



ALFRED JAY SCHRITTER

177 IBLA 238

Decided May 21, 2009



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

ALFRED JAY SCHRITTER

IBLA 2009-26

Decided May 21, 2009

Appeal from a decision of the Kingman (Arizona) Field Office, Bureau of Land Management, assessing damages for willful trespass based on removal of mineral materials from Federally-owned land. AZA-33377.

Affirmed in part as modified; set aside in part and remanded.

1. Administrative Appeals--State Courts

The Board will not rely on an unpublished memorandum decision from a state intermediate appellate court to resolve a controlling question of state law where the state court rules provide that such decisions shall not be regarded as precedent.

2. Federal Land Policy and Management Act of 1986: Permits

Where privately-owned mineral estate underlies acquired Federally-owned surface and the private mineral owner has a reserved right to use so much of the surface as is necessary and convenient for the extraction of the minerals, the private mineral owner must obtain an appropriate surface use authorization under 43 C.F.R. §§ 2920.1-1 in the exercise of those rights.

APPEARANCES: Jerry L. Haggard, Esq., Phoenix, Arizona, and Lisa S. Bruno, Esq., Kingman, Arizona, for appellant; Barbara B. Fugate, Esq., and Kendra Nitta, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEATH

Alfred Jay Schritter has appealed from an October 1, 2008, decision of the Kingman (Arizona) Field Office, Bureau of Land Management (BLM) (Decision), assessing Schritter \$4,500 as damages for willful trespass based on his removal of mineral materials from a tract of land in sec. 35, T. 21 N., R. 16 W., Gila & Salt River

Meridian, Mohave County, Arizona. The BLM Decision further required Schritter to reclaim the disturbance resulting from the trespass. For the reasons explained below, we affirm the Decision in part as modified, set the Decision aside in part, and remand for further proceedings consistent with this decision.

### *FACTUAL AND LEGAL BACKGROUND*

This is not the first time Schritter has removed mineral material from the subject land. In *Alfred Jay Schritter*, 171 IBLA 123 (2007) (*Schritter I*), we affirmed a prior decision of the BLM Kingman Field Office dated December 21, 2005, notifying Schritter that his removal of sand, gravel, rock, crushed stone and related materials from this tract constituted an unauthorized use of the public lands pursuant to 43 C.F.R. § 2920.1-2. A review of the background facts as explained in that decision and the Board's disposition of Schritter's appeal are necessary to place this appeal into its proper context.

#### *A. The Subject Property and Schritter's Operations*

In 1923, the United States patented land in section 35 to the Santa Fe Pacific Railroad Company (Santa Fe) under the Act of July 27, 1866, 14 Stat. 292. Notice of Appeal and Petition for Stay (NOA) Ex. 1. Santa Fe conveyed the land in section 35 to George Getz in 1950. NOA Ex. 2. The conveyance to Getz contained two reservations. The first reservation provided in relevant part:

Grantor expressly reserves and excepts *all oil, gas, and minerals whatsoever*, already found or which may hereafter be found, upon or under said lands, with the rights to prospect for, mine and remove the same, and to use so much of the surface of said lands as shall be necessary and convenient for shafts . . . storage purposes . . . and purposes necessary and convenient for the digging, drilling, and working of any mines or wells which may be operated on said lands.

*Id.* at unpaginated 2 (emphasis added). The second reservation (the "railroad reservation") provided:

This conveyance is made subject to and upon condition that in the event that grantor, or its successors or assigns . . . may at any time hereafter desire to construct across the premises hereinabove described, any railroad tracks . . . or to operate on said premises *gravel and ballast pits and quarries* and take material therefrom *for railroad purposes*, the right of way for any such tracks . . . and the land necessary and convenient for the operation of such gravel and ballast pits and quarries and taking of material therefrom *for railroad purposes*, may be

appropriated by any such Company desiring to construct such tracks . . . or to operate such gravel and ballast pits and quarries, [upon payment of a specified price] . . . .

*Id.* (emphasis added). The United States ultimately acquired Getz' interest in the land through an exchange effected under section 206 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1716 (2000). *See* NOA Ex. 3.

By quitclaim deed dated October 22, 2003, Santa Fe conveyed to Schritter "all of Santa Fe Pacific Railroad's right, title and interest, if any, in and to decorative rock, sand and gravel located within 100 feet of the surface," reserving to Santa Fe "all oil, gas, coal and minerals whatsoever" in the subject property. NOA Ex. 5. Later, on March 22, 2004, Santa Fe conveyed to Schritter "all of Grantor's right, title, and interest, if any" in the subject parcel. NOA Ex. 7. As a result of these conveyances, Schritter owned the interests reserved in Santa Fe's earlier conveyances to Getz.

Schritter had begun excavating stone, gravel and sand from the site by June 2004. Site inspections by BLM officers found that the material extracted from the surface was passed through a stationary "grizzly" with metal mesh screens of two different sizes that had been used to separate clay, silt, sand and gravel, and smaller pebbles from larger pebbles, cobbles, and stones. 171 IBLA at 127-28. By the end of August 2004, the BLM officers estimated that approximately 2,900 cubic yards of gravel had been removed from the site. In a telephone conversation approximately a week later, Schritter told one of the inspecting officers that some of the gravel was used primarily for road construction and home-site landscaping. *Id.* at 128.

