



UNITED STATES v. DAVY LEE WATERS ET AL. (ON RECONSIDERATION)

159 IBLA 248

Decided June 17, 2003

Editor's Note: Appeal Filed, 236 Fed. Appx 258 Civil No. 03-30730 CO (D. OR.), *aff'd sub nom.*, *Waters v. Josie*, 2006 WL 2385289, (Aug 17, 2006), *aff'd*, 236 Fed Appx 258 (May 24, 2007).



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.

DAVY LEE WATERS ET AL.  
(ON RECONSIDERATION)

IBLA 93-359R

Decided June 17, 2003

Petition for reconsideration of United States v. Waters, 146 IBLA 172 (1998), which affirmed, as modified, a decision of Administrative Law Judge Harvey C. Sweitzer declaring the Garden Spot Association Placer Mining Claim invalid after a patent application contest hearing. OR MC 88146.

Petition denied.

1. Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Discovery: Marketability--Rules of Practice: Appeals: Reconsideration

A petition for reconsideration of a Board decision declaring a mining claim invalid for lack of discovery of a valuable mineral deposit is properly denied, when the petitioner merely asserts that the Board erred in its economic analysis by using the percentage of wages offered by BLM as labor overhead costs, because those costs do not reflect the expenses for a self-employed miner, but fails to offer any evidence of what his labor overhead costs, as a self-employed miner, will be. The burden is not on an administrative law judge or this Board to select a percentage of labor overhead expenses for the self-employed miner in such a situation.

APPEARANCES: James R. Dole, Esq., Grants Pass, Oregon, for petitioners; Eric W. Nagle, Esq., Office of the Regional Solicitor, U. S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

## OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Davy and Sannaraha Waters have filed a petition for reconsideration of this Board's decision in United States v. Waters, 146 IBLA 172 (1998). In that decision this Board affirmed, as modified, the amended decision of Administrative Law Judge Harvey C. Sweitzer, dated April 14, 1993, declaring the Waters' Garden Spot Association Placer Mining Claim (OR MC 88146) null and void for lack of discovery of a valuable mineral deposit.

The Waters filed a patent application with the Bureau of Land Management (BLM) on January 7, 1987, seeking a patent for their claim. After reviewing that application, BLM initiated a contest complaint on March 27, 1991, charging lack of discovery of a valuable mineral deposit.<sup>1/</sup> The mining claim contained three types of gold-bearing reserves: Streambed gravels, premined gravels remaining from former hydraulic mining operations, and high bench "virgin" gravels. At the conclusion of the 6-day hearing conducted by Judge Sweitzer on the contest complaint in April and May 1992, the Government moved for summary decision, asserting that the Waters had failed to meet their burden of overcoming the Government's prima facie case and establishing a discovery by a preponderance of the evidence, because their evidence introduced at the hearing related primarily to streambed and premined placer deposits on the claim, which were not cited as discovery points in the patent application, had not been discovered at the time the mineral entry certificate was obtained on October 11, 1990,<sup>2/</sup> and had not been identified as a discovery at the time of the validity examination. (Tr. 765-70.)

Judge Sweitzer took that motion under advisement and, on July 8, 1992, issued an order allowing the resampling of the premined and streambed gravels. Thereafter, he reopened the hearing in December 1992 to receive additional evidence concerning the results of that resampling. Evidence presented at that hearing included Government Exhibit 35, which contained an economic cost analysis of the sampling, including an estimate of labor overhead expenses expressed as a percentage (25%) of wages. (Exh. 35 at 7.) The Waters objected to introduction of

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<sup>1/</sup> BLM subsequently requested and received from Judge Sweitzer leave to amend the Government's complaint to include an additional charge: "[T]he contestees[] primary use and purpose for the land is not mining. Contestees use the land primarily as a principle [sic] place of residence and other uses not related to mining." Given his disposition of the case, Judge Sweitzer found it unnecessary to rule on that charge. (Decision at 21.)

<sup>2/</sup> This is the date of issuance of the first half mineral entry final certificate in this case, which Judge Sweitzer held, citing United States v. Whittaker (On Reconsideration), 102 IBLA 162 (1988), was the date on which a discovery of a valuable mineral deposit had to exist.

this cost analysis at the hearing on the ground that it went beyond the purpose and scope of both the additional sampling and the second hearing, which, they asserted, were intended only to verify the values testified to on their behalf at the initial hearing, particularly of the streambed gravels. (Tr. 999-1000.) In support of their objection, the Waters stated that they did not have the evidence necessary and were not prepared to rebut the cost analysis evidence. (Tr. 1007.) Exhibit 35 was ultimately admitted into evidence, subject to the Waters' right to object to the contents of the exhibit. (Tr. 1077-1080.)

In his decision, Judge Sweitzer found that the virgin gravels, the premined gravels, and the streambed gravels constituted separate mineral deposits and that there was no discovery of gold in the premined gravels or streambed gravels prior to October 11, 1990. For that reason, he determined that evidence of gold found in those deposits was irrelevant to the validity of the claim. Therefore, Judge Sweitzer analyzed only the evidence of the value of gold per loose cubic yard (LCY) of the virgin gravel deposits and the evidence of the costs of mining and recovering that gold.<sup>3/</sup> He concluded that the costs of mining the virgin gravels, as set forth in his decision at 14-17, which did not factor in any additional labor overhead costs, exceeded projected revenues.

