that it was not where Wirth said it was. The photographs in the Wirth Mineral Report showing the site of the 1988 B-1 Trench and the three samples taken from it reveal that it was not a "trench" at all. Rather than digging a trench, it is clear that Wirth took samples B-1, B-2, and B-3 from a vein outcropping that appeared on the surface of a steep part of the hillside. Ex. A at 23. The effects of weather and natural forces in the intervening decade-plus before the 1999 examination easily could have obscured this location.

For all of these reasons, we agree that the ALJ properly included the Resource Block B Extension in his calculation of reserves. The question then becomes how much reserve is in place and can be mined.

3. Extent of Reserves in the Resource Block B Extension

The extent of the reserves in the Resource Block B Extension depends on both the depth and the grade of mineralization. With regard to the depth of mineralization, the ALJ concluded that there was no evidence that any of the reserve that would be mined from the surface in this portion of the vein had been reduced by underground stoping in the period before 1942 when the mine was producing. ALJ Decision at 56-57.²⁴ The ALJ found that because a new working level 100 feet below the upper workings of the Banjo Vein had been opened in 1941, the 6,290 tons mined in that year (out of the total 13,653 tons mined during the entire period the mine was open) were mined from the 3,030-level rather than from the 3,130-level.

²⁴ The ALJ rejected Giffen's view that this portion of the vein had been stoped to near the surface. Giffen's view was based primarily on total production figures from 1939-1942 and a geologic sketch of the Banjo Lode System prepared by Thomas K. Bundtzen in 1981. This sketch was labeled as "Plate 3" of Bundtzen's 1981 masters thesis titled "Geology and Mineral Deposits of the Kantishna Hills, Mt. McKinley Quadrangle, Alaska." See Tr. 27, 723-24, 769-70; Ex. A at App. 1; Ex. 8 at Att.; Ex. 20. The ALJ therefore referred to it as "Plate 3." The sketch indicated that this portion of the vein was "stoped to surface." Ex. A at App. 1.

Thus, according to the ALJ, only 7,363 tons of ore were stoped from the 3,130-level and sub-level. ALJ Decision at 56. Further, the ALJ stated, the depiction in Plate 3 of the area stoped to the surface was approximately 40 percent larger than the area reported in Red Top Mining's records as having been mined. The sketch therefore could not have precisely depicted the area stoped. Further, the ALJ pointed out that there were no signs of the area having been stoped. Finally, the ALJ noted, the 3,130-foot adit is approximately 80 feet southwest of and 70 feet in elevation below the 1988 B-1 Trench, the southwestern end of the Resource Block B Extension, and mineralization exists at the 3,130-level. *Id.* at 57. Thus, in the ALJ's view, mineralization extended 70 feet beneath the surface of the Resource Block B Extension. Therefore, it could be mined from the surface to a depth of 45 feet. *Id.* The ALJ accepted Giffen's estimate of an average width of 9.6 feet for this portion of the vein (which was not significantly different from Wirth's estimate of 9.4 feet). At a length of 50 feet, this resulted in a recoverable ore volume of 21,600 cubic feet, which, at 12.1 cubic feet per ton, translated into 1,785 tons of ore reserve in the Resource Block B Extension. ALJ Decision at 57-58.

BLM points out that while the new working level at 3,030 feet was opened in March 1941, the aerial tram that moved the ore to the mill was not moved to the 3,030-level until August 1941. Thus, all the ore processed before August must have come from the upper workings. SOR at 40. BLM's observation is correct and we concur with the inference BLM draws. BLM notes that 52 percent of the gold production in 1941 was in the months of May through July. It argues that if one assumed that only 40 percent (instead of 52 percent) of the 6,290 tons of ore mined in 1941 was mined before August, when the aerial tram was moved, this material must have come from "the 'stoped' area marked on Mr. Bundtzen's Plate 3" and, therefore, the upper workings must have produced 9,879 tons of ore rather than 7,363 tons. *Id.* at 41. BLM argues that this supports the extent of stoping depicted on Plate 3. *Id.* at 41. On that basis, BLM urges that the ALJ should have applied Giffen's "generous" assumption of a 10-foot depth for the Resource Block B Extension. *Id.*

Shearer asserts that Wirth testified that there was no evidence of stoping in this area that would change his resource estimate. Answer at 35-36. BLM responds that Shearer characterizes Wirth's testimony inaccurately. BLM Reply at 22. BLM again is correct in this respect. Without quoting it extensively, it is clear that the thrust of Wirth's hearing testimony is that while he was aware that there was stoping, he did not know the extent of it without access to the underground workings, and for that reason did not take it into account in deriving his own ore reserve estimates. Further, he did not rely on the Red Top Mining reports regarding how much ore had been extracted in the 1939-1941 period because he could not justify the figures independently. *See* Tr. 836-37, 843-48.

It is unlikely that there was no underground mining of the Banjo vein at all beneath the Resource Block B Extension, given the relative positions of the 3,130-level adit, the 1988 B-1 Trench (the southwestern end of the Resource Block B Extension), the 1999 Banjo #2 Trench, and the 1991 Banjo #1 Trench (in which underground support timbers were found), and the directional orientation and dip of the vein. See Ex. A Fig. 5; Ex. 47 Vol. 2 Att. 4 (Figs. 6, 8a, 8b). The question is how close to the surface the underground stoping came. The answer is unknown because the underground workings were not examined. But further calculations indicate whether it is likely that the amount of ore contemplated to be mined from the surface under the ALJ's mining plan is present in and recoverable from the vein.

We note that the ALJ does not propose that 1,785 tons of ore—his estimation of the ore tonnage available to a 45-foot depth in the Resource Block B Extension—would be mined from that segment of the vein. Instead, as explained above, the ALJ found that a prudent miner would mine 1,377 tons from the Resource Block B Extension and the same volume from Resource Block A on the Pass claim in one season. At 12.1 cubic feet per ton, approximately 16,662 cubic feet would be mined from each claim. Accordingly, assuming a 50-foot length and an average 9.6-foot vein width, the Resource Block B Extension would need to be mined to a depth of approximately 34.7 feet to recover that volume of ore.

If approximately 9,879 tons were produced from the upper workings—*i.e.*, the 3,130-level adit portal—before the tram was moved to the 3,030-level, that tonnage would equate to approximately 119,536 cubic feet of material at 12.1 cubic feet/ton. Given the 180-foot length of underground mining in the vein, and if the shaft generally was not wider than the widest part of the vein (approximately 12 feet),²⁵ the average height on the underground shaft would have to be approximately 55.3 feet. Of course, the shaft workings could have been wider than 12 feet, and, if they were, the average height of the shaft would correspondingly decrease.²⁶ Similarly, if more than 9,879 tons of ore were produced from the upper workings, the size of the shaft would increase.