*B. The Prior BLM Order and the Board Decision in Schritter I*

On December 31, 2005, the BLM Kingman Field Office ordered Schritter to cease all operations that would remove sand, gravel, rock and crushed stone that can be classified as "gravel and ballast" within the meaning of the "railroad reservation" in the conveyances described above. Because the reservation of gravel and ballast "for railroad purposes" did not apply in these circumstances (which Schritter did not dispute), and because the general mineral reservation did not apply to these materials, the Field Office determined that the extracted materials belonged to the United States. After ordering Schritter to cease operations, BLM stated that it would consider removal of such materials in the future to be a willful trespass.

On appeal, this Board explained in *Schritter I* that as successor to Getz, the United States could acquire no more than that which Getz acquired and Schritter could acquire no more than what Santa Fe retained. 171 IBLA at 129. We held:

The legal interpretation of a document conveying the surface and retaining the mineral estate is governed by the laws of the state in which the land is situated. *James A. Simpson*, 136 IBLA [77] at 79 [1996], citing *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372 (1977). In *Spurlock v. Santa Fe Pacific Railroad Company*, 694 P.2d 299 [1984], the Arizona Court of Appeals interpreted a deed from Santa Fe that contained a mineral reservation identical to that in the Getz deed, and incorporated a separate clause, like that in the Getz deed, that reserved “gravel, and ballast” for “railroad purposes.” In *Spurlock*, the Court held that the general mineral reservation did not include the right to remove sand, gravel, and ballast where that right was reserved separately in the railroad clause. *Id.* at 311. Thus, under Arizona law interpreting deed language indistinguishable from that of record here, the right to remove sand, gravel, and ballast was retained in the railroad clause. Moreover, the Court noted that the retention of that right was only for railroad purposes and that Santa Fe had subsequently abandoned the right. Thus, because the general mineral reservation did not include the right to remove sand, gravel, and ballast, and that latter right had been abandoned by Santa Fe, it remained with the surface estate.

171 IBLA at 129-30 (footnote omitted).

The Board noted that Schritter did not challenge BLM’s decision to the extent that it excluded “sand and gravel,” and did not challenge the conclusion based on *Spurlock* that all he received was the general mineral reservation. Instead, Schritter asserted that he was mining only “decorative rock,” and that “decorative rock” came within the general mineral reservation, relying on an unpublished Memorandum Decision in *State of Arizona ex rel. Mendez v. Carley*, No. 1 CA-CV 03-0792 (Ariz. Ct. App. Oct. 19, 2004) (“Mem. Dec.”). We explained that in *Carley*, the Arizona Court of Appeals, interpreting deed language like that in *Spurlock*, “distinguished ‘decorative rock’ from ‘sand, gravel, and ballast,’ holding that decorative rock falls within the general mineral reservation.” 171 IBLA at 130 (citing Mem. Dec. at 16). We noted that BLM’s decision acknowledged that *Carley* was not precedential, but that it indicated some likelihood that the Arizona courts would consider decorative rock to fall within the general mineral reservation. *Id.* at 130-31. We held: “BLM, however, concluded and we agree that the record indicates that the materials Schritter removed during the time period in question are ‘within the scope of ‘gravel and ballast’ addressed in the deed under the ‘railroad reservation,’” and therefore do not fall within the general mineral reservation. *Id.* at 131.

We noted that BLM employees observed gravel being mined and removed from the site, and that Schritter’s statement that he sold the material to a residential

development for roads and landscaping confirmed their observations and directly contradicted Schritter's assertion that the material was not suitable for road use. 171 IBLA at 131. We concluded: "The record supports a conclusion that Schritter removed mineral material . . . that was subject to the railroad reservation and, therefore, that was part of the surface estate owned by the United States." *Id.* at 133.

C. *Schritter's Subsequent Activity and the 2008 BLM Decision*

On December 18, 2006, while the appeal in *Schritter I* was pending, Schritter sent a letter to BLM captioned "Notice to Begin Decorative Rock Extraction." NOA Ex. 16. By that letter, Schritter purported to "provide[] notice that commencing January 15, 2007, he will begin extracting decorative rock pursuant to his mineral rights." BLM sent Paul L. Misiaszek, one of its geologists who had conducted the previous inspections of the site, back to investigate. Upon finding that materials were being removed, he prepared a Trespass Notice which he served on Schritter on January 12, 2007, together with a letter from the Kingman Field Office responding to Schritter's December 18, 2006, letter. NOA Ex. 17. The letter reiterated BLM's position that any unauthorized removal of materials in violation of its December 21, 2005, decision (then on appeal) would be considered a willful trespass.<sup>1</sup>

On February 18, 2008, Schritter's counsel wrote a letter to the Regional Solicitor's Office in Phoenix, stating that Schritter "intends to excavate and sell the decorative rock which he owns under the mineral reservation for landscaping purposes." NOA Ex. 21 at 1. Attached to that letter was a copy of a contract dated February 5, 2008, between Schritter and Action Landscape and Design, Inc., for the sale of "decorative rock and boulders" mined from the site at a price of \$15.00 per cubic yard at the site or \$20.00 per cubic yard delivered. NOA Ex. 20. The contract was for a 1-year term and was not for specific quantities, but for such materials "as Action's needs require." *Id.* at 1.<sup>2</sup>

The BLM Kingman Field Office responded to Schritter's counsel by letter dated March 19, 2008. NOA Ex. 22. In addition to citing the Board's decision in *Schritter I*, issued in February 2007, the Field Manager asserted: "BLM's position is that the only minerals subject to the general mineral reservation, and thus the only materials belonging to Mr. Schritter, are those in the bedrock." *Id.* at 2. All remaining mineral materials, he said, including those that might be used for a "decorative" purpose, belong to the United States. *Id.* The letter again warned that BLM would "institute

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<sup>1</sup> For reasons not explained in the record, no trespass decision resulted from the Jan. 12, 2007, Trespass Notice.