Judge Sweitzer addressed the Waters' objections to Exhibit 35, which included the labor overhead cost estimate, as follows:

The July 8, 1992 [resampling] Order specifically contemplates that the resampling results "shall be used as the basis for an economic analysis using the general mining method and production rates proposed by the claimants at the hearing in this matter." BLM complied in good faith with this order by Mr. Capps [the BLM mineral examiner] reviewing the resampling results, finding that the values were generally lower than the values obtained by contestees, performing an economic analysis based upon contestees' general mining method and production rates,

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<sup>3/</sup> In commenting on the evaluation study offered by the Waters in support of the validity of their claim (the "Mitchell/Tuchek Report"), Judge Sweitzer noted that "[n]o labor costs were included in these cost projections [for mining the virgin gravels] with the explanation it was because the Waters plan to conduct the mining operation themselves, (Tr. 466, 672, 679, 706, 708; Ex. J, p. 4)." Judge Sweitzer held that "[t]he failure to include labor costs is contrary to established law," citing United States v. Garner, 30 IBLA 42, 67 (1977). The Waters did, however, in an amendment to their patent application offer projected labor costs for two people of \$18.75 per hour (\$13.75/hour for an equipment operator and \$5.00/hour for a laborer (see Ex. 20)), which Judge Sweitzer utilized to calculate a labor cost of \$3.75/LCY. (Decision at 14.)

concluding that no discovery of a valuable mineral deposit existed (Tr. 1039-1040; Ex. 35), and thus refusing to dismiss the action.

Contrary to contestees' contentions, BLM (Mr. Capps) was not limited by the July 8, 1992, Order merely to comparing contestees' values with the resampling values or to using contestees' cost figures in completing its economic analysis. BLM was entitled to perform an economic analysis using its own cost projections based upon contestees' general mining method and production rates.

(Decision at 20.)

In our decision in United States v. Waters, we rejected Judge Sweitzer's holding that "the premined gravels and the streambed gravels constituted separate mineral deposits not known to exist on October 11, 1990," and undertook de novo review of the record in the case. 146 IBLA at 184-85. In doing so, we generated our own economic analysis of the viability of mining the virgin gravels, as well as the premined and streambed gravels. In our decision, we stated at 187-88:

Appellants testified that they planned to operate the claim without hiring any help. The assertion that labor costs need not be considered because claimants plan to do the work themselves is contrary to long-established precedent. "There is no reason to consider the value of the labor of a locator or the use of his mining equipment any differently from that which he might hire. Either one must be taken into consideration in determining the likelihood of a profitable venture being established." United States v. Garner, 30 IBLA 42, 67 (1977). As the Administrative Law Judge properly noted, the value of the claimants' labor must be considered in determining whether a prudent man would invest his labor and capital with a reasonable prospect of success in developing a paying mine. United States v. Alexander, 17 IBLA 421 (1974); United States v. White, 72 I.D. 522, 526 (1965), aff'd, White v. Udall, 404 F.2d 334 (9th Cir. 1968).

The labor rate of \$13.75/hour for an equipment operator and \$5/hour for a laborer used in appellants' revised cost estimates submitted after completion of the Government sampling (Ex. 20 at Attachment 7; Tr. 292) was deemed reasonable by the Administrative Law Judge. When wages are paid overhead expenses are incurred. These expenses include costs such as unemployment taxes, workers' compensation contributions, and social security contributions. Although it is lacking in detail, the best evidence of these costs is found on page 7 of Exhibit 35. We accept that estimate of 25 percent of the amount paid

in wages for the purpose of this analysis. <sup>4/</sup> Adding this amount to the direct labor cost [\$3.75/LCY] and dividing by appellants' proposed mining rate of 5 LCY/hour results in a \$4.69 per LCY total labor.

In their petition for reconsideration, the Waters assert that the Board misapplied the law with respect to the economic costs of a mining claimant's labor in this case. They argue that "[t]he primary basis for the Board's inflated labor rate is the application of a surcharge of 25% for unemployment taxes, workers compensation contributions, and social security contributions as the BLM examiner has posited." (Petition at 6.) It is their position that when claimants' plan is to work mining claims themselves such costs cannot be included in the labor rate. While they admit that such persons would pay self employment taxes, they do not reveal what such taxes would be in their situation. In fact, they argue only that "it is improper to add 25% to the per hour labor rate which Judge Sweitzer deemed reasonable." Id. at 7. They further contend that

[e]liminating the 25% tax surcharge returns the labor rate to \$3.75/LCY, just as Judge Sweitzer determined. See Sweitzer Decision at p. 14. That reduces the operating cost of mining the virgin gravels to \$5.97/LCY and results in a profit of \$.19/LCY. The operating cost of mining the pre-mined reserves is reduced to \$5.33/LCY for a profit of \$.16/LCY. The operating cost of mining the Galice Creek reserves is reduced to \$14.40/hour for a profit of \$2.82/hour.

Id. at 7-8.

The Waters assert that "the Board should reconsider and reverse its October 30, 1998, decision or remand it for further hearing." Id. at 3-4.

The regulation governing the filing of petitions for reconsideration provides that "[t]he Board may reconsider a decision in extraordinary circumstances for sufficient reason." 43 CFR 4.403. For the reasons stated below, we conclude that appellants have failed to show that there are extraordinary circumstances in this case for granting reconsideration or sufficient reasons for doing so.

[1] The Waters had the opportunity at the hearing to offer their own cost estimates, including labor overhead. They did not do so. <sup>5/</sup> In briefing to Judge

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<sup>4/</sup> We applied the 25% overhead expense to our analysis, not only of the virgin gravels, but of the premined and streambed gravels as well. 146 IBLA at 191, 192.

<sup>5/</sup> Any assertion therein that they were unprepared to do so was clearly countered by Judge Sweitzer's finding that his resampling order "specifically contemplates that the  
(continued...)

Sweitzer, they asserted that the overhead expenses cited in Exhibit 35 did not apply to them because “as has been clear from the outset, the Waters intend to operate this mine without outside labor. Self employed persons do not pay such taxes or insurance on an hourly basis, but only self-employment taxes based upon annual income.” (Contestees’ Responding Brief at 33-34.) However, rather than offering their cost estimate of what such self employment taxes would be for their operation, they argued at page 6 of their Closing Brief to Judge Sweitzer that

BLM persists in presuming that the Waters will hire outside labor, which will require payment of social security, worker’s compensation and unemployment taxes. Reply Brief at p. 4. Again, since no outside labor is contemplated, this is simply another BLM attempt to overstate expected operating costs. The BLM’s purported labor rate must be reduced by 25%.

