UNITED STATES v. J. DENNIS STACEY AND PELHAM L. JACKSON

171 IBLA 170 Decided March 28, 2007

UNITED STATES
v.
J. DENNIS STACEY AND PELHAM L. JACKSON

IBLA 2004-205 Decided March 28, 2007

Appeal from a decision by Administrative Law Judge Harvey C. Sweitzer, on a Complaint filed on behalf of the United States Forest Service, declaring a placer mining claim (P.R. Association #16) invalid because it was not shown to contain uncommon varieties of building stone that are locatable under the mining laws.

Affirmed.

1. Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Common Varieties of Minerals: Unique Property--Mining Claims: Common Varieties of Minerals: Special Value--Mining Claims: Determination of Validity

In order to establish that a deposit of building stone is uncommon variety and locatable under the mining laws under the Departmental guidelines identified in McClarty v. Secretary of the Interior, 408 F.2d 907, 908 (9th Cir. 1969), codified at 43 CFR 3830.12(b): (1) there must be a comparison of the mineral deposit with other deposits of such mineral generally; (2) the mineral deposit at issue must have a unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special value must be reflected by the higher price which the material commands in the market place.

2. Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Common Varieties of Minerals: Unique Property--Mining Claims: Common Varieties of Minerals: Special Value--Mining Claims: Determination of Validity

Where a mining claimant establishes that its deposit has a unique property which enables it to produce building stone at a reduced cost resulting in substantially greater profits than other, similar deposits, the claimant's deposit will be deemed to have a distinct and special value and be locatable under the mining laws when that unique property is intrinsic to the deposit. Where a claimant fails to demonstrate that its reduced costs and higher profits are attributable to an intrinsic, unique property of the deposit, however, the claimant will be deemed not to have preponderated against the Government's prima facie showing that the deposit is not locatable.

APPEARANCES: J.P. Tangen, Esq., Anchorage, Alaska, for J. Dennis Stacey and Pelham L. Jackson; Dawn C. Germain, Esq., Office of the General Counsel, United States Department of Agriculture, Juneau, Alaska, for the U.S. Forest Service.

OPINION BY ADMINISTRATIVE JUDGE JACKSON

J. Dennis Stacey and Pelham L. Jackson (appellants) appeal the decision of Administrative Law Judge Harvey C. Sweitzer in which he held that their building stone deposits were common variety and not locatable under the mining laws. The contest proceeding before Judge Sweitzer was initiated by the filing of a complaint by the Bureau of Land Management (BLM), on behalf of the United States Forest Service (USFS), charging that locatable minerals had not been exposed on appellants' 10 placer and one lode mining claims in sufficient quantity or quality to constitute a discovery of a valuable mineral deposit, that the lands embraced by these claims are nonmineral in character, and that the stone on these claims is common variety. [1/] After answer and a 6-day hearing, Judge Sweitzer issued a decision on March 29, 2004 (ALJ Decision), in which he declared the lode mining claim invalid, but determined that a valuable gold deposit has been discovered on nine of the ten

[1/] These claims were located after 1955 in secs. 11, 12, 13, and 14, T. 7 N., R. 2 E., Seward Meridian, Alaska. The lode claim was denominated as Spencer #1; the placer claims were denominated as P.R. Association #6 through P.R. Association #12, and P.R. Association #14 through P.R. Association #16. The P.R. Association #16 (PR 16) is the claim at issue on appeal.

contested placer claims. (ALJ Decision at 2, 20-28.) As to the tenth placer claim (PR 16), he ruled that appellants had not shown that stone on that claim, identified as graywacke [2/] and sometimes referred to as Spencer stone, is uncommon variety. (ALJ Decision at 29-34.) Appellants timely filed this appeal and challenged Judge Sweitzer's decision only with respect to the locatability of their building stone on PR 16.

BACKGROUND

Appellants' claims are situated along the Alaska Railroad on a glacio-fluvial outwash at the terminus of the Spencer Glacier in the Chugach National Forest. (Ex. 1 at 1, 7, 9.) Rock (sometimes referred to as Spencer stone) and gravel have been mined below the Spencer Glacier since the early 1900s. Id. at 13-15. Appellants produced 84,100 cubic yards of gravel and 160,664 cubic yards of rock from their claims between 1991 and 1997 under a mineral materials permit. [3/] Id. at 13, 15, 20, and 23. They submitted a proposed plan of operation for "locatable building stone" before their permit expired, but the Regional Forester, USFS, determined that appellants' stone was common variety stone and not locatable under the mining laws. (Ex. 1, Atts. 2 and 3.) The Regional Forester's determination was affirmed on appeal to the Chief, USFS, on October 28, 1997. (Ex. 1, Att. 4.)

During the pendency of their appeal to the Chief, USFS, certain lands were withdrawn from mineral entry, including those covered by appellants' claims, in order to make "high quality rock and gravel available to nearby communities for private and public works projects." (Ex. 1, Atts. 6 and 7.) Appellants were then notified that USFS would soon conduct a mineral validity examination to determine whether the discovery of a locatable mineral deposit had been made on their claims. This notice solicited their participation, requested information to assist in verifying the validity of their claims, and informed them that this review would address

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[2/] Graywacke is a "dirty" sandstone containing 20% or more silt and clay which occurs very commonly "both locally in southern Alaska (Map 6) and worldwide." (Ex. 1 at 12, 17; Tr. 83.) For ease of reference, we identify the Government's exhibits by number, the Contestee-Appellants' exhibits by letter, and all testimonial references are to the multi-volume set of transcripts for the 6-day hearing held before Judge Sweitzer.

[3/] Appellants' mineral materials permit was issued by the USFS for "common, unspecified, pit-run gravel and rock." (Ex. 1, Att. 11.) It was amended and extended on five occasions, ultimately expiring on Sept. 15, 1997. Id.

whether their rock was uncommon variety. [4] (Ex. 1, Att. 8.) In particular, the USFS notice advised Stacey and Jackson that they must identify any unique properties giving their deposit a distinct and special value. Id. at 2.

USFS conducted a field examination of appellants' claims in July of 1997. (Ex. 1 at 2; Tr. 32-33.) The lead examiner was Ronald Baer, a certified USFS geologist; his main assistant was USFS geologist Carol Huber. (Tr. 21, 23, 25, 26.) Shortly before the field examination began, appellants submitted information to demonstrate the validity of their claims. Appellants asserted, inter alia, that their stone was unique for use as armor stone [5] and that their deposit was unique because of its exceptionally high yield of armor stone which, they contended, "lowers production costs inversely in relation to yield." [6] (Ex. 1, Confidential Appendix (Conf. App.) 1 at 17-18; see also Ex. 1, Att. 2 at 2, and Ex. K at 9.) Appellants were present during the field examination, discovery locations were identified with their assistance, and all discovery sites were sampled by the mineral examiners. (Ex. 1 at 24-25.) Appellants did not then identify stone boulders on their claims as being uncommon variety or having any unique property that gave these boulders a distinct and special value for decorative use.

The mineral examiners evaluated whether appellants' armor stone was uncommon variety. After evaluating each element of the Departmental guidelines identified in McClarty v. Secretary of the Interior (McClarty), 408 F.2d 907, 908 (9th Cir. 1969), their Mineral Report concluded that appellants' stone was common variety. (Ex. 1 at 46-52 and Att. 20.) Shortly before the Mineral Report was issued

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[4] More specifically, the USFS notice states that: "The Regional Forester has determined that rip rap and armor stone you have been extracting under Forest Service permit is common variety, therefore, a salable commodity under USDA Forest Service regulation at 36 CFR 228, Subpart C. Since you have asserted that this material (rock) is an 'uncommon variety' mineral, the validity examination will review the mineral classification." (Ex. 1, Att. 8 at 2.)

[5] Armor stone is a generic term for any type of large, cubical, dense rock (e.g., graywacke, basalt, and granite) that is used on engineered marine structures to resist the effect of waves, tides, and storms. (Ex. 1, Att. 1 at 11; Tr. 940-41, 967, 969, 983, 1066; Ex. K at 4-5.) Individual armor stones range in size from 1,600 pounds to 10 tons or more. Id.

[6] As described in appellants' submission to the mineral examiners: "If the yield is 10%, then ten tons of rock must be quarried and handled to produce one ton of product. If the yield is 40%[,] however, then only 2 ½ tons of rock must be quarried to produce one ton of product." (Ex.1, Conf. App. 1 at 18.)