<sup>2</sup> The record does not indicate, and Schritter does not allege, that any rock was actually sold under that contract.

an action for willful trespass” if “BLM determines that Mr. Schritter is again removing mineral materials belonging to the United States.” *Id.*

On August 25, 2008, Schritter’s counsel notified the Regional Solicitor’s Office that Schritter had begun removing stone and selling it for landscape purposes. Answer Attachment A. Misiaszek, the BLM geologist, inspected the site on September 11, 2008. His observations, summarized in a declaration dated December 22, 2008, Answer Attachment B, were the basis of a Trespass Notice issued on the same day as the site inspection and served on Schritter the next day. NOA Ex. 23. The Trespass Notice allowed 15 days for Schritter to appear at the Kingman Field Office to effect a settlement for trespass damages. *Id.* When Schritter did not respond, BLM issued the October 1, 2008, Decision from which Schritter appeals.<sup>3</sup>

The Decision stated that “we have concluded that you have violated the Materials Act of 1947, 30 U.S.C. 601, and section 302 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1732; and that you are in trespass under both 43 CFR 3601.70 and 43 CFR 9239.0-7 . . . .” Decision at 2. After quoting the latter regulation, the Decision stated: “The current trespass involves the same type of materials for which BLM issued a trespass notice in 2005.” *Id.* It then stated that based on Misiaszek’s site visit, “BLM has determined that the materials you have removed are part of the gravel you were removing in 2005,” and that “[b]y your continued operations on these lands and removal of these materials . . . we conclude that you have committed an act of willful trespass.” *Id.* at 3. Under 43 C.F.R. § 9239.0-8 and Ariz. Rev. Stat. § 37-502, the Decision assessed three times the amount of damage resulting from the willful trespass. This was calculated as \$4,500 (300 tons of stone removed x \$5.00 per ton x 3). *Id.*

#### D. *The Instant Appeal*

Schritter’s legal arguments are set forth principally in the NOA, supplemented only briefly in his Statement of Reasons (SOR). Schritter asserts that both BLM and

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<sup>3</sup> In addition to the payment of trespass damages, the Decision also required Schritter to “remove all equipment or other property from the subject lands” and to “reclaim the disturbance resulting from your trespass.” Decision at 3-4. Specifically, BLM instructed Schritter to: “1.) Push down the high wall to no more than the original slope angle. 2.) Flatten all stock-piles. 3.) Remove the gate and repair the barbed-wire fence.” *Id.* at 4. In his NOA, Schritter stated that he had removed his equipment and the gate and repaired the fence. NOA at 13. He sought a stay of the requirements to pay the assessed treble damages, level the high wall and flatten the stockpiles. *Id.* at 13-29. BLM did not object to a stay of those requirements. BLM Response to Petition for Partial Stay of BLM’s Decision, dated Nov. 7, 2008. The requested stay was granted on Nov. 13, 2008.

the Board “have acknowledged that Appellant owns the decorative rock that has a special value for use as landscaping.” NOA at 14-15. Schritter relies on an early BLM letter dated December 21, 2003; the unpublished decision in *State ex rel. Mendez v. Carley, supra*; excerpts from a legal memorandum addressed to the BLM Arizona State Director from the Assistant Solicitor for Onshore Minerals dated December 14, 2005 (NOA Ex. 12); and two statements from *Schritter I*, 171 IBLA at 124 and 131. NOA at 7-9, 14-19. Schritter also attacks the Field Manager’s statement in the March 19, 2008, letter, noted in the Decision at 2, that the only minerals that belong to Schritter are those in the bedrock as having “absolutely no basis.” NOA at 19.

In arguing that the rock sold in 2008 is decorative rock, Schritter relies on the contract with Action Landscape and Design and five identified sales of rock to three different purchasers in August and September 2008, totaling 280 tons, at prices ranging from \$12.50 per ton to \$18.50 per ton. NOA at 11 and Ex. 4. He asserts that the Decision is a “tacit admission” that the material is decorative rock because the Decision used a value of \$5.00 per ton in assessing damages, while the average price for the decorative rock mined that he sold “was \$16.05 per ton, more than triple the value BLM attributed to that material.” NOA at 20.<sup>4</sup> He also attaches photographs of the landscaping at the residential lots at which he represents the stone was used. NOA Ex. 4 Ex. A.

Schritter argues that the decision in *Schritter I* was driven by the actual uses of the stone at that time for road construction and fill, NOA at 20, but that the test that should be applied to determine what was reserved under the general mineral reservation is whether the material has “distinct and special value,” regardless of how it is actually used. *Id.* at 21-22. Schritter derives this test from the exclusion in 30 U.S.C. § 611 (2006) of mineral deposits that have “distinct and special value” from the term “common varieties” in section 1 of the Materials Act of 1947, 30 U.S.C. § 601 (2006). On the basis of the prices allegedly paid for the stone, Schritter argues that it has a distinct and special value. He also contends on that basis that he did not mine materials in violation of the Materials Act. *See* NOA at 20-22.

Finally, Schritter contends that the same BLM office has permitted other parties to extract more than 130,000 tons of sand, gravel, common borrow, and decorative rock from two other sites at which BLM owns the surface and a private party owns the mineral estate through conveyances from Santa Fe under reservations that are identical or very similar to those involved in this case. Schritter argues that this disparate treatment is arbitrary or capricious and violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution. NOA at 25-29; SOR at 2-3.

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<sup>4</sup> The sales information given on page 11 of the NOA actually yields a weighted average price of approximately \$15.45 per ton.

