

UNITED STATES
v.
LEE CHARTRAND ET AL.

IBLA 70-556

Decided June 25, 1973

Appeals from decision (Arizona A-1186) of Administrative Law Judge L. K. Luoma declaring certain mining claims to be null and void and declaring portions of other claims to be valid.

Affirmed.

Administrative Procedure: Administrative Law Judges-- Rules of Practice: Appeals: Generally

Upon appeal from a decision of an Administrative Law Judge, the Board of Land Appeals may make all findings of fact and conclusions of law based upon the record just as though it were making the decision in the first instance.

Administrative Procedure: Generally--Rules of Practice: Evidence

The Board of Land Appeals has authority to reverse the findings of an Administrative Law Judge. However, where the resolution of a case depends primarily upon the Judge's findings of credibility, which in turn are based upon his reaction to the demeanor of witnesses, his findings will not be lightly set aside.

Mining Claims: Common Varieties of Minerals: Generally

Where placer mining claims are located after July 23, 1955, for deposits of building stone, the stone may be an uncommon variety subject to location where it commands a higher price in the market place because of its unique patterns and coloration characteristics.

Mining Claims: Common Varieties of Minerals: Generally --Act of August 4, 1892

The Act of July 23, 1955, as amended, 30 U.S.C. § 611 (1970), had the effect of excluding from the coverage of the mining laws "common varieties" of building stone, but left the Act of August 4, 1892, 30 U.S.C. § 161 (1970), authorizing the location of building stone placer mining claims, effective as to building stone that has "some property giving it distinct and special value."

To determine whether a deposit of building stone is of a common or uncommon variety, there must be a comparison of the deposit with other deposits of similar type materials in order to ascertain whether the deposit has a property giving it a distinct and special value. If the deposit is to be used for the same purposes as minerals of common occurrence, then there must be a showing that some property of the deposit gives it

a special value for such use and generally this value is reflected by the fact that the material commands a higher price in the market place.

Mining Claims: Discovery: Generally

Where locatable minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a mine, a discovery exists within the meaning of the mining laws.

Mining Claims: Discovery: Marketability

In applying the prudent-man test a critical factor to be considered, especially in the case of widespread nonmetallic mineral, is whether the claimed material is marketable. To establish the marketability of a widespread nonmetallic mineral a contestee must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit.

APPEARANCES: Lee Chartrand, pro se, for appellants-contestees; Richard L. Fowler, Esq., Office of the General Counsel, United

States Department of Agriculture, Albuquerque, New Mexico, for appellant-contestant.

OPINION BY MR. FISHMAN

On August 25, 1967, the Manager of the Arizona Land Office, Bureau of Land Management, initiated a contest on behalf of the United States Forest Service challenging the validity of the Picture Rock Claims Nos. 1, 2, 3, 4, 5, 6, and 7. These placer mining claims were owned by Lee Chartrand and Barbara Chartrand. The complaint was thereafter amended to include five additional placer mining claims, the Arizona Picture Rock Nos. 1, 2, 3, 4 and 5, which were located on September 1, 1967, by the contestees, Lee Chartrand, Barbara Chartrand, Robert Chartrand, Lloyd Chartrand, Donald Chartrand, Debra Chartrand, Denise Chartrand, and Robert B. Jones.

The Administrative Law Judge 1/ found that the mining claims challenged in the original complaint (the Picture Rock Claims Nos. 1-7) were abandoned, and declared them to be null and void. No party has challenged the determination made by the Judge in connection with these claims on appeal to this Board.

1/ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

In connection with the remaining claims (the Arizona Picture Rock Nos. 1-5) the amended complaint charged that a valid mineral discovery did not exist within the limits of the claims, that the land embraced within the limits of the claims was nonmineral in character, that the mineral material found within the limits of the claims was not a valuable mineral deposit within the meaning of 30 U.S.C. § 611 (1970), that the land included within the limits of the claims was not chiefly valuable for minerals, that the claims were not located in good faith, and that the claims were not located by bona fide locators acting in association and were therefore in excess of the acreage allowed by the mining laws of the United States.

Based upon all the evidence presented at the hearing the Judge found that the deposits of stone in the Arizona Picture Rock nos. 1, 3, and 4 were of a common variety. Thus, he concluded that these three claims were not subject to location after July 23, 1955, and declared the claims null and void. In connection with the Arizona Picture Rock Nos. 2 and 5 the Judge found that a deposit of stone exposed in a quarry situated on portions of both of these claims possessed a unique colorization characteristic which occurred in very limited areas of the widespread Coconino sandstone deposits found in the area. The Judge found that the stone from this quarry commanded a higher price in the marketplace than other stone used for the same purposes. Thus, he concluded that the deposit of

stone possessed a property giving it a distinct and special value and that the deposit therefore was not a common variety of stone removed from the ambit of the mining laws by the Act of July 23, 1955, 30 U.S.C. § 611 (1970). The Judge also found that the mineral character of the deposit of stone from the quarry was only demonstrated to exist in sufficient quantities on two ten-acre subdivisions of the Arizona Picture Rock No. 2 and on two adjacent ten-acre subdivisions of the Arizona Picture Rock No. 5. Consequently, the Judge concluded that discoveries of valuable minerals were only shown to exist on these portions of the claims and that the remaining portions of the claims were nonmineral in character and, therefore, null and void.

In connection with the marketability of the stone in question, the Judge found that a market existed in Phoenix, Arizona, and in other places where the stone from the quarry could be sold at a profit. Thus, he found that a person of ordinary prudence would be justified in spending his time and money in developing the property as a mine.

The contestant has appealed from that part of the Judge's decision which declared portions of the mining claims to be valid. The contestees have appealed from that part of the Judge's decision which declared the mining claims in issue to be null and void.

In order to determine whether a mining claimant has discovered a valuable mineral deposit within the meaning of 30 U.S.C. § 22 (1970), the Department has traditionally employed, with judicial approval, the prudent-man test. Under this test, a discovery exists " * * * where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine * * * ." Castle v. Womble, 19 L.D. 455, 457 (1894); see United States v. Coleman, 390 U.S. 599 (1968). In applying the prudent-man test a critical factor to be considered, especially in the case of a widespread nonmetallic mineral, is whether the claimed material is "marketable." To establish the marketability of a widespread nonmetallic mineral, a contestee must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit. Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959); Layman v. Ellis, 52 L.D. 714 (1929).