In his cost analysis of mining the virgin gravels, Judge Sweitzer did not adopt the 25% overhead figure, finding that, even without those additional expenses, the Waters’ costs of mining exceeded projected revenues. As noted above, we adopted the 25% labor overhead figure in our cost analysis of each of the three deposits.

On reconsideration, the Waters do not offer any cost figure to refute the 25% figure. They argue again, as they did to Judge Sweitzer, that the 25% labor overhead expense should be deleted because of their plan to mine the claim themselves. They assert in their petition that if that expense is removed, they derive a profit of \$8,170.00 mining the virgin gravels (\$0.19/LCY times 43,000 LCY), \$10,400.00 mining the premined gravels (\$0.16/LCY times 65,000 LCY), and at least \$2,500.00 mining the streambed gravels (\$2.82/LCY times 2,666 LCY) based on BLM’s estimate of the deposit and approximately \$42,000.00 based on their estimate of 16,533 LCY.

BLM, in its response to the petition, casts considerable doubt on the Waters’ profit estimates, even assuming deletion of the 25% overhead cost figure. (BLM Response at 9-12). For example, it correctly points out that the Waters’ profit margin of \$0.19/LCY is limited to Area D of the virgin gravels, which contains only 1,100 LCY for a profit of \$209.00, and that mining the remaining virgin gravel areas

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<sup>5/</sup> (...continued)

resampling results ‘shall be used as the basis for an economic analysis using the general mining method and production rates proposed by the claimants at the hearing in this matter.’ ” (Decision at 20.)

(Areas A, B, C, and E) would result in a substantial loss.<sup>6/</sup> Moreover, it appears that, at best, without factoring in any labor overhead expenses or other costs, the Waters could expect a profit of \$3,900.00 from mining the 65,000 LCY of premined gravels, rather than the \$10,400.00 asserted by the Waters.<sup>7/</sup>

In any event, the Waters offer nothing to counter the 25% labor overhead figure that we utilized in our decision other than to repeat their consistent argument that they will be mining themselves. While there is appeal to their argument that labor overhead costs of claimants who work a claim themselves will be different from those same costs for one who employs individuals to mine the claim, it cannot be denied that the labor overhead expenses were placed in issue at the hearing in this case and that BLM's estimate of 25% for labor overhead expenses was part of BLM's prima facie case.<sup>8/</sup>

In their petition for reconsideration, the Waters again allude to the fact that self employment taxes might be an overhead expense, yet they do not offer any

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<sup>6/</sup> BLM states:

“Judge Sweitzer found that the combined average value of virgin gravel in Areas A, B, C, and E is 0.0076 oz/LCY. Amended Decision at 12. Applying the Board's assumption that the gold is 850 fine, and that the net value after refining is \$390/oz, the average value of these virgin gravel deposits is only \$2.52/LCY, resulting in a loss of \$3.45/LCY, assuming contestees' posited cost of mining. Assuming that these areas total 42,000 LCY, claimants would lose at least \$144,900 by mining them.”

(BLM Response at 9.)

<sup>7/</sup> This is based on our subtotal of costs, including labor (but excluding the labor overhead of 25%) of \$5.23/LCY (\$3.75/LCY for labor, \$1.25 direct operating costs, \$0.09 maintenance, and \$0.14 reclamation) versus an average value per LCY of the nine samples of premined gravel of \$5.29. See BLM Response at 11, n.7. The Waters' estimate was based on an incorrect value calculation of \$5.49/LCY for the nine samples.

<sup>8/</sup> The mining operation is dictated by the mineral deposit, not the claimant. Therefore, when the deposit is such that it may be developed, as in this case, by a small mining operation, BLM may reasonably base its labor overhead cost estimate on hiring employees. See United States v. Clouser, 144 IBLA 110, 128 (1998). This is consistent with Judge Sweitzer's holding regarding Exhibit 35 that “BLM was entitled to perform an economic analysis using its own cost projections based upon contestees' general mining method and production rates.” (Decision at 20.)

estimate of what those might be. Rather, they contend labor overhead expenses should be zero and, if they are, the claim can be mined at a profit. The Waters overlook the fact that in our early decision we stated, regarding our analysis of the virgin gravel deposit, as follows at 146 IBLA 189:

Arriving at a cost of production, we deem it unnecessary to make a per LCY estimate of other costs, such as startup and shutdown costs not related to reclamation, depreciation, unrecoverable capital costs, permitting costs, or the cost of other overhead items such as accounting. Although, for the reasons set out above, our analysis does not track the analysis made by Judge Sweitzer in all respects, our conclusion is the same. The virgin gravels on the Garden Spot claim do not represent a discovery of valuable mineral on that claim. [Emphasis added; footnote omitted.]

In order to justify granting reconsideration of our determination that their claim was invalid for lack of discovery of a valuable mineral deposit, the Waters must allege more than that their labor overhead expenses would be zero. The burden is not on the administrative law judge or this Board to select a percentage figure for labor overhead expenses. An assertion that such a percentage is incorrect based on the mere allegation that the Waters will mine the claim themselves is insufficient to support granting a petition for reconsideration.

At a minimum, expenses for a self-employed miner would include self-employment taxes, as recognized by the Waters. While they are in the best position to state what those taxes would be, they have steadfastly refused to do so, even though, as set forth above, they have had multiple opportunities. In their petition for reconsideration, they state that “[s]elf employment taxes are based upon ‘net earnings’ of the taxpayer and so it would not be possible to determine the extent of this tax without consideration of claimants’ overall financial circumstances.” (Petition at 7.) Thus, the Waters admit that they are the only ones capable of providing such information. They must bear the consequences of failing to produce it.