However, Giffen found that Resource Block A on the Pass Claim contains 2,166 tons of ore, based on a 75-foot strike length and a depth of 45 feet that could

²⁵ Giffen's report, citing other sources, notes that "[t]he quartz vein ranges from a few feet thick to over 12 feet thick." Ex. 47 Vol. 1 at 19. While the vein might average about 9.4 to 9.6 feet wide, it is not unreasonable to presume that the excavations generally extended at least to the width of the widest part of the vein.

²⁶ That could be the case. A shaft only 12 feet wide and more than 55 feet tall, while presumably possible, might seem to be an unusually tall and narrow underground structure.

be mined from the surface. ALJ Decision at 34. This appears not to be disputed. The ALJ also found, as discussed above, that only 2,754 tons of ore (plus 306 tons of dilution material) would be mined in the single season of operations, half of which he assumed would come from Resource Block A on the Pass claim, and half from the Resource Block B Extension on the Banjo claim (1,377 tons each). ALJ Decision at 75-76. If, instead, Resource Block A, which was not mined underground in the 1939-1941 period, were completely mined to the full depth of 45 feet to recover 2,166 tons, then only 588 tons would have to come from the Block B Extension to extract a total of 2,754 tons. The 588 tons translates to 7,115 cubic feet, which would require mining to a depth of only 14.82 feet over the 50-foot length of the Resource Block B Extension, assuming a 9.6-foot average vein width.

While Wirth's understanding was that he could not take the stoping into account in calculating his reserve estimates (which the ALJ in any event revised) without being able to independently verify the extent of the stoping, the rock extracted during the 1939-1941 period had to come from somewhere. And it came from mining the underground Banjo vein and rock adjacent to it. The question then becomes whether the portion of the vein underlying the Resource Block B Extension was likely stoped to within approximately 15 feet of the surface. The answer to that question again is unknown. However, even if we were to assume that the average height of the underground shaft was not less than 55.3 feet, to be able to excavate 14.82 feet from the surface would require that the bottom of the shaft be at least approximately 70 feet below the surface of the Resource Block B Extension.

That does appear to be the case. As the ALJ noted, the 3,130-level adit portal is 70 feet deeper than the 1988 B-1 Trench. ALJ Decision at 57. It appears that in moving northeast along the vein in the Resource Block B Extension, the depth of the adit relative to the surface increases. *See, e.g., Ex. 47 Vol. 2 Att. 4 (Fig. 8b).*²⁷ It therefore appears that sufficient ore may be recovered from the Resource Block B Extension, together with Resource Block A on the Pass claim, to allow extraction of the 2,754-ton total that the ALJ found could be mined in one season.²⁸

With respect to the grade of the ore, BLM argues that it was improper for the ALJ to ascribe a grade of .6281 opt of gold and .7138 opt of silver for the Resource

²⁷ In the absence of access to the adit, there is nothing in the record regarding whether the floor level of the adit ever went below the 3,130-foot elevation level of the adit portal.

²⁸ Moreover, BLM's own figures regarding revenue that would be generated from mining operations assume that 294 tons are recoverable from Resource Block B and 322 tons from the Resource Block B Extension (although at lower mineral grades). SOR at 42 (Fig. 4).

Block B Extension on the ground that “mining below Resource Block B Extension is as extensive as the mining below Resource Block B.” Hence, BLM asserts, the surface sample grades from Giffen’s 1991 sampling in Resource Block B (.3668 opt of gold and .2917 opt of silver) should be applied to the Resource Block B Extension. SOR at 42. BLM further argues that if the portion of the vein in the Resource Block B Extension had a grade of .6281 opt of gold, the aerial tram would not have been moved to the 3,030-level adit in August 1941, and the mine would have been reopened in later years, particularly after the price of gold rose dramatically in the 1980s. *Id.* at 43.

Shearer argues that the Assistant Solicitor’s 1988 Memorandum is consistent with the ALJ’s use of historical mill-head mining grades. Further, he asserts that NPS “did not allow mechanical drilling to depth” and that Mark Anthony “was not allowed to bring in equipment to drill at depth during the first mineral exam and relied on the findings, discovery points, and samples collected from the first mineral exam to guide the requested second mineral exam.” Answer at 37. BLM, anticipating this argument, asserts: “Even if the Government had denied the Claimant access in 1988 or 1991, he was given the opportunity to bring mining equipment with him to the 1999 mineral examination.” SOR at 35; *see* BLM Reply at 23. *See also* ALJ Decision at 21; Tr. 93-94; Ex. 47 Vol. 1 at 5-6 and Att. 3 at 2. Shearer does not specifically refute this.

As noted previously, Judge Sweitzer concluded that the same grades applied to Resource Block A should be applied to the Resource Block B Extension because the fire-assayed surface samples of coarse gold from the 1988 B-1 Trench do not accurately represent the gold values present and may not accurately represent the grade of mineralization at depth. ALJ Decision at 59-60. We agree with both of the ALJ’s reasons. We do not believe the record compels BLM’s conclusion that the vein in the Resource Block B Extension has been stoped so close to the surface as to preclude surface mining to a depth of approximately 15 feet. Further, while BLM’s speculation as to the reasons for moving the aerial tram to the 3,030-level in August 1941, and its speculation regarding why the mine was not reopened in later years, are plausible, there are other equally plausible reasons that could explain both events. The record does not support the inferences BLM draws. We therefore agree with the ALJ that it is more reasonable to apply the historical results from the ore extracted during mining operations as better representing the probable mineral content of ore that would be extracted from the Resource Block B Extension.

For all of the reasons discussed above, we conclude that while the reserves in the Resource Block B Extension may be considerably less than the ALJ believes, the available evidence indicates that there are likely sufficient reserves in Resource Block A and the Resource Block B Extension, taken together, for 2,754 tons to be extracted in one operating season as the ALJ projected.

B. *Value of Reserves*

BLM first argues that the ALJ erred in not applying the Mineral Pricing Policy. BLM contends that the Office of Hearings and Appeals (OHA)—including the ALJ and this Board—is bound by that policy because it was issued by the Assistant Secretary for Land and Minerals Management. BLM argues that the Assistant Secretary’s signature established the document as the policy of the Department which the ALJ and the Board are bound to follow under 212 Departmental Manual (DM) 1 and 13.1. BLM further relies on *Blue Star, Inc.*, 41 IBLA 333, 335 (1979), for the proposition that an Assistant Secretary’s decision is not subject to review on appeal to the Board. SOR at 12-13; BLM Reply at 4-6.

Shearer argues that the Mineral Pricing Policy was not a rulemaking that bound Judge Sweitzer. Distinguishing between Secretarial “decisions” and “policies,” Shearer contends that the ALJ possesses broad authority to review the status of Departmental policies. Answer at 19. Shearer also notes that the Mineral Pricing Policy was issued in 2000, and argues that it cannot be applied to determine the validity of mining claims subject to the 1997 legislative taking. *Id.* Shearer further argues that there were no gold future prices before December 31, 1974, and gold prices for the 36 months prior to March 1972 were regulated. *Id.* at 21-22. Shearer asserts that Judge Sweitzer correctly considered the historical trend of a continual steady rise in the price of gold. *Id.* at 21.