BLM does not agree that it or this Board has admitted that Schritter owns all rock that can potentially be used for landscaping purposes. Answer at 10. BLM maintains that the “potential” right to remove decorative rock is not at issue because the materials removed are the same type as those involved in *Schritter I* that were determined to be gravel and ballast within the railroad reservation, not the general mineral reservation. *Id.* at 11. Thus, BLM contends that the “sole question to resolve” is “whether the minerals removed in 2008 differed in character from the minerals removed in 2005.” *Id.* BLM maintains that the site inspections reveal that they were of the same type, and *Schritter I* therefore controls here. *Id.* at 11, 13-14.

BLM strongly disagrees with Schritter’s argument that the Decision is a “tacit admission” that the material Schritter mined and sold is decorative rock because of the price at which it allegedly was sold. Answer at 10-11, 15-16. BLM points out that *Schritter I* rejected the argument that material is decorative rock simply because it is or could be used for landscaping. *Id.* at 16. BLM also disputes Schritter’s assertion that the Board has acknowledged or admitted that decorative rock falls within the general mineral reservation. *Id.*

BLM further argues that the test of whether a mineral is a “common variety” for purposes of the mining laws is irrelevant because Schritter’s ownership of the mineral estate in the subject parcel derives from the general mineral reservation in the conveyance by Santa Fe. BLM argues that is a question of Arizona law, not one under the Federal mining laws. Answer at 14-15. For all of these reasons, BLM maintains that Schritter has not met his burden to show error in BLM’s determination that he is mining materials that this Board determined in *Schritter I* belong to the United States, and has not shown that the material he sold differed from the materials that were the subject of that decision. Answer at 17-18.

#### ANALYSIS

*I. Whether Schritter Removed Material Owned by the United States Turns On Unresolved Questions of State Law.*

The Decision concluded that Schritter violated the general rule prohibiting unauthorized removal of material, 43 C.F.R. § 9239.0-7. It provides:

The extraction, severance, injury, or removal of timber or other vegetative resources or mineral materials from public lands under the jurisdiction of the Department of the Interior, except when authorized

by law and the regulations of the Department, is an act of trespass.  
Trespassers will be liable in damages to the United States . . . .<sup>5]</sup>

The regulations governing unauthorized use of mineral materials, also cited in the Decision, provide at 43 C.F.R. § 3601.71(a) that with an exception not relevant here, “you must not extract, sever, or remove mineral materials from public lands under the jurisdiction of the Department of the Interior, unless BLM or another Federal agency with jurisdiction authorizes the removal by sale or permit. Violation of this prohibition constitutes unauthorized use.” Section 3601.72 then provides: “Unauthorized users are liable for damages to the United States, and are subject to prosecution for such unlawful acts (see subpart 9239 of this chapter).” Thus, the regulations governing unauthorized use of mineral materials refer back to the general unauthorized removal of material regulations quoted above.

Either of these rules can be violated only if the United States owns the material removed. Whether Schritter has removed material owned by the United States in the instant case turns on two questions, namely, (1) whether the general mineral reservation includes “decorative rock,” and (2) if the answer to that question is in the affirmative, whether the stone extracted in this case constitutes decorative rock. If either question is answered in the negative, the United States owns the material. Schritter argues that both questions must be answered in the affirmative. BLM maintains that it is not necessary to address question (1) because the Board already answered question (2) in the negative in *Schritter I*, and the material here is of the same type and character as the stone involved in that case.

A. *Whether the General Mineral Reservation Includes “Decorative Rock” Is Unresolved.*

The first question, whether the general mineral reservation includes “decorative rock,” involves interpretation of the deed from Santa Fe to Getz. As we observed in *Schritter I*, quoted above, this is an issue of Arizona law.<sup>6</sup>

<sup>5</sup> The next section, 43 C.F.R. § 9239.0-8, provides that the rule of damages “will be the measure of damages prescribed by the laws of the State in which the trespass is committed,” unless Federal law prescribes a different rule. Ariz. Rev. Stat. § 37-502 provides that trespassers on state lands are liable “for three times the amount of the damage caused by the trespass, if the trespass was wilful.”

<sup>6</sup> Schritter’s assertion that this Board has acknowledged that he owns decorative rock under the general mineral reservation is a serious overstatement. The excerpts from *Schritter I* that Schritter quotes are not an admission or “acknowledgment” that the mineral estate includes decorative rock. The decision in *Schritter I* did note that BLM  
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In *Spurlock v. Santa Fe Pacific Railroad Co.*, 694 P.2d 299 (Ariz. Ct. App. 1984), Santa Fe had conveyed real property to Spurlock by deeds that contained general mineral and railroad reservations identical to those in the Getz deed in this case. Spurlock sued Santa Fe and its purchaser for conversion of helium underlying the lands conveyed and to quiet title to the helium. Santa Fe filed suit to quiet title to nitrogen, potash, petrified wood, and industrial clay, in addition to helium. Spurlock then sought to quiet title to sand and gravel. Santa Fe did not claim ownership to sand and gravel under the mineral reservation, but claimed a nonexclusive right to take gravel and ballast for railroad purposes under the railroad reservation. The court held that the extent of a general mineral reservation should be determined as a matter of law, without resorting to extrinsic evidence of subjective intent. 694 P.2d at 308. Under this approach, “the grantor retains ownership of all commercially valuable substances separate from the soil, while the grantee assumes ownership of a surface that has value in its use and enjoyment.” *Id.* The court held that helium, nitrogen, petrified wood, and industrial clay are minerals reserved under the general mineral reservation, and that “[a]ll are inorganic commercially valuable substances which are distinct from the soil itself.” *Id.* at 311. The court also held that because gravel and ballast were specifically mentioned in the railroad reservation, they were not included in the general mineral reservation. *Id.*<sup>7</sup>

