



UNITED STATES v. LARRY AND VIRGINIA KRIBS

174 IBLA 375

Decided June 23, 2008



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.  
LARRY AND VIRGINIA KRIBS

IBLA 2008-16

Decided June 23, 2008

Appeal from a decision of an Administrative Law Judge declaring six mining claims null and void after a hearing on a mining claim contest. OROR 60860.

Affirmed.

1. Administrative Procedure: Burden of Proof--Evidence: Preponderance--Evidence: Prima Facie Case--Mining Claims: Contests--Mining Claims: Determination of Validity

In a mining contest, the Government establishes a *prima facie* case when a mineral examiner testifies that he has examined a mining claim and found the mineral values insufficient to support a finding of discovery of a valuable mineral deposit. A mining claimant does not prove error in an Administrative Law Judge's conclusions that a *prima facie* case was made, and that the claimant did not overcome it on the issue of a market, by submitting new and uncorroborated assertions on appeal which revise the claimant's testimony at the contest hearing. Evidence offered for the first time during an appeal from a decision in a mining claim contest can only be reviewed to determine whether to order another hearing; since the claimant did not explain why the evidence was not offered at the contest hearing and the offered, new information was not consistent with the claimant's testimony or contentions at the hearing, another hearing is not required.

APPEARANCES: Larry and Virginia Kribs, Bend, Oregon, *pro sese*; Michael Schoessler, Esq. Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE HEMMER

Larry and Virginia Kribs appeal from a decision dated September 25, 2007, of Administrative Law Judge Harvey C. Sweitzer, declaring their contested mining claims null and void. On September 29, 2004, the Burns, Oregon, District Office, Bureau of Land Management (BLM), filed a contest (OROR 60860) against the validity of six unpatented lode mining claims held by the Kribs. The Kribs had located the Desert Dog S-1 (ORMC 153758), Desert Dog S-2 (ORMC 153759), Desert Dog S-3 (ORMC 154451), Desert Dog S-4 (ORMC 154452), Tule Springs #1 (ORMC 155379), and Tule Springs #2 (ORMC 155380) lode claims between 1998 and 2000, but the lands were withdrawn from mineral entry thereafter in 2000. BLM's mining contest complaint alleged that the claimants failed to locate minerals within the boundaries of the claims in sufficient quantity or quality to constitute a discovery of a valuable mineral deposit at the time the lands were withdrawn or subsequently. Following completion of a hearing in Bend, Oregon, on May 22-24, 2007, Judge Sweitzer issued a decision declaring the claims null and void. Appellants filed a timely appeal from that decision.

*Statement of Facts*

The following statement derives from the testimony at the hearing as presented in the Transcript (Tr.), the exhibits (Exs.) submitted by the parties, and the record before us. The contestant (Government) submitted exhibits numbered 1 through 25; the exhibits submitted by the Kribs (contestees) are identified by letters A through D and F through R. On behalf of the United States, BLM, through its attorney, called three witnesses: retired certified mineral examiner Gerard Capps, gemologist Robert F. Trapp, and BLM mineral examiner Charles Horsburgh. Representing themselves, the Kribs cross-examined the Government witnesses and themselves testified under oath.

Oregon sunstone is a plagioclase, labradorite feldspar.<sup>1</sup> Valuable sunstone presents as a crystal and occurs in various parts of the world. Ex. 10 at 197-99. The trademark of Oregon sunstone is its brilliant spangled appearance, known as "schiller," which is caused by tiny flecks of copper contained in varying amounts and presentations within the stones. Ex. 3 at 13<sup>2</sup>; Ex. I (the most valuable sunstones are reds with copper flecks). In addition, only Oregon sunstones "occur with brilliant clarity with deep reds and greens" and pinks also caused by copper content. Ex. 3 at

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<sup>1</sup> This Board discussed Oregon sunstone in *United States v. Rodgers*, 32 IBLA 77, 84 (1977), *rev'd on other grounds*, 726 F.2d 1376 (9th Cir. 1984).

<sup>2</sup> The Government's Ex. 3 is the Mineral Report for the Validity Examination for the six claims, prepared by Capps. Its tab 4 is the Appraisal prepared by Trapp.

13; Tr. 75. Generally, the more copper, the more valuable the sunstone becomes. *See* Exs. 10, 11, 13; Tr. 66-67, 77. Less valuable Oregon sunstones present as light brown or yellow crystal. Ex. 10 at 212-14; Tr. 64, 77-80. While not as durable as other gemstones, Oregon sunstone was designated as the Oregon state gemstone in 1987. Ex. 11; Tr. 64. Because sunstone “hardness” is in the “lower range of minerals useful for gemstones,” they scratch easily and cannot generally be used for rings. Ex. 3 at 13. Oregon sunstone producers have been attempting to develop the market for sunstones, to some degree of success. Ex. 10 at 214; Ex. I (owner of Ponderosa mine in “campaign to market sunstone”); Ex. J (“quality sunstone is poised to take off in the market”). Clearly, a market exists for the finest and largest stones with the deepest red and green colors, for bicolored stones, and stones with schiller, aventurescence (inclusions creating a schiller are larger and visible); iridescence (rainbow colors can be seen inside a gem, resembling an oil-slick on water or colors on soap bubbles), and adularescence (effect can be seen as a floating, billowing light). Ex. 3 tab 4 (Trapp Appraisal) at 9; Exs. I, J, and K. As these qualities decrease, at some point the market value evaporates; likewise, the record reflects debate over whether clear, colorless laboradite feldspar may properly be defined as Oregon sunstone. Ex. 12 at 16; Exs. I and J.

Feldspar that qualifies as Oregon sunstone is found in lenticular phenocrysts (large single crystals of feldspar) embedded in basalt – the dark, dense, igneous rock created from lava flows during the Miocene Age in southeast Oregon. Ex. 3 at 15; Ex. 10; Tr. 62. Sunstone locations in Oregon include the Ponderosa Mine; Rabbit Hill (a BLM-administered site where members of the public can prospect for and remove sunstones for free) in the area of Plush, Oregon; and the White Horse area. *See* Ex. 3 at 15, Ex. 1 (post-it notes); Ex. H at 222. Profitable operations at the Ponderosa and Plush deposits occur in association with basalt that is significantly weathered, permitting the sunstones to be easily removed without shattering or damaging the phenocrysts. Ex. 3 at 15; Ex. 10 at 205 (weathered basalt); Ex. 11 at 23. Those deposits are found in locations where water has decomposed the basalt so that it has become loose, alluvial material, making sunstone extraction ideal with a backhoe and shovel. Tr. 85-86. Explosives are used in this area to remove the overburden or capstone to reach the lake bed basalt. Once exposed, the basalt is soft and mining procedures no longer require use of explosives that would sever or crack the feldspar. Ex. 10 at 205; Tr. 85-86; 410-12.

The Kribs are involved in the business of housing construction, building approximately 30-40 houses per year. Tr. 468. In addition, they have some involvement with gems or semi-precious gems, operating a store in Bend where they sell opals and “thunderegg” products, which do not derive from the mining claims in question. *See* Ex. A-1 (advertisement from Desert Dog Mines); Tr. 454.