BLM responds that the Mineral Pricing Policy, by its terms, applies to validity determinations for all unpatented claims, including claims located before the withdrawal of the affected land from mineral entry. BLM Reply at 7 (citing 65 Fed. Reg. at 41,275). BLM further maintains that this includes unpatented claims subject to the 1997 legislative taking. *Id.* BLM also points out that the Mineral Pricing Policy takes into account situations in which futures prices are not available. *Id.* at 8.

[3] As the Assistant Secretary and BLM have expressly made clear, by adopting the policy, BLM did not intend to promulgate a regulation. By its own description, the Mineral Pricing Policy was a statement of policy, not a rule. The summary statement at the beginning of the document reads: “The Bureau of Land Management (BLM) is instituting a policy for calculating the mineral commodity price to use when determining whether a mining claim contains a ‘discovery’ of a valuable mineral deposit. The policy is necessary to establish a consistent approach in determining claim validity.” 65 Fed. Reg. at 41,724. In addition, while the Mineral Pricing Policy invited comments, it was not adopted following publication of a proposed rule and an opportunity to submit comments, as required under the Administrative Procedure Act (APA), 5 U.S.C. § 553(c) and (d) (2006); it was in

effect as soon as it was published.²⁹ It follows that the Mineral Pricing Policy is a general statement of policy under 5 U.S.C. § 553(b)(3)(A) (2006), not a substantive rule under the APA, and does not have the force and effect of law. *See, e.g., Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995); *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1072 (9th Cir. 2010); *Saint Marys Hospital of Rochester, Minnesota v. Leavitt*, 535 F.3d 802, 807 (8th Cir. 2008), and cases cited. BLM does not disagree, stating, in its SOR, “the policy is not intended to be a regulation.” SOR at 13 n.9.

BLM, nevertheless, argues that, in contrast to policy directives issued by BLM as provisions of the BLM Manual or as Instruction Memoranda, the Commodities Pricing Policy was issued by the Assistant Secretary, Land and Minerals Management, as “an exercise of the Secretary’s delegated authority,” and “is thus the policy of the Department and became binding on all bureaus and offices in the Department, including [OHA].” SOR at 12. BLM cites a provision relating to the Office of Hearings and Appeals, 212 DM 13.1. Under 212 DM 13.8 B, OHA may not “review a decision in a particular matter involving specific parties issued or approved by the Secretary, the Deputy Secretary, or an Assistant Secretary.” Importantly, the Commodities Pricing Policy upon which BLM relies does not purport to decide the “particular matter” of this contest involving this “specific” party.

We have explained on several occasions that while BLM employees may be obliged to follow internal BLM instructions, such instructions do not bind this Board or the public. *See Biodiversity Conservation Alliance*, 174 IBLA 174, 180 (2008); *Wyoming Outdoor Council*, 171 IBLA 153, 166-68 (2007), and cases cited; *Fallini v. BLM*, 162 IBLA 10, 38 (2004), and cases cited. In arguing here that the signature of the Assistant Secretary for Land and Minerals Management (rather than the BLM Director or other BLM official) on the statement of policy makes it binding on the

²⁹ “The policy statement is effective July 6, 2000, but BLM will accept public comments for 60 days. BLM will consider the comments and decide whether or not to amend this policy statement.” 65 Fed. Reg. at 41,724. No subsequent final rule or change was published after submission of comments, if indeed any were submitted at all. There was no claim of exemption from notice-and-comment procedures that would allow BLM to promulgate an immediately final rule under 5 U.S.C. § 553(b)(3)(B) (2006).

OHA, including the Hearings Division and this Board,³⁰ BLM misapprehends the import of *Blue Star* and the DM.

In *Blue Star*, Indian homestead patents had been issued to two individuals in 1911. In 1978, the Assistant Secretary for Indian Affairs issued an order cancelling the patents, for the purpose of returning the lands to trust status so that the Department could probate the estates of the two individuals. The Assistant Secretary also instructed the BLM Director to issue trust patents to the two individuals' heirs for the same lands. The BLM Director then issued a memorandum to the BLM New Mexico State Director instructing him to issue a decision cancelling the patents and issuing new trust patents. BLM subsequently issued decisions implementing those instructions. Lessees of various uranium leases on the lands involved appealed those decisions to this Board. In dismissing the appeal on the grounds that BLM's decisions in that case were not subject to the Board's review, the Board first quoted the delegations of authority to the Assistant Secretaries severally and to the OHA Director in the Departmental Manual. The Board then explained:

From these expressions we find that the authority which has been delegated to the Office of Hearings and Appeals and to its Director, for the purpose of its specific functions, is the equivalent of that delegated to each of the several Assistant Secretaries, *i.e.*, "all of the authority of the Secretary." Accordingly, each has the power to act with finality on matters within his or her own province. It follows that it was not contemplated that one officer who commands all of the authority of the Secretary should employ that authority to invade the province of another such officer who is not under his direct supervision. Thus, where an Assistant Secretary has made a decision or, prior to the filing of an appeal, has approved a decision made by a subordinate, that decision may not be reviewed in the Office of Hearings and Appeals since the full authority of the Secretary would have been exercised.

41 IBLA at 335-36.

³⁰ An Assistant Secretary's signature could oblige subordinates of the Assistant Secretary outside BLM—*i.e.*, the Minerals Management Service (MMS) and the Office of Surface Mining Reclamation and Enforcement (OSM) under the organizational structure in place at the time—to follow the policy. However, in this instance, the policy by its terms is directed only to BLM, and the policy is not relevant to MMS or OSM. 65 Fed. Reg. at 41,725. ("[T]he BLM is adopting the following Statement of Policy on the proper method to determine the market price of the mineral at issue." "Statement of Policy. The BLM will use the following steps to determine the price of mineral commodities when analyzing the economic marketability of a mineral deposit in determining the validity of a mining claim.").

[4] The situation in the instant case is not analogous. In issuing the Mineral Pricing Policy, the Assistant Secretary did not make a decision or adjudicate a dispute that determined rights or obligations of specific parties in a particular matter, unlike the situation in *Blue Star* and similar cases.³¹ The Assistant Secretary does not have authority to issue policy statements that bind all other offices of the Department not subordinate to the Assistant Secretary, or other Departmental officers who hold delegations of authority equivalent to the Assistant Secretary's, without the Department undertaking rulemaking under APA procedures.³² The instant appeal does not involve an attempt by the ALJ or this Board to review a matter already adjudicated or decided by another officer to whom is delegated all of the authority of the Secretary.