(January 1999) and approved (February 1999), appellants raised a new issue to the mineral examiners, asserting that locatable, decorative boulders were also present on their claims. (Ex. U.) On June 25, 1999, BLM initiated this contest.

DISCUSSION

This appeal involves a single question: whether PR 16 contains a stone deposit that is locatable under the mining laws. Under the Building Stone Act of August 4, 1892, 30 U.S.C. § 161 (2000), lands chiefly valuable for building stone and not otherwise withdrawn were generally made subject to location as placer mining claims. See generally United States v. Haskins, 59 IBLA 1, 88 I.D. 925 (1981). The subsequent enactment of the Materials Act of 1947, 61 Stat. 681, and section 3 of the Multiple Use Mining Act of 1955 (Common Varieties Act or Surface Resources Act), 30 U.S.C. § 611 (2000), however, limited the applicability of the Building Stone Act "only to building stone that has 'some property giving it a distinct and special value.'" United States v. Coleman, 390 U.S. 599, 607 (1968). As succinctly stated by Judge Sweitzer, "a building stone is locatable only if it is an uncommon variety." (ALJ Decision at 12.)

Appellants contend that PR 16 contains large armor stone and decorative boulder deposits that are uncommon variety and thus locatable under the mining laws. They argue in their Statement of Reasons (SOR) that the Government failed to establish a prima facie case that their armor stone and/or boulders are common variety and that appellants established that both deposits were uncommon variety stone. For ease of analysis, we address their arguments on armor stone and decorative boulders separately below.

I. Armor Stone

A. The Government Established a Prima Facie Case

Judge Sweitzer held that "[a] prima facie case means that the Government's case-in-chief is completely adequate to support the contest and that no further proof is needed to nullify the claim." (ALJ Decision at 15, citing United States v. Knoblock, 131 IBLA 48, 81, 101 I.D. 123, 140-41 (1994).) In order to establish a prima facie case that the mineral material is a "common variety," Judge Sweitzer held the Government must show "(1) that the mineral material is sand, stone, gravel, pumice, pumicite, or cinders, (2) that the material's price is similar to that paid for such material typically put to 'common variety' use, and (3) that the Government's witness has been unable to identify any special use for the mineral material commanding a higher price." (ALJ Decision at 15, citing United States v. Rothbard, 137 IBLA 159,

171 (1996).) "In other words," Judge Sweitzer held, "the Government must present sufficient evidence to establish a prima facie case that the mineral deposit does not possess a unique property giving it a distinct and special value." (ALJ Decision at 16, citing United States v. LeFaivre, 138 IBLA 60, 67 (1997).)

Judge Sweitzer correctly ruled that the Government had presented a prima facie case that the Spencer stone, or graywacke, is common variety stone. The Mineral Report concluded that graywacke is common variety rock and not subject to location under the mining laws based upon a number of factors, "including that graywacke is extremely common and widespread, that a number of other common variety rock types may meet engineering specifications for armor stone and riprap, and that Spencer Stone does not command a higher price in the market place than other common varieties used for armor stone." (ALJ Decision at 11; Ex. 1 at 2, 47-50.) Baer also testified that appellants had not identified the discovery of any other stone, such as decorative boulders, before or during his field examination of these claims. (Tr. 84.) Judge Sweitzer accordingly ruled: "This evidence from a Government examiner, who has had sufficient training and experience to qualify as an expert witness, establishes a prima facie case of the claim's invalidity." (ALJ Decision at 16, citing United States v. Gillette, 104 IBLA 269, 274-75 (1988), and United States v. Mansfield, 35 IBLA 95, 96-99 (1978).) On these facts, Judge Sweitzer could hardly have ruled other than that the Government had established a prima facie case that appellants' stone was common variety, whether in blocks (i.e., armor stone) or as boulders. Accordingly, the burden then shifted to appellants to demonstrate by a preponderance of the evidence that their deposit is uncommon variety and locatable under the mining laws. LeFaivre, 138 IBLA at 68.

B. Appellants Failed to Demonstrate that their Armor Stone Deposit is Uncommon Variety.

[1] To overcome a prima facie case of common variety under the Common Varieties Act, appellants must establish that their stone deposit has "some property giving it distinct and special value." United States v. Coleman, 390 U.S. at 605. In response to the Supreme Court's decision, the Secretary reviewed prior Departmental decisions to identify criteria for determining whether a particular property gives a deposit a "distinct and special value." United States v. U.S. Minerals Development Corp., 75 I.D. 127, 139 (1968). From its review of that decision, the Ninth Circuit Court of Appeals discerned five Departmental guidelines for determining whether a particular building stone deposit is subject to location under the mining laws:

> (1) there must be a comparison of the mineral deposit in question with other deposits of such minerals generally; (2) the mineral deposit in

> question must have a unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special value must be reflected by the higher price which the material commands in the market place.

McClarty, 408 F.2d at 908. However, the Ninth Circuit held that higher prices "cannot be the exclusive way of proving that a deposit has a distinct and special economic value attributable to the unique property of the deposit," noting that "[i]t is quite possible that the economic value of the stone would be reflected by reduced costs or overhead so that the profit to the producer would be substantially more while the retail market would remain competitive with other building stone." Id. at 909.

[2] On remand and after rehearing, the Board found that McClarty's stone was "cheaper by half to quarry and prepare for market, resulting in significantly higher profits to the quarry operator," and held that this was sufficient to demonstrate that McClarty's stone had a distinct and special value. United States v. McClarty, 17 IBLA 20, 42, 81 I.D. 472, 481-82 (1974). See also United States v. Knipe, 170 IBLA 161, 165-66 (2006); United States v. Thompson, 168 IBLA 64, 75 (2006) and cases cited; LeFaivre, 138 IBLA at 66-67; United States v. Pope, 25 IBLA 199, 208-09 (1976), aff'd on reconsideration, 27 IBLA 133, 134 (1976). As recently recognized in Knipe, 170 IBLA at 165-66, "the distinct and special value of the mineral deposit may be reflected by the higher price which the material commands or the lower cost of mining the material, but in each case, the linchpin of profitability must be some intrinsic property of the mineral deposit, rather than extrinsic factors." With this understanding of the Departmental guidelines, codified at 43 CFR 3830.12(b), [7] and the McClarty test, we apply them to the circumstances presented.

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[7] This rule answers the question "What are the characteristics of a locatable mineral?," stating, in subsection (b) of 43 CFR 3830.12:
"Under the Surface Resources Act, certain varieties of mineral materials are locatable if they are uncommon because they possess a distinct and special value. As provided in *McClarty v. Secretary of the Interior*, 408 F.2d 907 (9th Cir. 1969), we determine whether mineral materials have a distinct and special value by:
(1) Comparing the mineral deposit in question with other deposits of such minerals generally;
(2) Determining whether the mineral deposit in question has a unique physical property;
(3) Determining whether the unique property gives the deposit a distinct and
(continued...)

Comparison of Appellants' Deposit with Other Deposits of Such Mineral Generally

The parties agree that appellants' rock has been and can be used as armor stone. Appellants contend, however, that Judge Sweitzer misapplied the first Departmental guideline, 43 CFR 3830.12(b)(1), by comparing their deposit to other armor stone quarries, rather than to stone quarries generally. (SOR at 18-22.)

Judge Sweitzer considered "a key issue in determining whether the armor stone is common or uncommon variety is whether the [appellants'] deposit should be compared to similar deposits of stone or common variety deposits of stone generally." (ALJ Decision at 29.) Relying upon United States v. Kaycee Bentonite Corp., 64 IBLA 183, 89 I.D. 262 (1982), he determined that "Spencer stone should be compared to similar deposits of stone rather than common variety deposits generally * * *." (ALJ Decision at 32.) To reach that finding, he observed that:

> Factors favoring a finding that the Spencer stone should be compared to similar deposits of stone rather than common variety deposits generally include (1) that use of the rock for armor stone falls under the category of building purposes which are typical of common variety minerals, (2) that graywacke is commonly found in southern Alaska and worldwide, and (3) that the value of armor stone depends on incidental factors like the proximity of the deposit to prospective consumers, local needs, and the like, rather than on any generally recognized value. Using the graywacke to build structures–marine or otherwise–is obviously a typical building purpose, and the fact that other types of rock, including basalt, granite, welded tuff, quartzite, and gneiss, are used as armor stone (see, e.g., Ex. 1, [p]p. 47-48; Tr. 822-23, 870) underscores that typicality.

(ALJ Decision at 30.)