Larry Kribs became aware of the prosperous Ponderosa sunstone mine in 1998, and the Kribs thus decided to locate lode mining claims for the stone. Tr. 471-72. Appellants located the Desert Dog S-1 and S-2 sunstone lode claims on April 29 and 30, 1998, and the Desert Dog S-3 and S-4 claims on April 30, 1999. Ex. 3 at 5, Table 1. By letter dated July 17, 2000, the Kribs informed BLM that they had been evaluating the four Desert Dog claims and had “gone through” about 1,000 pounds of concentrate “yielding 20-25 lbs. of colored sunstones.” Ex. 3 tab 6. According to this letter, about “5% would be considered precious and another 15% semi-precious.” *Id.* The Kribs explained that they were continuing to explore and that they would bring in a backhoe when “the best mineable site is selected.” *Id.* The Kribs subsequently located the Tule Springs #1 and #2 claims on September 7 and 8, 2000. The six claims are located in three non-contiguous locations in secs. 6 and 7, T. 27 S., R. 35 E.; sec. 31, T. 37 S., R. 35 E.; and sec. 1, T. 37 S., R. 34 E., Willamette Meridian, Harney County, Oregon. Complaint at 4; *see also* Ex. 3 at 5, Table 1; Ex. 2 (map).

On October 30, 2000, Congress included the lands subject to the mining claims in legislation entitled the Steens Mountain Cooperative Management and Protection Act (Steens Act), 16 U.S.C. §§ 460nnn through 460nnn-122 (2000), which withdrew 425,550 acres of Federal land located in Harney County, Oregon, from location, entry, and patent under the mining laws “[s]ubject to valid existing rights.” 16 U.S.C. § 460nnn-81 (2000). BLM subsequently promulgated regulations, effective January 20, 2001, codifying its existing policy of requiring validity examinations when mining operations are proposed on withdrawn lands. 43 C.F.R. § 3809.100, 65 Fed. Reg. 69997, 70026 (Nov. 21, 2000). 43 C.F.R. § 3809.100(a) states in relevant part: “After the date on which the lands are withdrawn from appropriation under the mining laws, BLM will not . . . allow notice-level operations to proceed until BLM has prepared a mineral examination report to determine whether the mining claim was valid before the withdrawal, and whether it remains valid.”<sup>3</sup>

As noted above, the July 17, 2000, letter from Larry Kribs, doing business under the name Desert Dog Mines, Inc., stated that he was conducting exploration work on the Desert Dog claims. Ex. 3 tab 6.<sup>4</sup> Despite the terms of 43 C.F.R. § 3809.100, the parties agree that BLM permitted the Kribs to continue to conduct notice level exploration for years. The Government’s Ex. 15 contains a telephone conversation record and three letters from the Kribs, under the business name Tule Springs Sunstones, Inc., ranging from April 3, 2001, through December 19, 2002. The nature of these letters is unclear; it is conceivable that they were sent in

<sup>3</sup> This regulation was retained in a subsequent rulemaking amending and revising the regulations in 43 C.F.R. Part 3809. *See* 66 Fed. Reg. 54834 (Oct. 30, 2001).

<sup>4</sup> This letter asserted that Desert Dog Mines, Inc., would be digging exploration pits in the fall using electric jackhammers and dynamite. *Id.*

association with affidavits of assessment work that Larry Kribs submitted annually between 2000 and 2004, as required by section 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (2000). It is conceivable that the Kribs submitted these letters in association with “notice level operations” under 43 C.F.R. §§ 3809.10(b) and 3809.21, as the Kribs submitted into evidence several undated “notices of intent” as Ex. N, accompanied by BLM orders and letters related to such notices which reveal that, after the withdrawal, the Kribs continued to perform exploration of some number of the mining claims with BLM’s knowledge. BLM Answer at 24. The letters in Ex. 15 (and the Kribs’ Ex. L) explain that the Kribs were collecting material which was “being evaluated,” that they were drilling or enlarging test holes to “evaluate,” and that they were continuing to perform “exploration work” on unspecified claims. See Ex. 15, Dec. 19, 2002, letter from Larry Kribs to BLM (“exploration work was very productive,” collected “[a]pproximately 9000# of concentrate,” which they “have just finished cleaning and sorting”); Apr. 30, 2002, letter from the Kribs to BLM (“We will [be] doing exploration work starting May 1, 2002.”); Dec. 10, 2001, letter from Larry Kribs to BLM (“We will be doing exploration work next spring.”); July 18, 2001, letter from Larry Kribs to BLM (“With so much promising material, further exploration work is needed.”).)

By letter dated August 14, 2002, BLM notified the Kribs that it would conduct a validity examination with respect to the six sunstone mining claims. Ex. N. BLM hired Capps, a certified geologist and retired BLM mineral examiner trained in economic analysis of mining operations and experienced in validating feldspar discoveries, to conduct the validity exam.<sup>5</sup> In 2002, Capps met with appellants prior to visiting the sites and discussed sampling procedures with them. Tr. 92. Capps performed two on-site visits in 2002, and upon entering the claims, saw no evidence of test pits on the Tule Springs #1 and #2 lode claims. Tr. 109-11. Kribs admitted that he had not conducted any exploration activities on those claims before September 2004. Tr. 475. The Desert Dog S-2 claim had two test pits, both dug in May 2001, after the claim was withdrawn from mineral entry.<sup>5</sup> Ex. 3 at 38; Tr. 111-12. Capps could not locate any in-place mineralization on the Tule Springs #1, #2,

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<sup>5</sup> Capps had previously conducted a validity examination for several Oregon sunstone mining claims on which the Ponderosa Mine is located north of Burns, Oregon, and the Kribs submitted the resulting Mineral Report as Ex. M. Tr. 28. Three of the four claims there were valid because the stones had marketable characteristics as discussed *infra*. The invalidated fourth mining claim was located on very dense basalt and the Ponderosa Mine claimant conceded that this claim could not produce stones in sufficient quantity to justify the expense of blasting and crushing the host rock. See Ex. M at 17-18.

<sup>6</sup> Larry Kribs testified that he first brought a backhoe to the claims in 2001 or the spring of 2002. Tr. 551-52.

or Desert Dog S-2 sites. On the other three claims with exploratory pits created by Kribs' backhoe, Capps did not see any soft material underneath the hard basalt that would indicate that the basalt was weathered, which was in Capps' view a hallmark of the profitable sunstone mines in the area. Tr. 435; *see also* Tr. 593-94.

The Kribs selected sites for sampling evidence of Oregon sunstone deposits. Tr. 92-93. Capps took nine samples from the six claims at an average of 240 pounds of material per unscreened sample. Tr. 91, 95. After screening, Capps took the screened material off site and sorted it. He picked out the feldspar pieces and categorized them by color and weight. Ex. 3 at 26; Exs. 20-22 (sample pictures). Capps characterized stones from each sample in the following categories: "(1) Clear, Colorless (CC) material with few fractures, (2) Clear, Colorless to Reddish Brown (CC/RB) material with mottled reddish brown discoloration along fractures and feathers, translucent but heavily fractured and poor solidity, and (3) Reddish Brown (RB) material, some of significant size, largely opaque with visible striations and weak cleavage layering." Ex. 3 at 54. In addition to pieces collected by his own sampling, Capps requested and received from the Kribs their own sample stones. *Id.* at 27; Tr. 122-23, 544. The Kribs did not provide Capps with any clear, colorless stones because they believed they were worthless; they testified that they were searching for the valuable, colored sunstones, with attributes such as schiller. Tr. 124, 544-45. According to Capps, the Kribs' samples did not significantly differ from the stones Capps had procured from the sample sites; they were fractured and small. Tr. 124-25.