The mining claims in issue were located as placer claims for building stones. The Act of August 4, 1892, 27 Stat. 348, 30 U.S.C. § 161 (1970), is therefore applicable. The Act provides in pertinent part:

Any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims. * * *

The mining claims in issue were located subsequent to the enactment of the Act of July 23, 1955, 30

U.S.C. § 611 (1970). The Act provides in pertinent part:

No deposit of common varieties of * * * stone * * * shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: Provided, however * * * "Common varieties" * * * does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value * * *.

In United States v. Coleman, *supra* at 605, the Supreme Court considered the effect that 30

U.S.C. § 611 (1970) had on 30 U.S.C. § 161 (1970). The Court stated:

Thus we read 30 U.S.C. § 611, passed in 1955, as removing from the coverage of the mining laws "common varieties" of building stone, but leaving 30 U.S.C. § 161, the 1892 Act, entirely effective as to building stone that has "some property giving it distinct and special value" (expressly excluded under § 611).

As stated in United States v. Minerals Development Corporation, 75 I.D. 127, 134 (1968), the Department interprets the 1955 [A]ct as requiring an uncommon variety of stone to meet two criteria: (1) that the deposit have a unique property, and (2) that the unique property give the deposit a distinct and special value. In order to determine whether a deposit of stone has a unique property which

gives it a distinct and special value, there must be a comparison of the material under consideration with other deposits of similar materials. Therefore, it must be shown that the material under consideration has some property which gives it value for purposes for which other materials are not suited, or, if the material is to be used for the same purposes as other materials of common occurrence, that it possess some property which gives it a special value for such uses, which value is generally reflected by the fact that it commands a higher price in the market place. United States of America v. California Soylaid Products, 5 IBLA 179 (1972). See United States v. Thomas, 1 IBLA 209, 78 I.D. 5 (1971).

In applying these tests to the evidence presented at the hearing, the Judge concluded that the contestees established a valid discovery on the 40-acre tract referred to above.

The Judge made several evidentiary findings to support his ultimate findings of fact and conclusions of law set forth above. The Judge's treatment of the evidence appears on pages 10 to 17 of his decision which we hereby adopt as set forth below:

Mr. Robert B. Wilson, a duly qualified engineer of mines and geology, employed by the United States Forest Service, testified in behalf of the Contestant (Ex. 1). The bulk of Mr. Wilson's testimony is contained in a mineral report dated November 13, 1968, and received in evidence as Exhibit No. 2. He examined the claims in May and September of 1967, and in

September of 1968. They are situated approximately 17 miles west of Heber, Arizona, and 2 1/2 to 4 miles north of State Highway 160. None of the permanent roads in the area furnish [sic] direct access to the claims but there are several abandoned logging roads by which they can be reached in a pickup truck. The topography of the claims is gentle to moderate and the area is covered with a heavy stand of ponderosa pine.

The Coconino sandstone formation crops out in many places on the claims and is believed to be the only bedrock formation in those areas of the claims where the bedrocks are obscured by overburden. However, the outcropping strata of Coconino sandstone are from the uppermost part of the formation and it is possible that there are some thin erosional remnants of the Kaibab limestone formation overlying the Coconino sandstone on some of the higher ridges where the bedrocks are obscured by a thin mantle of overburden.

The Coconino sandstone formation is a uniformly, medium-grained, well-cemented, white, pink and brown to red colored, cross-bedded sandstone of Permian age. The coloring usually follows the bedding or strata rather than crossing through it at angles, producing solid colors rather than varicolors in particular stones. It ranges from less than 100 feet to more than 500 feet in thickness and underlies the whole of the Coconino plateau where it crops out over wide areas in Mojave, Coconino, Yavapai, Navajo and Gila Counties, from as far east as Holbrook to as far west as Seligman, Arizona, a distance of 150 miles. It has been quarried in a great number of places.

Most, if not all, of the presently operating Coconino sandstone quarries are located in the vicinity of Ashfork, Arizona, where a wide range of colors can be obtained and the cost of quarrying and transportation is as low as any in the industry.

Mr. Wilson stated that the objective in a Coconino sandstone quarry is to get out as much flagstone as possible. He described a commercial grade of flagstone as being a minimum of two feet square in size, with a thickness varying from under one inch to around two inches. The value drops fast on any stone over two inches thick.

He stated that thicker slabs may be cut into strips, called ashlar strips, which are marketable for veneering. In any quarry there remains a certain amount of waste rock of all shapes and sizes, not conforming to any particular specification, called rubble, which can be used for laying up into walls or making fireplaces. This material is so plentiful in all quarries that it can usually be obtained for the price of hauling it away.

He stated that all the quarries produce as many colors as possible and all colors sell for essentially the same price. A dealer price list (Ex. 9) shows the current prices paid producers for the various types of Coconino sandstone.

In general, the sandstone exposed on the claims is a rather thick-bedded, medium to fine-grained, light brown to dark red rock that has little tendency to split along the bedding. However, there are a few zones of cross-bedded rock in which the individual beds range from less than one inch to around fifteen inches in thickness. These cross-bedded strata contain sharp bands of contrasting colors that have a strong tendency to cut across the bedding. The most pronounced coloring is found in working No. 3 on the Arizona Picture Rock No. 2 claim. It is this type of coloring, in Mr. Wilson's opinion, that has led Contestees to believe the rock is an unusual variety.

In the way of improvements and development work on the claims, Mr. Wilson found a small one-room cabin, approximately 2 1/4 miles of abandoned logging roads that are being used as a means of access, six shallow bulldozer cuts, and one quarry. He plotted the development workings on Attachment No. 3 to Exhibit No. 2, and described them as follows:

No. 1 claim [footnote omitted]--Working No. 1 is a bulldozer cut approximately 40 feet long, 10 feet wide and 2 1/2 feet deep in which the overburden has been stripped from the top of the fine to medium grained, light to medium brown colored sandstone. The sandstone is highly fractured and breaks out into small angular blocks that have little tendency to split along the bedding. None of the material excavated from the cut has been removed from the site.