7/ (...continued)
special value;

(4) Determining whether, if the special value is for uses to which ordinary varieties of the mineral are put, the deposit has some distinct and special value for such use; and

(5) Determining whether the distinct and special value is reflected by the higher price that the material commands in the market place."

Judge Sweitzer also relied upon the testimony of Gregory A. Beischer, contestees' expert and a certified professional geologist with 15 years of experience in construction material deposits (Tr. 856-57), who testified that "lots of quarries can produce two-ton stones" (Tr. 906-07), as well as the testimony of both Beischer and Baer that over 30 Alaskan quarries produce armor stone. Id. See also Ex. 1, Att. 20; Ex. K. Table 2. In addition, he noted that Spencer stone from PR 16 is similar to other graywacke in characteristics and uses and that graywacke is indisputably "common both in southern Alaska and worldwide." (ALJ Decision at 31.)

Appellants countered in their rebuttal case that virtually no other quarry could produce acceptable armor stone because each had "fatal flaws." [8/] (Ex. B, Table 2-4; Tr. 774-75, 784, 818-19.) On appeal, appellants assert that stone meeting USACE specifications for armor stone is "limited and rare" (SOR at 18), but this assertion is not supported by the record. Many of the same "fatally flawed" quarries identified by Stacey were shown to produce armor stone acceptable to USACE. (Ex. 1, Att. 20; Tr. 92-93, 341-47, 1081-82.) Moreover, Judge Sweitzer noted that "rock from eight other Alaskan quarries meet all of the USACE specifications * * *. Mr. Baer presented data showing that rock from 12 of the quarries for which Stacey lacked information or a 'fatal flaw' was identified actually was determined by the USACE to be suitable for armor stone or had been successfully used as armor stone * * * (compare Ex. K, Table 2 with Ex. 1, Att. 20; see also Tr. 820-21, 930-31)." (ALJ Decision at 31.) In fact, Kenneth J. Eissis (USACE), testified that the Corps of Engineers "only rarely adjusts ADCE's standard specifications for armor rock to allow for use of a local rock because there usually is no problem finding a source of rock which will meet the specifications (Tr. 1087-89, 1110-11)." (ALJ Decision at 31.)

[8/] The principal "fatal flaw" identified by appellants involved petrographic test results involving microscopic analysis to identify minute rock flaws. (Tr. 782; Ex. B, Att. 8 at 3-4.) Government experts testified that the most important specification for armor stone is size and that other specifications, including petrographic test results, could be adjusted depending on armor stone availability. (Tr. 1061, 1086-88, 1110-11.) Judge Sweitzer noted that, during rebuttal, expert testimony from two employees of the Alaska District Corps of Engineers (ADCE) supported Baer's conclusion that graywacke or Spencer stone was common variety rock, testifying that "there are many sources for armor stone meeting the USACE's [U.S. Army Corps of Engineers'] minimum specifications and the Spencer Stone derives no distinct and special value from any attributes that exceed those specifications or from the large size of the rocks that the deposit is capable of producing (see, e.g., Tr. 1061-68, 1081-82)." (ALJ Decision at 11.)

Whether a particular deposit is uncommon variety under the first element of the Departmental guidelines requires a comparison of claimant's deposit "with other deposits of such mineral generally." 43 CFR 3830.12(b)(1). Judge Sweitzer compared appellants' deposit of graywacke, which had been used as armor stone, with other armor stone deposits, as well as with other graywacke deposits. (ALJ Decision at 32.) Appellants contended in their rebuttal case and argue on appeal that these comparisons were improper because they were not to ordinary, common variety stone deposits. We find no error in Judge Sweitzer's rejecting appellants' proffered comparisons and comparing their deposit with other armor stone deposits. See United States v. Pitkin Iron Corp., 170 IBLA 352, 388-89 (2006); Knipe, 170 IBLA at 178-79. Moreover and in any event, we find the Government demonstrated that rock used as armor stone is common variety building stone by showing that many types of stone are usable as armor stone (e.g., graywacke, basalt, granite, quartzite, and gneiss) and that a large number of quarries (20+) produce rock acceptable for use as armor stone in Alaska.

Unique Properties Identified by Appellants

The second element of the Departmental guidelines requires the identification of a unique property. 43 CFR 3830.12(b)(2). See e.g. United States v. Foley, 142 IBLA 176, 184 (1998), dismissed, No. N-00-0435-HDM-VPC (D. Nev. Sept. 25, 2000) and No. 00-553-C (Cl.Ct. Sept. 13, 2000) (a unique property is one which distinguishes the deposit in question from other deposits of similar materials). Appellants contend that their deposit has two, related unique properties: an ability to produce large armor stone; [9/] and a high yield of large armor stone that results in lower costs.

Whether the ability to produce large armor stone is a unique property is less than clear. Although the record demonstrates that only large armor stone can be used in certain high energy environments (e.g., where the marine structure faces the open sea and is susceptible to strong wave action and intense storms) (Tr. 916-20, 940-41, 983, 1066, 1087; Ex. K at 7; Ex. L) and while several projects requiring large armor stone have been built in Alaska (including at least one which used appellants' large armor stone) (Ex. K at 5; Ex. I at 3; Tr. 821, 983-84, 970, 988, 1064-67), there are at least three Alaskan quarries that produce large armor stone, with a fourth quarry, located in Washington, also producing large armor stone for the Alaskan

[9/] For purposes of characterization in this case, the parties understood and generally agreed that armor stone varies by size: large armor stones weigh over 2 tons; medium armor stones weigh between 1,600 and 4,000 pounds; and small armor stones weigh between 1,200 and 1,600 pounds. See, e.g., Ex. K at 5.

market. (Tr. 892-94, 906-07, 922, 938-39, 975-80; Ex. J; Ex. K at 9.) In addition, Eissis and Raychel, USACE, testified that "there are many sources for armor stone meeting the USACE's minimum specifications and the Spencer Stone derives no distinct and special value from any attributes that exceed those specifications or from the large size of the rocks that the deposit is capable of producing (see, e.g., Tr. 1061-68, 1081-82)." (ALJ Decision at 11.)

Rather than deciding whether the ability to produce large armor stone or this deposit's high yield of large armor stone is "unique," Judge Sweitzer focused on the third Departmental guideline, 43 CFR 3830.12(b)(3), stating that even assuming these are unique properties, appellants failed to show that they imparted a distinct and special value to their deposit. (ALJ Decision at 32, 33.) Also assuming, as did Judge Sweitzer, that these properties render appellants' deposit unique, we proceed similarly to determine whether these properties impart a distinct and special value to appellants' deposit that is reflected either by higher prices which their large armor stone commands in the market place or by reduced cost of production resulting in substantially greater profits to the appellants.

Demonstrating Higher Prices in the Market Place

Considering whether appellants' large armor stone commands a higher price in the market, 43 CFR 3830.12(b)(5), the record shows that the government (e.g., ADCE) typically pays more for large armor stone than smaller stone, inclusive of transportation, handling, and placement costs. (Ex. I at 4; Tr. 393; Ex. B, Att. 8.) Judge Sweitzer held that general testimony concerning higher prices paid by the government was insufficient to establish distinct and special value because those prices might be attributable to higher quarrying, transportation, and placement costs. (ALJ Decision at 33.) [10/] Based upon our review of the record, we agree with Judge Sweitzer that appellants failed to demonstrate that their large armor stone commands a higher price in the market place than smaller, common variety armor stone.

[10/] The record, however, suggests that appellants' cost to quarry, transport, and place armor stone is the same or similar for all sizes of armor stone they produce: quarrying costs for large stone appear to be less than or comparable to the quarrying costs for smaller stone (Tr. 403, 811-12, 972-73); transportation costs for the same rock from the same quarry should be the same regardless of stone size (Ex. B, Item 8, Government Specifications at 2); and the cost to place large armor stone may be less. (Ex. B, Item 8, Project Specifications at 7; Tr. 896.) Of these, only potentially lower quarrying costs for the production of large armor stone would be intrinsic to appellants' deposit. See discussion, infra.