Capps employed gemologist Trapp to determine the samples' value.<sup>7</sup> Tr. 121-22. Capps provided Trapp with what he called a "split," or representative portion, of both his and the Kribs' samples of sunstone. Tr. 403-04, 415; Ex. 16 (cover letter); Exs. 18-20 (sample pictures). Trapp testified that he evaluated the samples by factors including clarity, color, cleavage planes,<sup>8</sup> and by how effectively they could be cut. Tr. 155-57. Trapp conducted a refraction and gravity test to establish that the samples were, in fact, plagioclase feldspar. Tr. 168. Using his own equipment to cut, grind, and polish, Trapp cabochon cut whatever material he could, concluding that

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<sup>7</sup> Trapp is a graduate of the Gemological Institute of America, is a member of both the Accredited Gemologist Association and the National Association of Jewelry Appraisers, and operates Trapp Gemological Services. Tr. 132, 137, 140. The work of this business includes gemology reports and appraisals. Tr. 148.

<sup>8</sup> Cleavage is the occurrence of fissures within the stone that causes it to fracture when cut. Tr. 157.

80% of the samples were unsuitable for “this initial work” due to a high propensity for fracturing.<sup>9</sup> *Id.*; Ex. 3 tab 4, Appraisal at 9.

Trapp concluded that the CC samples had a value of 2 to 10 cents per gram on both the date of withdrawal and the hearing date because, from a lapidary standpoint, it could be sold as “moonstone” even though it is not chemically a moonstone.<sup>10</sup> Ex. 3 tab 4, Appraisal at 8; Ex. 5; Tr. 184. These samples, while small, had fewer fractures and could be faceted for use in jewelry. Tr. 219. Nonetheless, Trapp explained that any marketability of even the CC samples was at best “limited.” *Id.*; Ex. 3 tab 4, Appraisal at 9.

Trapp concluded that the other stones were “poor” and valueless because the CC/RB and RB sunstones’ main feature was fragility due to a high density of fractures and cleavage planes, thus making it unlikely that the crystals could be cut into marketable pieces. Ex. 3 tab 4, Appraisal at 10; Tr. 168-70, 175-78, 218-19. Capps had concluded that, unlike the financially successful Ponderosa and Plush sunstone mine areas, the Kribs were required to use explosives and jackhammers to recover the phenocrysts from the host rock even after removing the overburden caps and that the fractures were thus caused by the mining itself. Ex. 3 at 15; Tr. 80, 85-87, 98-99, 410-13, 430-31, 435. Trapp testified that even the stones that could be cabochon cut were of poor quality because only a few crystals exhibited schiller and the samples did not contain the marketable and higher valued “pink, intense red, green, bi-colored colors.” Tr. 179-81; Ex. 10.

In an effort to assess the sunstone market, Trapp attended the Tucson Gem Show in February 2003, where he examined and compared sunstones for sale with samples from the contested claims. Tr. 158; Ex. 3 tab 4, Appraisal at 9. He concluded that the most valuable sunstones exhibited in Tucson were “clear, red color in faceted form” and that the samples provided to him from the mining claims “in all respects other than origin, were not like materials being marketed as ‘Oregon sunstone.’” Ex 3 tab 4 at 9. He explained that that cost of sorting and marketing

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<sup>9</sup> Cabochon is a style of cutting in which the top of the stone forms a curved convex surface. Tr. 168. The base may be convex, concave, or flat. A facet cut results in polished, flat, plane surfaces. *A Dictionary of Mining, Mineral, and Related Terms*, (Bureau of Mines, Department of the Interior, 1968 ed.), at 159, 408.

<sup>10</sup> Moonstones are a clear orthoclase feldspar. Tr. 183. The parties disagree as to whether clear, colorless, plagioclase feldspar qualifies as Oregon sunstone. Ex. 12, 17; Tr. 71-73. The documents submitted into the record by both parties indicate that the line between what actually qualifies as “sunstone” becomes illusory when plain colorless material is involved. The Board cannot resolve this scientific dispute.

such stone would be greater than the sales value. *Id.* at 10. He testified that sunstone dealers in Tuscon, shown the samples, ascribed no value to them. *Id.*;

Tr. 164, 179, 181, 185-86. Dealers had the same reaction to the CC material.  
Tr. 179-81, 185-86.

In 2003, Capps detailed his findings and conclusions, along with Trapp's Appraisal, in the Mineral Report. Ex. 3. Capps concluded that the Kribs had failed to make a sufficient exposure of mineralization before the withdrawal date on the Tule Springs #1, Tule Springs #2, and Desert Dog S-2 lode claims. *Id.* at 32-33; Tr. 116-17. He accepted that exposures on the other 3 claims may have existed prior to the withdrawal date. Nevertheless, Capps found that daily mining costs would far exceed the estimated daily revenue that any of the claims could produce. Tr. 118. Using the figures both he and Trapp logged from the samples, Capps generated a mining cost/profit analysis table for each claim. Capps calculated, based on the pre-screened material (concentrate) extracted from the sites, that certain grams per screened pound of the material were the feldspar classified as CC, at a varied value per screened pound of material for each claim. The Desert Dog S-4 claim had the highest valued CC stone, estimated at \$0.16 cents per pound of sample material. (Table 3 of the Mineral Report shows that the sample values ranged from \$0.02 to \$0.16 per pound. Ex. 3 at 31.) He estimated that the Desert Dog S-4 claim would produce a reserve of 29,090,000 pounds of excavated material to screen, and assumed that such a reserve would exist on each claim.<sup>11</sup>

Using estimated production rates proposed by the Kribs, Capps opined that an 8-hour-day's work consisting of drilling or blasting and screening 5, full, 5-gallon buckets per hour would produce 55 pounds of material less than 7/8 inches and greater than 1/4 inches per hour (after being screened, each bucket had a recovery rate of 11 pounds of less than 7/8 inch and greater than 1/4 inch material). Capps testified that he estimated that Virginia Kribs would work 8 hours screening concentrate and Larry Kribs would excavate and drill for 2 hours, and then join in screening. Capps also presumed the Kribs would hire unskilled laborers at minimum wage to sort the screened material. Assuming these screening times, the Kribs would produce 770 screened pounds of material at the highest conceivable yield of \$0.16/pound (assuming 100 percent of the recovered material was crystal feldspar),

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<sup>11</sup> He devised this figure by deciding that a prudent miner would mine a 100-foot circle around the pit exposure. There were seven documented pits on the claims with a 5-foot average depth at which the material was exposed. Ex. 3 at 31; Tr. 340, 587-88. Thus, Capps multiplied pi (3.14~) by the circumference of the Desert Dog S-4 claim by 5 feet to reach a cubic feet number. That number was converted into cubic yards and multiplied by the density of basalt per ton. *Id.*

or \$123 a day. Ex. 3 at 32-33; Ex. 4 at unpaginated 1; Tr. 342-44.<sup>12</sup> Employing Trapp's conclusion that 80% of the samples were not suitable for cutting due to their high propensity for fracturing, the value per pound of screened material would be reduced to less than \$25.00 a day. *Id.*

