UNITED STATES v. GEOFFREY AND CHARLOTTE GARCIA (ON JUDICIAL REMAND)

184 IBLA 255 Decided December 27, 2013

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. GEOFFREY AND CHARLOTTE GARCIA
(ON JUDICIAL REMAND)

IBLA 1998-270-2 Decided December 27, 2013

U.S. v. Geoffrey Garcia and Charlotte Garcia, 161 IBLA 235 (2004), reconsideration denied May 18, 2005, on judicial remand.

Affirmed as modified.

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

   To be "valid," a mining claim must be supported by the discovery of a valuable mineral deposit. A discovery exists where the evidence is such that a prudent person would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. The test has been refined to require the mining claimant to show as a present fact that there is a reasonable likelihood of successfully developing a paying mine, considering historic price and cost factors and assuming that they will continue. The mining law does not provide for or recognize any exception to the showing required to establish a discovery.

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

   When applying the marketability component of the prudent man test, a claimant cannot rely on speculative future marketability to supply present value on the marketability date. Nor can he use hindsight to supply the future prices he reasonably might have anticipated on the marketability date without also considering the higher costs of labor, capital, energy, equipment, and environmental permitting and compliance necessary to develop and operate a mine.

APPEARANCES: Geoffrey and Charlotte Garcia, *pro sese*, Merlin, Oregon; Michael Schoessler, Esq., U.S. Department of the Interior, Office of the Solicitor, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

The Board's decision in *U.S. v. Geoffrey Garcia and Charlotte Garcia*, 161 IBLA 235 (2004), reconsideration denied by Order dated May 18, 2005, is again before us as the result of a remand from the U.S. District Court for the Eastern District of Virginia, as ordered by United States Court of Appeals for the Fourth Circuit.

To summarize the administrative proceedings,[1] on April 30, 1996, the Government initiated a contest challenging the validity the Last Chance Association Placer mining claim, ORMC 81850, alleging that minerals had not been found within the limits of the claim in sufficient quantity and/or quality to constitute a discovery of a valuable mineral deposit, and further alleging that the land embraced by the claim was not being used or occupied for mining purposes or operations. The contest was heard in September 1997 by Administrative Law Judge (ALJ) Harvey Sweitzer, who rendered a decision finding that the claim was valid on March 26, 1998 (ALJ Decision). The Bureau of Land Management (BLM) appealed.

On appeal, the Board determined that Judge Sweitzer had properly analyzed the evidence and determined the facts in all but one respect, but correcting that error materially affected the economic analysis. Specifically, the Board concluded that Judge Sweitzer erred in using a waste water system designed to handle a production rate of 100 loose cubic yards per hour (lcy/hour).[2] We reached that conclusion because the evidence showed that the Garcias proposed a production rate of 25 lcy/hour, and that figure was the basis of the Government's estimate of the costs of designing and constructing a waste water treatment system that did not discharge water to the surface. *U.S. v. Garcia*, 161 IBLA at 253. Because the evidence showed that the existing waste water system of settling ponds could not handle a production rate of 100 lcy/hour without discharging to the surface, and because such discharges

[1] The facts of this matter are set forth at length in *U.S. v. Garcia*.

[2] Judge Sweitzer used 100 lcy/hour because the Garcias' updated patent application and their expert, James D. Rodine, indicated that the wash plant had been used to process ore from other claims at rates of 60 to 100 lcy/hour using a two-person crew. *U.S. v. Garcia*, 161 IBLA at 253-54. However, the record also contained evidence that the Garcias had previously discharged water to the surface in violation of state law.

are prohibited under state law, we rejected the 100 lcy/hour rate as unsupported in the record.[3] Adjusting the analysis in light of a wash plant rate of 25 lcy/hour resulted in total costs of $103,500 to mine Area 1, estimated revenues of $94,800, and a loss of $8,700. *Id.*, at 258. On that basis, we reversed the ALJ's decision finding that the Garcias had discovered a valuable mineral deposit on the Last Chance Association mining claim. *Id.*

The Garcias filed suit in the U.S. District Court, Eastern District of Virginia, Alexandria Division, where the District Court, ruling on cross-motions for summary judgment, granted the United States' motion, denied the Garcias' motion, and dismissed the appeal by Order dated December 18, 2007. *Garcia v. U.S.*, No. 1:06cv915 (CMH/TCB) (Dec. 19, 2007). The Garcias appealed. In an unpublished *per curiam* opinion, the Fourth Circuit Court upheld the Board's decision in every respect except one, and directed the District Court to remand the case to the Board to consider that issue. *Garcia v. U.S.*, No. 08-1250 (4th Cir. Jan. 20, 2010) (Slip Op.), 442 Fed. Appx. 745, 2010 WL 7325246, 2010 U.S. App. LEXIS 1197.[4]

Citing certain long-standing precedent,[5] the Garcias contended that "the marketability test does not apply to claims involving precious metals." 442 Fed. Appx. at 751, Slip Op. at 14. The Circuit Court stated:

> We agree that, when precious metals are concerned, the applicant does not have to demonstrate *present* marketability, and that the correct legal standard for precious metals claims is whether, considering the likely costs and revenues, a prudent person would expend labor and capital to mine the claim. This standard permits an applicant to point to the *likely future price* of a precious metal to demonstrate that a

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[3] We declined to simply quadruple the cost of building the ponds because doing so would ignore economies of scale, and there was no evidence in the record regarding the cost of building settling ponds to handle a production rate of 100 lcy/hour, whereas adequate evidence had been adduced with respect to a 25 lcy/hour operation. While there was a significant question concerning whether the site could physically hold ponds sized to handle 100 lcy/hour, there was no question that the site could handle a 25 lcy/hour operation. *U.S. v. Garcia*, 161 IBLA at 255.

[4] The Circuit Court summarily denied the parties' cross-motions for rehearing by Order dated May 4, 2010.

[5] The Garcias cited *U.S. v. Coleman*, 390 U.S. 599, 602 (1968) (quoting *Castle v. Womble*, 19 L.D. 455, 457 (1984)), and *Moon Mining Co. v. Hecla Mining Co.*, 161 IBLA 334, 362 (2004) (citing *Lara v. Sec'y of the Interior*, 820 F.2d 1535, 1541 (9th Cir. 1987)). *See* 442 Fed. Appx. at 751, Slip Op. at 13-14.

> prudent person would mine the metal even if market conditions at the moment were not favorable. [Emphasis added.]

Id. The Court remanded the case to the District Court with instructions to remand to the Board "to consider the Garcias' claim under the correct legal standard." *Id*. Accordingly, we are here concerned with the Circuit Court's perception that this Board "held [the Garcias] to an incorrect standard by requiring them to demonstrate to a certainty that their mine would yield an immediate profit." *Id.*

In response to an order of the Board, on February 28 and March 4, 2011, the parties submitted their recommendations with respect to how to proceed to comply with the remand order. The Garcias stated that the issue identified by the Court could be resolved on the basis of the administrative record. BLM agreed that no further evidence or hearing was necessary to comply with the Court's directive. Briefing was scheduled by the Board in an order dated March 2, 2011.

The Parties' Arguments on Remand

BLM states the issue on remand as a matter of whether the Board's use of $400 per troy ounce (tr. oz.) should be revised to account for "likely future" gold prices as of March 20, 1990,[6] the marketability date, and "whether, considering the likely costs and revenues, a prudent person would expend labor and capital to mine the claim." BLM Opening Brief on Remand (Opening Brief) at 12 (citing 442 Fed. Appx. at 751, Slip Op. at 14). BLM argues the likely future prices of gold were the same or less than those determined by the Board, and therefore the Garcias' claim remains invalid under the mining law.

The Garcias open their arguments noting that in their patent application they estimated expenses of $1,000 to $2,000 and an estimated recovery of 0.01 to 0.02 tr. oz. of gold/cy in a gravity-fed water method of processing an average of 50 cy/day over a 4-month mining season, further estimating that approximately 160,000 cy of gravel had been mined. Claimants' Argument on Remand (Claimants' Argument) at 1. In addition, they assert the Mineral Examiner determined that "approximately $1.4 million worth of gold remained on the claim at a $400/ounce

[6] Although the Board's decision in *U.S. v. Garcia*, 161 IBLA at 238, stated that the Garcias received First Half Final Certificate (FHFC) on Mar. 3, 1990, the ALJ Decision stated that FHFC was issued on Mar. 20, 1990 (citing the Mineral Report for the Last Chance Association Placer Claim, Govt. Ex. 2 at 4). The hearing proceeded on the latter basis.

gold price," citing Administrative Record (AR)[7] at 1134 (patent application). *Id.* at 2. They argue that based on historic prices only as of the date FHFC issued on March 20, 1990, a prudent person would have been justified in expending labor and means with a reasonable chance of developing a successful mine. More specifically, the Garcias argue:

> A review of gold prices in the 5 years previous to the [FHFC] shows that from April of 1987 to July 1988 (16 months) the average price of gold was higher than $436 per ounce. . . . A review of gold prices in the 5 years before the patent application in 1985 would show that in 1980 the price of gold had a cumulative average of over $600 per ounce and in 1981 around $460. The average gold price in the peak month (December of 1987) in the 5 years preceding the [FHFC] was $486.31/ounce or approximately 21% higher than the $400/ounce used by the IBLA in their calculations. . . . Factoring this into the IBLA's net revenue estimate of $94,800, a gold price of $486/ounce would give a net revenue of $115,200 or a net profit of approximately $11,200 after the $103,000 in expenses is deducted.

Id. at 3-4. The Garcias conclude they reasonably would have anticipated that gold prices would continue to rise and be as high as the highest of those of the past. *Id.* at 4.