No. 2 claim--Working No. 1 is a bulldozer cut approximately 65 feet long, 12 feet wide and 2 1/2 feet deep in which the overburden has been stripped from the top of a thickly bedded, light red colored sandstone. The sandstone is highly fractured and has little tendency to split along the bedding. None of the material excavated from the cut has been removed from the site. Working No. 2 is a bulldozer cut approximately 30 feet long, 14 feet wide and 3 feet deep, in which the overburden has been stripped from the top of the light brown colored sandstone. The sandstone is highly fractured and breaks out in small angular blocks that have little tendency to split along the bedding. None of the material excavated from the cut has been removed from the site. Working No. 3 covers an area approximately 250 feet long and 75 feet wide where the overburden has been stripped from a zone of cross-bedded sandstone in which there are sharp bands of color ranging from light yellowish-brown to dark red. The rock is more thinly bedded than that exposed in any of the other workings of the claims. Some of it will split into one-half to twelve-inch thick slabs. From the appearance of the working as of September 24, 1968, no more than 125 cubic yards of stone have been removed from rock in place. A considerable amount of the stone removed has been sorted according to thickness and stockpiled on the claim for use as flagstone and cut ashlar strips. Some flagstone and the ashlar strips cut from the thick slabs have been removed from the claim, but the amount removed and the price received could not be determined, as Lee Chartrand, who claims to be the only person to have removed stone from the claims would only state that he had sold the stone he had removed at a good profit, and could have sold a lot more if the Forest Service had not taken action to prevent him.

No. 3 claim--Working No. 1 is a bulldozer cut approximately 45 feet long and 30 feet wide, in which the loose rock has been removed from

the top of an outcropping of fine to medium grained, light brown colored sandstone. The sandstone is highly fractured and has little tendency to split along the bedding. None of the material excavated from the cut has been removed from the site. Working No. 2 is a bulldozer cut approximately 60 feet long, 14 feet wide and 3 feet deep, in which the overburden has been chipped from the top of a medium to fine grained, light brown colored sandstone. The sandstone is highly fractured and has little tendency to split along the bedding. None of the material excavated from the cut has been removed from the site.

No. 4 claim--Working No. 1 is a bulldozer cut approximately 40 feet long, 12 feet wide and 2 1/2 feet deep, in which the overburden has been stripped down to expose a small area of light brown colored, fine to medium grained sandstone. The exposed sandstone is highly fractured and appears to be thickly bedded. None of the material excavated from the cut has been removed from the site.

No. 5 claim--The west end of working No. 3 on the No. 2 claim, is believed to extend onto the No. 5 claim. There is no other working on the claim, but there are numerous outcroppings of the Coconino sandstone in which the rock is highly fractured and thickly bedded and little tendency to split along the bedding.

According to Mr. Wilson, the stone found in the quarry on claim No. 2 and extending somewhat into No. 5 (identified as working No. 3) has an unusual characteristic in that the coloring has a tendency to cross the bedding at angles rather than following the bedding or strata. When this stone is cleaved along the strata, it presents a varicolored pattern on its surface, ranging in all colors from white to red to almost purple. In a normal Coconino deposit, a given stone would cleave into a solid color only. This would be true of the stone he found in the other workings on the claims.

Mr. Wilson knows of no other Coconino sandstone that has a comparable coloration characteristic, and has never

seen a quarry that has this feature in the rock where the coloring crosses the bedding so pronouncedly.

This type of coloration, in Mr. Wilson's opinion, resulted from weathering near the top of the Coconino formation. The ground water solutions have brought manganese and iron and, in percolating through the pores of the rock, precipitated the minerals causing the coloration. He felt that as the quarrying proceeds downward in the pit this type of coloration will disappear and the fresher rock at depth will have the normal solid coloration.

Mr. Wilson could not determine either from exposures, outcroppings or geological inference, as to how far this unusual deposit extended laterally from the quarry into the No. 2 and No. 5 claims. He stated it definitely did not cover the entire area of those claims and it did not occur at all on anything exposed on the Nos. 1, 3 and 4 claims.

Mr. Wilson expressed the opinion that the material on the claims would be classified as a common variety of sandstone of widespread occurrence and not locatable under section 3 of the Act of July 23, 1955. He also expressed the opinion that a market does not exist for the mineral material on the claims and that it cannot be marketed at a profit. He felt the claims are not chiefly valuable for mineral.

Mr. Leonard A. Lindquist, timber staff officer, Sitgreaves National Forest, with a degree in Forest Management from Iowa State University, testified that he made a timber appraisal of the area covered by the claims. He estimated that the total area is presently covered with 4,500,000 board feet of merchantable timber valued at \$ 35 per thousand, or \$ 160,000, and, in addition, 6,000 cords of pulpwood valued at \$ 1.00 per cord, or \$ 6,000. These are stumpage values. He stated that the area is a very good quality site and constitutes an excellent place for growing timber.

Mr. Lee Chartrand, a timber cutter by occupation, began his testimony by displaying a large assortment of stone taken from the quarry previously described, and identified as working No. 3. (Mr. Wilson agreed that

all the stone came from that working.) Part of the display was photographed in color and is shown in Exhibits G, H, I and J. Mr. Chartrand gave a demonstration of how the various stones on display could be cleaved by use of a hammer and chisels. An example was a slab of stone 3 feet by 18 inches by 1 1/2 inches thick, which he split into two 3/4-inch thick slabs. The cleaved surfaces exhibited beautiful color patterns, perfectly complementing each other, as shown in the color photos. He stated that artists consider these complementary designs to be in the nature of hand painted pictures which can be hung on the wall. One such split stone, shown in Exhibit C, he sold to a stone yard in Montana for \$ 15. Another one, shown in Exhibit D, he sold for \$ 30.