The record includes information on the prices paid appellants for their large armor stone and for their other, smaller stone, but is limited to only two projects where their stone was used:

> Whittier (1991) - Appellants provided more than 750 tons of medium armor stone (1,600-4,000 pounds per stone), nearly 750 tons of large armor stone (over 2 tons per stone), and almost 200 tons of quarry spalls (i.e., stone chips) to Strand, Inc., for the repair of the Delong Dock under Strand's contract with the Corps of Engineers. (Ex. B, Item 7.) Although armor stone and spalls were separately identified on Strand's invoice and while differently sized stone was required for this project, appellants received one unit price ($54.80 per ton) for their large armor stone, medium armor stone, and quarry spalls. Id.
>
> Homer Spit (1996) - Appellants provided stone for the repair of the Homer Spit under Nugget Construction's contract with the Corps of Engineers. Nugget's successful bid identified that large armor stone was priced nearly 20% less than considerably smaller filter stone (less than 400 pounds per stone). (Ex. B, Item 8, Bidding Abstract.)

Since appellants' own evidence indicates that large armor stone was sold for no more than their smaller, common variety stone (i.e., medium armor stone, filter stone, and quarry spalls), see also Tr. 94, 95, 810, 811, we find that they clearly failed to demonstrate that their large armor stone commands a higher price in the market place.

Demonstrating that Reduced Costs Resulted in Increased Profits

Assuming that appellants' deposit is unique in its ability to produce a high yield of large armor stone, as did Judge Sweitzer, we agree with his conclusion that high yield, standing alone, is insufficient to impart a distinct and special value to this deposit. (ALJ Decision at 32.) High yield can reduce production costs and may result in increased profits. See e.g., United States v. McClarty, 17 IBLA at 45. Nonetheless, to demonstrate that high yield is a unique, intrinsic property that imparts a distinct and special value to this deposit, it was appellants' burden to establish (not merely assert or assume) that high yield reduced their production costs

and that these reduced costs resulted in substantially increased profits. [11/] Moreover, any such unique property must also be intrinsic to the deposit. See e.g., Knipe, 170 IBLA at 165 ("the linchpin of profitability must be some intrinsic property of the mineral deposit"). [12/]

The record indicates that rock suitable for use as armor stone is ubiquitous and that, while a large number of quarries (20+) can produce armor stone, only three have an "acceptable" yield of large armor stone. (Tr. 890-93, 907, 939; Ex. K at 6, 9; Ex. J.) [13/] Each of these three quarries is roughly 600 miles from the others (Ex. J at 2), and appellants introduced evidence that their quarry's market area is relatively large due to its proximity to low cost rail and water transportation systems (Ex. K at 9; Tr. 878-80). Since the market areas for each of these quarries tend not to overlap and since proximity between a quarry and the location where its rock will be used "is what really counts" (ALJ Decision at 32, quoting Tr. 879), each quarry effectively dominates a limited market area for its large armor stone: Nome Quarry (Western Alaska); Dome Quarry (the Alaskan Peninsula); and Appellants' Quarry (South-central Alaska). See Ex. J at 2. See also Tr. 880, 900-01, 922, 925, 974, 975, 978, 992. [14/]

[11/] Judge Sweitzer held that appellants "failed to show the difference, if any, between the costs of mining armor stone from the Spencer quarry and the costs of other quarries." (ALJ Decision at 32.) Even if appellants had demonstrated that they were the low cost producer of large armor stone, this still would have been insufficient to establish that high yield imparts a distinct and special value to this deposit. Whatever cost advantage appellants may have is wholly irrelevant unless they show that their resulting profits are substantially higher than those for other large armor stone quarries.

[12/] In this vein and as to profits generally, we note that appellants suffered a net loss from selling 14,275 tons of rock in 1991, including 1,500 tons of armor stone for the Whittier Project (Ex. 1, Conf. App. 6), suggesting that the large armor stone market may not be particularly profitable (if it is profitable at all).

[13/] Since the costs for an engineered marine structure are driven largely by the cost to acquire and transport armor stone (Tr. 94, 812-13) and since a project does not go forward if its costs exceed anticipated benefits (Tr. 928-30), it may be that lower yield quarries with higher production costs simply do not compete in the rather limited market for large armor stone.

[14/] Based upon these geographically-based market areas and the limited market for large armor stone in Alaska, see discussion infra, it would appear that any reduced costs to produce large armor stone would logically and more likely result in a quarry

(continued...)

Judge Sweitzer discussed the "criticality of location," finding it significant that contestees' own witness, Beischer, testified that

> the closest quarry to a breakwater project is generally used and that it is "smart" to design a breakwater to use a local armor stone source if possible (Tr. 880, 900-01; see also Tr. 992). This is so because armor stone is the most expensive part of a breakwater project and that the farther the source of suitable armor stone, the more likely a project will not go forward because the costs will outweigh the benefits (Tr. 928-29; see also Tr. 972-73). This fact highlights the importance of an armor stone quarry's location. [Footnote omitted.]

(ALJ Decision at 32.) Appellants' other witnesses, Orson Pratt Smith III and Dennis Nottingham, likewise emphasized "the importance of location and the availability of transportation modes that minimize handling of the rock or other transportation cost factors (see, e.g., Tr. 922, 925, 974, 976, 978; Ex. 1, p. 3; Ex. K, p. 9)." (ALJ Decision at 32.)

In addition and in consideration of the relatively few projects likely to require large armor stone (Tr. 415, 980, 989, 1062, 1066-70), Judge Sweitzer noted:

> [I]t is not at all clear that there is a market for any large armor stone produced by the Spencer Quarry. Generally, a quarry's market extends only several hundred miles (Tr. 924-25). Given the transportation costs, Mr. Beischer identified the market for Spencer Stone as being south-central Alaska, extending anywhere along the Alaska Railway line, to the Kenai Peninsula, out into the Cook Inlet to Kodiak and beyond, and across Prince William Sound (Tr. 879). Mr. Nottingham, whose company works on 75% of the marine projects in Alaska, could identify only one small project in south-central Alaska that will definitely need armor rock in the future and that project does not require large armor stone (Tr. 980-82, 1062, 1064-65).
>
> He mentioned several other possible projects, but those projects were either on hold or in the planning stages with feasibility still to be determined (id.). Further, Mr. Eissis

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[14/] (...continued)
expanding its market area than substantially increasing its profits.

> credibly testified that none of those projects would require rock over 2 tons (Tr. 1062, 1064-65), and Mr. Nottingham confirmed that the maximum rock size for a good portion of those projects is 2 tons (Tr. 989). Mr. Eissis did identify four projects which required large armor stone, but three were already completed (Tr. 1068-70). The fourth is the Nome harbor project, which will require large armor stone in the future to complete an expansion phase (id.) but Mr. Beischer testified that project is outside the Spencer Quarry's market area and that the quarry could not compete with the Nome Quarry for that project (Tr. 821).

(ALJ Decision at 33.) Based upon our review of the record, appellants simply failed to demonstrate that high yield imparted a distinct and special value to this stone deposit which was reflected in lower costs that substantially increased their profits.

Before concluding our consideration of armor stone, we emphasize that a deposit's special and distinct value must be based upon an intrinsic, unique property (not an extrinsic factor) and that location is clearly an extrinsic consideration. See e.g., Knipe, 170 IBLA at 165-66; United States v. Foley, 142 IBLA at 188 ("Price affected by proximity, however, can never be used to evaluate the intrinsic quality of mineral in an uncommon variety determination"); United States v. Henri (On Judicial Remand), 104 IBLA 93, 99 (1994), aff'd, Henri v. Lujan, No. A90-237 (D. Alaska July 31, 1993), appeal dismissed, No. 93-35102 (9th Cir. Aug. 25, 1993). Since neither higher prices nor reduced costs resulting in increased profits were established by appellants, we conclude that they failed to carry their burden of establishing that their deposit has a unique property for use as armor stone which imparts a distinct and special value to that deposit under either the Departmental guidelines or the McClarty test. [15/]

II. Decorative Boulders

Judge Sweitzer also determined that the graywacke boulders on the surface of PR 16 were common variety. (ALJ Decision at 34-35.) Appellants contend on appeal that the Government failed to establish a prima facie case that such boulders are common variety and that they demonstrated that these boulders are uncommon variety and thus locatable under the mining laws. (SOR at 29-30.)

[15/] We note in passing that even if higher prices or reduced costs and increased profits had been established, they must also be attributable to an intrinsic property and not be a function of the deposit's favorable location or other extrinsic factor.