The Garcias further argue that they could sell refined gold at the spot market price of $400/tr. oz. "instead of 15% below the spot price as described in IBLA's mining scenario," and if they did, it would add $16,726 to the Board's estimated net return, resulting in a profit of $8,000. *Id*. at 4-5. They maintain they had a "reasonable chance of profiting" from the claim, even with a loss of $8,700, because the Board included costs that they would pay themselves to work the claim. *Id.* at 5. Lastly, they suggest that there may be a "more cost efficient method to mine the claim" than that considered by the Board. *Id.* at 6.

BLM filed a Response Brief. It first emphasizes that the mineral deposit (referred to as Area 1 at the hearing and by the ALJ) would be mined out in less than 1 year at a loss of $8,700.[8] BLM challenges the prefatory assertions contained in the

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[7] The AR was provided on compact disks with an index and 120 PDF files consisting of numerous documents that were bates-stamped sequentially.

[8] Though the Garcias now suggest that the Board erred in considering only Area 1 in weighing profitability, the parties agree that the deposit designated as Area 1 would be exhausted in less than 1 year. Garcias' Petition for Rehearing before the Fourth (continued...)

Claimants' Argument by noting that the mining operation described in the patent application likely would not comply with state law and, in any event, was not the operation that was presented at the hearing through the Garcias' expert witness. BLM further argues that the Garcias' $1,000 to $2,000 estimate of expenses did not include wages for them or anyone else. Additionally, BLM disputes the accuracy of the assertion that the Mineral Examiner's tests indicated the claim held $1.4 million of gold, stating that no such figure appears anywhere in the record. BLM disputes both the implied gold value of $8.75/lcy the Garcias appeared to have applied to the 160,000 lcy of mined pay gravels, and the volume of pay gravels, contending neither is supported in the record. According to BLM, the average value of BLM's samples assumed a price of $400/tr. oz. and a fineness of 820, which results in $7.93/lcy. Response Brief at 2-3.

With respect to the merits of the Garcias' arguments in response to the remand order, BLM first states that the Garcias erroneously look only to past gold prices in fashioning their argument, when the Court directed the Board to re-examine the "likely future" prices of gold. *Id.* at 4. Second, BLM argues the Garcias improperly selected the month with the highest gold prices (December 1987) from among past months to determine the gold value as of March 20, 1990, which is "not a rational, objective, or even statistically sound method . . . . Nor is it representative evidence of gold prices at the time of the marketability date—in general, or in this specific instance." *Id.* at 7. Thus, BLM in general assails use of one month to establish historic prices, and use of December 1987 in particular, to increase revenue projections, and properly objects to selecting the 16 months when average gold prices were highest ($436/tr. oz. for April 1987 to July 1988), while excluding the remaining 44 months of the 5-year period when average prices were below $436/tr. oz. *Id.* at 7-8. BLM rejects the Garcias' reasoning that because the price of gold increased 15 percent in September 1989 to February 1990, they reasonably could assume similar increases would persist, noting that they have again selected the

[8] (continued...)
Circuit dated Apr. 6, 2012, at 5 ("[M]ining in Area 1 . . . can be completed in less than a year, most likely in less than six months"); *see also U.S. v. Garcia*, 161 IBLA at 250-53 (citing Tr. at 496 and ALJ Decision at 29). It should be noted that in their revised mining plan dated June 14, 1990, the Garcias proposed to initially mine Area 1, which had the shallowest overburden, so that mining costs would be considerably less than mining other areas of the claim. If Area 1 could not be mined profitably, it was highly probable the other areas could not be mined profitably, given the much higher costs to remove and dispose of the considerably thicker overburden found elsewhere on the claim. Had mining begun in March 1990, it would have ended by March 1991 at the latest, a fact that is plainly relevant to a marketability or profitability analysis.

period most favorable to them and ignored less favorable periods, even though the evidence showed that prices in fact declined after the marketability date. *Id.* at 9.

BLM also contests the Garcias' assertions that they could sell gold at the spot market price and eliminate the 15 percent reduction applied by Judge Sweitzer, or sell unrefined gold and eliminate the Judge's adjustments for fineness and smelting costs.[9] BLM rightly contends the issues raised in these arguments have been determined and are now foreclosed by administrative finality, res judicata, and collateral estoppel, as they could have been raised and litigated during the hearing. *Id.* at 10-11.

BLM next responds that the Garcias' assertions with respect to their willingness to mine the claim even if they lost money and the costs they could avoid by working and supervising themselves (*e.g.,* lost time, contingencies, and overhead) improperly substitute a subjective test for the objective test that the prudent person and marketability standards require under long-standing precedent. *Id.* at 12-13. BLM notes, moreover, that the Garcias' expert included calculations covering these same costs, where the Government calculated only the costs for lost time and contingencies. *Id.* at 12, n.9. Clearly, the question of whether the prudent person test is a subjective test has long since been answered in the negative and will not be revisited here. *See U.S. v. Coleman*, 390 U.S. at 602.

Lastly, BLM correctly urges the Board to disregard the Garcias' contentions with respect to "unnamed potential mining operations," as they could have submitted evidence of any such operations at the hearing and did not do so. *Id.* at 14.