Had the Secretary personally issued the Mineral Pricing Policy, then the OHA, including the ALJ and this Board, as the Secretary's delegates, would be obligated to follow it. But the Assistant Secretary does not establish "policies . . . of the Department" within the meaning of 212 DM 13.1 that bind the Director of the OHA and the Boards and Divisions within the OHA. Accordingly, Judge Sweitzer correctly understood that the Mineral Pricing Policy, while instructive for BLM examiners, does not have the force and effect of law and is not binding on other offices or agencies of the Department outside BLM, including the OHA.

[5] As explained above, the ALJ held that applying the Mineral Pricing Policy in this case would be inappropriate because at the time of withdrawal, gold prices were on an upward trend and the expected life of the mine was short (one season).³³ He found it more appropriate to use the average monthly price for March 1972, the month of withdrawal, which ranged from \$48.33 per ounce to \$48.78, depending on the price source. ALJ Decision at 69-71. We agree with the ALJ's reasons, and agree

³¹ See *Marathon Oil Co.*, 108 IBLA 177 (1989); *Cook Inlet Region, Inc.*, 132 IBLA 186 (1995).

³² Nor was there any assertion in the Mineral Pricing Policy that the Assistant Secretary was purporting to act on the direction of the Secretary to bind all of the Secretary's other subordinates (such as the OHA) who are not the Assistant Secretary's subordinates.

³³ Applying the Mineral Pricing Policy in this case would average the monthly average price for March 1972 with the monthly average prices for each of the 36 months preceding March 1972. We may take official notice of the fact that there was no domestic gold futures market in March 1972. The statutory prohibition against private ownership of gold coins, bars, and certificates in the Gold Reserve Act of 1934 was repealed on Aug. 14, 1974, effective Dec. 31, 1974, by Section 2 of Pub. L. No. 93-373, 88 Stat. 445. There were no domestic gold futures contracts or futures contract trading before that time.

that the average monthly price just before the date of withdrawal is the most accurate representation of the market price for determining the validity of the claims under these circumstances.³⁴

III. *Costs of Mining, Milling, Etc.*

BLM disputes the ALJ's analysis of the costs of mining, milling, and other operations on several grounds. Specifically, BLM asserts that the ALJ used a wage rate that was too low, underestimated the number of employees that would be needed to operate the Banjo Mill and the costs of refurbishing the mill, and failed to include downtime and other costs.

A. *Labor Costs—the 1972 Wage Rate*

As explained above, the ALJ used a base wage rate of slightly more than \$2.66 per hour, plus an 18.59 percent “burden” for various taxes and worker’s compensation insurance, for a total of \$3.16 per hour. BLM contends that a reasonable person with the skills necessary to properly conduct the work required under the proposed mining operation—including operating heavy equipment and the generator, compressor, jaw crusher, ball mill, belt feeder, rake classifier, flotation cells, etc.—would not have accepted that wage to work in the Kantishna area in 1972. SOR at 15-17, 23-25. BLM argues that this is “less than the average wage for

³⁴ Judge Sweitzer stated: “Because the withdrawal date was March 16, 1972, more than halfway through the month of March, the average monthly price of gold in March 1972 more accurately represents the market price of gold at the time of withdrawal.” ALJ Decision at 71 n.14. The ALJ’s factual predicate appears to be incorrect. March 16, 1972, was the date the withdrawal was published in the *Federal Register*. The actual withdrawal date, according to the document, was March 9, 1972. Therefore, consistent with the principles that (1) validity of a claim must be determined by the value of the mineral as of the date of the withdrawal, and (2) a claim does not become valid because the market value of the mineral subsequently increased, as explained in the March 1998 Assistant Solicitor’s Memorandum, we conclude that the February 1972 average price, not the March 1972 average price, should be used because the March price was established by transactions occurring mostly after the date of withdrawal. However, given the fact that both Intervenor’s source, USA GOLD, Centennial Precious Metals, Inc., and the Government’s source, www.kitco.com, show an average price for gold in February 1972 that is only 7 cents per ounce less than the price per ounce for March 1972 (\$48.26 per ounce and \$48.33 per ounce)—a difference that is marginal, to say the least, and not significant to the outcome of the appeal—we see no reason to modify the Decision.

a fry cook in Anchorage in 1969,” while skilled operators of heavy equipment (such as bulldozers, cranes, drilling machines, and loaders) were making more than \$7.00 per hour in 1969. *Id.* at 17 (citing Ex. 47 Vol. 3 Att. 10 at 7-8). According to BLM, the “very low 1972 wage rates” the ALJ used “cannot attract workers with the skill level necessary to successfully operate the Banjo Mill at the designed production and recovery rates from the first minute of the first hour of mill operation and then continually from that point on until the end of the mining season.” *Id.* at 25. BLM also argues that almost all of Shearer’s evidence pointed to wage rates higher, not lower, than the rate Giffen used (\$4.54 per hour exclusive of burden)³⁵; that Giffen’s rate is consistent with the available objective market data; and that Judge Sweitzer’s reliance on the three letters that Mark Anthony supplied to Giffen regarding the local wage rate in 1972 was misplaced. BLM concludes that Shearer failed to meet his burden to demonstrate that a prudent small claim miner would have accepted less than \$4.54 per hour in 1972. *Id.* at 17-18, 25-27.

Shearer defends the three letters on which the ALJ relied. He asserts that nothing was presented to impeach these letters, and the fact that their authors were not present at the hearing “is not fatal to the letters being offered as evidence.” Answer at 24. Shearer also argues that in comparing the rate the ALJ used with wage rates for various jobs in Anchorage, BLM overlooked the benefits of the miner in Kantishna receiving room and board in addition to wages and the higher cost of living in Anchorage. *Id.* at 25. Shearer maintains that Giffen’s view of “what an ordinary miner would or would not accept are only Giffen’s opinions and are not based on a preponderance of the evidence.” *Id.* In its Reply, BLM asserts that Giffen’s research on wage comparisons for the labor market in 1972 preponderated on this issue and contends that Shearer did not rebut this evidence. BLM Reply at 9-11.

³⁵ With an 18.59 percent burden added, Giffen’s effective wage rate was \$5.39 per hour. ALJ Decision at 87; Ex. 47 Vol. 1 at 70; Tr. 198-99. When Giffen initially prepared his mineral report, he used a wage rate of \$7.45 per hour reported by the U.S. Bureau of Labor Statistics as the average earnings for miners in Alaska in 1972. ALJ Decision at 85; Tr. 249. One of the reviewers of his draft report observed that this figure was greatly influenced by large mines which typically pay a higher wage than a small miner could afford. Tr. 249-50; Ex. 47 Vol. 1 at 66. Giffen then examined mine wage data reported by Western Mine Engineering for the years 1984 and 1991-1996, extracted data for small mines in Alaska for positions such as heavy equipment operator and miner, and then adjusted those rates back to 1972 to derive an average 1972 wage for equipment operators for small Alaska mines of \$4.54 per hour. Ex. 47 Vol. 1 at 66-67; Ex. 38; Tr. 196-97, 250. His cost analysis was based upon that rate.