A. The Government Established a Prima Facie Case

Appellants argue that the Government was required separately to address boulders during its case-in-chief, asserting that the mineral examiners turned "a blind eye to the obvious," that the quality of their boulders was "self-evident," and that their use as decorative boulders was adequately raised by their earlier assertion that this claim contained "uncommon" stone deposits. (SOR at 30.) At the time of the field examination, however, appellants identified only armor stone as a special or uncommon use for their graywacke. (Ex. 1, Conf. App. 1.) The mineral examiners evaluated the use of appellants' rock as armor stone in their Mineral Report, and Baer testified that no other uncommon variety stone had been identified during their field examination. (Ex. 1 at 46-52; Tr. 84.) The Government's prima facie case was limited to whether use of appellants' stone as armor stone renders it uncommon variety. Appellants assert on appeal that the mineral examiners should have evaluated whether their stone boulders could be used as decoration and whether such use would be an uncommon variety use. Appellants also contend that the Government's prima facie case should have separately addressed whether their boulders are uncommon variety when used as decorative stone.

Whether mineral examiners Baer and Huber should have evaluated appellants' boulders for use as decoration turns largely on their duties in conducting a mineral examination and the related responsibilities of a claimant:

> [W]hile a Government mineral examiner must have cognizance of the normal uses and methods of beneficiation of any mineral in formulating an opinion as to whether a discovery of a valuable mineral deposit has occurred (cf. United States v. Hooker, 48 IBLA 22 (1980)), there is absolutely no requirement that a mineral examiner consider all theoretical uses for the claimed mineral or unproven methods of beneficiation as a predicate of his or her expert opinion. When a Government mineral examiner testifies that, based upon an examination of the claim and considering both the normal uses and modes of extraction of any mineral located thereon, there is disclosed no evidence of a valuable mineral deposit such as would justify a reasonably prudent individual in the further expenditure of his or her labor and means with a reasonable prospect of success in developing a paying mine, a prima facie case has been presented. If a mining claimant wishes to show that a mineral deposit embraced within the claim is valuable either because of unusual uses to which the mineral may be put, or because a new method of extraction reduces the cost of

> beneficiation, it is the claimant's affirmative duty to raise such a claim and present evidence thereon. A claimant might well ultimately preponderate on such a showing, but the failure of the Government to expressly negate the existence of such a possibility does not invalidate its prima facie case.

United States v. Segna, 49 IBLA 73, 75 (1980).

The presence of boulders on appellants' claim may have been obvious to the examiners (e.g., they were photographed atop them), but their use and value as decoration was not. No mention of boulders having any special, unique, or uncommon use or property was made to the mineral examiners before or during their field examination, and neither boulders nor decorative boulders were identified in appellants' timely submission on the locatability of their stone. (Tr. 84; Ex. 1, App. 1 at 13-17.) Appellants did not identify their boulders as uncommon variety or make any mention of decorative boulders until more than 14 months after the field examination. (Ex. U.) In essence, they contend that the examiners should have then reopened the mineral examination, revisited the claims, and evaluated whether they contain boulders that are uncommon variety because of their distinct and special value as decorative boulders. We reject appellants' suggestion that Baer was required to expand and reopen his mineral examination under the circumstances presented in this case.

The Government's case-in-chief established a prima facie case that appellants' rock was common variety. See discussion supra. Armor stone was raised clearly, early, and often by appellants and extensively evaluated by the mineral examiners. (Ex. B; Ex. 1 at 17-18, 22, 24-25, 32, 37-38, 45-52, and App. 1 at 13-17.) The issue of boulders and their use as decoration, however, was not raised until long after the field examination was completed, and even then, it was supported only by assertions (not evidence). Since the mineral examiners were not required to consider other, additional uses of appellants' rock, the Government was not required separately to address appellants' boulders or their use as decoration during its case-in-chief. See United States v. Segna, 49 IBLA at 75 ("the failure of the Government to expressly negate the existence of such a possibility does not invalidate its prima facie case"). Cf. United States v. Miller, 165 IBLA 342, 369 (2005); United States v. Hicks, 172 IBLA 73, 79 (2004); United States v. Winkley, 160 IBLA 126, 144 (2003). We, therefore, find that the Government adequately established a common variety prima facie case and that the burden was clearly on appellants to demonstrate that their boulders are uncommon variety and thus locatable under the mining laws.

B. Appellants Failed to Demonstrate that their Boulder Deposit is Uncommon Variety

To establish that a boulder deposit is uncommon variety and locatable under the mining laws, appellants must satisfy the Departmental guidelines by comparing their boulder deposit with "other such minerals generally," 43 CFR 3830.12(b)(1), identifying a unique property which distinguishes their boulder deposit from other deposits of similar materials, 43 CFR 3830.12(b)(2), and establishing that this unique property imparts a distinct and special value to their deposit that is reflected in this stone's higher price in the market, 43 CFR 3830.12(b)(5). Judge Sweitzer held that appellants did not meet this burden because they failed to establish that "decorative boulders are, in fact, an uncommon variety of stone with a unique property giving them a distinct and special value" or to compare their boulders with boulders that are sold as decorative boulders in the ornamental stone market. (ALJ Decision at 34-35.) We agree.

Appellants introduced evidence that boulders are present on their claims and that decorative boulders could be valuable and locatable. (Ex. B at 2-22; Ex. U; Tr. 791.) They then contend that their boulders are per se locatable, citing United States v. United Mining Corp., 142 IBLA 339 (1998), rev'd in part and remanded to IBLA by Secretarial decision (May 15, 2000), dismissed with prejudice (settled), No. CV99-594S-MBW (D. Idaho Mar. 4, 2002), [16] and claiming their quality for use as decoration is "self-evident." (SOR at 30; Ex. U; Ex. B at 2-22.)

Judge Sweitzer's summary of the record as to contestees' failure to prove a discovery of a valuable deposit of decorative boulders demonstrates without question that the contestees fell far short of overcoming the Government's prima facie case:

> The factual foundation for Mr. Stacey's opinion that the decorative boulders are an uncommon variety of stone is deficient. There is no indication that Contestees have conducted any kind of study to determine whether the decorative boulders are, in fact, an uncommon variety of stone with a unique property giving them a distinct and special value. They have not mentioned any comparison between their boulders and other rock conducted by them or someone with more expertise in the ornamental stone market. Contestees have

[16] Appellants' suggestion that United Mining creates a special rule for the locatability of these boulders is clearly misplaced because, as identified above, this decision was reversed in part by the Secretary and, therefore, has little (if any) precedential value.

> failed to meet their burden of showing that the deposit of decorative boulders is an uncommon variety with a unique property giving it a distinct and special value.
>
> * * * * * * *
>
> Assuming, arguendo, that the decorative boulders are an uncommon variety of stone, Mr. Stacey's opinion that the boulders can be mined economically lacks an adequate factual foundation and, hence, lacks probative value. His statements suffer from vagueness and a lack of supporting detail. For instance, he does not identify the size of the "large" market for decorative boulders, either in Anchorage or elsewhere. Nor does he explain to what extent the market is "growing." Also, he does not identify the source or market from which he derived the alleged selling price of $250-$300/ton for larger boulders. Evidence of specific or potential sales of decorative boulders from the subject claims is also lacking, as Contestees have never sold any (Tr. 808) and have not yet cultivated the market for the decorative boulders because the quarry "operator's efforts were focused on structural Armor Units." (Ex. B, p. 2-22) Mining cost data and reserve estimates for each claim are also absent, leading to the conclusion that there is insufficient evidence to support a finding that a discovery of a valuable deposit of decorative boulders exists.

(ALJ Decision at 35.)

Appellants did not compare their boulders with any other rock, stone, or boulder deposits or with any other boulders sold in the ornamental market as decorative boulders. This deficiency alone warrants our affirmance of Judge Sweitzer's decision. Although they assert that their boulders are marketable (SOR at 30), the record is devoid of any evidence that appellants' boulders have been marketed as decorative boulders or would command a higher price in the market place. This deficiency also and separately warrants our affirmance of Judge Sweitzer's decision. We find that appellants failed to compare their deposit with other deposits of such mineral generally or to establish that their boulder deposit has a unique property which gives it a special and distinct value that is reflected in higher prices in the market place. Accordingly, we hold that appellants failed to demonstrate by a preponderance of the evidence that their boulder deposit is uncommon variety and locatable under the mining laws.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James K. Jackson
Administrative Judge

ADMINISTRATIVE JUDGE ROBERTS CONCURRING SPECIALLY:

While I am in complete agreement with my colleague's disposition of this appeal, I write separately to emphasize the rationale for affirming Judge Sweitzer's ruling that the graywacke rock [17/] at issue is of common variety and not locatable under the mining laws. The evidence more than establishes the Government's prima facie case that the mineral deposit does not possess a unique property giving it a distinct and special value. See, e.g., United States v. LeFaivre, 138 IBLA 60, 67 (1997), and cases cited. Once the Government presented a prima facie case, the burden shifted to the contestees to overcome this showing by a preponderance of the evidence. Id. They have "completely failed to overcome BLM's prima facie case," to quote LeFaivre, with respect to both armor stone and decorative boulders. Id. at 68. I wish to address more fully the armor stone question.