The Garcias responded with a Reply Brief, disputing BLM's claim that the deposit will be mined out in less than a year. Although this Board merely reviewed the record created by the parties, they contend BLM is referring to a portion of a 6.5-acre deposit "put forth by the IBLA," whereas they described a much larger deposit in their original patent application and 1990 updated application. Garcias' Reply Brief at 1. Second, the Garcias object to BLM's assertion that only one issue is before this Board on remand, contending they properly raised matters relating to "likely costs and revenues" because "the 'costs' assumed by the Board would also be revenues for the miners." *Id.* at 2. Third, ignoring the Fourth Circuit's statement to the contrary, 442 Fed. Appx. at 751, Slip Op. at 14, the Garcias challenge BLM's statements that it is error to consider only gold prices before FHFC was issued,

[9] The 15 percent figure for the price of gold sold in Oregon was established by the Garcias' mining expert. *U.S. v. Garcia*, 161 IBLA at 246. Similarly, the Garcias' witness used an economic analysis that included adjustment for fineness and smelting. Response Brief at 11, n.8 (citing Contestees' Ex. V, AR at 1337, and Ex. X, AR at 1342).

arguing that if post-FHFC prices are considered, then we properly may consider current prices because the "official price of gold is of public record." Reply Brief at 3 (citing *U.S. v. Gold Placers, Inc.*, 25 IBLA 368 (1976)). The Garcias frame the issue before the Board on remand in terms of whether, "[c]onsidering the grade and tenor [sic] of the deposit and the historical price of gold, evidence has shown that the Claimants had a reasonable chance of making a profit from mining the claim." *Id.* at 3-4. A brief restatement of the law governing discovery is appropriate.

The Law of Discovery

[1] To be "valid," a mining claim must be supported by the discovery of a valuable mineral deposit. 30 U.S.C. § 22 (2006); *Cameron v. U.S.*, 52 U.S. 450, 459 (1920); *Barrows v. Hickel*, 447 F.2d 80, 82 (9th Cir. 1971). A discovery exists where the evidence is such that a prudent individual would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. *Chrisman v. Miller*, 197 U.S. 313 (1905); *Castle v. Womble*, 19 L.D. 455, 457 (1894). "[P]rofitability is an important consideration in applying the prudent-man test." *U.S. v. Coleman*, 390 U.S. at 602 (quoting *Castle v. Womble*, 19 L.D. at 457). Thus, the "prudent man" test has been refined to require a showing that the mineral deposit is "presently marketable at a profit," meaning that the mining claimant "must show that *as a present fact*, considering historic price and cost factors and assuming that they will continue, there is a reasonable likelihood of success that a paying mine can be developed." *In re Pacific Coast Molybdenum*, 75 IBLA 16, 29, 90 I.D. 352, 360 (1983) (emphasis added). The mining law does not provide for or recognize any exception to the showing required to establish a discovery.

Determining that a prudent individual would be justified in attempting to develop a paying mine necessarily involves consideration of whether a mineral deposit has been exposed within the limits of a claim and, if so, whether the evidence is such that an individual would be justified in concluding that the exposed mineral exists in sufficient quantity and quality so as to make expectations of profitable extraction reasonable under the facts of record. *See, e.g., Chrisman v. Miller*, 197 U.S. at 322; *Thomas v. Morton*, 408 F. Supp. 1361, 1371-72 (D. Ariz. 1976), *aff'd*, 552 F.2d 871 (9th Cir. 1977); *Converse v. Udall*, 399 F.2d 616, 620-21 (9th Cir. 1968). Stated differently, the issue is whether a prudent person would have a reasonable expectation that minerals could be extracted and sold at a profit as of the marketability date. *U.S. v. Anthony*, 180 IBLA 308, 332 (2011).

The prudent person standard is an objective standard, and therefore does not depend on what a particular claimant may actually plan to do. *See U.S. v. Coleman*, 390 U.S. at 602; *U.S. v. Willsie*, 152 IBLA 241, 271 (2000); *U.S. v. Foresyth*, 100 IBLA 185, 209-10, 94 I.D. 453, 467 (1987); *U.S. v. Rice*, 73 IBLA 128, 140-41 (1983);

U.S. v. Harper, 8 IBLA 357, 369-70 (1972). In applying that standard, we assume "proper management" of the mining venture. *See Converse v. Udall*, 399 F.2d at 623.

Analysis

We begin by stating that we do not perceive the remand as either an opportunity for or a directive to conduct a second *de novo* review of the ALJ's decision. The Board sustained the ALJ's analysis of the evidence and findings of fact with the sole exception of the wash plant rate. The Circuit Court did not reverse the Board's decision or its view of the facts as revealed by the record established at the hearing, and it expressly affirmed the Board's conclusion regarding the appropriate wash plant rate. 442 Fed. Appx. at 749-50, Slip Op. at 9-10. The Garcias' arguments, enumerated above, largely constitute an effort to revive issues and contentions that were either waived or finally decided by the Department, straying far beyond the Court's mandate to apply "the correct legal standard for precious metals," by considering "likely future prices." *Id.* If not discussed below, we accordingly consider such arguments no further.