Judge Sweitzer recognized, as the examiners had found, that job-specific wage rate data was not available for the Kantishna area in 1972. *See* ALJ Decision at 84, 86. This fact, along with the size of the subject mine and operation, featured prominently in his analysis.

The ALJ found that the three letters that Mark Anthony supplied to Giffen preponderated over the other evidence and Giffen's analysis. ALJ Decision at 81, 87, 94.³⁶ The first letter was written by Richard C. Swainbank, Ph.D., State of Alaska Department of Commerce and Economic Development, on June 19, 1998, in response to an inquiry by Mark Anthony regarding the existence of official records documenting the wages paid in the placer mining industry from 1971 to 1972. ALJ Decision at 81-82; Ex. 47 Vol. 1 at 65, Vol. 3 Att. 10 at 5. Though Swainbank could not find any official wage records from that time, he added his own experience:

However, in 1971 I worked for Resource Associates of Alaska exploring the Golden Zone area about 40 miles southeast of the Kantishna, and because I had an advanced degree I was one of the higher-paid employees on the crew, at \$850 per month from July through September. The contract terms were standard, 6 days per week, 12 hours per day with very basic tent accommodation and food. That would work out to be about \$2.67 per hour.

Ex. 47 Vol. 3 Att. 10 at 5. He further explained that “[i]n 1972 I could not find any mineral related work” and expressed the view that “[i]t is clear that 1972 was a very depressed time for the mining industry, with a lot of people looking for work.” *Id.* Giffen contacted Swainbank by telephone on April 11, 2000. Giffen's conversation record confirms that Swainbank verified the wage information in his letter to Mark Anthony. Ex. 47 Vol. 1 at 65, Att. 3 at 22. In fact, after speaking with Swainbank, “Giffen went so far as to admit that he ‘can’t refute what Dick says.’” ALJ Decision at 88 (citing Ex. 47 Vol. 1, Att. 3 at 6).

The second letter, dated July 10, 1998, is from Mark Anthony to Russell Kucinski with the stated purpose of providing “additional information to verify employment and mining wages in 1972.” ALJ Decision at 82-83; Ex. 47 Vol. 3, Att. 10 at 3-4. Mark Anthony outlined his personal experience working in mines during the early 1970s, stating that in 1974 he worked as a miner for 3 months for Bliss and Sons at a mine near Nome where he was paid \$550.00 per month to work 12 hours per day, 7 days per week. He reported that in 1975 he worked for 3 months

³⁶ As noted previously, he took the average of the rates stated in these letters (converted to an hourly rate), but with an 18.59 percent burden added to them, to derive a total hourly wage rate of \$3.16 (a base rate of slightly more than \$2.66 per hour, plus burden).

for Mark III Exploration, in charge of drilling and blasting on the Pyrola mining property located on Admiralty Island, where he was paid \$850.00 per month to work 10 hours per day, 7 days per week (the equivalent of \$2.83 per hour). Mark Anthony's letter also stated: "According to Brigitta Windisch-Cole, Labor Economist for the Research and Analysis Section of the Alaska Department of Labor, 'a labor figure including burden for a miner in Kantishna in 1972 of approximately \$2.60 per hour would not be unreasonable.'" Ex. 47 Vol. 3, Att. 10 at 3-4. Mark Anthony also cited Swainbank's letter.

Giffen contacted Windisch-Cole to discuss Mark Anthony's statement that she concurred with a \$2.60 per hour wage rate for a miner in Kantishna in 1972. Giffen states: "Ms. Windisch-Cole indicated that she would never have made a statement to that effect because the Alaska Department of Labor does not collect wage data specific to the Kantishna area." Ex. 47 Vol. 1 at 65; *see* Ex. 47 Vol. 1 Att. 2 at 5. Following the conversation, Windisch-Cole provided Giffen copies of two Alaska Department of Labor reports for wage rates of various employers in Anchorage, Alaska, as of 1969 and 1974. The reports are not specific to the Kantishna region, and the 1969 report does not list a going wage rate for miners.

The third letter, dated April 9, 2000, was from Jim Bliss of Bliss and Sons. ALJ Decision at 83-84; Ex. 47 Vol. 3 Att. 10 at 1. The letter stated that Bliss' family operated a gold mine at Ungalik, Alaska (near Unalakleet on the west coast of Alaska on Norton Sound), from 1958 to 1992, and that from 1970 to 1974, they hired service operators for \$550 per month and experienced operators for \$800 per month to work 12 hours per day, 7 days per week, with room and board. *Id.*; Ex. 47 Vol. 3 Att. 10 at 1.

Giffen contacted Bliss by telephone. According to Giffen's conversation record, Bliss confirmed that the employees of his father's small placer mining operation worked in twelve hour shifts for \$800 per month in the early 1970s, with no benefits. In the rare instances in which workers lasted the entire season, they were given a bonus of \$100 per month at the end of the season. Ex. 47 Vol. 1 Att. 3 at 23.³⁷

As we noted in *United States v. Feezor*, 130 IBLA 146, 200 (1994):

To establish the preponderance of the evidence means to prove that something is more likely so than not so; in other words, the 'preponderance of the evidence' means such evidence, when considered and compared with that opposed to it, has more convincing force and

³⁷ The ALJ recognized that "the wages that were actually received by these men did not include the burden expense that their employers incurred in addition to the wages paid their employees." ALJ Decision at 89.

produces in your minds belief that what is sought to be proved is more likely to be true than not true.

quoting *South-East Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767, 778 (6th Cir. 1970), and citing *Winston L. Thornton*, 106 IBLA 15, 19-20 (1988), and *Thunderbird Oil Corp.*, 91 IBLA 195, 201 (1986), *aff'd sub nom. Planet Corp. v. Hodel*, CV No. 86-679 HB (D. N.M. May 6, 1987). In *Feezor*, we further explained:

We recognize that the Board has long noted that substantial deference is accorded to findings of Administrative Law Judges on conflicting evidence, based on the reality that the trier of fact has a unique opportunity to observe the various witnesses and judge the weight to be accorded their testimony. *See, e.g., Holland Livestock Ranch*, 52 IBLA 326, 350, 88 I.D. 275, 289 (1981), *rev'd on other grounds*, 714 F.2d 90 (9th Cir. 1983); *United States v. Chartrand*, 11 IBLA 194, 212, 80 I.D. 408, 417-18 (1973). But, we have also cautioned that this deference is not absolute, particularly where the Judge's determination of credibility is not premised on demeanor evidence. *See Bureau of Land Management v. Ericsson*, 88 IBLA 248, 262-64 (1985) (separate opinion).