Capps' Mineral Report, his addendum thereto, and his testimony during the hearing concluded that daily mining costs alone (not including marketing or reclamation costs) would surpass any net income from mining either on the date of withdrawal in 2000 or in 2006, when the original hearing was scheduled. *See* Tr. 352, 355.<sup>13</sup> He implemented the Oregon Bureau of Labor and Industries (BOLI) prevailing hourly wage rates for heavy machine operators and material movers for 2000 and 2006.<sup>14</sup> Capps projected that unskilled laborers could sort what the screens left behind. *Id.*; Exs. 4 (Addendum to Original Mineral Report, with corrections), 6 (Prevailing BOLI Wage Rates, July 1, 2000), 7 (Prevailing BOLI Wage Rates, July 1, 2006). He thus attributed the Oregon hourly minimum wage to any sorting work. Ex. 8 (Technical Assistance for Employers). The economic analysis showed that the Kribs would lose hundreds of dollars a day in the mining business in both 2000 and 2006. Capps concluded that the quantity and quality of material were

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<sup>12</sup> Capps reached this figure as follows: The Desert Dog S-4 claim sample yielded the highest amount of feldspar per pound, which was 8.98 grams per pound of material greater than 1/4 inch but less than 7/8 inches after screening. Presuming this highest yield for all claims, Capps multiplied that figure by .18, the average weight in grams of CC feldspar per pound of screened material. *See* Ex. 3 at 25. This calculation equaled 1.60 grams per pound of CC feldspar, which, when multiplied by \$0.10 cents, the highest value attributed to the CC feldspar, resulted in a figure of \$0.16 cents per pound of screened material.

<sup>13</sup> The Mineral Report was prepared to reflect, *inter alia*, the mining costs at the date of withdrawal. The Report received BLM technical approval on Aug. 25, 2004, from BLM certified mineral review examiner Charles Horsburgh. BLM management acknowledged the Report on Sept. 7, 2004. Ex. 3 at 1; Tr. 38.

Capps' addendum was prepared in anticipation of a 2006 hearing and assessed mining costs as of the original hearing date. Capps also reduced hourly mining costs previously reported in the Mineral Report for the 2000 date of withdrawal by 2 cents for Larry Kribs and \$1.00 for Virginia Kribs because Capps had inadvertently used the 2002 Oregon Bureau of Labor and Industries prevailing hourly wage rate. *Cf.* Ex. 3 at 32, tab 5; Exs. 4, 6. This change ultimately did not affect the Mineral Report's conclusion that mining costs exceeded mineral value. Tr. 56.

<sup>14</sup> While Capps testified that he only estimated that Larry Kribs would be excavating or drilling for a maximum of 2 hours a day, he attributed the BOLI wage for "Equipment Operator" to Kribs' work even when he was screening. Tr. 343.

such that a person of ordinary prudence would not invest time and effort in developing a paying mine.

Trapp testified that after he prepared his initial appraisal, the Kribs sent samples of stones allegedly from one or more of their claims to Trapp in March 2005 for his unsolicited, independent review, apparently because they were wholly dissatisfied with the Mineral Report. Tr. 195, 197-98; Ex. 17 (Mar. 2, 2005, letter from Kribs to Trapp) at unpaginated 2. Using the same evaluation method for these samples that he used in his initial appraisal, Trapp concluded that the samples of colored stones were no different than what he had seen, and that there would be nothing but a limited market for a few of them. As for the CC stones, he concluded that some of the stones were larger than the ones he inspected in 2003. *Id.* He reported these findings to the Kribs by letter dated March 15, 2005. Ex. 17. Trapp specifically stated, as he did in his initial appraisal, that “[i]t would be incorrect to refer to [this] material as ‘Oregon Sunstone’ as it does not contain the copper content.” *Id.* (Mar. 15, 2005, letter from Trapp to Kribs) at unpaginated 3-4; Tr. 205. Trapp compared the clear samples to Madagascar moonstones, and explained that the largest Madagascar stones command between \$0.20 and \$0.80 per karat, with the value increasing depending on “intense” yellow color. Ex. 17; Tr. 206. While the CC stones in the Kribs’ 2005 sample were higher in value because of their larger size, Trapp testified that he could not authenticate whether and when the stones were taken from the Kribs’ mining claims or how they might be representative of material from a particular claim. Tr. 238. Trapp did not include the Kribs’ 2005 samples in his appraisal addendum. Ex. 5. This material was neither provided to Capps nor incorporated into Capps’ economic analysis addendum. Tr. 312-13; *see* Ex. 4.

As part of their rebuttal case, the Kribs brought to the hearing 460 pieces of clear, colorless feldspar that were faceted at the end of 2006. Ex. B-3 (cover letter to gem cutter in Asia). The stones are shown in photograph Exs. B-1 and B-2. Kribs testified that they were found on at least one or more of the six claims, but that, because the Kribs believed the clear material to be of low value, they did not label the source of any clear feldspar piece. Tr. 485, 455. Nor did the Kribs appear to be aware of the date the stones were excavated. Tr. 554-56. Fifty percent of the stones displayed in Exs. B-1 and B-2 was originally float feldspar picked from the claims’ surface and Kribs testified with “a hundred percent certainty” that any large pieces collected were from that float. Tr. 556-57. He testified that any pieces found before 2000 would have likely been float material because they had no equipment on site at that time. Tr. 556. When evaluating their value, Capps stated that the feldspar stones were “cute, but they’re -- you know, it’s, it’s decorative material rather than really true sunstones that are on the market.” Tr. 573. The Kribs also offered into

evidence other pictures of colored gems. Exs. C, D, F, and G.<sup>15</sup> These are pictures of different rough and 20 cut stones, including, in Exs. F-1 and F-4, one large faceted and one large cabochon stone. Kribs testified that the stones came from test pits on the Desert Dog S-1, S-3, or S-4 claims at some time after 1999. Tr. 489-98.

The Kribs offered into evidence a letter addressed to them from Jonathan L. Sprecher, a consulting geologist specializing in gold and silver mining, from Bend, Oregon. Exs. Q, R (Sprecher's resume). Sprecher provided editorial notations and corrections to the Mineral Report, which he based on BLM Manual H-3890-3 (Validity Mineral Reports, (Rel. 3-317 (10/08/03))). Sprecher did not render any conclusions to show that the feldspar could be extracted, removed, and marketed at a profit from any of the subject mining claims. Ex. Q. Sprecher generally objected to Capps' qualification to act as a mineral examiner, and provided criticisms of the Mineral Report details regarding such things as its discussion of feldspar geology, its map references, and its allegedly insufficient information regarding lab and analytical work. He asserted at several points that the "value of a gem deposit is from the larger size gemstones." Ex. Q at 4-5 ("small increase in size increased the value by 5 and 7 times"). He checked Oregon sunstone prices, but did not correlate them to stones found on the mining claims. *Id.* at 5-6. He disagreed with Capps' conclusion that there is no "open market" for Oregon sunstone. As support for this conclusion, he asserted that he Googled rough sunstones, and found 1,630 hits, 100 of which he looked at, 25 of which offer rough sunstone for sale. On eBay, he "found 11 items from six separate sites and 32 items from four ebay stores." Ex. Q at 7. He concluded from this that "[g]iven so many outlets, the price for Oregon sunstones is set by the market, not individual producers." *Id.* Sprecher did not testify at the validity hearing.