Mr. Chartrand described other stones, all of which he characterized as rubble, as being suitable for cleaving into thin tile for flooring and drainboards, generally competitive with ceramic tile. Others he described as suitable for making fireplace facings, lamp stands, and other ornamental objects. An example of a fireplace constructed with this stone is shown in Exhibit F, in which 1 1/2 tons of rubble stone and 21 sq. ft. of hearth stone were used. An invoice in Exhibit K shows that Mr. Chartrand received \$ 84 for this stone.

Mr. Chartrand stated he could alone quarry, split and prepare for market, three tons of stone in a normal eight-hour day. He estimated that as soon as the quarry is opened up to the point where he is working on fresh surfaces he can process ten tons per day, using simple hand tools. He also stated that he had quarried down to a depth of six feet and the farther down he went, the colors of the stone became brighter and the designs more beautiful.

Prior to initiation of this contest action, Mr. Chartrand had been advanced \$ 5,000 by a Mr. Hal Butler who was interested in marketing the stone from the quarry. By the middle of September 1967, Mr. Chartrand had about 100 tons of stone quarried and guillotined and placed on pallets, ready for delivery. He had built a hundred yards of new road which would have provided access to Mr. Butler's large diesel trucks. It was at this time, according to Mr. Chartrand, that the Forest Service blocked his access roads by bulldozing 3-foot-high mounds over them. This physical blocking of the roads prevented him from meeting his commitment with Mr. Butler,

and resulted in cessation of his operations. Apparently the only actual sales he has succeeded in making so far are those shown by ten invoices, Exhibit K, totaling \$ 286.72.

Mr. Hal Butler, Show Low, Arizona, a salesman of lumber products, testified that he visited Mr. Chartrand's quarry on several occasions and took samples of the stone to display to his customers in the lumber industry. On the basis of their interest, he advanced Mr. Chartrand \$ 5,000 as capital to begin production. He stated that he immediately had two buyers, one an architect, for 100 tons at approximately \$ 55 to \$ 60 per ton f.o.b. the quarry. Mr. Chartrand was unable to fulfill his commitment, apparently because of being stopped by the Forest Service.

Mr. Gage Keith Fink, Phoenix, Arizona, testified as follows:

He first started prospecting for stone in 1945 and has since been in the business of quarrying different building stones throughout the southwestern states, establishing distributorships in the east and west, and retailing and wholesaling stone, with a yard in Phoenix and outlets in other cities. In recent years he has assisted groups on Indian reservations in Arizona in exploring for stone and investigating the possibilities of opening quarries for them.

He has purchased flagstone from Kaibab, Dunbar and from six or seven different quarries in the Drake, Williams, Seligman and Snowflake areas. Throughout the year he sells approximately 300 tons of Coconino flagstone. He estimated that 95 percent of all of the stone in all of the various quarries of flagstone consisted of a solid type color, either brown-beige, beige, or red. A very minor amount would be in the multi-colors. Nowhere else has he seen anything to compare with the multi-colors found on Mr. Chartrand's claims.

He quarries many different types and colors of stone for mosaic-type veneering, including schist, quartz, jasper, onyx, sandstone and epidote. This has been used in the construction of a number of buildings in Phoenix, such as the Thomas Mall, County Complex, Christown, Valley National Bank and Western Electric. Using 25-ton trucks

it costs \$ 6 per ton to haul stone into the Phoenix area from points farther away than Mr. Chartrand's claims. This stone sells in the retail yards for prices ranging from \$ 35 per ton up to \$ 200 per ton for some types. All of the stone exhibited by Mr. Chartrand could, without exception, be used in mosaic-type veneering. It can also be used as flagstone for patios, entranceways and flooring. Because of the swirling-type coloring, the stone is particularly attractive for use for entrances in homes, and for tile and other decorative uses. There is no other Coconino sandstone in the Arizona deposits which has this coloration characteristic.

For veneering purposes he sells stone for \$ 50 per ton which is not nearly as attractive as that on display in the hearing room. For decorative uses he sells ordinary solid colored flagstone for two cents per pound whereas the stone on display would sell for five to six cents per pound.

He acquired one load of stone from Mr. Chartrand. He sold one of the stones, similar to ones on display, for \$ 75 and he received a premium price for all the rest.

Mr. John J. Blakeley, Phoenix, Arizona, testified that he has been in the building materials and supply business in Phoenix for the past 39 years and is always looking for new products to offer contractors and to the general public. In addition to Phoenix, he has connections in the stone business in the Los Angeles area, the Bay area and the Pacific Northwest.

He visited Mr. Chartrand's quarry in the late summer of 1967 and acquired some of the stone as samples and immediately sold them to contractors. One of his outside contacts wanted an exclusive setup to handle the stone in the Bay area, where, at that time, the normal Coconino flagstone was bringing retail around \$ 80 per ton, or four cents per pound. This contact reported that if he could be supplied with this material from the claims he could sell it at a premium of two to three cents a pound over the normal. Mr. Blakeley again visited the claims and found that there was just no end to the beautiful stone up there and no end to its potential. He used the words "it's fantastic." He has supplied materials on a good many of the major buildings in Phoenix and all over

Arizona, and has never seen anything to equal the beauty and uniqueness of this particular stone. He has all of the facilities necessary to merchandise this stone in Phoenix, and all he needs is a source of supply.

He presently has customers for the stone and merely needs deliveries from the source. The potential for the stone is almost unlimited in the construction business because it can be used for portico entries, foyers, veneering, swimming pools, patios, stepping stones, etc.

While not being a geologist, he testified that in his opinion the coloration formations exist because of centuries of sedimentation, chemical reaction, and compression, and that the coloration followed through consistently. It is not a seam coloration from oxides coming down through the seams. It is a coloration that seems to have been formed through a churning or whipping at the time it was in a mud or fluid state. The coloration goes solid all the way through the stone.

Contestant has appealed from that part of the Judge's decision which found portions of the mining claims to be mineral in character and contain a valid discovery. The gist of contestant's appeal is that the Judge failed to consider and give sufficient weight to all the relevant evidence in determining the facts which appear in his decision. In support of its position, contestant has incorporated in its brief on appeal several excerpts of testimony which are generally supportive of contestant's position on the issues raised in the hearing.