As noted by my colleague, this appeal involves the single question of whether the PR 16 claim contains a deposit of stone locatable under the mining laws. Under the Building Stone Act of August 4, 1892, 27 Stat. 348, 30 U.S.C. § 161 (2000), lands chiefly valuable for building stone and not otherwise withdrawn or reserved were subject to location as placer mining claims. See generally United States v. Haskins, 59 IBLA 1, 88 I.D. 925 (1981). While the Building Stone Act was originally perceived as applicable only to common varieties of building stone, see 59 IBLA at 42-43 n.26, 88 I.D. at 946 n.26, the subsequent adoption of section 3 of the Surface Resources Act in 1955, 30 U.S.C. § 611 (2000), together with the decision of the Supreme Court in United States v. Coleman, 390 U.S. 599, 607 (1968), resulted in a limitation of the applicability of the Building Stone Act to locations of uncommon varieties of building stone which had some property giving it a distinct and special value. See also McClarty v. Secretary of the Interior, 408 F.2d 907, 908 (9th Cir. 1969).

Thus, as Judge Sweitzer stated, "a building stone is locatable only if it is an uncommon variety." (Decision at 12.) He quoted the following portion of United States v. LeFaivre as setting forth the standards to be followed in determining whether a stone is common or uncommon:

> The definitive guidelines for distinguishing common from uncommon varieties of minerals are set forth in McClarty v. Secretary of the Interior, [408 F. 2d 907, 908 (9th Cir. 1969)]. Therein, the Court opined:

[17/] "Graywacke" is a "dirty sandstone containing 20% or more silt and clay. Graywacke rock occurs very commonly, both locally in southern Alaska (Map 6) and worldwide." (Ex. 1 at 17; Tr. 83.)

> (1) [T]here must be a comparison of the mineral deposit in question with other deposits of such minerals generally; (2) the mineral deposit in question must have a unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special value must be reflected by the higher price which the material commands in the market place.

> Id. at 908. The Court further indicated that the special economic value of the stone might also be reflected by reduced costs or overhead generating greater profits where the retail market price of the stone remains competitive with other building stone. Id. at 909; see also United States v. Henri (On Judicial Remand), 104 IBLA 93, 96-97 and n.3.

138 IBLA 60, 66 (1997). [18]

The Government's Prima Facie Case

Judge Sweitzer states that "[a] prima facie case means that the Government's case-in-chief is completely adequate to support the contest and that no further proof is needed to nullify the claim." (Decision at 15, citing United States v. Knoblock,

[18] Judge Sweitzer stated further, that "[e]ven if the graywacke is found to be uncommon and thus locatable, each of the contested mining claims is valid only if each contains within its boundaries locatable mineral of sufficient quality and quantity to constitute a 'valuable mineral deposit.'" (Decision at 13, citing United States v. Collord, 128 IBLA 266, 268 (1994), aff'd in relevant part, rev'd in part, Civ. No. 94-0432-S-EJL (D. Idaho Sept. 28, 1994), aff'd, 154 F.3d (9th Cir. 1998). Judge Sweitzer did not reach the question whether there was a "valuable mineral deposit," i.e., whether there is "found within the limit of the contested mining claim mineral of such quality and quantity as to justify a person of ordinary prudence in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine." (Decision at 13, citing 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).) He ruled instead that the graywacke was common variety stone, which is not locatable. (Decision at 34.)

131 IBLA 48, 81, 101 I.D. 123, 140-41 (1994).) His statement of the general rule follows:

> It follows that a prima facie case of no discovery is made when a Government mineral examiner offers his expert opinion that a discovery of a valuable mineral deposit has not been made within the boundaries of a contested claim, provided that such opinion is formed on the basis of probative evidence of the character, quality and extent of the mineralization allegedly discovered by the claimant and on the proper standard for determining whether a discovery has been shown to exist. United States v. Hooker, 48 IBLA 22, 28 (1980).

(Decision at 16.)

In order to establish a prima facie case that the mineral material is a "common variety," Judge Sweitzer stated that the Government must show "(1) that the mineral material is sand, stone, gravel, pumice, pumicite, or cinders, (2) that the material's price is similar to that paid for such material typically put to 'common variety' use, and (3) that the Government's witness has been unable to identify any special use for the mineral material commanding a higher price." Id., citing United States v. Rothbard, 137 IBLA 159, 171 (1996).) "In other words," Judge Sweitzer states, "the Government must present sufficient evidence to establish a prima facie case that the mineral deposit does not possess a unique property giving it a distinct and special value." (Decision at 16, citing United States v. LeFaivre, 138 IBLA at 67.)

Judge Sweitzer correctly ruled that the Government had presented a prima facie case that the Spencer Stone, or graywacke, was common variety. In his mineral report, Baer concluded that graywacke rock is common variety rock and not subject to location under the mining laws. (Ex. 1 at 2.) His conclusion was based upon a number of factors, "including that graywacke is extremely common and widespread, that a number of other common variety rock types may meet engineering specifications for armor stone and riprap, and that Spencer Stone does not command a higher price in the market place than other common varieties used for armor stone." (Decision at 11; Ex. 1 at 47-50.) [19/] He concluded that the Spencer Stone

[19/] Judge Sweitzer noted that, during rebuttal, expert testimony from two employees of the Alaska District Corps of Engineers (ADCE) supported Baer's conclusion that graywacke or Spencer Stone was common variety rock, testifying that "there are many sources for armor stone meeting the USACE's minimum specifications and the Spencer Stone derives no distinct and special value from any attributes that exceed

(continued...)

"doe not have any unique intrinsic property that gives it a distinct or special value and is therefore a common variety mineral which is not locatable." (Decision at 16.) Judge Sweitzer ruled: "This evidence from a Government examiner, who has had sufficient training and experience to qualify as an expert witness, establishes a prima facie case of the claim's validity." Id., citing United States v. Gillette, 104 IBLA 269, 274-75 (1988); United States v. Mansfield, 35 IBLA 95, 96-99 (1978). [20/]

In examining the claims, Baer observed common variety graywacke, which the record shows is extremely common and widespread. (Ex. 1 at 47-50.) Accordingly, the burden of preponderation shifted to contestees. E.g., United States v. LeFaivre, 138 IBLA at 68.

Contestees' Failure to Overcome the Government's
Prima Facie Case by a Preponderance of the Evidence

The Armor Stone is Common Variety Stone

As a preliminary matter, Judge Sweitzer was correct in rejecting "[c]ontestees' contention that the Spencer Stone is locatable for use as filter stone and riprap" as "contrary to both the law and the facts * * *." (Decision at 29.) As stated in United States v. Verdugo & Miller, Inc., 37 IBLA 277, 279 (1978), "[m]aterial which is

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[19/] (...continued)
those specifications or from the large size of the rocks that the deposit is capable of producing (see, e.g., Tr. 1061-68, 1081-82)." (Decision at 11.)

[20/] This ruling is consistent with the rule, followed by the Board, that the threshold burden on the Government to go forward is limited. See United States v. Dresselhaus, 81 IBLA 252, 257 (1984). The Government need only show that the mineral deposit does not possess a unique property giving it a distinct and special value to meet its burden. Contestees contend that there was no basis for Judge Sweitzer's conclusion that the Government had presented a prima facie case, given that Baer failed to present evidence "comparing the price of Spencer stone to the price of stone typically put to a common variety use * * *." (SOR at 13.) This contention is clearly erroneous, given that the Government showed that the Spencer stone "was used for armor stone, toe stone, filter stone, ballast, and other rip rap, in other words, common variety uses." (Answer at 6.) As the Government points out, "Stacey himself confirmed that he paid the same royalty price for the rock regardless of the rock's ultimate usage" (Tr. 810), that "the contractor, Spencer Rock Products, paid him one price for the rock, regardless of the size of the blasted pieces or the use to which they were to be put" (Tr. 811), and that "the Spencer quarry rock did not command a higher [price] in the marketplace" (Tr. 94, 95).

principally valuable for use as * * * sub-base, ballast, [and] riprap * * * was never locatable." (Emphasis in original.)