In response to Sprecher's letter, the Government called witness Charles Horsburgh, the BLM certified mineral review examiner who had approved the Mineral Report, to discuss the relevance of Sprecher's letter. Horsburgh had traveled to the claims, read Sprecher's letter, and ultimately decided that Sprecher was unfamiliar with BLM guidelines or the subject mining claim deposits and that the letter contributed nothing probative of the substantive issues of the case. Tr. 590.<sup>16</sup>

Following the contest hearing, Judge Sweitzer issued his decision concluding that all six mining claims were invalid for lack of discovery of a valuable mineral deposit. The Kribs appealed.

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<sup>15</sup> The Kribs' Ex. K-2 is from the Plush gemfield. Tr. 479.

<sup>16</sup> Neither Sprecher's letter nor his resume indicates that he has experience reviewing or performing validity examinations or has a professional familiarity with Oregon sunstone. *See* Ex. R.

*Arguments of the Parties*

The Kribs' Statement of Reasons (SOR) is a compilation of documents and evidence, some of which was submitted into the record (*e.g.*, Ex. N) and some of which is newly presented. The initial SOR enumerates 7 arguments. (1) The Kribs claim that the Government's *prima facie* case was based on "incorrect and false testimony and a flawed Validity Exam." SOR at 1. (2) They assert that the six mining claims are in three non-contiguous places and therefore different sampling was required. *Id.* (3) They claim to have a "valid existing right" not addressed by Judge Sweitzer. *Id.* (4) They argue that the "decision and Capps' report do not conform to 3809.100 and consequently do not have legal standing. This was not a patent survey." (5) They object to statements made by Capps "during testimony" which they claim to have been refuted by the Mineral Report and object to Judge Sweitzer's conclusion that "we haven't done enough work on the claims. **This work is not necessary** for a valid discovery as long as there is exposure of the mineral deposit before withdrawal." SOR at 2. (6) They claim that, having sold products at the Tucson Gem show, they "have a better and more informed concept of the market for Sunstones from our claims" than did Trapp or Capps. *Id.* (7) They complain that Judge Sweitzer did not give weight to Sprecher's letter to them, Ex. Q, identifying it without explanation as a "report prepared for the BLM." SOR at 3.

The Kribs attach to the SOR four documents which they identify as a "List of Enclosed Arguments." The first is identified as "Sunstone Facts." This document contains commentary on various record documents, for example identifying the Government's Ex. 10 as "[a] must read" and directing the reader to various pages of Ex. 15, submitted by the Government, which they identify as "Kribs Exhibit 15 Ponderosa." This document is a set of notes directing the reader to record information that the Kribs believe may be relevant to our review. The second attachment is entitled "Sunstone Valuation," and similarly goes through testimony with points of relevance to the Kribs. They conclude: "I would have had a rough time evaluating the selected samples sent to Mr. Trapp. They were small and selected for uniformity not value. Sunstone grades sharply up in price with size. See all of the other exhibits on stone value. Capps should not have graded the stones."

The third attachment, entitled "Mining vs Sampling," is a set of assertions about techniques for mining. The Kribs claim to be "sellers of Oregon Sunstones" at the Tucson Gem show, and, as best we can determine, to generally comment that they may have performed different mining techniques or used "Power Screens," at a cost of \$4,000-\$5,000, not addressed by Capps. The fourth attachment, entitled "Kribs' Exploration Costs and Methods," is a three-page complaint against Capps' alleged "negligence or deception"; it charges that Judge Sweitzer should have "recognize[d] that Capps' unreasonable costs and methods were for exploration and sampling and not actual mining." On page 2, the Kribs propose a mining scenario

“using some of Capps’ factual information and using the Kribs’ Testimony,” which avers that they could with no additional manpower mine “4200#” “of concentrate per day.” Apparently accepting Trapp’s view that the only valuable mineral found on their mining claims was clear, colorless stone, they propose that they could recover, at a vastly enhanced mining rate, 3,200 karats per day of such stones. Based on Trapps’ letter to them dated March 15, 2005 (Ex. 17), in which Trapp asserted that Madagascar sunstones of 1 karat or larger could sell for \$.20-\$.80/karat, they propose a “recovery of \$640-\$2,560 profit per day for the larger stones.”<sup>17</sup> The Kribs also attach various exhibits, some previously submitted into evidence, and others indicating that they have advertised sunstones at the Tucson Gem Show.

BLM objects to the Kribs’ SOR in general, explaining that the Kribs did nothing to identify any error committed by Judge Sweitzer in construing the evidence before him. BLM objects to the Kribs’ effort to add “evidence” at this juncture, pointing out that they had the opportunity at the hearing to cross-examine witnesses and present data, exhibits, and testimony, under oath. BLM argues that they cannot supplant a failed effort with uncorroborated statements and evidence now of a new mining method for clear, colorless stone, with entirely new parameters for stones and for hypothetical mining, at a time when the alleged information is neither verified under oath nor subject to cross-examination. In any event, BLM submits that most of the Kribs’ assertions are based on a lack of comprehension regarding mining claim validity, and that they are based on unsupportable assertions of fact.

### *Analysis*

We must agree with BLM. We find that the Kribs’ arguments reflect a misunderstanding of the nature of the validity examination that took place on their mining claims and the relevant principles of law that controlled it. Judge Sweitzer’s opinion studiously explained the law and its operation as it applied to the Kribs’ mining claims. It appears that the Kribs remain unpersuaded by his stated points of law. We briefly restate the law, in the hope that it clarifies any misunderstandings on their part, and identify what we believe to be the operative information in response to charges they make in their SOR. We do our best to understand their objections, but avoid making a case for the Kribs that they have not made.

The Mining Law of 1872, *as amended*, permits location of lode claims along veins or lodes of “rock in place bearing . . . valuable deposits.” 30 U.S.C. § 23 (2000). The validity of a lode mining claim depends on the discovery of an exposure

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<sup>17</sup> Mathematically, the assumption of this range of “profit” sets the cost factor at zero and the minimum size of each stone at one karat. Moreover, Trapp’s letter to the Kribs set the higher of these values for the more intense yellow Madagascar sunstones, not clear, colorless feldspar.

of a valuable mineral deposit in place within the boundaries of the claim. *United States v. Martinek*, 166 IBLA 347, 351 (2005), and cases cited. Such a discovery has been made when “minerals have been found and the evidence is of such a character 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 paying mine.” *United States v. Coleman*, 390 U.S. 599 (1968); *Castle v. Womble*, 19 L.D. 455, 457 (1894); *Converse v. Udall*, 399 F.2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969); *United States v. Lederer*, 144 IBLA 1, 9 (1998).

[1] When the Government challenges the validity of a mining claim by alleging a lack of discovery of a valuable mineral deposit, it has the burden of presenting sufficient evidence to establish a *prima facie* case that the claim is invalid. The Government presents such a case when a mineral examiner “testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery.” *United States v. Boucher*, 147 IBLA 236, 248 (1999), *citing United States v. Dresselhaus*, 81 IBLA 252, 257 (1984). The Government has presented a *prima facie* case when evidence provided in its case-in-chief “is completely adequate to support the Government’s contest of the claim and . . . no further proof is needed to nullify the claim.” *United States v. Martinek*, 166 IBLA at 404, *quoting United States v. Bunkowski*, 5 IBLA 102, 119, 79 I.D. 43, 51 (1972). Where land has been withdrawn from mineral entry subject to valid existing rights, the Government must show that a valuable mineral deposit was not already physically disclosed within the limits of a mining claim on the date of withdrawal and at the time of a hearing. *United States v. Hicks*, 162 IBLA 72, 76 (2004), and cases cited.<sup>18</sup> If the Government can make this showing as of the the time of withdrawal, there is no need to show the lack of such a discovery at the time of the hearing since it is enough to invalidate a claim by showing that it was invalid at the time the land was withdrawn. No further exploration for the purpose of physically exposing a valuable mineral deposit may be permitted after the date of withdrawal. *United States v. Mavros*, 122 IBLA 297, 301-02 (1992). Moreover, each of the contested claims must be supported by a discovery of a valuable mineral deposit, and, thus, there must be an actual exposure within the boundaries of each claim. *United States v. E. K. Lehmann & Associates of Montana, Inc. (Lehmann)*, 161 IBLA 40, 89 (2004), and cases cited.