130 IBLA at 200-01.

In the instant case, the ALJ's determination is not based on demeanor evidence. Neither Swainbank nor Bliss nor Mark Anthony appeared at the hearing, and thus they were not available for further questioning or cross-examination. The ALJ had to make an independent judgment based solely on the documentary evidence, as must we.

In *United States v. Clouser*, 144 IBLA 110 (1998), the claimants in a mining contest challenged the ALJ's use of the prevailing wage rate for miners in the western states of \$12.11 per hour for August 1990 (the time of the hearing) rather than the Federal minimum wage rate for the same month of \$5.64 per hour. The Board observed:

In conducting a profitability analysis, we have held that the labor costs to be used are those that reflect the "value that an ordinary person would expect to receive for his labor." *United States v. Whitney*, [51 IBLA 73, 84 (1980)]. This is true whether the work is to be performed by the claimants or hired help. *See United States v. White*, 72 I.D. 522, 526 (1965), *aff'd*, *White v. Udall*, No. 1-65-122 (D. Idaho Jan. 6, 1967), *aff'd*, 404 F.2d 334 (9th Cir. 1968). As a general proposition, the value that an ordinary person would expect to receive

may depend to some extent on the nature of the work to be performed and on the nature of the mining operation (whether large or small). It may also be true, as Appellants assert, that small operators “must, out of economic necessity, pay less [than large operators].”

144 IBLA at 129.

The question, therefore, is whether the contestant has preponderated in showing that Judge Sweitzer erred in determining that the Swainbank, Mark Anthony, and Bliss letters preponderate over the wage schedules on which Giffen relied. Like the ALJ, we note that Giffen’s conversation with Windisch-Cole discredited the representation in Mark Anthony’s letter that she had told him \$2.60 per hour was a reasonable wage for a miner in Kantishna in 1972. However, Giffen’s other conversations, as he reported them, fully corroborate the remainder of Mark Anthony’s representations and Shearer’s assertions.

We agree with Judge Sweitzer that wage rates effective *in Kantishna in 1972* are the most accurate reflection of the market wage rates that workers would have been paid there, not the wage rates relied upon by Giffen. ALJ Decision at 87. We come to this conclusion, as did Judge Sweitzer, because “Giffen’s wage rates, which are based on wage rate data that has been indexed back at least 12 years and up to as much as 24 years, is necessarily less accurate than a wage rate based on actual mine labor wage rate data from 1972.” *Id.* at 88.³⁸ Moreover, we agree with Giffen and Judge Sweitzer that wages *at small mines* “more accurately reflect what could be expected for wage rates at the Banjo and Pass claims.” ALJ Decision at 86 (quoting Ex. 47 Vol. 1 at 66). Finally, like Judge Sweitzer, we also are convinced of the credibility and significance of the Swainbank, Bliss, and Contestee reports of regional wage rates for small mine operations in 1972 given the close similarity of their independent figures, *i.e.*, they are all within fifty dollars of one another. *Id.* at 88.

In light of the record before us, we find that Judge Sweitzer’s weighing of the evidence and his determination that a wage rate of approximately \$2.66 per hour (exclusive of burden, or \$3.16 per hour including burden) in the Kantishna area of Alaska in 1972 was reasonable and well-supported by the evidence, and, therefore, affirm Judge Sweitzer’s determination as to the preponderance of the evidence bearing on the applicable wage-rate for this size operation in Kantishna in 1972.

³⁸ See BLM’s Handbook for Mineral Examiners, Ex. 39 at V-9 (“Cost indexing works best to update costs of individual pieces of equipment or processes over a short term.”)

B. *Number of Employees Needed to Operate the Banjo Mill*

BLM also challenges Judge Sweitzer's conclusion that the operation would require only three, and not four, individuals to operate the mill under the proposed milling plan. SOR at 49-51. Giffen had concluded that four people would be required, two per 12-hour shift. Ex. 47 Vol. 1 at 73. Giffen's view was based in part on the operation of a modularized portable 100-ton-per-day gravity and flotation mill manufactured by the Blue Range Milling Corp., which was designed to be operated by two men per shift. *Id.*; see Ex. 47 Vol. 3 Att. 9 at 3.

According to the Giffen Mineral Report, the Banjo Mill has a grizzly on the first level that passes 1-inch-minus material to a fine ore bin on the second level. Material larger than 1 inch passed through an electric-motor-powered jaw crusher on the first level and then to the fine ore bin. A belt feeder moved ore from the fine ore bin to a ball mill on a third level powered by a 50-hp electric motor. In the ball mill, the ore was mixed with water and steel balls and ground to the consistency of fine sand. The ball mill discharged into a mineral jig powered by another electric motor that recovered gold concentrate in the jig hutch. The overflow from the jig passed through a rake classifier powered by yet another electric motor. Coarse material from the rake classifier was sent back through the ball mill, while fine material went to two Wilfley tables on the fourth and fifth levels powered by two more electric motors. Gold was recovered on the tables. The table middlings were sent through one of three flotation cells for further concentration. The jig hutch concentrates and the concentrated material from the flotation cells were amalgamated in an amalgamation drum on the third level. Gold amalgam was then taken to a small Montag furnace on the sixth level in which the amalgam was retorted, recovering gold and mercury. A 6-cylinder Caterpillar diesel engine and the electric generator it powered (the power source for the mill and the mine and camp operations) was located on the third level. Ex. 47 Vol. 1 at 25.

Judge Sweitzer reasoned that "the Blue Range portable mill has little in common with the Banjo Mill, except that both mills have gravity flotation circuits." ALJ Decision at 120. He noted that the Blue Range mill was designed to process 100 tons of ore per day, in contrast to the Banjo Mill's 36 tons per day. But the Blue Range mill's ore bin would hold only 15 tons. Thus, he observed, the Blue Range mill's ore bin would have to be refilled every 3 hours for 20 hours to process 100 tons. *Id.* The ALJ inferred: "Presumably, one employee would be needed per shift to fill the fine ore bin with crushed ore, and one employee per shift to oversee the grinding and flotation circuits." *Id.*

He then contrasted the Banjo Mill, which had only a 36-ton-per-day processing capacity but a fine ore bin that could hold 160 tons. Thus, the ore bin could hold more material than could be processed in one shift. He further noted that the jaw

crusher needs to operate for only 8 hours to crush 36 tons of ore, the maximum daily capacity of the ball mill. ALJ Decision at 120-21. The ALJ concluded:

These facts show that the Banjo Mill's circuit, like the Red Top Mill's circuit, would be able to crush enough ore in only one shift to continuously feed the mill for 24 hours. Therefore, the Banjo Mill, unlike a Blue Range portable mill, can be operated by three mill employees. Two mill employees would be needed during the first mill shift—one to crush the ore and fill the ore bin, and one to oversee the milling circuit. Because enough ore can be crushed and stored in the fine ore bin during the first shift to feed the ball mill for the entirety of both shifts, only one employee would be needed during the second shift to oversee the milling circuit. As Intervenor contends, the evidence therefore contradicts Mr. Giffen's determination that the Banjo Mill must be staffed with two mill employees for the second shift.