We cannot agree with contestant's argument that the Judge did not consider or give sufficient weight to certain evidence. The Judge's ultimate findings of fact were based upon all the evidence

presented to him at the hearing, as he so stated in his decision. While the Judge did not mention certain facts, this did not establish that he failed to consider all the relevant evidence. See United States v. Zerwekh, 9 IBLA 172, 175 (1973).

This Department has a long-standing practice of affording considerable weight to the findings of the trier of fact at an administrative hearing. The reason for this practice is because the trier of fact who presides over a hearing has an opportunity to observe the witnesses, and is in the best position to judge the weight to be accorded conflicting testimony. See Forrest B. Mulkins, A-21087 (December 8, 1937), I.G.D. 22; United States v. Humboldt Placer Mining Company, 8 IBLA 407 (1972). We recognize that the Board of Land Appeals has authority to reverse the fact findings of a Judge; however, where, as here, the resolution of a case depends primarily upon his findings of credibility, which in turn are based upon his reaction to the demeanor of witnesses, his findings will not be lightly set aside by this Board. State Director for Utah, v. Dunham, 3 IBLA 155, 78 I.D. 272 (1971), and cases cited therein.

The contestees argue on appeal that all of their claims should have been validated in toto. Contestees assert that the Judge gave too much weight to the testimony of the mineral examiner, Robert B. Wilson, who testified on behalf of the contestant. The Judge found,

and his finding is supported by the record, that the mineral character of the land embraced within the claims in issue was only established in connection with the stone found on the quarry which extended at most into the two 10-acre subdivisions of both the Arizona Picture Rock No. 2 and the Arizona Picture Rock No. 5. Wilson testified that neither by physical exposure nor by geological inference could it be determined how far the stone extended laterally from the quarry, although it did extend to some degree. As noted in the decision of the Judge, this testimony was uncontroverted. Thus, we are of the opinion that the Judge properly found that contestees had not established a discovery except on those portions of the claims which the Judge validated. We disagree with the argument made by contestees that the Judge gave too much weight to the testimony of the mineral examiner. Contestees' argument is subject to the same rationale set forth above. State Director of Utah v. Dunham, supra; Forrest B. Mulkins, supra.

The decision of the Judge is supported by the preponderance of the substantial and probative evidence. Nevertheless, the following excerpts of testimony are set forth, since they particularly buttress our findings.

Robert B. Wilson, the mineral examiner called by contestant, testified as follows on cross-examination by Lee Chartrand:

[Tr. 12]

Q. It is stated in this report that it's a common variety of sandstone over [sic] wide occurrence.

Do you say that this stone is found other places?

A. Well, the Coconino sandstone formation is exposed in northern Arizona from, I suppose, from around Holbrook as far west as Seligman, that's a matter of 150 miles or so, all along the Rim, and places in Gila County and it's been quarried in a great many places. I'd say it was a widespread occurrence.

Q. Would you say this particular color and design in stone is widespread?

A. This particular coloring, I call it a kind of a -- some of it has almost a purple cast in the coloring, has a tendency to cross the bedding rather than be along the bedding, and that type of coloration is, well, it's not -- does occur in other places. It's not widespread, no. This particular pattern of coloring is not particularly widespread.

* * * * *

On recross-examination by Lee Chartrand, Wilson testified:

[Tr. 27]

Q. Mr. Wilson, what percent of the quarries in this Coconino stone would you say had the vertical coloring, would run vertically in the veins?

[Tr. 28]

A. Well, I couldn't say.

Q. Do you know of any that do?

A. That is exactly like yours? By vertical [sic] you mean across it, straight up?

Q. Not exactly straight up and down.

A. But almost. The coloring in this rock, the way it crosses the bedding, I don't know of any Coconino sandstone that has the coloration and the crossing of the bedding the way this particular stone of yours does, if that's what you mean.

Q. Yes.

A. I have seen it in the field where it wasn't being quarried. I have never seen the quarry that had this feature in the rock where the coloring crossed the bedding so pronouncedly as it does here. Usually it crosses it kind of sneaky and you mistake the coloring for the bedding; it is actually crossing the bedding.

* * * * *

On Examination by the Judge, Wilson testified:

[Tr. 137]

Q. Mr. Wilson, there's been testimony here that this type of coloration occurs in perhaps only five per cent of the total area of the Coconino flagstone deposit. Why would not the same type of weathering have occurred in the other areas, why only in this particular spot?

[Tr. 138]

A. I don't know about the percentage but I believe I testified when I was on the stand before that this particular type of coloration does occur in other places. Where the outcrops have been deeply weathered, it does occur.

Q. Is it your testimony that this similar type of coloration occurs generally throughout the flagstone deposits in Arizona?

A. No, no, only in those places where the rock has been exposed to weathering for a long time and certain minerals are necessary to produce this type of coloration.

Q. Is this then, a common phenomenon or an uncommon phenomenon throughout the flagstone deposit?

A. This type of coloration is relatively uncommon throughout the Coconino sandstone.

Q. What is the reason it is relatively uncommon?

A. That I couldn't say.

* * * * *

The testimony of the witnesses called by contestees was, as could be expected, even more favorable on the issue of the uniqueness of the stone in question. We are of the opinion that all of the testimony on this issue supports the finding of the Judge that the particular type of Coconino sandstone on portions of the Arizona Picture Rock Nos. 2 and 5 possesses a unique property. While most Coconino sandstone occurs in solid shades of one color or another, the stone in issue not only occurs in variegated bands of several shades of color but the colors also occur in veins which are characterized as being vertical, i.e., generally running upward and crossing the bedding rather than running parallel to the bedding. The occurrence of both of these properties in the same deposit of stone, as is evidenced by Contestees' Exhibits A, B, C, D, E, F, G, H, I, and J, gives the stone a unique property.

There was a considerable amount of testimony to support the finding of the Judge that the stone in issue commanded a higher price in the marketplace than other stone used for similar purposes.