Judge Sweitzer found that the Government sufficiently proved that the Tule Springs #1, Tule Springs #2, and Desert Dog S-2 claims contained no discovery before the withdrawal date. We agree. The record shows that, while onsite, Capps found no evidence of test pits on the Tule Springs #1 and #2 claims. He also noted in the Mineral Report that no discovery work had begun on the Desert Dog S-2 claim

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<sup>18</sup> Thus the Kribs’ belief, SOR at ¶ 5, that an “exposure” is all that they were required to show at the time of withdrawal misunderstands that there must be the exposure of a valuable mineral deposit within the claim boundary.

prior to withdrawal. Ex. 3 at 16. Kribs admitted that the Kribs had not performed any exploration work on the three claims before the withdrawal date. Tr. 475. Capps summarized these findings in his Mineral Report and concluded that no timely discovery occurred on those claims. As the record supports the conclusion that the Kribs had no discovery on the Tule Springs #1, Tule Springs #2, and Desert Dog S-2 claims as of the date of withdrawal, we affirm Judge Sweitzer's conclusion that they are invalid and address these three claims no further.

Judge Sweitzer also concluded that the Government established a *prima facie* case that the other three claims did not support a discovery at the time of withdrawal.<sup>19</sup> We agree. We recognize the vehemence of the Kribs' objection to the Mineral Report, in their many accusations as to its allegedly false or deceptive nature, but a party appealing has the burden of showing error in an administrative law judge's decision. *United States v. Pass Minerals, Inc.*, 168 IBLA 115, 149 (2006), and cases cited. Because conclusory allegations of error, standing alone, do not meet appellants' burden of proof on appeal, they must show with particularity that a mistake occurred and must further support the allegations with arguments or appropriate evidence showing error. *United States v. Multiple Use, Inc.*, 120 IBLA 63, 76 (1991). The Kribs have not demonstrated that Judge Sweitzer was wrong in concluding that the Government presented a *prima facie* case.

"Once a *prima facie* case is presented, the burden then shifts to the claimant and it is incumbent upon the claimant to present evidence which is sufficient to overcome the Government's case on the issues raised." *United States v. Gillette*, 104 IBLA 269, 274 (1988) (citations omitted). Judge Sweitzer found that appellants made no such evidentiary presentation on rebuttal. We cannot find that the Kribs' arguments before us would result in our overruling Judge Sweitzer's conclusion.

We recognize that the strongest case to be made for the Kribs comes in the area of Capps' mining costs, and so we consider that issue. It is clear from the record that Capps himself repudiated the accuracy of his cost figures. Capps' Mineral Report is replete with inked and initialed corrections. It is difficult to find a figure he did *not* change based on matters raised by the Kribs, Sprecher, or BLM. He had concluded

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<sup>19</sup> The Kribs attempted to escape the consequences of that showing by objecting to Capps' qualifications to practice geology in the State of Oregon without a license, based on Sprecher's comment in his letter. Ex. Q at 1. Judge Sweitzer properly rejected that assertion, decision at 3, noting that Capps was a certified mineral examiner in BLM's employ and may conduct validity exams on Federal lands even after retirement. See *BLM Manual*, § 3895.7 (Rel. 3-313 (9/21/98)) ("After separation . . . by retirement, certification may be retained."). This Board has previously recognized Capps as a BLM-certified mineral examiner and expert witness. *United States v. Rothbard*, 137 IBLA 159, 168 (1996).

that the use by the Kribs of dynamite and blasting caps would produce 2,000 pounds of material to process. He changed that figure to 5,000 pounds based on Sprecher's letter. See Ex. 3 at 32; Ex. Q. This in turn required him to change his daily cost of explosives from \$6.50 to \$1.00. Conversely, he tripled the amount of time (from 0.5 hours to 1.5 hours) needed daily for backhoe use, thus tripling that cost from \$17.50 to \$52.50. He concluded based on Trapp's value figures that the Kribs could recover at most \$0.16/pound of concentrate and therefore that the value per day of material sorted would be \$123. He changed this, however, to \$25 per day of value, to reflect Trapp's finding that 80% of the material was too fractured to cut. As noted above, he changed the hourly labor costs because he had used the 2002 BOLI wage figures, rather than the lower 2000 figures at the date of withdrawal.

We applaud the correction of error in any mineral report and, so long as the correction is made timely, professionally, and accurately, proceed to consider the report so corrected. Indeed, we would hesitate to issue a holding that would create an incentive for a certified mineral examiner to doggedly adhere to an obvious error to avoid admitting mistakes that could easily be corrected. On the other hand, the Report before us unfortunately suffers an appearance of being full of faults. Moreover, Capps utilized hourly labor figures of \$24.19/hour for Larry Kribs and \$24.01 for Virginia Kribs. For an 8 hour day each, this totaled \$193.52 and \$192.08, respectively. As noted above, Capps corrected these figures in his testimony to reflect 2000 wages. We note, however, that the Mineral Report for the Ponderosa Mine considered minimum wage labor costs for "labor to screen the material and pick out the stones which is the simplest form of mining with minimal costs." Ex. M at 21, 22, and n.8. The Kribs complain in the documents that comprise their SOR that a labor cost of \$8-10 should have been used, which would substantially reduce the costs of mining.<sup>20</sup> We find that the Kribs' submission into evidence of the Mineral Report regarding the Ponderosa Mines undercuts the case for the higher hourly rates associated with the Kribs' screening activities. But even at the \$10/hour rate advocated by the Kribs, the cost of labor for unskilled workers to screen material would overtake the daily value of found feldspar within the first hour.

This is because, more importantly, Trapp testified that there is no significant market for any of the Kribs' stones, other than to compete in the moonstone market with sales of transparent, colorless feldspar. His Appraisal and testimony are sufficient to present a *prima facie* case for the Government that there is no market for the stones on the subject three mining claims.