*Spurlock* set the background for the October 19, 2004, unpublished Memorandum Decision of the Arizona Court of Appeals in *State of Arizona ex rel. Mendez v. Carley*. In that case, the State sought to condemn land owned by Carley. The deed from Santa Fe to Carley’s predecessors in interest contained a general mineral reservation and a railroad reservation functionally identical to those in the instant appeal. Santa Fe claimed ownership of the mineral estate (and entitlement to compensation as a result of the condemnation) under *Spurlock*. Carley claimed ownership of the minerals in question on the basis that they were “decorative rock” that came within the definition of gravel or ballast, and that Santa Fe had abandoned any claim to gravel or ballast. Mem. Dec. at 4. Further, Carley and Santa Fe stipulated that the “highest and best use” of the property was for the “commercial mining and production of andesite, rhyolite, and altered tuff, which are most valuable when sold as decorative rock.” *Id.* at 5. They also stipulated that one parcel

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<sup>6</sup> (...continued)

(not this Board) did not dispute a “potential right” to remove such rock, 171 IBLA at 124, and that the unpublished *Carley* decision “portends a likelihood” that the Arizona courts may ultimately consider decorative rock as within the general mineral reservation, *id.* at 131, but *Schritter I* did not decide that question.

<sup>7</sup> The court noted, without explanation, that the trial court had found that Santa Fe had abandoned any right to take sand and gravel for railroad purposes, and had not appealed that ruling. Title to sand and gravel therefore was quieted in *Spurlock*. *Id.*

contained “deposits of red-brown andesite, pink rhyolite, pinkish-brown fault block rhyolite, and pink and yellow-red altered tuff” that were “distinct from the soil itself” and that those deposits were “commercially valuable for the extraction and production of decorative rock.” *Id.* Based on this factual stipulation and Carley’s citation to definitions of “ballast” in mining dictionaries, the court rejected Carley’s argument that the rock constituted “ballast” within the meaning of the railroad reservation. *Id.* at 16-17. In view of Carley’s and Santa Fe’s stipulation that the substances were mineral deposits distinct from the soil and commercially valuable, the court held that they were covered by the mineral reservation under *Spurlock* and that Santa Fe owned the disputed deposits. *Id.* at 18, 22.

[1] Schritter relies on *Carley* for the proposition that “decorative rock” is included in the general mineral reservation.<sup>8</sup> *Carley*, however, is an unpublished memorandum decision of Arizona’s intermediate appellate court. Rule 28(a)(2) of the Arizona Rules of Civil Appellate Procedure provides that “[a] memorandum decision is a written disposition of a matter not intended for publication.” Rule 28(c) further provides that, with two exceptions not relevant here, “[m]emorandum decisions *shall not be regarded as precedent* nor cited in any court.” (Emphasis added.) *See, e.g., Hourani v. Benson Hospital*, 122 P.3d 6, 14 (Ariz. Ct. App. 2005). Thus, even if we assume *arguendo* that it was correctly decided, *Carley* is not precedent on which Schritter can rely under Arizona rules. Should the issue reach the Arizona Supreme Court in the future, it may agree with that decision, or it may not. There is no published case in Arizona (and we have found no published decision from any other jurisdiction in the United States) that addresses whether a general mineral reservation such as that involved here covers “decorative rock.” We must therefore regard that issue as still an open question under Arizona law.

This Board should not decide that question in the first instance. The proper avenue for determining whether the general mineral reservation in the conveyance to Getz includes decorative rock is not through this appeal, but rather through a quiet title suit under 28 U.S.C. § 2409a.<sup>9</sup> As the Supreme Court held: “Congress intended

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<sup>8</sup> We have found no indication in Arizona cases, and Schritter does not assert, that the mineral reservation covers rock or stone generally. This is consistent with Santa Fe’s separate reservation in the deed to Getz of a non-exclusive right to extract gravel and ballast, and the holding in *Spurlock* that gravel and ballast are not included in the mineral reservation. Thus, the question is whether there is a special category of stone—called “decorative rock”—that does fall within the mineral reservation.

<sup>9</sup> Subsection (a) of that section provides in relevant part: “The United States may be named as a party defendant in a civil action under this section to adjudicate a  
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the QTA [Quiet Title Act] to provide the exclusive means by which adverse claimants could challenge the United States' title to real property.” *Block v. North Dakota ex rel. Board of University and School Lands*, 461 U.S. 273, 286 (1983). Should such a suit be brought regarding the tract at issue in this appeal, the Federal courts would apply Arizona law. Further, the Federal courts would have the option of seeking an opinion from the Arizona Supreme Court under Arizona’s statutory “certification” procedure.<sup>10</sup> That certification procedure does not extend to this Board.

*B. The “Distinct and Special Value” Test under 30 U.S.C. §§ 601 and 611 (2006) Does Not Apply Here.*

As noted previously, Schritter suggests that the “distinct and special value” test prescribed in 30 U.S.C. § 611 (2006) for determining whether materials are of “common variety” for purposes of section 1 of the Materials Act of 1947, 30 U.S.C. § 601 (2000), should be applied to determine what was reserved under the general mineral reservation. Section 601 authorizes the Secretary to dispose of mineral materials, including common varieties of stone and gravel on public lands of the United States. Section 611 provides that the term “common varieties” as used in section 601 does not include deposits which are valuable because the deposit has some property giving it “distinct and special value,” and that common varieties are not locatable under the mining laws.<sup>11</sup>

We agree with BLM, Answer at 14, that whether the stone Schritter extracted is not of a common variety (and therefore locatable under the mining laws and not

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<sup>9</sup> (...continued)

disputed title to real property in which the United States claims an interest, other than a security interest or water rights.”