As to that mandate, the Fourth Circuit's decision did not purport to change, in any way, the substantial and long-standing body of law regarding the requirements of discovery. In the absence of any analysis or citation to statutory or other controlling authority,[10] we do not interpret the Court's decision as intending to mint a new

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[10] The Court cited *Moon Mining v. Hecla,* 161 IBLA 334, which cited *Lara v. Sec'y of Interior*, 820 F.2d at 1541. 442 Fed. Appx. at 751, Slip Op. at 14. Neither decision is properly construed as creating an exception to the prudent man test requiring a claimant to show, as a present fact, that there is a reasonable likelihood of success in developing a paying mine, and neither announces a new standard that excises profitability from the core of the prudent man test. Moreover, the price of gold on a given date was not the dispositive issue in either case. *Moon Mining* was decided based on the finding that the mining claimant had inferred a grade of resource that could not be sustained in the record. 161 IBLA at 356, 362, 368. In *Lara*, with respect to one pair of claims, plaintiff argued that "he need not make *a full showing* of marketability because he mines a precious metal." 820 F.2d at 1541. After considering apparently conflicting precedent that could be reconciled only by distinguishing between common variety and precious minerals, the Ninth Circuit reiterated the principle that profitability need not be guaranteed or absolutely proven, but "evidence of the *costs and profits* of mining the claims should have been considered in determining 'whether a person of ordinary prudence would be justified in the further investment of labor and capital.'" *Id.* (citing *Multiple Use, Inc.*, 353 F. Supp. 184, 190-91 (D.C. Ariz. 1972) (emphasis added)). The *Lara* Court held the Board had erred in purportedly requiring "a showing that the mineral in question

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exception to those requirements merely because the mineral deposit at issue is a precious metal.

Applying the Marketability Concept to Precious Metals

Although the marketability test has been identified with cases involving common variety minerals at the time such minerals were locatable, *see, e.g.*, *Layman v. Ellis*, 52 L.D. 714, 721 (1929), the Department issued a decision involving claims for titanium that traced the development of the marketability test through authorities dating back to 1873, the year after the mining law was enacted. *U.S. v. New Jersey Zinc Co.*, 74 I.D. 191, 194-96 (1967).

In *U.S. v. Coleman*, 390 U.S. at 600-03, the Court approved the Department's marketability test—whether a mineral can be "extracted, removed and marketed at a profit"—deeming it a logical complement of the prudent-man standard. Although the Court 12 years later concluded that the particular history of the treatment of oil shale claims indicated that the "present marketability standard does not apply to" them, the Court also stated that "[i]t does not affect our conclusion in *United States v. Coleman* that for other minerals the Interior Department's profitability test is a permissible interpretation of the 'valuable mineral' requirement." *Andrus v. Shell Oil Co.*, 446 U.S. 657, 673 n.11 (1980).[11]

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[10] (...continued)
can be presently extracted, removed, and marketed at a profit." *Id.* (citing *U.S. v. Lara*, 67 IBLA 48, 57 (1982), *aff'd*, *U.S. v. Lara (On Reconsideration)*, 80 IBLA 215 (1982)). However, the Court's decision affirmed the district court's decision, which had upheld the Board's determination that Lara's claims were invalid for lack of a valuable mineral discovery of gold. That determination was premised on the Board's finding that Lara had presented no evidence that the claims contained gold, not on issues of valuation and profitability. In sum, *Moon Mining* and *Lara*, and the precedent upon which they rely, are wholly consistent with the prudent man test we initially applied and again apply in considering the Garcias' claims on remand.

[11] The attempt to distinguish claims for precious metals from claims for other minerals arises for the obvious reason that a buyer can be found for gold once it is produced, but other minerals may not be marketable if users have closer sources of supply. *See, e.g., Ideal Basic Industries v. Morton*, 542 F.2d 1364, 1369-70 (9th Cir. 1976) (limestone not marketable from claims that were too far from prospective purchasers who had closer sources of supply). Although the Court in *Coleman* observed that high prices for precious metals left "little room for doubt that they can be extracted and marketed at a profit," 390 U.S. at 603, the mining law refers not to minerals but to mineral *deposits*, and many gold deposits cannot be
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Nevertheless, the Supreme Court's conclusion that the marketability test applies to all minerals other than oil shale has not discouraged mining claimants from arguing that it does not apply to precious minerals. In the year before the Court issued its opinion directing that the Garcias' case be remanded, another Court provided this terse response to arguments similar to those raised by the Garcias: "[T]his court sees no reason to revisit the Supreme Court's decision in *Coleman*, applied to valuable minerals such as gold and silver by the Ninth and Tenth Circuits, as well as the IBLA, in its resolution of the instant motion." *Ernest K. Lehmann & Assoc. of Montana v. Salazar*, 602 F. Supp.2d 146, 161 (D.D.C. 2009) (citing *Dredge Corp. v. Conn*, 733 F.2d 704 (9th Cir. 1984); *Hallenbeck v. Kleppe*, 590 F.2d 852 (10th Cir. 1979)); *U.S. v. Bush*, 157 IBLA 372, 376 (2002). The Court of Appeals for the District of Columbia Circuit affirmed. 377 Fed. Appx. 28 (D.C. Cir. 2010); *accord*, *Roberts v. Morton*, 549 F.2d 158, 163 (10th Cir.), *cert. denied*, 434 U.S. 834 (1977); *Converse v. Udall*, 399 F.2d at 621-22; *Skaw v. U.S.*, 13 Cl.Ct. 7, 28 (1987), *aff'd*, 847 F.2d 842 (Fed. Cir.), *cert. denied*, 488 U.S. 854 (1988).