Judge Sweitzer did not find that the Kribs' testimony or evidence overcame Trapp's presentation and Appraisal, and we agree with him. Judge Sweitzer's

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<sup>20</sup> This assertion was a change from Krib's testimony that the cost of labor should be \$10/hour. Tr. 482.

conclusion that the Government submitted a *prima facie* case on this point is supported by the facts which show that a prudent miner would not mine the Desert Dog S-1, S-3, and S-4 mining claims in anticipation of their economic viability. The samples of colored stone proved to be small, fractured, and dull. Though the clear samples were given some seemingly inflated value for purposes of giving the claims the benefit of the doubt, even the Kribs did not contend in their hearing presentation that mining them would support the cost of doing so.<sup>21</sup>

We must agree with Judge Sweitzer that the Kribs' evidence in the form of additional feldspar crystals sent to Trapp which they claim were found on the Desert Dog S-1, S-3, and S-4 mining claims prior to withdrawal is not sufficient to overcome the Government's *prima facie* case. The presence of feldspar crystals on a mining claim does not satisfy the requirements of a discovery of a *valuable* mineral deposit under the Mining Law where it has not been shown that the market that exists for such stones would justify a prudent person's expending further time and money in reasonable anticipation of developing a profitable mine. *United States v. Thompson*, 168 IBLA 64, 103 (2006); *United States v. Foresyth*, 100 IBLA 185, 210, 95 I.D. 453, 467 (1988) ("It is not enough that a claimant himself desires to [mine] if the evidence leads to the conclusion that a prudent man would not.") (citation omitted); *Castle v. Womble*, 19 L.D. 455, 457 (1894), judicially approved in *Chrisman v. Miller*, 197 U.S. 313 (1905). This is particularly true when the Kribs testified at the hearing that they would not have mined for that material because of its low value.

We recognize the Kribs' dilemma that the only value Trapp found in their claims lay in something they were never looking for in the first place (CC material), while he discredited the value of the samples of material they were seeking to find. The problem is that they have not overcome his testimony and Appraisal conclusion that they cannot produce enough valuable sunstone on the claims to make a profit.

The Kribs failed to submit any evidence of a market for *their* stone that would overcome their own documented cost figures. The Kribs submitted articles into the record describing "material from the Ponderosa Mine as . . . the finest of all Oregon sunstone." Ex. I (Tucson Report). Though they assert that their stones compare favorably with those from the Ponderosa area, they do not prove this claim with any evidence. Other documents in the Kribs' Ex. I explain that the "most valuable sunstones are red with copper flecks." The Kribs submit public sunstone advertisements to show its value, but these ads publicize "Oregon red" and "fancy color" or "bicolor" sunstone. *Id.* The Notices of Assessment work submitted annually by the Kribs indicate that they have spent a minimum of \$20,000 in improvements to

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<sup>21</sup> As noted above, even though Trapp considered that the nine samples of CC material would recover various prices from \$0.02-\$0.10/gram, Capps chose the highest possible value for purposes of his Mineral Report. See Ex. 3 at Table 3.

the claims.<sup>21</sup> They assert in their testimony that a mine would cost approximately \$100,000 to establish. Tr. 524. Marketing costs would be \$6,000, “just to set up booths and advertising.” Tr. 482. Yet, they have submitted receipts for sunstone sales totaling at most \$370.50. Ex. 3 tab 2. We state “at most” because in some cases, the word “opal” is crossed out and sunstone replaces that word; in one case “2 stones” are recorded as having been sold; what type is unclear.

Frankly, the evidence of the Kribs’ work on the claims is that they have spent at least \$20,000; that BLM allowed them to continue to operate on their claims despite the requirements of 43 C.F.R. § 3809.100; that they repeatedly asserted that they were exploring even years after the withdrawal; and that they have sold \$370 worth of sunstones. At the same time, the Kribs’ letters to BLM asserted that they had retrieved 1.25 pounds of precious stones, and three times that of semiprecious stones, as early as 2000. Ex. 3 tab 6 (July 17, 2000, letter from Desert Dog Mines, Inc., to BLM). The Kribs’ own information validates Trapp’s inability to find evidence of a market for their sunstones because, as of the time of withdrawal and thereafter, they never were able to collect much in the way of sunstones valuable enough to sell. Their evidence does not support the conclusion that a prudent miner would invest further, let alone the \$100,000 they claim a mine would cost. In *United States v. Alaska Limestone Corp.*, 66 IBLA 316, 320 (1982), *aff’d*, 614 F.Supp. 642 (D. Alaska 1985), *citing United States v. Hess*, 46 IBLA 1 (1980), we rejected as speculative a rebuttal based on the presumption that the claimant could create a market that it had not shown in prior years. Quite simply, it is up to the Kribs to rebut the Government’s *prima facie* case with evidence of a real market for stone from their particular mining claims that would cover costs of mining. Their \$370 in sunstone sales, in the face of their own assertions of having spent in excess of \$20,000, does not meet their burden. The “best evidence of what a prudent man would do in the same or very nearly the same circumstances is what miners have or have not done over a period of years.” *United States v. Martinez*, 49 IBLA 360, 371, 87 I.D. 386, 392 (1980), *citing United States v. Wichner*, 35 IBLA 240 (1978); *see also United States v. Willsie*, 152 IBLA 241, 264 (2000). What the evidence shows is that years after withdrawal, the Kribs continued to conduct activities they described as exploration, and that they had found a few valuable stones, not a valuable deposit that would justify the establishment of a mine.

Nor does the information submitted in their SOR help them. They assert:

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<sup>21</sup> This figure is reported on the Affidavit of Annual Assessment Work, signed by Larry Kribs on Aug. 12, 2004. Added together, the Affidavits from 2000 through 2004 would attest to a total expenditure of \$49,300. Thus, we assume here that the 2004 Affidavit’s figure for the value of improvements to the mining claims is cumulative rather than additive. The Kribs testified that they have already spent \$30,000 on labor. Tr. 525.

As further proof of our discovery, our ad in the 2000 Gem Show Guide (Attachment 1) telling of our Sunstones. We chose not to sell any of the rough as we had only a few pounds of Gem Grade. Several dozen potential purchasers were really impressed with the opaque red material and wanted to be notified when we had material to sell. In August 2000, we sent a pound of clear stones to Bangkok to be faceted. A courier delivered them to us at the 2001 Tucson Gem Show. We elected to sell a few of the stones at \$10-\$15 a caret wholesale.

SOR at 2. The Kribs testified that they would be happy to find stones that could sell for \$25, which would be “very, very good.” Tr. 498.

We agree with BLM that we cannot accept the “Kribs’ Exploration and Costs Methods” into evidence to supplant their failure to overcome the Government’s *prima facie* case of lack of a market at the hearing. This appeal is not another opportunity to submit evidence they did not choose to submit at that time. *United States v. Pass Minerals, Inc.*, 168 IBLA at 149. Our review of a belated proffer of evidence is limited to an inquiry of whether it is sufficient to show that appellants are entitled to another hearing. *United States v. Memmott*, 132 IBLA 283, 287-88 (1995), and cases cited. To support a rehearing, appellants must explain why the late-offered evidence was not introduced at the first hearing. *Id.* The Kribs have not done so.

In any event, we would not find this document to provide a sufficient evidentiary basis for further hearing. The increased mining productivity proffered in it (from 770 pounds of concentrate per day to 4,200 pounds) does not correspond to Larry Kribs’ testimony during the validity hearing in which the Mineral Report was the subject of both direct and cross-examination. *See* Tr. 476-78; 481-82 (Kribs testified that, when mining as opposed to sampling, he would bring a small shaker screen and “run 100 to 200 yards of material in a couple of weeks”). The suggestion that either production could be increased by a factor of 6 without adding laborers or that the Kribs could find, daily, 3,200 karats of moonstones each in excess of 1 karat is inherently incredible in light of the evidence adduced at the hearing. Most importantly, the “Kribs’ Exploration and Costs Methods” stands as proof against the mining claims’ validity at the time of the withdrawal. By the time of the hearing, the Kribs testified that they were not searching for clear, colorless stones at all because such stones had little to no value. That they have scoured the data presented at the hearing, for purposes of an SOR, to reconfigure a potential mine with parameters to compete with Madagascar moonstone, only demonstrates what the Kribs do not want to be established – that no such discovery of a valuable deposit was made by the date of withdrawal. We consider this information no further.