Gage Keith Fink, whose business was the quarrying of different kinds of building stone, testified on direct examination by Lee Chartrand:

[Tr. 92]

Q. Did you ever try any sales of this stone on your yard?

A. Yes, we had one load of this stone in our yard. We sold one stone about the size of this larger one you split here today for \$ 75, and we got a premium price out of all of it. All the stone we had we got a premium price.

* * * * *

On cross-examination by counsel for contestant, Fink testified:

[Tr. 96, 97]

Q. Now, what would the price in the stone yard be for ashlar veneer?

A. You just sell the stone * * * I'd say this stone would probably sell for -- it would have to be tried in that area, but we are getting \$ 50 for many stones that are not as near as pretty as this.

* * * * *

On examination by the Judge, Fink testified:

[Tr. 99]

Q. What is the significance in the marketplace of the swirling-type coloring that's displayed in this flagstone?

A. Its beauty.

Q. What does it do price-wise; how does it compare price-wise?

A. Oh, if you were to have an entrance put in a home and it would be the same as laying, almost, just laying cement, or laying something colorful, like laying a plain tile or a real decorative tile.

Q. I can appreciate that but what do people pay for one or the other? Is there a difference in the amount that they pay?

A. Definitely, definitely. In stones like this where we were selling retail at our yard flagstone at two cents a pound, we get five and six cents for this.

Q. Have you sold this type of stone for five or six cents a pound?

A. Oh, definitely, definitely.

Q. Whereas, you normally sell the solid-colored flagstone for two cents?

A. Two cents.

* * * * *

John J. Blakely, who had been in the materials and supply business for 39 years, testified:

[Tr. 101, 102]

* * * * *

Q. * * * when this stone was shown to me I acquired some samples and immediately I sold it to some of my contractors * * * I contacted two or three of the people I knew * * * and one man * * * had an interest in a stone yard up in that area, [Pacific Northwest] he was in that area on a sales trip and he immediately looked me up and he wanted an exclusive setup to handle this stone in his area. He told me at the time that price

really wasn't any object. He said that at that time that normal regular Coconino flagstone, which a good bit of it moves out of Drake-Seligman-Williams area, was bringing retail around \$ 80 a ton in the Bay area, which would be four cents a pound, and on the basis of this type of stone, if we could supply him, he could sell it at a premium of two to three cents a pound over this.

* * * * *

Finally, Hal Butler, whose primary business was in lumber, testified as follows on direct examination by Chartrand:

[Tr. 108]

* * * * *

A. * * * [Chartrand] had taken me out to the quarry, and being a salesman all my life I was immediately sold on what I had seen at the quarry. I went so far as to take samples of it * * * and on my calls to the customers in the lumber industry I would display, show them this. I didn't have a customer that I called on that didn't want truckloads of this rock.

So, on the basis of that I advanced Lee \$ 5,000 to get me out some rock because I could sell it nearly everywhere I went.

* * * * *

[Tr. 109]

* * * * *

Q. At the time I first showed you this and you contacted a few buyers, what did you give me an order for on this stone, how much did you give me? What order did you give me first?

A. I told you to get me out 100 ton immediately, that I had it sold, and it would bring approximately \$ 55 to \$ 60 a ton quarried, f.o.b. quarried.

It is conceded by contestant that a general market for stone exists in the area of the claims. Contestees, furthermore, presented receipts at the hearing showing actual sales of the stone. While these receipts only total between \$ 250 and \$ 300 the record discloses that contestees had several tons of stone sorted and piled but were thwarted in their attempts to market the stone because someone blocked the access road which extended from the claims to the highway. It was uncontroverted at the hearing that the road was blocked by a timber contractor. The real bone of contention was whether the Forest Service authorized the blocking. In any event, we are of the opinion that the Judge properly found that the stone in issue could be marketed at a profit.

Although the Judge made no express finding that the land embraced within the validated portions of the claims was chiefly valuable for minerals under 30 U.S.C. § 161 (1970), we are of the opinion that such a finding is implicit in his decision. The only evidence presented by contestant on whether the claims in issue were chiefly valuable for minerals was the testimony of Leonard A. Lindquist, a timber staff officer of the Sitgreaves National Forest. (Tr. 41.) He testified that in his opinion the estimated value of the timber on all of the land embraced within the claims (560 acres) was \$ 166,000. Contestant argues that this testimony supports an inference that the value of the timber on the validated portions

of the mining claims (40 acres) is \$ 11,440. Assuming arguendo that this inferred estimate were accurate, it must be inferred from the evidence that the value of the stone on the same 40-acre tract would far exceed \$ 11,440. The mineral report prepared by contestant states that the Coconino sandstone formation "ranges from less than 100 ft. to more than 500 ft. in thickness." Hal Butler testified that he advanced Lee Chartrand \$ 5,000 for a single order of the stone. (Tr. 108.) Butler stated that he placed an order with Chartrand for 100 tons of the stone, which Butler had sold, and that the 100 tons "would bring approximately \$ 55 to \$ 60 a ton * * * f.o.b. quarried." (Tr. 109.) Gage Keith Fink testified that he had sold the type of flagstone displayed at the hearing for five or six cents a pound and that solid-colored flagstone only sold for two cents a pound.

The Judge considered the testimony of Lindquist in connection with the value of the land for timber. He also considered the fact that the stone in issue occurred in sufficient quantities and could be marketed at a profit commanding a higher price than other stone used for similar purposes. Under the facts and circumstances in this case, we feel that the findings of the Judge support a conclusion that the land in issue is chiefly valuable for stone. See generally, Burke v. Southern Pacific R. R. Co., 234 U.S. 669 (1914); United States v. Zerwekh, supra, at 175. See also 5 C.J.S. Appeal &

Error § 1564(8). 2/ In any event, upon appeal from a decision of an Administrative Law Judge, this Board can make all findings of fact and conclusions of law based upon the record just as though it were making the decision in the first instance. United States v. Middleswart, 67 I.D. 232 (1960); 5 U.S.C. § 557 (1970). We are satisfied from our review of all of the evidence that the land in issue is chiefly valuable for minerals.