In *Converse v. Udall*, Converse argued that the wrong legal standard of discovery had been applied to mining claims located on National Forest lands prior to the enactment of the Surface Resources Act or Common Varieties Act, 30 U.S.C. §§ 611-615 (2006). Citing *Chrisman v. Miller*, 197 U.S. at 321, which adopted the Department's decision in *Castle v. Womble*, 19 L.D. at 457 (quoted with approval in *U.S. v. Iron Silver Mining Co.*, 128 U.S. 673, 683 (1888)), the Ninth Circuit stated that "it was made clear as long ago as 1888 that the finding of some mineral, or even a vein or lode, is not enough to constitute discovery – their extent and value are also to be considered." *Converse v. Udall*, 399 F.2d at 619, and cases cited. Like the Garcias, Converse contended that *U.S. v. Coleman*, 390 U.S. at 600 held that "marketability has no relevance in a case where the discovery is of precious metals," based on the following dictum:

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[11] (...continued)
prudently developed because they lack the extent or quality needed to justify the necessary expenditures. *See, e.g.*, *Ernest K. Lehmann & Assoc. of Montana v. Salazar*, 602 F. Supp.2d at 159-63. As one writer observed:

> Many abandoned mines bear silent witness that not all deposits of precious metals can be extracted and marketed at a profit. The precious metals, unlike some of the non-metallic minerals such as sand and gravel, can always be marketed in the sense that they can be sold, but this does not mean they can be sold at a profit.

M. Braustein, NATURAL ENVIRONMENTS AND NATURAL RESOURCES: An Economic Analysis and New Interpretation of the General Mining Law, 32 UCLA L. Rev. 1133, 1172 (1985).

> While it is true that the marketability test is usually the critical factor in cases involving nonmetallic minerals of widespread occurrence, this is accounted for by the perfectly natural reason that precious metals which are in small supply and for which there is a great demand, sell at a price so high as to leave little room for doubt that they can be extracted and marketed at a profit.

399 F.2d at 621 (quoting *U.S. v. Coleman*, 390 U.S. at 603).

The *Converse* Court expressly rejected the contention that marketability need not be shown in precious metals cases, stating:

> We think it clear that the marketability test is applicable to all mining claims. We do not agree with Converse's argument that the last sentence . . . means that marketability has no relevance in a case where discovery is of precious metals. Such a holding would be contrary to Mr. Justice Field's rationale in *United States v. Iron Silver Mining Co., supra* (128 U.S. at 683, 9 S. Ct. 195), and to the rationale of the prudent man test itself. It, too, concerns itself with whether minerals are "valuable in an economic sense." And that is the way that courts have long interpreted it. That is what Mr. Justice Field was writing about. So was Mr. Justice Brewer in *Chrisman v. Miller, supra* (197 U.S. at 322-323, 25 S. Ct. 468). So was Mr. Justice Van Devanter in *Cole v. Ralph, supra* (252 U.S. at 299, 40 S. Ct. 321) and in *Cameron v. United States, supra* (252 U.S. at 457, 40 S. Ct. 410). So were Judge Gilbert in *Charlton v. Kelly, supra* (156 F. at 436-437, Judge Hamley in *Adams v. United States, supra* (318 F.2d at 870), and Judge Madden in *Mulhern v. Hammitt*, 9 Cir., 1964, 326 F.2d 896, all speaking for this court.

399 F.2d at 621-22.

We agree that the precedent cited by the Ninth Circuit reflects the great majority of holdings in the courts and this Department addressing the issue and clearly puts the matter to rest. Accordingly, our task has two aspects: to consider "likely future prices" of gold as of the marketability date, and then determine whether a gold valuation that includes those likely future prices shows, as of the marketability date, that the gold could then be marketed at a price that exceeds the costs of mining, extracting, removing, and marketing it. *See* 442 Fed. Appx. at 751, Slip Op. at 13; *U.S. v. Anthony*, 180 IBLA at 329. Notwithstanding the Garcias' assertions to the contrary, that showing is not properly characterized as requiring the claimant to be actually engaged in a profitable mining operation on the marketability date, or certainty of commercial success: "[A]ctual successful exploitation need not be shown - only the reasonable potential for it." *U.S. v. Gillette*, 104 IBLA 269, 274 (1988).