Moreover, with knowledge that the Board also believed that other costs, such as startup and shutdown costs not related to reclamation, depreciation, unrecoverable capital costs, permitting costs, or the cost of other overhead items such as accounting, were relevant to a determination of whether or not a discovery exists on their claim, they also refused to provide any showing of what those costs might be in their petition for reconsideration. Clearly, putting aside the 25% labor overhead provided by BLM, increased costs for the Waters’ operation for self-employment

taxes, as well as the other costs set forth above, would again support our original conclusions that none of the deposits on the claim constitute the discovery of a valuable mineral deposit. The Waters have failed to show that reconsideration is justified in this case. The petition must be denied.

To the extent the Waters have made additional arguments in support of their petition for reconsideration, those arguments have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is denied.

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Bruce R. Harris  
Deputy Chief Administrative Judge

We concur:

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Gail M. Frazier  
Administrative Judge

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Lisa Hemmer  
Administrative Judge

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David L. Hughes  
Administrative Judge

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T. Britt Price  
Administrative Judge

## ADMINISTRATIVE JUDGE GRANT DISSENTING:

Contestees/appellants Davy Waters and Sannaraha Waters filed a petition for reconsideration of our decision in this case, cited as United States v. Waters, 146 IBLA 172 (1998). On appeal from a decision of Administrative Law Judge Harvey C. Sweitzer in a mining claim validity contest, we considered the record de novo and affirmed, as modified, the decision of Judge Sweitzer finding the Garden Spot Association Placer Mining Claim null and void for lack of discovery of a valuable mineral deposit.

Petitioners assert that the Board has misapplied the law with respect to the economic costs of a mining claimant's labor in this case. In particular, petitioners challenge our application of payroll overhead charges based upon a percentage of direct labor cost to account for expenses required of an employer such as contributions for social security benefits, unemployment insurance, and workman's compensation. Acknowledging that the value of the labor of the locator must be considered in evaluating a mining claim,<sup>1/</sup> petitioners assert that this rule is grounded in the prudent man standard first set forth in Castle v. Womble, 19 L.D. 455, 457 (1894),<sup>2/</sup> and does not require an assumption that the claimant will hire employees to work the claim. Petitioners contend that the overhead costs attributable to an employer are not appropriate when the prudent miners work the claim themselves as self-employed individuals and, thus, will not be required to pay unemployment taxes, worker's compensation taxes, or social security taxes required of an employer. Recognizing that claimants would be subject to self-employment taxes, petitioners point out this would be based on net earnings of claimants and could not be calculated without reference to claimants' overall financial circumstances.

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<sup>1/</sup> The Department's approach to this question was addressed in United States v. Clouser, 144 IBLA 110, 129 (1998):

"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)."

<sup>2/</sup> There has been a discovery when minerals have been found in sufficient quantity and quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine. 19 L.D. at 457.

Petitioners assert that, without this 25 percent labor overhead surcharge used by the Board, the evidence supports a finding that operation of the claim is profitable, establishing a discovery. Petitioners also contend that when the mining costs include a payment to claimant equal to the amount the claimant would receive if paid wages, a mining claim need not be rejected under the prudent man standard simply because the remaining net income from a mining venture is small, since a reasonably prudent man would invest time and effort in such an enterprise because it offered a profit in excess of what the claimant would earn as wages.

Much of the difficulty in resolving the question of discovery in this case stems from the assumption by the witnesses and trial counsel for the Government that relevant evidence of the value of the placer deposit was properly limited to values disclosed in the high bench virgin gravels on the claim. United States v. Waters, *supra* at 175-176; 180. This argument was set forth by counsel for the Government as the basis for a motion for summary decision filed at the close of contestees' case at the initial hearing in this contest. The Government contended that contestees had failed to overcome the Government's prima facie case because their evidence at the hearing related primarily to streambed and premined placer deposits on the claim which were not cited as discovery points either in the patent application or by the time the certificate of mineral entry was obtained. (Tr. 765.) In the alternative, counsel for BLM proposed an "order that would permit the Government to validate or verify the sampling results that [were] presented \* \* \* by Claimants." The Motion for Summary Decision was taken under advisement by Judge Sweitzer. (Tr. 772.) Counsel for the Government went on to state that "if [contestees'] gold samples can be verified, we would withdraw our contest to the patent application." (Tr. 776.)<sup>3/</sup> Subsequently, Judge Sweitzer issued an Order to Test and Confirm Gold Values, in which the parties stipulated to the terms and conditions of a joint mineral sampling of the two areas of the mineral deposit on the claim not sampled by the BLM mineral examiner in November 1988 and April 1989. The order "contemplated that the data from the resampling would be entered into the record without further hearing." (Amended Decision at 3.) Pursuant to the order, the parties conducted a joint sampling of premined gravels on the claim and the gravels in Galice Creek as it flows through the claim. Subsequently, Judge Sweitzer ordered the hearing reopened.

The evidence of operating costs presented by the Government at the initial hearing was rejected by both the administrative law judge and the Board because it was based on a cost estimate found in a U.S. Bureau of Mines Cost Estimating

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<sup>3/</sup> Counsel for the Government later withdrew this proposal, stating that she lacked authority to make the offer, since the contest could not be withdrawn unless there were a finding that a valid discovery had been made. (Tr. 1029.)