Id. at 121. The ALJ presumes that one employee in the Blue Range mill on both shifts is committed exclusively to crushing ore and filling the fine ore bin. He then extrapolates that one employee in the Banjo Mill on one shift is committed exclusively to that function, while the other employee conducts and oversees all other mill operations. BLM argues that it would be difficult, and perhaps impossible, for one person to conduct all the mill's operations on the night shift. SOR at 50. We agree that the work will be difficult, but cannot find that BLM has preponderated in showing that Judge Sweitzer erred in his assumptions and determination. *See* ALJ Decision at 122.

C. Refurbishing the Banjo Mill

BLM contends that Judge Sweitzer seriously underestimated the costs of refurbishing the Banjo Mill to operating condition. BLM argues that the ALJ relied on a discredited affidavit regarding the mill's condition and improperly discounted evidence that the Banjo Mill needed major, and thus costly, reconstruction after 30 years of non-use (as Giffen had determined). Thus, according to BLM, the ALJ seriously underestimated both the capital and labor cost of refurbishing the mill. SOR at 46-49.

After research and discussions with expert consultants, Giffen determined that refurbishing the mill in 1972 would have required

replacement of all rubber components, including all drive belts, rubber Wilfley table covers, rubber pipe and pump connections, and jig diaphragms. Bearings would need to be cleaned and re-lubricated or replaced. Electrical wiring and switch boxes would need to be

replaced/refurbished due to corrosion and/or theft. All pumps would likely need to be replaced. Timbers supporting the jaw crusher would need to be replaced. Electric motors would need a good cleaning and lubricating, at least; undoubtedly some would need replacing. Additionally, guards will have to be fabricated and placed on all motors, belts, and other moving mill equipment for the protection of the mill workers.

Ex. 47 Vol. 1 at 82.³⁹ Giffen further concluded:

I estimate that 50 percent of the original mill equipment installation labor will be required to refurbish the Red Top Mill equipment and to bring it into a reliable production mode in 1972 (1,050.5 hours). This will include refurbishing the power plant. The mill building will require major reconstruction for safe operations. Mill building reconstruction labor is estimated at 25% of the original mill building construction labor estimate (2,750 hours, Denver Equipment Handbook (1953 p. 524)[]) or 687.5 hours in 1972.

Id. at 84.

Judge Sweitzer agreed with Giffen's assessment that the mill was not operational on the withdrawal date and needed to be refurbished. ALJ Decision at 103-08. Judge Sweitzer had no disagreement with any of the work Giffen specified as necessary to refurbish the mill equipment and bring the mill into operating condition. However, Judge Sweitzer excluded Giffen's mill building reconstruction labor estimate as part of the capital cost estimate for refurbishing the Banjo Mill because "[a] preponderance of the evidence demonstrates, however, that the Banjo Mill building did not need 'major reconstruction' on the withdrawal date." ALJ Decision at 111. Beyond relying on an affidavit by an older gentleman who had performed assessment work for Red Top Mining on the Banjo claims in 1969-1972 (including minor repair work on buildings on the claims) and Bundtzen's observation of the mill in 1975, *see id.* at 111-12, the ALJ seemed most influenced by Giffen's own

³⁹ The Giffen Mineral Report generally refers to the Banjo Mill as the "Red Top Mill." Giffen explains that this is not to be confused with the "Red Top Mill" located on the nearby Red Top claim that was constructed after the date of withdrawal. Ex. 47 Vol. 1 at 89. Giffen noted: "Some of the mill equipment from the Red Top Mill on the Banjo claim was used in the construction of the Red Top Mill on the Red Top claim." *Id.* Following the ALJ's convention to avoid confusion, we have consistently referred to the "Red Top Mill on the Banjo claim" as the "Banjo Mill." *See* ALJ Decision at 8 n.5.

statements in the discussions with the expert consultants that indicated that Giffen believed that the mill building was in good condition in 1972.

The ALJ quoted the record of Giffen's conversation with one of the consultants, in which Giffen apparently stated that "the mill building has been well maintained keeping the weather out of the building since 1942." ALJ Decision at 112 (quoting Ex. 47 Vol. 1 Att. 3 at 6). Judge Sweitzer also quoted the record of Giffen's conversations with a second consultant, in which Giffen apparently stated that "[t]here was a caretaker for the mill through the early 1970s and the mill building was kept in good repair through this time. Though not operating since the mill closure in 1942, the mill was kept intact and out of the weather through the early 1970s." ALJ Decision at 112 (quoting Ex. 47 Vol. 1 Att. 3 at 9). The same conversation record added that "[t]he following assumptions are made of the mill: 1) The mill building was in good condition in 1972 . . . 3) Maintenance of the mill building was less diligent after the early 1970s, thus requiring some repairs before the building could be made safe for occupation/operation today (1999)" *Id.*⁴⁰ On this basis, the ALJ concluded: "All of the evidence regarding the condition of the Banjo Mill building on or around 1972 contradicts a finding that the Banjo Mill building required major reconstruction on the withdrawal date." ALJ Decision at 113.

BLM challenges the witness testimony accepted by Judge Sweitzer that describes the Banjo Mill to be in good condition as non-credible, but offers no contrary evidence other than the 1939 report and Giffen's report and testimony. SOR at 46-49. BLM argues that "[c]ommon knowledge would suggest that wood products used in the original construction 33 years before . . . would be susceptible to rot" and that "after 33 years, there was likely rotting wood which would require additional work to make the mill safe for the workers." *Id.* at 47, 48.

Photographs taken during the 1999 examination show the inside of the mill building as quite dilapidated, with temporary timber supports put in at various points, apparently to prop up different levels. Ex. 47 Vol. 4 Att. at 18-25. But the question is what the condition of the building structure was in 1972, 27 years before the photographs were taken. We share BLM's concern that there could be timber rot issues with a wooden building that was subject to the effects of 30 consecutive Alaska winters without serious maintenance. One might question whether all or almost all of the deterioration in the condition of the structure evident in the 1999 photographs would have occurred in the most recent 27 years before the 1999 mineral

⁴⁰ Giffen's testimony at the hearing, Tr. 182, cited a 1939 report as describing foundation problems with the mill (*see* Ex. 17 at 3), but the ALJ found that the report did not support Giffen's determination that the Banjo Mill building required a major reconstruction due to foundation problems. ALJ Decision at 112-13.

examination, and none or very little of it in the previous 30 since the mill ceased operation. Giffen's statements and testimony, taken together, indicate that he initially assumed or believed, in the 1999-2000 time frame, that the mill building structure was in satisfactory condition in 1972 and deteriorated in later years, and then changed his mind before preparing his report.