Judge Sweitzer deemed the "jist of the testimony from Contestees' expert witnesses" to be "that the Spencer Stone's alleged uniqueness is related to use of the larger particles as armor stone as opposed to the use of smaller particles as filler stone or riprap (see, e.g., Tr. 775-76, 781, 793, 907-08, 937-39)." (Decision at 29.) He observed that "a key issue in determining whether the armor stone is common or uncommon variety is whether the deposit should be compared to similar deposits of stone or common variety deposits of stone generally." Id. He relied upon United States v. Kaycee Bentonite Corp., 64 IBLA 183, 89 I.D. 262, 276 (1982), in determining that "the Spencer stone should be compared to similar deposits of stone rather than common variety deposits generally * * *." (Decision at 30.) [21/] He reached this conclusion because unlike the stone at issue in United States v. Bolinder, which was marketed for atypical purposes and is not widespread, graywacke from the PR 16 claim is similar to other graywacke in characteristics and uses, and "undisputably is common both in southern Alaska and worldwide." (Decision at 31.) He explained this holding more fully in the following terms:

[21/] In Kaycee Bentonite Corp., the Board interpreted and applied United States v. Bolinder, 28 IBLA 187, 83 I.D. 609 (1976), which involved a deposit of geodes, which the Government had contended was a common variety because it did not differ from other deposits of geodes. The Board in Bolinder agreed that "the proper basis of comparison was with deposits of stone generally, not other deposits of geodes." However, pertinent to Judge Sweitzer's analysis, the Board in Kaycee Bentonite Corp. stated as follows:

"The decision [in Bolinder] states no general rule when a deposit of stone will be compared with common stone generally rather than with stone just like itself. The decision, however, affords, ample basis for such generalization. The Board noted that geodes possessed an economic value in trade and the ornamental arts, apart from whatever commercial value may be attributed to their uniqueness as a so-called "natural curiosity," a use which would not have made them valuable within the meaning of the mining laws. The uses making them locatable can be distinguished from use as a building material which has typified common variety minerals in the cases relied on by contestant. The Board also noted that geodes are not widespread. The Bolinder case then governs the comparison of deposits when (1) the contested deposit is marketable for purposes which are not typical of common variety minerals; and (2) the material is not widespread."
64 IBLA 183, 89 I.D. 262, 276 (1982) (footnote omitted).

> Factors favoring a finding that the Spencer stone should be compared to similar deposits of stone rather than common variety deposits generally include (1) that use of the rock for armor stone falls under the category of building purposes which are typical of common variety minerals, (2) that graywacke is commonly found in southern Alaska and worldwide, and (3) that the value of armor stone depends on incidental factors like the proximity of the deposit to prospective consumers, local needs, and the like, rather than on any generally recognized value. Using the graywacke to build structures–marine or otherwise–is obviously a typical building purpose, and the fact that other types of rock, including basalt, granite, welded tuff, quartzite, and gneiss, are used as armor stone (see, e.g., Ex. 1, p. 47-48; Tr. 822-23, 870) underscores that typicality.

(Decision at 30.)

In fact, Gregory A. Beischer, contestees' expert, a certified professional geologist with 15 years of experience in construction material deposits (Tr. 856-57), testified that "lots of quarries can produce two-ton stones" (Tr. 906-07). Beischer and Baer "identified in exhibit tables approximately 3 dozen quarries in Alaska that produce armor stone (Ex. 1, Att. 20; Ex. K. Table 2)." (Decision at 30.) Moreover, "11 out of the 34 Alaskan armor stone quarries for which a rock type was identified by Mr. Beischer or Mr. Baer produce graywacke rock (see Ex. K, Table 2; Ex. 1, Att. 20)." Id. Judge Sweitzer observed that this data belies Beischer's "testimony that it is fairly uncommon to use graywacke as armor stone (Tr. 822-23, 87)." Id. He summarized the evidence on the nature and use of graywacke as follows:

> That data also shows that the rock from the other six listed Alaskan graywacke quarries is generally similar to the Spencer Stone. The rock from two of them, like the Spencer Stone, meets all the USACE's typical specifications for armor stone (Ex. K, Table 2). Three more meet all of the specifications tests but have unspecified "petrographic problem(s)" or "access/workability problems," according to a table prepared by Mr. Stacey and copied by Mr. Beischer (Ex. B, Table 2-4; Ex. K, Table 2; Ex. K, Table 2; Tr. 817-19, 899, 907-08). Mr. Baer gathered data showing that the rock from the two quarries with alleged petrographic problems (Rocky Point and Crown Point) was found suitable for armor stone by the USACE (Ex. 1, Att. 20). Only one of the six failed to meet a typical USACE specification.

Id. at 31. Again, Judge Sweitzer concluded that this data supported the conclusion that graywacke from the PR 16 claim is similar to other graywacke, common in both southern Alaska and worldwide. He added that "there is little other evidence comparing the Spencer Stone to other graywacke." Id.; United States v. Knipe, 170 IBLA 161, 165 (2006).

Judge Sweitzer rejected the contestees' "broad contention that the Spencer Stone is unique in comparison to all common variety deposits (graywacke or other) because it meets or exceeds all of the typical specifications for armor stone used by the USACE." Id. He noted that Stacey's "table purports to show that only five of the listed Alaskan quarries can meet all of the typical specifications for armor stone (Ex. K, Table 2)," and that, according to Stacey, "[t]he rest have 'fatal flaws * * * or the characteristics of the rock are unknown" to Stacy (i.e.; Tr. 817-19)." Id. However, he also noted that "rock from eight other Alaskan quarries meets all of the USACE specifications tests." Id.; Ex. K, Table 2. Moreover, Baer presented data showing that rock from 12 of the quarries for which Stacy lacked information, or to which he attributed a "fatal flaw," were "determined by the USACE to be suitable for armor stone or had been successfully used as armor stone." Id. Kenneth J. Eissis from the Alaska District Corps of Engineers (ADCE) testified that ADCE "only rarely adjusts ADCE's standard specifications for armor rock to allow for use of a local rock because there usually is no problem finding a source of rock which will meet the specifications (Tr. 1087-89, 1110-11)." Id.

Judge Sweitzer discussed the "criticality of location" in determining whether the Spencer Stone should be compared to similar deposits of stone, rather than to common variety deposits generally. He found it significant that contestees' own witness, Beischer, testified that

> the closest quarry to a breakwater project is generally used and that it is 'smart' to design a breakwater to use a local armor stone source if possible (Tr. 880, 900-01; see also Tr. 992). This is so because armor stone is the most expensive part of a breakwater project and that the farther the source of suitable armor stone, the more likely a project will not go forward because the costs will outweigh the benefits (Tr. 928-29; see also Tr. 972-73). This fact highlights the importance of an armor stone quarry's location. [Footnote omitted.]

Id. at 32. Beischer further testified that "'location is really what counts' due to the cost of transporting armor stone to a project site." Id. at 32, quoting Tr. 879. Contestees' other witnesses, Orson Pratt Smith III and Dennis Nottingham, likewise emphasized "the importance of location and the availability of transportation modes

that minimize handling of the rock or other transportation cost factors (see, e.g., Tr. 922, 925, 974, 976, 978; Ex. 1, p. 3; Ex. K, p. 9)." (Decision at 32.) Based upon this evidence, Judge Sweitzer properly concluded that because the Spencer Stone is not put to an atypical use, and because it is widely available, so that projects can be designed with a local rock source in mind, it should be compared to other graywacke and not to other common variety stone. This holding accords with the Board's analysis in United States v. Kaycee Bentonite Corp., 64 IBLA at 183, 89 I.D. at 276, as well as our more recent opinion in United States v. Pitkin, 170 IBLA at 387.

In applying the McClarty guideline that the mineral deposit in question must have a unique property, Judge Sweitzer carefully evaluated contestees' expert testimony that a unique property of "the Spencer Stone deposit is its ability to produce large armor stone and to yield a high percentage of armor stone rock." (Decision at 32.) The evidence shows that armor stone pieces generally range from one to ten tons in size, with anything larger being exceptionally large. (Tr. 867, 965.) Beischer testified that the "yield of armor stones, particularly large and very large armor stones, at Spencer Quarry is exceptional [] and * * * rare" (Ex. K. at 9; Tr. 939, 979), and that lots of quarries can produce two-ton rocks, but that only a few can produce "an acceptable yield of two-ton rocks" (Tr. 906-07). Judge Sweitzer stated that "[a]ssuming, arguendo, that high yield is a unique property of the Spencer deposit, Contestees failed to show that this property gives the deposit a special value." (Decision at 32.) He concluded that while the costs of mining large armor stone "can result in reduced costs to mine" (Tr. 786, 793, 866), the contestees "failed to show the difference, if any, between the costs of mining armor stone from the Spencer Quarry and the costs of other quarries." Id.