At the hearing, the Garcias elected not to introduce evidence of gold prices after the marketability date and established an overall average price of $396.73/tr. oz., based on the 5-year period from April 1985 through March 1990. In contrast, BLM submitted evidence of actual reported gold prices for the 5-year period from January 1988 through December 1992 and the yearly averages for each of those years. It then averaged the yearly averages for the period, establishing a price of $381.56/tr. oz., rounded to $382/tr. oz. Judge Sweitzer rejected both methods of determining gold prices.

After determining they were accurate and comparable, he considered the Garcias' averaged prices for April 1985 through March 1990, and BLM's averaged prices for January 1988 and March 1990, and averaged them, which resulted in a price of $408.89/tr. oz. The Judge adopted a price of $400/tr. oz. ALJ Decision at 20-21.[12]

On appeal, the Board determined to defer to the ALJ's methodology, reasoning as follows:

> In *U.S. v. Collord*, 128 IBLA 266, 277, n.4 (1994), *aff'd in relevant part, rev'd in part*, No. 94-0432-S-EJL (D. Idaho, Sept. 28, 1994), *aff'd*, 154 F.3d 933 (9th Cir. 1998), we did not limit consideration of the price of gold to an historic range up to and including the date of issue of an FHFC. Instead, the Board discussed the evidence in the record . . . . Thus, while *Collord* does provide support for looking beyond the date of issuance of FHFC in order to establish an applicable gold price in this case, it does not provide

[12] BLM surmises that Judge Sweitzer reached his final valuation of $400/tr. oz. by adding the monthly prices proffered by both parties ($23,803.98 for the Garcias' 60 months + $11,039.99 for BLM's 27 months = $34,843.97), dividing that sum by the total number of months ($34,843.97 ÷ 87 = $400.51), and then rounding down rather than up. BLM Opening Brief at 3, n.1.

> specific guidance on what the relevant period of time should be.[5] For that reason, under the circumstances of this case, we will defer to Judge Sweitzer's finding of $400/tr-oz. for the price of gold, as it does not differ significantly from that offered by [Mineral Examiner] Capps ($382/tr-oz.).
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> [5] Therein, despite having data for a three-year period beyond issuance of the FHFC, the Board utilized only a few months of that data (July 1985 to January 1986).

U.S. v. Garcia, 161 IBLA at 245-46.[13]

Complying with the Court's Instructions on Remand

As stated, the Circuit Court appeared to disapprove the use of only past gold prices to determine a gold valuation. We are therefore obliged to abandon the deference we accorded the ALJ's method of valuation. Accepting the parties' election to stand on the record of the proceedings before the ALJ, we shall consider the evidence of the 2 years of future gold prices adduced by BLM at the hearing, in addition to those for the 9 months remaining after the March 1990 marketability date. *See* BLM Ex. 2 at 35.[14] We perceive two courses of action, neither of which changes the Board's reasoning or the outcome for the Garcias.

The Board could consider a 5-year period as the parties did,[15] and adjust it to include the record evidence of future prices. In that case, we would include the averaged prices for the 9 months that remained of 1990, and those for 1991 and 1992, and correspondingly omit the Garcias' figures for 9 months of 1985, and those for 1986 and 1987. That method would produce an overall 5-year average gold price

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[13] BLM notes that it has since provided for use of a 6-year average pricing formula that considers the average price for the month in which the marketability date occurs; the monthly average price for each of the 36 months preceding the marketability date; and the monthly average price for each of the 36 months following the marketability date. Three years' of futures information is generally all that is available. 65 Fed. Reg. 41724, 41725-26 (July 6, 2000); BLM Opening Brief at 12-13, n.6.

[14] Those prices have not been impugned or rejected as wrong or inaccurate, and they show that gold prices in fact declined from an average annual price of $383.60/tr. oz. in 1990, to $362.19 in 1991, to $343.69 in 1992.

[15] *See U.S. v. Garcia*, 161 IBLA at 244, n.3.

of \$381.569/tr. oz. (\$22,894.16 total of average monthly prices ÷ 60 months = \$381.569).

Alternatively, the Board could consider all 8 years of data supplied by both parties (6 years of data from the Garcias and 2 years of data from BLM), as it did before it determined to defer to Judge Sweitzer's calculation. *See U.S. v. Garcia*, 161 IBLA at 245-46. Even with abnormally high gold prices in 1987 and 1988, the average gold price for that 8-year period was \$381.51/tr. oz. *Id.* Therefore, under either approach, correcting the deficiency identified by the Court – *i.e.,* the failure to consider likely future gold prices – produces, within cents of each other, the same valuation figure that BLM urged at the hearing that Judge Sweitzer rejected. At \$382/tr. oz., the Garcias' anticipated revenues decline from \$94,800 to \$90,300, and their net loss increases from \$8,700 to \$13,200, bearing in mind the facts that the deposit in Area 1 would be mined out in less than a year, and the Garcias' net losses would likely be greater if they mined any other areas of the claim because costs would be greater. *Id.* at 248, n.10 (citing ALJ Decision at 21), 258.