Contestees have requested this Board to make a field examination of the claims to prove that all of the claims contain stone with unique coloration characteristics and patterns. It is not a function of this Board to make field examinations of mining claims. Contestees were afforded an opportunity to establish the mineral character of the claims at the hearing. Their failure to do so cannot serve as a basis for a further evidentiary hearing. The request is accordingly denied.

2/ "Where the record does not contain express findings of all material facts involved in the case or conclusions of law, it will be presumed, on appeal, that the lower court found, in favor of the prevailing party, all the facts necessary for the support of the judgment."

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.

Frederick Fishman, Member

We concur:

Joseph W. Goss, Member

Douglas E. Henriques, Member

Edward W. Stuebing, Member

Anne Poindexter Lewis, Member

MRS. THOMPSON, DISSENTING IN PART

Insofar as the majority affirms that part of the Administrative Law Judge's decision finding that certain mining claims, or portions thereof, are null and void, I concur. I must dissent, however, with the majority's affirmance of the Judge's decision finding 40 acres within the Arizona Picture Rock Nos. 2 and 5 claims to have a discovery of a valuable mineral deposit.

My basic disagreement with the majority is to the factual findings pertaining to the stone within those 40 acres, and the inferences drawn from the evidence in the record concerning its value and the value of the land for other purposes.

The Building Stone Act of August 4, 1892, 30 U.S.C. § 161 (1970), authorizes location of mining claims for "lands that are chiefly valuable for building stone." By the Act of July 25, 1955, 30 U.S.C. § 611 (1970), "common varieties" of stone are no longer deemed a valuable mineral deposit within the meaning of the mining laws, but do not include "deposits of such materials which are valuable because the deposit has some property giving it distinct and special value." Prior to the 1955 Act, a deposit of building stone was not deemed a valuable mineral deposit under the mining laws unless there was satisfactory proof establishing that the deposit, though of commercial quality, could be marketed

at a profit. United States v. Estate of Victor E. Hanny, 63 I.D. 369 (1956); United States v. Strauss, 59 I.D. 129 (1945). After the 1955 Act, it is necessary to establish not only that a deposit of building stone may be marketed at a profit and that the land is chiefly valuable for the building stone, but also that the deposit has "some property giving it distinct and special value." United States v. Coleman, 390 U.S. 599 (1968).

The Judge found that the contestant's evidence was sufficient to make a prima facie showing that the mineral materials on the claims are a common variety not subject to location under the mining laws, but that the contestees, by a preponderance of the evidence established the uncommon nature of the deposit of stone exposed in the quarry on the Arizona Picture Rock Nos. 2 and 5 claims. Specifically, he stated at 17:

Based upon all the evidence presented, I find that the stone in that quarry has a unique coloration characteristic which occurs in very limited areas of the widespread Coconino sandstone deposits. Because of this unique characteristic the stone commands a distinctly higher price in the market place over other stone used for the same purposes, giving it a special and distinct value, and qualifying it as an uncommon variety of stone under the law as set forth above. I further find that a market exists in Phoenix, Arizona, and other places where the stone from the quarry can be sold at a profit, and that a person of ordinary prudence would be justified in spending his time and money in developing the property as a mine.

He then discussed whether each ten-acre tract within the two claims was mineral in character and concluded that, at most, the uncommon variety of stone extends into two ten-acre subdivisions of both the No. 2 and No. 5 claims, that neither by physical exposures nor geological inference could it be determined how far the stone extended laterally from the quarry. He concluded that the other stone on the claims was of the same character "as the stone found throughout the vast Coconino sandstone deposit" and is a common variety, no longer locatable under the mining laws. Although he discussed mineral character, he did not discuss whether the 40 acres found to be mineral in character were "chiefly valuable for minerals," nor did he analyze the facts or give any reasons for any conclusion that the lands are more valuable for the stone than for other purposes.

I believe one may only speculate as to the basic data and reasons to support the decisions of the Judge and the majority of this Board as to the 40 acres found to contain a valuable deposit of locatable minerals. 1/

1/ The findings and the reasons for the findings and conclusions in an administrative determination should be clear so that a reviewing authority may "know the basic data and the whys and wherefores" of the conclusions. Guam v. Federal Maritime Commission, 329 F.2d 251, 255 (D.C. Cir. 1964), further hearing, 365 F.2d 515 (D.C. Cir. 1966), cert. den. 385 U.S. 1002. There should not have to be speculation as to the basis for the conclusions in the decision, nor is a reviewing authority required to accept an agency counselor's post hoc argument at face value. Northeast Airlines v. C.A.B., 331 F.2d 579, 586 (1st Cir. 1964).

The majority glosses over the fact the Judge made no express finding that the land was chiefly valuable for building stone, although one of the charges of the amended complaint, and a material issue in the case, was that the land within the claims is not chiefly valuable for minerals, by stating that such a finding is implicit in his decision. The majority alternatively makes its own finding that the land is chiefly valuable for minerals. I am unable to ascertain how such a finding can be made from the present record without assumptions and inferences not warranted from the evidence.

The Forest Service presented testimony of an employee, a forester, that the estimated value of the timber on the 560 acres embraced within all of the claims in the contest was \$ 166,000. As the Judge noted in his decision, the Forest Service's mineral examiner gave his opinion that none of the land within any of the claims was chiefly valuable for the mineral thereon. The Judge concluded that the Government's evidence made a prima facie case.

When the Government in a mineral contest makes a prima facie case as to the pertinent issues leading to the conclusion that the claim is invalid for lack of discovery of a valuable mineral deposit locatable under the mining laws, the contestee has the

burden of proof to show with a preponderance of the evidence that there has been a discovery and the claim is valid. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). The burden of proof goes to all of the elements essential to prove the validity of the claim. Thus, when the Government established prima facie that the land was not chiefly valuable for minerals, the contestee had the burden to show by a preponderance of the evidence that the mineral value exceeded other values of the land. This burden has not been satisfied by the evidence in this case.