The Krib’s rebuttal case would falter in any event because, as Judge Sweitzer held, they have not met the test for showing that a particular claim contains a

valuable deposit. The Kribs assert that the samples they submitted in Exs. C, D, F, and G, were found somewhere, sometime, on the six claims. No evidence or testimony was adduced to verify when or where these samples were extracted. Therefore, they cannot command substantial evidentiary weight, if any at all. *United States v. Martinek*, 166 IBLA at 414-15 (inference of valuable minerals is not enough to show exposure of a valuable deposit within the limits of a mining claim boundary).

Moreover, the Kribs conceded that many of their samples are from grab samples or float material. The Kribs argue that the exposure can be documented in the occurrence of float on their claims. SOR at ¶ 5. But even a good assayed sample of float material will not suffice to establish a location of a lode claim because exposure of a vein or lode carrying mineral values in place is a necessary precondition to the validity of a lode claim. 30 U.S.C. § 23 (2000); *United States v. Winkley*, 160 IBLA 126, 135 n.11 (2003). It is well established that a vein or other mineralized ore body must be physically exposed on an unpatented lode mining claim, *Lehmann*, 161 IBLA at 92-93, and appellants made no persuasive showing that a mineral deposit existed on any of the three claims on which they had conducted exploration at the date of withdrawal, by submitting stones that could have come from anywhere or could have been non-representative high grade samples from a group of claims rather than evidence of valuable mineralization on a particular claim.

Appellants state that Judge Sweitzer erred in relying on the validity exam to invalidate their claims because sampling should have taken place on each claim. SOR at 1 ¶ 2. The fact that each claim was sampled was not disputed during the hearing. The Kribs worked with Capps to select sample sites and did not object to those sites or his sampling methods used during the sampling. *See, e.g.*, Ex. 15, Dec. 19, 2002, letter from Larry Kribs to BLM (stating that the mineral examination took two trips). Furthermore, “[a] *prima facie* case cannot be overcome by arguments that the mineral examiner did not do the sampling and assaying that might have proven the existence of a discovery.” *United States v. Hicks*, 162 IBLA at 79 (quoting *United States v. Winkley*, 160 IBLA at 144).

The Kribs believe Judge Sweitzer erred by failing to acknowledge what they claim are their valid existing rights under the Steens Act. SOR at ¶ 3. While the Steens Act withdrew the land on which appellants’ claims were located from new location, entry, and patent under the mining laws, “[s]ubject to valid existing rights,” 16 U.S.C. § 460nnn-81 (2000), as against the United States, a mining claimant acquires no vested rights merely by locating a mining claim. “Even though a claim may be perfected in all other respects, unless and until a claimant is able to show that the claim is supported by a discovery of a valuable, locatable mineral within the boundaries of the claim, no rights are acquired.” *United States v. Conner*, 139 IBLA 361, 365 (1997); *aff’d*, 73 F.Supp. 2d 1215 (1999) (citations omitted). The hearing gave the appellants a forum to show that they had a valid existing right with respect

to one or all of their claims prior to the withdrawal. Because appellants could not show that a valuable discovery occurred on their claims at the time of the withdrawal, there were no “valid existing rights” for Judge Sweitzer to discuss.

The Kribs argue that 43 C.F.R. § “3809.100 states that no work can be done until a Validity Exam is completed. The decision states that our claims are invalid because insufficient or no work was done before withdrawal.” SOR at ¶ 4. We infer that the Kribs believe that the regulation prevented them from effectively sampling to prove a valuable discovery. BLM correctly points out in its Answer that the regulation “would only come into play after a withdrawal; thus BLM would have had no impact on what [appellants] did or did not do on the six claims prior to the 2000 withdrawal.” Answer at 25. Notwithstanding the fact that BLM allowed the Kribs to continue to explore the mining claims, to the extent the Kribs believe as a legal matter that they were entitled to find the discovery after a withdrawal, they are mistaken. *Lehmann*, 161 IBLA at 107.

The Kribs aver they have been going to gem shows for at least a decade and therefore “have a better and more informed concept of the market for Sunstones from our claims than either” Capps or Trapp. SOR at ¶ 6. While it may be true that appellants have a keen knowledge of the sunstone market, they still presented no evidence to rebut the Government’s showing that the stones on their claims were not marketable, such that a prudent person would consider mining them.

Appellants claim that the “Jonathon Sprecher report prepared for the BLM was given a lot of value by the BLM. C Horsburgh of the BLM testified 25 pages Tr. 574-599 trying to refute the report.” SOR at ¶ 7. BLM elicited Horsburgh’s testimony to respond to the Sprecher letter, after objecting to its introduction given that Sprecher was not there to testify as to its contents. We find BLM’s concerns well-taken. BLM’s legal strategy in responding to the letter with its own witness, in the absence of a contestee witness to cross-examine, in no way validates the letter. We agree with Judge Sweitzer that Sprecher’s letter is difficult to find probative. Sprecher wrote that he had been to the claim sites and had found float material similar to “Oregon Sunstones collected at other localities.” Ex. Q at 1, 4. Sprecher declared that “[s]ince the value of material removed was compared to an estimate of the mining costs to determine the validity of the claims, a more detailed cost estimate should have been prepared.” *Id.* at 4. Sprecher contradicted the conclusion that no open market for Oregon sunstones exists by doing a Google search and seeing what he could find on eBay. *Id.* at 7. But as the Kribs concede, Sprecher did not aver that the claims supported a valuable discovery or that there was even a market for the stones found on the mining claims. The following colloquy took place:

THE COURT: Does Exhibit Q in any place give an opinion of Mr. Sprecher concerning whether or not any of the Claims is valid?

MR. KRIBS: I don't believe there's a statement in so many words, that the Claims are valid, because this report, this a ge-, this is a report by a geologist.

THE COURT: But I didn't understand what you said. Does he, someplace, give his opinion that they are valid?

MR. KRIBS: No. He made no opinion about the validity of them.

Tr. 534.

Finally, the Kribs attribute error to Judge Sweitzer's failure to give Sprecher's report "any weight." But, Judge Sweitzer held:

[Sprecher's] critique has limited or no probative worth because it was not made under oath or penalty of perjury, the bases and significance of many of his opinions are not adequately explained, he did not appear at [the] hearing to explain them and test them by cross-examination, and his criticisms are largely immaterial. Their immateriality stems from two factors: (1) that they have no bearing upon whether a prima facie case was established because they were not adduced during the Government's case-in-chief and (2) that the Kribs failed to provide the data and analysis necessary to establish a reliable estimate of the mineralization' quality, quantity, and value to compete with the analyses and estimates of Messrs. Capps and Trapp which might be weakened by the criticisms.

Decision at 23. We cannot disagree with this conclusion on the probative value of a "witness" who did not testify.

Our review of the law and the evidence adduced at the hearing convinces us that the evidence, considered in its totality, fails to establish the existence of a valuable mineral deposit within the limits of the Kribs' lode mining claims. The Kribs did not refute the Government's proof of the lack of a market for the representative mineral found on the mining claims sufficient to overcome the costs of mining even at a minimum wage rate.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision is affirmed.

\_\_\_\_\_/s/\_\_\_\_\_  
Lisa Hemmer  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
James F. Roberts  
Administrative Judge