On remand, the Garcias urge us to use actual gold prices from the decades since the 1990 marketability date to validate their willingness to expend their labor and means and endure losses. Because the price of gold overall has generally trended upwards over time, despite periodic declines in price, their mining operation eventually would have become profitable, finally compensating them for the losses suffered in years past. *See* Claimants' Argument at 5 ("The Claimants have a reasonable chance of profiting from the Last Chance Claim even if the mine operated at the \$8,700 loss described by the IBLA's mining scenario."); *id.* ("a prudent person would mine the claim even if the IBLA's cost scenario projected a small loss"); Claimants' Reply Brief at 3 ("If the court is to consider the price of gold after the issuance of the [FHFC] in 1990, then they could look to today's gold prices hovering well above \$1,450 per ounce. . . . [W]e contend that the official price of gold is of public report."). The Garcias plainly misconstrue the prudent person test as consistently applied by the courts and this Department.

[2] The prudent person formulation predicts likely future prices based on the historic range of prices for the mineral on the marketability date, and accounts for fluctuations in price by averaging them for the period under consideration. *In Re Pacific Coast Molybdenum Co.*, 75 IBLA at 29, 90 I.D. at 360. "An elevated or depressed price for gold does not represent any relevant historic range and is essentially based on speculation or unsupported hope." *U.S. v. Laczkowski*, 111 IBLA 165, 172 (1989). "A claimant cannot rely on speculative future marketability to supply present value." *Barrows v. Hickel*, 477 F.2d 80, 83 (9th Cir. 1971) (locatable sand and gravel). Thus, nothing in the law of discovery or the countless judicial and Departmental decisions that have applied it supports or authorizes the use of hindsight to demonstrate that the Garcias' belief that prices would eventually rise

enough to render a mine profitable was prudent on March 20, 1990. *U.S. v. Freeman*, 179 IBLA 341, 357-58, n.15 (2010). To allow hindsight to substitute for the prices a prudent person could reasonably expect as of the marketability date would be to allow claimants to speculatively hold claims for years, waiting for a time when their claims could be profitably developed.

We reiterate that "[t]he test is not . . . whether a prudent man at some time in the future under more favorable circumstances might expect to develop a profitable mine, but whether under the circumstances *known at the time* a profitable mine might be expected to be developed." *U.S. v. Jenkins*, 75 I.D. 312, 318 (1968). Assumptions regarding the prudent person are based on objective standards related to the nature of the mineral deposit disclosed on the claim, and not on the attributes, inclinations, desires, or circumstances of a given claimant. Evidence of a claimant's willingness to develop a claim therefore does not demonstrate a discovery. *U.S. v. Foresyth*, 100 IBLA at 209-10, 94 I.D. at 467. Moreover, even when a claimant is actually mining a claim at a small profit, a finding of no discovery may be justified because "a prudent man would not develop a mine which promised a profit below the return for a commercial venture." *U.S. v. Kottinger*, 14 IBLA 10, 16 (1973). "[P]rofit over cost must be realizable from the [mineral deposit] itself and it is that profit which must attract the reasonable man." *Ideal Basic Industries, Inc. v. Morton*, 542 F.2d 1364, 1369 (9th Cir. 1976) (locatable limestone) (citing *Melluzzo v. Morton*, 534 F.2d 860, 864 (9th Cir. 1976)). Clearly, the Garcias' willingness to lose money on their mining venture until the price of gold rose to eliminate and compensate them for such losses cannot suffice to establish a discovery within the meaning of the mining law. To abandon present marketability would be to adopt speculation as a basis for demonstrating a discovery of a valid mineral deposit, contrary to long-standing Federal law.

Even assuming *arguendo* that the Department should now suddenly announce a new test that allows hindsight to be substituted for the future prices that reasonably would have been anticipated on the marketability date, the higher costs of labor, capital, energy, equipment, opportunity, environmental permitting and compliance costs revealed in hindsight also would have to be considered, a fact the Garcias have failed to acknowledge or address. In any case, it would be improper to allow the Garcias to strip out costs they are willing to absorb, even at a loss. *See U.S. v. Armstrong*, 184 IBLA 180, 218-19 (2013).

As the Circuit Court directed, the Board has considered the record evidence of likely future gold prices as of the 1990 marketability date and determined that the correct gold valuation was $382/tr. oz. On that date, the mineral deposit in Area 1 could not be marketed at a price that exceeded the likely costs of conducting the mining operation the Garcias envisioned. The decision is modified to reflect a price for gold of $382/tr. oz. and is affirmed as so modified.

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 as modified on judicial remand.

/s/
T. Britt Price
Administrative Judge

I concur:

/s/
Christina S. Kalavritinos
Administrative Judge