<sup>10</sup> Ariz. Rev. Stat. § 12-1861 provides:

The supreme court may answer questions of law certified to it by the supreme court of the United States, a court of appeals of the United States, a United States district court or a tribal court when requested by the certifying court if there are involved in any proceedings before the certifying court questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court and the intermediate appellate courts of this state.

*See also Arizonans for Official English v. Arizona*, 520 U.S. 43, 51 n.5, 76-80 (1997).

<sup>11</sup> The Decision also stated that Schritter had violated section 601. Decision at 2. Section 601 is part of the authority for the mineral materials unauthorized use regulations at 43 C.F.R. § 3601.71. *See* 66 Fed. Reg. 58892, 58902 (Nov. 23, 2001).

disposable under the Materials Act) is irrelevant to the question of whether the stone falls within the general mineral reservation or the railroad reservation in the private deed from Santa Fe to Getz discussed above. That is a question of interpretation of the deed under state law. Whether the material has “distinct and special value” under section 611 does not resolve that question. We therefore reject Schritter’s suggested test for determining the scope of the general mineral reservation.

C. *Whether the Material Schritter Extracted Constitutes Decorative Rock Cannot Be Determined on the Present Record.*

The second question is, even if “decorative rock” is determined to come within the general mineral reservation, whether the material extracted in this case is decorative rock. “Decorative rock” has not been defined, and no test for determining what constitutes “decorative rock” has been established. Schritter argues that the stone removed from the site should be deemed to be decorative rock on the basis of (1) the fact that it was spread out as landscaping on residential property at five different home sites (*i.e.*, was used for decorative purposes), and (2) he obtained a considerably higher price for it than BLM used in assessing trespass damages.

Some of the stone involved in *Schritter I* was used for landscaping. 171 IBLA at 128; NOA Ex. 4, Affidavit of Alfred Jay Schritter, at 3, ¶ 15. Schritter also submitted a supposed expert report in the earlier appeal that stated that the material could be used for landscaping. We held: “Schritter argues that ‘landscape material,’ in all cases, constitutes decorative stone, and that any material that could be used for landscape purposes cannot, by definition, be sand, gravel and ballast, as categorized by BLM. We reject those propositions.” 171 IBLA at 132. The same holding applies here. Schritter’s position would make almost any rock “decorative rock” if it was or could be used for landscaping. The practical effect of accepting that view would be that most any rock would or could come within a general mineral reservation. We know of no legal support for such a result.<sup>12</sup> Moreover, establishing a definition or test of what constitutes decorative rock is also an unresolved question of state law.

The record in this case provides no basis on which this Board could conclude that the stone extracted here clearly constitutes decorative rock under whatever test ultimately might be established. There is no stipulation between the parties similar to the stipulation in *Carley* regarding the nature and value of the rock. There is no

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<sup>12</sup> We agree with Schritter that the Kingman Field Office was incorrect in asserting that Schritter’s mineral estate is limited to minerals in the bedrock. Such a position would exclude minerals that may occur on or near the surface, for example, some types of gold ore deposits or valuable gemstone deposits. But no such deposits are in evidence here. The BLM official’s legal assertion was incorrect, but it has no impact on the outcome of this appeal.

evidence regarding the type or composition of the rock involved. The only contract for the sale of rock in the record is the contract priced on a different basis (volume as opposed to weight), under which it appears no sales were made. For reasons not explained, Schritter has not submitted any of the contracts or records for the sales he identifies. Nor does the record contain any evidence regarding what types of stone generally are sold as decorative stone in the local market, or at what price, or how such stone compares to the composition of the stone Schritter sold.

However, BLM's argument that the rock Schritter sold does not constitute decorative rock because it is of the same type determined in *Schritter I* to constitute ballast is also problematic. BLM relies on Misiaszek's declaration, which states that in his site inspection on September 11, 2008, he observed that materials in the piles "were the same type of materials for which BLM issued trespass notices in 2005 and 2007." Misiaszek Declaration, Answer Attachment B, at 3, ¶ 10. He further "observed a screened stone pile that had decreased in volume markedly since my previous site visits." *Id.* Schritter has not specifically refuted these sworn statements. However, it does not necessarily follow that the rock cannot constitute decorative rock. Schritter has asserted in his affidavit (NOA Ex. 4) sales of specific quantities to identified purchasers on specific dates at specific prices. Those prices range from 2.5 to 3.7 times the value that BLM attributed to the rock as ballast in calculating trespass damages.<sup>15</sup> The record in *Schritter I* contained no evidence of a sales value for the rock. Assuming the truthfulness of the statements in Schritter's affidavit, and particularly in view of the absence of an established definition or test, the record here does not provide a sufficient basis on which to determine that the rock Schritter sold does not constitute decorative rock under any circumstances.

For all of these reasons, we are unable to resolve either of the questions on which the United States' ownership of the materials Schritter removed turns. We therefore set aside BLM's determination that Schritter was in willful trespass under 43 C.F.R. § 9239.0-7 and 43 C.F.R. § 3601.70, as well as 30 U.S.C. § 601 (2006).