Handbook which was predicated upon a much larger scale operation. The mineral examiner acknowledged that the authors of the Handbook did not deem those estimated costs applicable to an operation with the capacity envisioned by claimants. United States v. Waters, supra at 187 n.12. The only other evidence introduced by the Government which included labor overhead expenses is found in Government Exhibit 35. When this exhibit was introduced at the second hearing in this contest, contestees objected to its introduction on the ground that this cost analysis went beyond the purpose and scope of both the additional sampling and the second hearing, which were intended to verify the values testified to on behalf of claimants at the initial hearing, particularly in the stream bed. (Tr. 999-1000.) In support of their objection, claimants stated that they did not have the evidence necessary to and were not prepared to rebut the nature and scope of the labor overhead costs set out in Exhibit 35. (Tr. 1007.) Exhibit 35 was ultimately admitted into evidence subject to contestees' right to object to the contents of the exhibit. (Tr. 1077-1080.)

In his decision, Judge Sweitzer did not include labor overhead as an element of the cost of labor or rely upon the information set forth in Exhibit 35.<sup>4/</sup> In our decision, on de novo review, we noted that “[w]hen wages are paid overhead expenses are incurred” and accepted the evidence of labor overhead set forth in Exhibit 35 as unrefuted evidence of the costs a prudent miner would expect to incur. Petitioners have pointed out that we erred when applying the 25 percent payroll overhead charge set out in Exhibit 35 by inadvertently assuming the applicability of labor overhead costs (including unemployment insurance, workman’s compensation, and social security contributions) associated with hiring miners to do the work. For this reason, I must respectfully dissent from the decision of the Board en banc to deny the petition for reconsideration.

The majority concludes that further evidence of labor costs was within the scope of the Order to Test and Confirm Gold Values and the rehearing, and that this evidence established a prima facie case. They deny reconsideration on the ground claimants failed to meet the burden of rebutting the prima facie case regarding costs. It can reasonably be argued that Exhibit 35 was properly admitted. However, I also find that the administrative law judge properly disregarded the payroll overhead costs incurred when hiring miners and maintaining a payroll. Its adequacy to support a prima facie case regarding costs of labor overhead was effectively impeached by

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<sup>4/</sup> In the absence of any other evidence of applicable labor overhead costs, the administrative law judge did not include labor overhead in his cost analysis.

testimony that the claimants intended to operate the mine as self-employed miners. (Tr. 466, 586, 672.)<sup>5/</sup>

As a corollary to the prudent man standard of discovery stated above at note 2, a discovery generally requires a showing that the mineral deposit can be mined, removed, and marketed at a profit (marketability rule). United States v. New York Mines, Inc., 105 IBLA 171, 182, 95 I.D. 223, 229-230 (1989); United States v. Harris, 38 IBLA 137, 139-140 (1978). When applying the prudent man standard to a mining claim that does not have an active and profitable mine, the person undertaking the mineral examination will typically apply a series of assumptions. These assumptions must be based on an objective standard related to the nature of the mineral deposit disclosed on the claim, rather than the attributes or circumstances of a claimant. Only the claim itself is at issue, and that is the reason the Government contest of a mining claim has historically been regarded as an action quasi in rem, rather than in personam. United States v. Oneida Perlite, 57 IBLA 167, 190, 88 I.D. 772, 785 (1981). For example, when the optimum mining method would call for a large tonnage mine plan and large initial capital expenditures would be required, a reasonable assumption can be made that the operation will be undertaken by a large mining company. When, as in this case, the optimum mining method involves a small scale operation with minimal capital expenditures capable of being operated efficiently by the co-claimants,<sup>6/</sup> different assumptions are applicable.<sup>7/</sup> In applying the prudent man rule to such a deposit, it is also assumed that the claimant has the capital, the desire, and the ability to do the labor required to develop and extract the mineral. The financial resources of the claimants are irrelevant to this inquiry. See, e.g., United States v. Wirz, 89 IBLA 350, 358 (1985); United States v. Gainer, 30 IBLA 42, 67 (1977); United States v. Reynders, 26 IBLA 131, 136 (1976). For the same reason, the claimant's age or physical ability to do the work is also irrelevant.

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<sup>5/</sup> As the majority opinion recognizes, the administrative law judge ruled that "BLM was entitled to perform an economic analysis using its own cost projections based upon contestees' general mining method and production rates." (Decision at 20.) Overhead costs associated with hiring miners to operate the claim was not consistent with claimants' proposed operation.

<sup>6/</sup> Such a mining claim has been referred to as a "mom and pop" operation. See Bureau of Land Management, United States Department of the Interior, Handbook for Mineral Examiners (H-3890-1), (Revised 3/17/89) at p. V-9.

<sup>7/</sup> By way of extreme example, if the optimum operation is a 100,000 ton per day open pit mine, corporate headquarters overhead costs would be properly included. Corporate headquarters costs would not be applicable in a one-man suction dredge operation. The mining operation is dictated by the mineral deposit, not the claimant.

With respect to labor costs, this Board has held, as contestant notes, that “the value of the labor of an individual mining claimant is not to be treated any different[ly] than that of one he might hire.” United States v. Wirz, *supra*, quoted in United States v. Miller, 138 IBLA 246, 275 (1997); see United States v. Gardener, 18 IBLA 175, 179 (1974). Thus, with respect to a profitability analysis we have found 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. Clouser, 144 IBLA at 129, quoting United States v. Whitney, 51 IBLA at 84. Under this objective standard, it is assumed that prudent claimants having the capacity, skills, and ability necessary to conduct mining operations may avail themselves of the opportunity to realize the value of their labor as a miner. This fact was recognized in our decision in United States v. Waters, *supra* at 188, and we reaffirm our determination that the appropriate “value of their labor” is measured against the value that would be received in the general area of the mine when performing the same tasks, or the “market value” of the labor.<sup>8/</sup>

The mining operation ultimately chosen by both the mineral examiner (at the second hearing) and the claimants for the purpose of making the assumptions necessary to project production rates and costs was a “mom and pop” operation where the owners of the claim would operate the property, doing the work themselves, rather than hiring someone else to do it. In our decision, we accepted the Government evidence estimating the overhead on labor costs at 25 percent and added a cost equal to 25 percent of the fair value of the co-claimants’ labor as a cost of mining. (Ex. 35.) Petitioners have persuasively argued on reconsideration that the self-employed miner does not encounter the overhead costs incurred by one who hires an employee to do the same work, and that we erred when assuming to the contrary from the limited evidence in the record regarding anticipated labor overhead costs. Thus, we erred when assuming the Government’s evidence (Ex. 35) contained a reasonable projection of overhead costs in operating contestees’ mining claim.