Based on the record before us, we are unable to say that BLM's speculation regarding the condition of the building after 30 years, though perhaps reasonable as a matter of practical judgment, is sufficient to show error in Judge Sweitzer's decision on the issue of whether a major reconstruction of the mill building was necessary in 1972.

The ALJ included an extensive analysis of capital costs. With respect to one part (capitalization of some mill equipment) of one element of capital costs (cost of milling), Shearer asserts that the record establishes that both mills were essentially operational on March 16, 1972, and, with about a week's worth of labor in 1972, would have been available to mill the ore. Moreover, he asserts that constructing a portable/modularized mill, as contestee, Mark Anthony, had originally proposed, would cost less than refurbishing the Banjo mill (constructed in the 1930s).⁴¹

To be clear, in discussing milling costs, the ALJ looked at the testimony and the record and found that "all of the evidence regarding the condition of the Banjo Mill building on or around 1972 contradicts a finding that the Banjo Mill building required major reconstruction on the withdrawal date." ALJ Decision at 113. He made specific, detailed findings regarding the costs of labor and the costs to rent and purchase construction equipment, and supplies needed to refurbish the mill, and added them together for estimated 1972 "capital costs" of refurbishing the mill, totaling \$9,432.58. Here, as elsewhere throughout his decision, Judge Sweitzer reasonably exercised practical, judicial economy, counting it unnecessary to undertake an additional analysis of the potential capital costs of constructing a new mill, as advocated by Shearer. He stated:

It is unnecessary to decide whether it would have cost less to construct a portable/modularized mill than refurbish the Banjo Mill, [as Intervenor contends], because[, even including the capital costs of refurbishing the mill,] Intervenor has succeeded in establishing that there was a reasonable prospect on the withdrawal date that the commercial value of the mineral that could be recovered in one mining

⁴¹ As Judge Sweitzer notes, Giffen had reasoned that refurbishing the equipment would actually require more labor than was required in installing it, since it would have to be uninstalled, partially disassembled, reassembled, and reinstalled. ALJ Decision at 110 citing Ex. 47 Vol. 1 at 83.

season using the refurbished Banjo Mill would have exceeded the cost of extracting, processing, transporting, and marketing the mineral. Therefore, this Decision assumes, without deciding, that a prudent man would have used the refurbished Banjo Mill and incorporates into the economic analysis the capital costs of refurbishing the mill.

ALJ Decision at 114-15.

D. The Cost of Capital

The final element is the cost of capital or finance charge, *i.e.*, the product of the loan amount (total estimated capital and operating costs), the duration of the loan in months, and the monthly interest rate. ALJ Decision at 163. The ALJ noted that there was no dispute over the duration of the loan, assumed to equal the number of camp days (122 days or 4 months), and that the issue in dispute is the appropriate interest rate that the operator would have had to pay to finance the total estimated capital and operating costs. He observed that neither the 10 percent annual interest rate Giffen used nor the 6 percent interest rate Shearer used was supported by any reference or documentation. *Id.* at 164; *see* Ex. 47 Vol. 1 at 84, 80, 88, Att. 3 at 21. Here too, however, Judge Sweitzer determined that “resolution of this dispute is unnecessary because even if Mr. Giffen’s higher annual interest rate is assumed to be more accurate and adopted, Intervenor has still succeeded in establishing that there was a reasonable prospect on the withdrawal date that the commercial value of the 2,754-ton operation would have exceeded the total of its capital, operating, and finance costs.” *Id.* at 163-64. Accordingly, Judge Sweitzer adopted the 10 percent (0.8333% monthly) interest rate. *Id.* at 164. We concur.

E. Additional Costs Not Estimated—Downtime Costs

BLM disputes Judge Sweitzer’s decision not to consider the cost of downtime, *e.g.*, when the mill is not operating due to necessary repairs. SOR at 52-53. Judge Sweitzer noted that there was “no indication in the record as to how costs for lost time should be estimated” and that Giffen in effect acknowledged as much. ALJ Decision at 166. Judge Sweitzer concluded:

In the absence of some indication of the amount of a cost associated with mining a claim, there is no basis for ascertaining the amount and therefore the cost will not be considered in analyzing the marketability of the claim. *See United States v. Miller*, 138 IBLA 246, 272 n.15 (1997) (costs will not be considered where they are merely mentioned without some indication of the amount of the costs; there must be some basis in the record for the administrative law judge to ascertain what the costs might be); *see also United States v. Gillette*,

104 IBLA 269, 275 (1988) (without specific cost data, profit analysis is of little probative worth). Thus, a cost for lost time cannot be considered in determining the marketability of the subject claims on the withdrawal date.

Id. Our precedent is clear: simply raising the specter of other costs, without some evidence as to their amount, is insufficient to put a claimant to any proof on the issue, and such costs will not be considered in determining the validity of a mining claim. *See United States v. Miller*, 138 IBLA at 272 n.15.⁴²

IV. Validity of the Claims on the Date of Withdrawal

The foregoing analysis indicates that a prudent person would have expected to operate a mine on the Banjo and Pass claims and extract and market minerals from those claims at a profit as of the date of withdrawal of the lands in 1972. In our view, the ALJ did not significantly overestimate the quantity and value of minerals on the claims, nor did he underestimate the costs of mining and milling.

Consequently, we hold that the Banjo and Pass claims are supported by a discovery of a valuable mineral deposit at the time of withdrawal.⁴³

⁴² Moreover, as Judge Sweitzer noted, even if a 10 percent additional contingency cost to account for unexpected expenses were added, there would still be a profit upon which “a person of ordinary prudence would have been justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.” ALJ Decision at 168.

⁴³ We have considered Shearer’s assertions that the claims could be found valid based on his concept of aggregating the reserves in the Banjo and Pass claims with alleged additional gold reserves in other claims in the vicinity or by using the Red Top Mill (on the Red Top claim). *See* note 19 above. In our view, the evidence in the record does not support either of these theories. Further, the ALJ correctly determined that the Red Top Mill was constructed in 1973, and thus did not exist on the date of withdrawal. *See* ALJ Decision at 96-101. In addition, to the extent not expressly or impliedly addressed in this decision, all errors of fact or law alleged by BLM have been considered and are rejected. *See National Labor Relations Board v. Sharples Chemicals, Inc.*, 209 F.2d 645, 652 (6th Cir. 1954); *Glacier-Two Medicine Alliance*, 88 IBLA 133, 156 (1985).

Conclusion

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Sweitzer's decision dismissing the Government's complaint against the Banjo and Pass lode mining claims contesting the validity of the claims on the sole basis that minerals were not found within the limits of these claims in sufficient quantities or qualities to constitute a discovery of a valuable mineral deposit on March 16, 1972, the date when the land encompassing the claims was withdrawn from mineral entry, is affirmed.

_____/s/_____
Christina S. Kalavritinos
Administrative Judge

I concur:

_____/s/_____
James F. Roberts
Administrative Judge