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<sup>15</sup> We note that the sale to one of the named purchasers, Cierra Homes, L.L.C., (at \$15.00 per ton) apparently was not an arm's-length transaction. Official public records of the Arizona Corporation Commission, State of Arizona Public Access System, reveal that Cierra Homes, L.L.C., File No. L-1383851-2, was incorporated on July 31, 2007, and that its two members are Schritter's grandson, L. D. Schritter, and Sarah Ann Schritter. The listed address for both of them and for the company is the same as Schritter's address. See [http://starpas.azcc.gov/scripts/cgiip.exe/WService=wsbroker1/names-detail.p?name-id=L13838512&type=L.L.C.](http://starpas.azcc.gov/scripts/cgiip.exe/WService=wsbroker1/names-detail.p?name-id=L13838512&type=L.L.C) No similar connections with the other two purchasers, Pennington, L.L.C., and Main Construction and Landscape, L.L.C., appear from these records.

III. *Schritter's Actions Constituted Trespass under 43 C.F.R. § 2920.1-2.*

However, other trespass rules are found at 43 C.F.R. § 2920.1-2 (the provision BLM relied on in *Schritter I*). Paragraph (a) of that section provides: “Any use, occupancy, or development of the public lands, other than casual use as defined in § 2920.0–5(k) of this title, without authorization under the procedures in § 2920.1–1 of this title, shall be considered a trespass.”<sup>14</sup> Section 2920.1-2(a) further makes trespassers liable for: “(1) The administrative costs incurred by the United States as a consequence of such trespass; and (2) The fair market value rental of the lands for the current year and past years of trespass; and (3) Rehabilitating and stabilizing the lands that were the subject of such trespass” or the costs incurred by the United States to do so.<sup>15</sup>

[2] In the instant case, as quoted above, the general mineral reservation in the Getz deed reserved to Santa Fe the right “to use so much of the surface of said lands as shall be necessary and convenient for shafts . . . storage purposes . . . and purposes necessary and convenient for the digging, drilling, and working of any mines or wells which may be operated on said lands.” However, once the surface became Federal land, it became “public lands” subject to FLPMA.<sup>16</sup> Section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2000), provides that in managing the public lands, the Secretary shall “regulate, through easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate, the use, occupancy, and development of the public lands,” and that he shall “by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” FLPMA section 302, together with sections 303 and 310 (43 U.S.C. §§ 1733 and 1740

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<sup>14</sup> Section 2920.1-1 provides: “Any use not specifically authorized under other laws or regulations and not specifically forbidden by law may be authorized under this part.” The authorized uses include “residential, agricultural, industrial, and commercial.” This section provides for land use authorizations in the form of leases, permits, or easements, depending on the circumstances.

<sup>15</sup> Paragraph (b) of this section provides that if a trespass is not timely resolved under paragraph (a), BLM may assess twice the fair market rental value accrued since the inception of the trespass (up to 6 years) for non-willful trespass, and 3 times the fair market rental value for the same period in the case of a willful trespass.

<sup>16</sup> The term “public lands” means “any land and interest in land owned by the United States within the several States and administered by the Bureau of Land Management, without regard to how the United States acquired ownership.” 43 U.S.C. § 1702(e) (2000). The Federal interest in the subject parcel therefore constitutes “public lands.”

(2000), respectively <sup>17</sup>), are the source of authority for 43 C.F.R. Part 2920. 43 C.F.R. § 2920.0-3; 52 Fed. Reg. 49114, 49115 (Dec. 29, 1987).

The situation presented in this case is a rare circumstance in which privately-owned mineral estate underlies Federally-owned surface, rather than the other way around. While Schritter has the right under the general mineral reservation to enter and use so much of the surface as necessary and convenient for the extraction of whatever minerals he owns, we do not believe that this reservation entitles him to completely ignore the requirements of FLPMA and its implementing rules and do whatever he wishes to do on the surface to extract minerals whenever he wishes. If Schritter wants to enter and use the surface to extract minerals covered by the general mineral reservation, he would be entitled to an appropriate land use authorization (such as a permit) to do so, and BLM could not unreasonably withhold such an authorization. At the same time, we believe that the FLPMA requirements and rules empower BLM to ensure reasonable and appropriate conditions and safeguards in the exercise of those rights for the protection of the public's interest in the surface.

While we have found no prior decision of this Board addressing such a situation, the Eighth Circuit addressed a very similar situation in *Duncan Energy Co. v. United States Forest Service*, 50 F.3d 584 (8th Cir. 1995). There, the United States Forest Service (USFS) had acquired the surface estate in certain lands within the Little Missouri National Grassland in North Dakota under the former section 32(a) of the Bankhead-Jones Farm Tenant Act of 1937, former 7 U.S.C. § 1011(a) (1958), subject to a mineral reservation. The reserved mineral estate had been conveyed to plaintiff Meridian Oil, Inc., who had entered into an exploration agreement with plaintiff Duncan Energy Co. Section 32(f) of the Act, 7 U.S.C. § 1011(f) (2006) grants authority to the Secretary of Agriculture “[t]o make such rules and regulations as he deems necessary to prevent trespasses and otherwise regulate the use and occupancy of property acquired by, or transferred to, the Secretary for the purposes of [the Act], in order to conserve and utilize it or advance the purposes of [the Act].” Under that authority, USFS had promulgated so-called “special use” regulations requiring approval of use by a USFS authorized officer. 36 C.F.R. § 251.50(a). The plaintiffs maintained that they had a right to enter the Federal surface to drill for oil and gas without having to obtain approval under those rules. The Eighth Circuit disagreed. The court noted that the only issue was “the Forest Service’s ability to regulate surface access to outstanding mineral rights. The Forest Service recognizes that it cannot prevent Duncan, as the owner of the dominant mineral estate, from exploring for or developing its minerals.” 50 F.3d at 589. After analyzing and

<sup>17</sup> These sections grant the Secretary authority to promulgate rules to implement FLPMA with respect to the management, use, and protection of the public lands, and to carry out the purposes of that Act and other laws applicable to the public lands.

rejecting Duncan's various arguments, the court held that the special use regulations applied and "that the Forest Service has the limited authority it seeks here; that is, the authority to determine the reasonable use of the federal surface." *Id.* at 591.