When reviewing the petition for reconsideration, it is important to consider the impact of this error on the evidence of marketability of the deposit. In analyzing the return from mining in our decision we assumed a price of gold of \$400/ounce which had been used by the Government mineral examiner in his mineral report. (Ex. 20 at 16.) In response to the petition for reconsideration, contestant points out that the Board used this price to give contestees the benefit of the doubt and asserts that

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<sup>8/</sup> The minimum wage establishes the floor for determination of the value of the claimant's labor. When there is evidence establishing that the market value of the labor being performed is greater than that provided by the minimum wage, the market value is properly used. United States v. Miller, *supra*.

petitioners err in assuming a gold price of \$400/ounce in seeking reconsideration. Contestant asserts that the price of \$390/ounce of gold utilized by the administrative law judge is fully supported by the record.

The administrative law judge found with respect to the price of gold:

The average price of gold for the period beginning in January of 1985 and ending in October of 1990 was \$389.17 (Ex. 21). As of December 2, 1992, the price was \$332/oz (Ex. 34, p. 4). Because the price of gold in October of 1990 was \$380.36/oz (Ex. 21) and because the recent trend in gold prices is downward, applying a price of \$390.00/oz., the approximate average price for the period from January 1985 to October 1990, is more than fair to contestees.

(Administrative Law Judge Sweitzer's decision at 12.) As contestant points out, we held that contestees had not shown error in Judge Sweitzer's use of a price of \$390/ounce based on the evidence of record. 146 IBLA at 185. When the precise price of gold was not critical to the issue of discovery because other cost factors made the difference immaterial, a price of \$400/ounce could be assumed without compromising our validity conclusion.

In view of the inapplicability of the costs of overhead associated with hiring miners and the fact that, based on the record, the relevant price of gold is \$390/ounce, it is appropriate to reexamine the effect of these costs and the price of gold which we used in our analysis. As noted in our decision, the evidence indicated that the smelter returned to the claimant 98 percent of the value of the gold content less a \$2.00/ounce refining charge. 146 IBLA at 186; Ex. R. Thus the return for gold at a price of \$390/ounce would be calculated at \$380.20/ounce. If the returns from mining the virgin gravels in Area D are evaluated on the basis of a price of gold of \$390/ounce which the administrative law judge found to be fully supported by the record, the returns are as follows:

<u>Sample No.</u>	<u>Sample Size in LCYS</u>	<u>Recovered Gold in Ounces/LCY</u>	<u>Value of Recovered Gold in \$/LCY</u>
Bridge 2	2.00	0.0261	\$9.92
Bridge 2B	3.00	0.0134	\$5.09
GS-3B	1.20	0.0078	\$2.97
Average value			\$5.99

With respect to the costs of mining the virgin gravel from Area D, we concluded that the following costs, other than labor, were established by the evidence:

Summary of Non-Labor Costs (per LCY):

Direct operating cost	1.25
Timber removal	.04
Overburden removal	.60
Maintenance	.09
Reclamation	<u>.14</u>
Costs other than labor	2.12

In analyzing the cost of mining, we applied the labor or wage rates of \$13.75/hour for an equipment operator and \$5/hour for a laborer used in appellants' revised cost estimates submitted after completion of the Government sampling (Ex. 20 at Attachment 7; Tr. 292), which was deemed reasonable by the administrative law judge. At a sum of \$18.75/hour, this equates to \$3.75/LCY. This would bring the total of costs considered in our decision (excepting labor overhead associated with hiring miners) to \$5.87/LCY.

When the erroneously calculated labor overhead is omitted from the cost calculation, expenses amount to \$5.87/LCY as set forth above. This would leave a net return of \$0.12/LCY for this deposit in addition to the amount that has been credited to the claimants in the form of wages, as the wages they would pay to themselves would be considered as income to the claimants. In this context, I find that petitioners have overcome the Government's prima face case that there was no discovery with respect to the virgin gravel deposits.

Regarding the premined gravels, we find that the value of the samples in terms of gold priced at \$390/ounce is set forth as follows:

<u>Sample No.</u>	<u>Sample Size in LCYS</u>	<u>850 Fine Gold in Ounces</u>	<u>Recovered Gold in Ounces</u>	<u>Value per LCY</u>
HB-AA	1.00	0.0092	0.0078	\$2.97
HB-BB	1.00	0.0162	0.0138	\$5.24
BE-E	0.50	0.0120	0.0102	\$7.76
92-4	2.44		0.0077	\$1.20
92-5	2.44		0.0508	\$7.92
92-6	2.44		0.0804	\$12.53
92-7	2.33		0.0170	\$2.77
92-8	2.44		0.0287	\$4.47
92-9	1.22		0.0089	<u>\$2.77</u>
Average value				\$5.29

A summary of the costs (per LCY) other than labor applicable to the premined gravel deposit, as set forth in our decision, 146 IBLA at 191, shows:

Direct operating cost	1.25
Maintenance	0.09
Reclamation	<u>0.14</u>
Subtotal without labor	1.48

Labor costs for the premined gravel operation, like the virgin gravel deposit, encompass a two-person operation at \$13.75/hour for an equipment operator and \$5/hour for a laborer. Thus, the direct cost of labor without any applicable overhead would be \$18.75/hour which equates to \$3.75/LCY. Hence, the subtotal of costs without labor overhead entailed in hiring miners would be \$5.23/LCY. Thus, the return would exceed the cost of mining, leaving a net return of \$0.06/LCY for this deposit in addition to the amount that has been credited to the claimants in the form of wages, as the wages they would pay to themselves would be considered as income to the claimants. In this situation, I find that petitioners have overcome the Government's prima facie case that there was no discovery with respect to the premined gravel deposits.