His analysis of the pivotal issue of whether the ability of the Spencer Quarry to produce large armor stone is a unique property which imparts a distinct and special value to the deposit is set forth below:

> Assuming, arguendo, that the ability to produce large armor stone is a unique property, Contestees failed to show that that property gives the deposit a special value. All they provided was general testimony that the price of armor stone depends upon the size of the rock, yield of the quarry, and the proximity of the quarry to the project, with prices for rock placed at the project site ranging from $30/ton to $100/ton (see also Tr. 94, 1061). Thus, a significant portion of the price is not for the rock itself but for quarrying, transportation, and keying costs (Tr. 94, 812-13). Because large armor stone has higher handling costs (Tr. 991), it is not clear whether any higher price for larger stone would merely reflect higher costs as opposed to a premium

> paid. More importantly, no further specifics were provided from which an informed judgment might be made as to the extent, if any, of the premium paid for larger rock.
>
> Additionally, it is not at all clear that there is a market for any large armor stone produced by the Spencer Quarry. Generally, a quarry's market extends only several hundred miles (Tr. 924-25). Given the transportation costs, Mr. Beischer identified the market for Spencer Stone as being south-central Alaska, extending anywhere along the Alaska Railway line, to the Kenai Peninsula, out into the Cook Inlet to Kodiak and beyond, and across Prince William Sound (Tr. 879). Mr. Nottingham, whose company works on 75% of the marine projects in Alaska, could identify only one small project in south-central Alaska that will definitely need armor rock in the future and that project does not require large armor stone (Tr. 980-82, 1062, 1064-65).
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> He mentioned several other possible projects but those projects were either on hold or in the planning stages with feasibility still to be determined (id.). Further, Mr. Eissis credibly testified that none of those projects would require rock over 2 tons (Tr. 1062, 1064-65), and Mr. Nottingham confirmed that the maximum rock size for a good portion of those projects is 2 tons (Tr. 989). Mr. Eissis did identify four projects which required large armor stone, but three were already completed (Tr. 1068-70). The fourth is the Nome harbor project, which will require large armor stone in the future to complete an expansion phase (id.) but Mr. Beischer testified that that project is outside the Spencer Quarry's market area and that the quarry could not compete with the Nome Quarry for that project (Tr. 821).
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> The fact that there is little or no market for the larger stone is yet another factor favoring a finding that the Spencer Stone is a common variety stone. The smaller the demand for large armor stone, the less likely the supply will command a higher price than other armor stone.

Id. at 33. The record clearly supports Judge Sweitzer's ruling that the ability to produce large armor stone is not a unique property that gives the deposit a distinct and special value. See United States v. Knipe, 170 IBLA at 185-90 (the "unique" color or appearance of the stone does not give it a "distinct and special value").

Moreover, Judge Sweitzer rejected appellants' contention that the ability to produce large armor stone results in reduced production costs so that the stone receives a higher price in the marketplace, rendering the stone an uncommon variety. The record supports his reasoning that such reduced costs must be considered against the fact that availability of the armor stone is widespread; that much of the cost of using large armor stone is in transporting and not producing it; and that the financial realities of whether a project will be undertaken depends upon proximity of a stone source. In sum, the record is clear that there is next to no market for large armor stone. See Decision at 32-33.

Judge Sweitzer assumed, arguendo, that the cost of mining large armor stone is reduced, but he demonstrated, nevertheless, through the testimony of Eissis and Jerome Raychel of ADCE, that "there are many sources for armor stone meeting the USACE's minimum specifications and the Spencer Stone derives no distinct and special value from any attributes that exceed those specifications or from the large size of the rocks that the deposit is capable of producing (see, e.g., Tr. 1061-68, 1081-82)." (Decision at 11.) As observed by counsel for the USFS: "What appellants have tried to argue throughout this case is that the Spencer graywacke is good stone, that it is well-suited for armor stone. This much is true. It is good stone. It is not however, uncommon." (Opposition of Appellants' Appeal at 14, citing United States v. Verdugo & Miller, 37 IBLA at 280.)

As discussed, once the Government met its threshold burden of presenting a prima facie case with respect to the common variety nature of graywacke or Spencer Stone, the burden then shifted to the contestees to overcome this showing by a preponderance of the evidence. As noted in United States v. LeFaivre, "it is the mining claimant who is the actual proponent of the rule that the claim is valid, and, therefore, it is the mining claimant who bears the ultimate burden of persuasion (burden of proof)." 138 IBLA at 67, citing United States v. Knoblock, 131 IBLA at 81, 101 I.D. at 140-41, and cases cited. The contestees "completely failed to overcome BLM's prima facie case," LeFaivre, 138 IBLA at 68, regarding both armor stone and decorative boulders.

The "Decorative Boulders" are Common Variety Stone

I agree that Judge Sweitzer correctly ruled that contestees failed to establish by a preponderance of the evidence that the "decorative boulder" deposit is an uncommon variety.

The passages Judge Jackson quotes from United States v. Chappell, 72 IBLA 88, 93 (1983), and United States v. Segna, 49 IBLA 73, 75 (1980), clearly support

the conclusion that the appellants were under an affirmative duty to identify uncommon uses for their stone and to do so in a timely manner so as to enable the mineral examiners to evaluate whether the stone is of uncommon variety. In particular, United States v. Segna provides solid support for Judge Sweitzer's ruling that contestees, "having failed to inform BLM of this contention [that the PR 16 claim contained locatable decorative boulders] or any discovery points for decorative boulders prior to or during the validity examination, assumed the risk that the Government mineral examiners would be unable to verify the alleged discovery of a valuable deposit of decorative boulders." (Decision at 19.) In this case, there was no mention during the mineral examination that the graywacke was locatable as decorative stone. Not until Baer had nearly finished completing his Mineral Examination did the contestees raise the issue. United States v. Segna stands for the proposition that they failed in their affirmative duty to raise this claim and present evidence thereon.

Judge Sweitzer's analysis of the decorative boulder question is brief because there is very little in the record on the subject. In their Exhibit B, contestees assert: "Decorative boulders have become so scarce that artificial stone boulders are being cast from concrete. Anchorage has a large and growing market for boulders. Natural round rock boulders ranging from 12" to 24" carry a retail price of $42.20/ton at Anchorage Sand & Gravel." (Ex. B at 2-22; see also Tr. 791.) As noted, in his December 22, 1998, letter to Baer, who was nearing completion of his Mineral Report, Stacey asserted that larger boulders will sell for "$250-$300/ton, or more." (Ex. U; see also Ex. B at 2-22.) Stacey attached to his letter a newspaper article discussing the market for ornamental rocks in California and one seller's price of $250/ton. (Ex. U.) He explained that boulders on the subject claims, including the PR 16 claim, range in size from 18" to over 48" in minimum cross section. Id. He stated further: "The P.R. claims contain a large resource of this type of uncommon variety stone which can be mined economically and shipped to markets in Alaska and out of state. A conservative estimate of tonnage, based on boulders visible at the surface of the deposit and our subsurface exploration is 250,000 tons of boulders available as a mineable resource." Id.; see also Tr. 791. This is the sum total of what contestees presented on the subject of graywacke as decorative boulders.

Judge Sweitzer's summary of the record as to contestees' failure to prove a discovery of a valuable deposit of decorative boulders demonstrates without question that the contestees fell far short of overcoming the Government's prima facie case that such boulders, like other graywacke rock on the PR 16 claim, are common variety. (Decision at 35.) Again, as the Board found in United States v. LeFaivre, 138 IBLA at 68, "we find that [contestees have] completely failed to overcome BLM's prima facie case."

Conclusion

Judge Sweitzer's decision and the record establish unquestionably that the Government presented a prima facie case that the PR 16 claim does not contain a discovery of a valuable mineral deposit and that the graywacke constitutes a deposit of common variety stone not locatable under the mining laws, and that the contestees failed to carry their burden of demonstrating by a preponderance of the evidence that a discovery of a valuable mineral deposit is present on the claim, either for large armor stone or for decorative boulders. (Decision at 35.) I would affirm his ruling in all respects.

James F. Roberts
Administrative Judge