The same principle applies here. Though BLM may not prevent the development of privately-owned mineral estate on the parcel, it may determine reasonable use of the surface. Thus, if it is ultimately determined that Schritter owns "decorative rock" on the parcel, he would be entitled to a permit to use the surface to extract the rock, including reasonable and appropriate conditions on that use.

Even assuming *arguendo* that Schritter owns decorative rock as he claims, he did not obtain a surface use authorization as required under 43 C.F.R. §§ 2920.1-1 and 2920.1-2. We therefore modify the Decision to hold that Schritter was in trespass under section 2920.1-2, and affirm as modified. We further affirm BLM in requiring Schritter to cease operations until he obtains an appropriate surface use authorization. We remand for BLM to determine whether assessment of trespass liability under section 2920.1-2(a) and (b) is appropriate under the circumstances, and, if so, to recalculate amounts to be assessed. Whether the trespass was willful depends on whether Schritter's conduct falls within the definition of "knowing or willful" at 43 C.F.R. § 2920.0-5(m). BLM must determine in the first instance whether the trespass in this case meets this definition, which it should do on remand.<sup>18</sup>

Should Schritter seek a land use authorization under 43 C.F.R. § 2920.1-1 after remand, BLM may decline to issue such an authorization until Schritter establishes ownership of whatever material he seeks to extract through an action under the Quiet Title Act, and, in the event that he does, until he has submitted such

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<sup>18</sup> That section provides in relevant part:

*Knowing and willful* means that a violation is *knowingly and willfully* committed if it constitutes the voluntary or conscious performance of an act which is prohibited or the voluntary or conscious failure to perform an act or duty that is required. The terms [sic] does not include performances or failures to perform which are honest mistakes or which are merely inadvertent. The term includes, but does not require, performances or failures to perform which result from a criminal or evil intent or from a specific intent to violate the law. The knowing or willful nature of conduct may be established by plain indifference to or reckless disregard of the requirements of law, regulations, orders, or terms of a lease. . . . Conduct which is otherwise regarded as being knowing or willful is rendered neither accidental nor mitigated in character by the belief that the conduct is reasonable or legal.

additional evidence as may be necessary or appropriate to demonstrate that the authorization he seeks is for the removal of that material.

*IV. Schritter's Remaining Arguments Are Not Persuasive.*

As noted above, Schritter asserts that he has been treated differently from other parties who have extracted large volumes of sand, gravel, common borrow material and decorative rock from nearby lands of which the Federal government owns the surface under conveyances with general mineral and railroad reservations identical or similar to those involved here. NOA at 25-29 and Exs. 26-35. However, while Schritter has provided copies of instruments of conveyance to various parties, his allegations regarding extraction of materials by third parties are bare assertions for which he has provided no evidence or documentation.

Even assuming, *arguendo*, that his allegations are factually correct, the propriety of any actions of the BLM Kingman Field Office in these situations has not been brought before this Board. It is unclear on the present record whether BLM has failed to enforce the government's property rights in these situations. However, if it has, it is still the case that "[t]he authority of the United States to enforce a public right or to protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties." *Lone Star Steel Co.*, 79 IBLA 345, 349 (1984), *citing Amoco Production Co.*, 78 IBLA 93 (1983); *Alyson A. Allison*, 72 IBLA 333 (1983); *Warren L. Jacobs*, 71 IBLA 385 (1983); *see also Rogue River Outfitters Association*, 83 IBLA 151, 154 (1984).

Schritter also argues that the alleged disparate treatment violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution.<sup>19</sup> NOA at 29. However, this Board ordinarily is not a forum in which to adjudicate equal protection challenges. *Mark Patrick Heath*, 175 IBLA 167, 196 (2008), and cases cited.

*CONCLUSION*

For the reasons discussed above, we set aside the portion of the Decision concluding that Schritter had committed willful trespass under 43 C.F.R. § 9239.0-7 and 43 C.F.R. § 3601.70 and 30 U.S.C. § 601 (2006). We modify the decision to hold that Schritter's actions constituted trespass under 43 C.F.R. § 2920.1-2, and affirm as modified. We remand this matter to BLM to recalculate amounts to be assessed under section 2920.1-2(a) and (b), and to determine whether Schritter's

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<sup>19</sup> Inasmuch as the Equal Protection Clause of the Fourteenth Amendment applies to states, we presume that Schritter means to refer to the equal protection component of the Due Process Clause of the Fifth Amendment. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497 (1954).

trespass was willful under 43 C.F.R. § 2920.0-5(m). We affirm BLM in requiring Schritter to cease operations until he obtains an appropriate surface use authorization.

We further continue the stay of the requirements for Schritter to level the high wall and flatten the stockpiles on the parcel for 120 days from the date of this decision, to allow Schritter a reasonable time to decide whether to file an action under the Quiet Title Act or to seek judicial review of this decision. If Schritter does neither, the current stay will expire and Schritter must level the high wall and flatten the stockpiles.

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 appealed from is affirmed in part as modified, and set aside in part and remanded for further proceedings consistent with this decision.

\_\_\_\_\_/s/\_\_\_\_\_  
Geoffrey Heath  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
James K. Jackson  
Administrative Judge