In the case of streambed gravels, productivity was reasonably measured in terms of the ounces of gold recovered per hour. Adjusted to reflect a price of gold of \$390/ounce, the return is set forth as follows:

Sample	Ounces of Gold <u>Recovered</u>	Hours in Dredging	Net Smelter Return <u>(\$380.20/oz.)</u>	<u>Return/hour</u>
D-1	0.2420	3.0	\$92.01	\$30.67
92-2	0.0830	4.0	\$31.56	\$7.89
BG	0.1094	2.0	\$41.59	\$20.80
GC	0.0293	1.5	\$11.14	<u>\$7.43</u>
Rate of Return		10.5	\$176.30	\$16.79

We also addressed the costs of a streambed dredging operation in our decision. 146 IBLA at 192-93. We concluded on the basis of the evidence that non-labor operating costs and the capital costs of the suction dredge were as follows:

Cost Per Hour (Other Than Labor)

Fuel	1.00
Supplies	.60
Permitting etc.	.30
Capital costs (amortized)	<u>0.75</u>
Subtotal	\$2.65

With respect to labor costs, we found the applicable labor costs for dredging (allowing for the cost of time spent in nonproductive activity) to be \$12.50/hour of dredging when the erroneous labor overhead costs are removed. 146 IBLA at 192. Thus, the sum of costs without labor overhead costs associated with hiring a miner would amount to \$15.15/hour which is less than the return per hour. As noted above, the amount calculated as labor cost would be wages the claimants pay to themselves and would be income to the claimants. On these facts, I conclude on reconsideration that petitioners have overcome the Government's prima facie case that there was no discovery with respect to suction dredge operation.

Accordingly, I find that there is a small net return from the richest area of the virgin gravels (\$0.29/LCY or \$1.45/hour) and from the premined gravels (\$0.26/LCY or \$1.30/hour). With respect to the streambed gravel deposits, a somewhat larger net return would be realized. As petitioners have asserted, this Board has previously noted that a net return over costs need not be large when payment of the prevailing wage to the self-employed claimant is included in the costs. United States v. Kiggins,

39 IBLA 88, 90 (1979) (Burski, A. J., concurring). The actual return would be the net return plus the amount charged as labor.

When the Government contests a mining claim, alleging that it is not supported by the discovery of a valuable mineral deposit, it bears the initial burden of making a prima facie case that no discovery exists, whereupon the burden shifts to the claimant to rebut by a preponderance of the evidence the matters placed in issue by the Government. United States v. Springer, 491 F. 2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 834 (1974); United States v. Hooker, 48 IBLA 22, 26-27 (1980). The ultimate burden of proof on these matters rests with the claimant. See United States v. Springer, supra at 242; United States v. Taylor, 19 IBLA 9, 22-23, 82 I.D. 68, 73 (1975). It should be noted, however, that when the Government presents its case, it is not necessary to present evidence on every aspect of a discovery. Once a prima facie case is presented, the claimant must present evidence sufficient to overcome by a preponderance of the evidence the Government's case on those issues raised. United States v. Pool, 78 IBLA 215, 220 (1984); see United States v. Springer, supra at 242; Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959); United States v. Rice, 73 IBLA 128, 140 (1983). In circumstances such as this in which claimants have overcome the prima facie case, the contest is properly dismissed as dismissal does not determine the validity of the claim, but merely establishes that, as to the issues raised by the Government's prima facie case at the hearing, the claimants prevailed by a preponderance of the evidence. United States v. Hooker, supra at 26-27. <sup>2/</sup>

When a patent application has been filed, as in this case, it is essential for the Department to determine whether all of the requirements of the law have been met

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<sup>2/</sup> A contest of the validity of a mining claim is properly distinguished from an adjudication of a patent application in this regard. If BLM finds that a mineral patent application does not contain sufficient information to sustain a finding that the mineral deposit on the claim supports a discovery under the prudent man standard of discovery, it can notify the mineral patent applicant that the patent application does not have sufficient supporting data and will be held for rejection. If additional information is submitted it becomes a part of the record, thus providing a more complete record for adjudication of the application. If sufficient supporting information is not submitted, a decision rejecting the application can be issued. Compare Thermal Energy Co., 135 IBLA 291 (1996) (Applying the prudent man standard of discovery to adjudication of a coal preference right lease application.) A decision rejecting a patent application does not render a mining claim invalid and is appealable to this Board. On the other hand, a mining claim contest goes to the validity of the claim, and claimant is not limited to the evidence contained in the mineral patent application.

before a patent may issue. Consequently, when it becomes apparent on appeal that the evidence presented at the contest hearing has not resolved an essential issue, the Board has remanded the case to the administrative law judge for a further hearing on material issues not addressed in the evidence. See e.g. United States v. Multiple Use, Inc., 120 IBLA 63 (1991). At the least, I find petitioners are entitled to the further hearing which they have requested.

Cases such as this, in which claimants have overcome the prima facie case presented in two separate hearings and yet the record fails to establish entitlement to patent, indicate that BLM needs more information to adjudicate the patent application.<sup>10/</sup> Consequently, I find it appropriate in this case to dismiss the contest and remand the case to BLM for further adjudication of the patent application.

Dismissal of the contest does not dictate the issuance of a patent. As noted previously, in a mining contest the Government has the burden of presenting sufficient evidence to establish a prima facie case that the claim is invalid. The claimant only has the obligation to overcome the Government's prima facie case. Those elements of discovery not placed in issue need not be overcome, and a claimant does not have to prove the validity of the claim to prevail in a mining claim contest.

As the parties seeking a patent, the claimants have the greater burden of tendering all evidence necessary to prove that the claim is valid, and that they have satisfied the requirements for patent issuance. Thus, they must submit all evidence necessary for the Department to fulfill its 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. 450, 460 (1920); United States v. Hooker, supra at 27; United States v. Taylor, supra at 25-26, 82 I.D. at 74.<sup>11/</sup>

Accordingly, I must respectfully dissent from the decision of my colleagues en banc to deny reconsideration. I would grant the petition for reconsideration in this

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<sup>10/</sup> Likewise, more information is needed in order to bring a contest, if BLM again finds this appropriate. This lack of information poses a significant risk that the evidence necessary to adjudicate this application might not be elicited at a third hearing, despite the expense and delay to the parties associated with a third hearing.

<sup>11/</sup> In this process, BLM would not be limited to issues raised by the Board and may ask claimants to submit any additional evidence that they reasonably consider necessary for a determination whether a patent should issue. See Thermal Energy Co., supra at 321-23.

case and remand the case to BLM to allow it to obtain the information necessary to adjudicate the patent application.

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C. Randall Grant, Jr.  
Administrative Judge

I concur:

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Will A. Irwin  
Administrative Judge

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James F. Roberts  
Administrative Judge

Administrative Judge Mullen concurring with the dissent:

Let there be no doubt. This is a landmark decision. It is the first case in the history of the Office of Hearings and Appeals that the panel that has drafted a decision has been denied the opportunity to correct a material error in that decision.<sup>1/</sup>

When the Petition for Reconsideration was filed, Judge Grant and I recognized that we erroneously applied a cost estimate used for companies having a payroll. When we applied this factor, we overlooked the fact that, at the hearing before Judge Sweitzer, the Government introduced the 25-percent payroll overhead charge and the Waters objected to the application of that charge. Judge Sweitzer took the objection under advisement and proceeded with the hearing without ruling thereon. Judge Grant and I inadvertently failed to note that Judge Sweitzer was not obligated to make a ruling on the Waters' objection because he never applied the 25-percent payroll overhead charge as a cost. When we undertook our economic analysis we applied a payroll overhead charge to an operation having no employees and no payroll. As can be seen in Judge Grant's dissent, that mistake makes a material difference in the outcome of the case. I agree totally with his entire analysis, but write separately to stress my belief that we should be given the opportunity to correct our error. The action taken by the majority deprives us of that opportunity, and the decision in United States v. Waters, 146 IBLA 172 (1998), stands uncorrected.

I urge the reader to carefully analyze the majority opinion. As a basis for their conclusion that the Waters decision should not be reconsidered, the majority has no problem speculating about the possible negative impact of a number of costs which were

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<sup>1/</sup> This Board has reconsidered cases sua sponte when an error in the decision has been perceived. See Keith P. Carpenter (on Reconsideration), 113 IBLA 27 (1990); January 10, 1983, Order Reaffirming Northway Natives, Inc., 69 IBLA 219, (1982), after sua sponte reconsideration; American Telephone & Telegraph (On Reconsideration), 59 IBLA 343 (1981). If I had been made aware of the error in another way, I would have sought to correct that error sua sponte, as my other colleagues have been allowed to do in the past. The hasty action now being taken by five of my colleagues deprives me of this option as well.

never addressed at the evidentiary hearing.<sup>2/</sup> No evidence has ever been introduced by the Government regarding the amount of any of these costs.

In a mining claim contest a claimant will prevail if the claimant is able to overcome the prima facie case presented by the Government.<sup>3/</sup> The claimant does not have to prove every aspect of discovery or address every conceivable cost that might be incurred during the course of mining. If the Government does not place a cost (such as startup or shutdown cost) in contention, the claimant need not introduce or discuss that cost when overcoming the Government's case. It should be assumed that, if the Government's expert witness did not introduce evidence regarding a mining cost when making the Government's prima facie case, it was because the witness had considered that cost during the course of his analysis and did not consider it to be material. The majority rejects our elimination of the 25-percent payroll overhead cost because we did not take other costs into consideration.

These alleged additional costs were not placed in evidence during the hearing. They were listed by the Office of the Solicitor in the Government's Response to the Motion for Reconsideration, and the Government has offered nothing that would indicate what those costs might be. The majority accepts these nebulous allegations without question and is using them to justify denying our reconsideration of the case.

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<sup>2/</sup> The majority addresses costs that Judge Grant and I did not consider in our Waters decision. At the same time they choose not to address, or even mention, items we did not consider that would benefit the claimants. These items (depletion allowance, depreciation allowance other credits, etc.) were enumerated by claimants as reasons for reopening the hearing. The items the majority choose to ignore would offset or materially reduce many of the costs the majority has advanced to justify their decision to deny reconsideration.

<sup>3/</sup> See United States v. Springer, 491 F.2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 834 (1974); U.S. v. Rich Knoblock, 131 IBLA 48 (1994); U.S. v. Mineco, et al, 127 IBLA 181 (1993); United States v. Franklin, supra; and cases cited therein.

<sup>4/</sup> If this was the paramount reason for their action, an obvious and reasonable course would be to remand the case for the submission of further evidence. See U.S. v. Multiple Use, 120 IBLA 63, 134 (1991). Similarly, the Board could call for further briefing regarding the costs that can be reasonably anticipated by a miner not paying employees a wage or salary, and other costs, credits, and deductions not considered during the hearing or when reviewing the case on appeal. I find either approach acceptable.

At the same time they are rejecting the claimants' Motion for Reconsideration because the claimants did not tender specific evidence regarding costs they might incur. I trust that the reader will see the irony.

I can think of no good reason reason for not allowing Judge Grant and me to correct a material error in our decision.

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R.W. Mullen  
Administrative Judge