Although there was evidence as to a total timber value for the 560 acres of all the claims, the testimony pertaining to timber value was not broken down as to particular 10-acre subdivisions. In view of the Judge's conclusion that there was a locatable mineral on 40 acres, by hindsight the Forest Service should have detailed the evidence as to the timber value as to each particular 10-acre subdivision. There is, however, no specific evidence submitted by the contestee which would establish any estimated value of the mineral deposit within that acreage or any estimated value of timber or other nonmineral values of the land for that acreage. The majority in argument would accept the contestant's attorney's post hoc contention of an inferred proportionate timber value of \$ 11,440 for the 40 acres. As the variables as to the value of timber are so great over a given area,

without further information than that in the record, I would not accept such an inference. The value could be significantly less than that if much timber has already been cut for the quarry, or it could possibly be more.

Of more importance in this case, I see no basis in the evidence for ascribing any significant mineral value greater than that, as the majority has done, to the deposit of stone within the quarry. The majority and the Judge have concluded that the solid colored stone within the claims is a common variety within the meaning of the Act of July 23, 1955. To determine the value of the mineral deposit, therefore, no value can be given to that stone. An estimate of the value of the deposit must be based solely upon mineral still locatable under the mining laws. United States v. Lease, 6 IBLA 11, 79 I.D. 379 (1972); United States v. Chas. Pfizer & Co., Inc., 76 I.D. 331 (1969), reconsideration denied, 6 IBLA 514 (1972).

Assuming arguendo that the variable colored stone is still locatable under the mining laws, what is a reasonable estimate of the quantity of that stone and what is the value of that quantity? These are difficult questions, of course, but the answer to these questions and to the value of the land for nonmineral purposes must be given in order to make a proper determination that the land is chiefly valuable for building stone.

The report of an examination of the claims by the Forest Service's mineral examiner, Robert E. Wilson, was submitted as Contestant's Exhibit #2. In this report, Wilson described the geology of the area, and stated in part as follows:

The Coconino sandstone formation is a uniformly, medium-grained, well-cemented, white, pink and brown to red colored, cross-bedded sandstone of Permian Age. * * * It ranges from less than 100 ft. to more than 500 ft. in thickness and underlies the whole of the Coconino plateau where it crops out over wide areas in Mojave, Coconino, Yavapai, Navajo and Gila Counties from as far east as Holbrook to as far west as Seligman. * * *

Most, if not all, of the presently operating Coconino sandstone quarries are located in the vicinity of Ashfork, Arizona, where a wide range of colors can be obtained and the cost of quarrying and transportation is as low as any in the industry.

* * * * *

In general, the sandstone exposed on the [subject] claims is a rather thick-bedded, medium to fine grained, light brown to dark red rock that has little tendency to split along the bedding. However, there are a few zones of cross-bedded rock in which the individual beds range from less than one inch to around 15 inches in thickness. These cross-bedded strata contain sharp bands of contrasting colors that have a strong tendency to cut across the bedding. The most pronounced coloring is found in Working No. 3 on the Arizona Picture Rock No. 2 claim where it produces the effects shown in Photos Nos. 13 and 14 of Attachment No. 1c. It is this type of coloring that has led the claimant to believe the rock is an unusual variety. [Emphasis added.]

It is only the stone described in the underscoring which is deemed by the Judge and the majority to be an uncommon variety. The report does not support any inference, as implied by the majority,

that such stone is within a 100 to 500 feet thickness of the total Coconino sandstone formation which covers a wide area throughout Arizona. If it were so extensive, it would be in such quantities that it would have to be determined a common variety. Cf. United States v. Brubaker, 9 IBLA 281, 80 I.D. 261 (1973). Actually, a fair reading of the quoted portion of the mineral report indicates that there are only a few zones of this variegated rock in thicknesses from less than one inch to around 15 inches in thickness. The Judge indicated there were some 100 tons of stone quarried and guillotined and placed on pallets ready for delivery. In the mineral report of the Government's witness, it was stated that as of September 24, 1968, no more than 125 cu. yds. of stone had been removed from rock in place in working no. 3, the quarry in question (Contestant's Ex. 2, at 6). Nothing in the record establishes how much more of the variegated colored stone can reasonably be estimated to be within the 40 acres adjudged to be mineral in character.

With regard to any value of the stone, the majority relies on testimony which is primarily conjectural in nature. None of this testimony establishes any in-place value of the stone. It all relates to possible retail prices rather than quarry prices. The majority emphasizes testimony by Hal Butler concerning an advance to Lee Chartrand of \$ 5,000. Unfortunately the testimony concerning this advance is somewhat confusing and unclear as to

the actual terms of the transaction between Butler and Chartrand. There was no corroborative evidence by way of canceled check, copy of a contract, etc. It is not clear from the testimony that the amount represented any sale price for 100 tons of stone at the quarry, as the majority implies. Indeed, Butler's testimony is that 100 tons should be taken from the quarry immediately "that I had it sold, and it would bring approximately \$ 55 to \$ 60 a ton quarried, f.o.b. quarried" (Tr. 109.) There was no clarification as to these terms. It would appear that the \$ 55 to \$ 60 represented the price the buyer would pay him for the stone -- not what he would pay Chartrand. In any event, the sales were not made, with Chartrand trying to place the blame for this upon the Forest Service, as will be discussed further, infra. Our further discussion as to market value of the stone establishes that there is no probative evidence which would support a conclusion that the land is chiefly valuable for the stone.

We turn now to the most critical question in this case, i.e., whether the stone is a common or uncommon variety of building stone. I believe the Judge misstated the testimony of the Forest Service's witness, Wilson, in saying that he "knows of no other Coconino sandstone that has a comparable coloration characteristic." The entire testimony of Wilson reveals that there is a wide variety of variegated colored stone in the Coconino sandstone formation,

and although the witness had seen no other quarry having similar type of vertical-patterned rock, he had observed similar rock exposed between Heber and Long Valley. In addition to the testimony quoted by the majority, see also other testimony at Tr. 26-29, 138-39.

Testimony of contestees' witness Gage Keith Fink indicates that there are other stones, schist and quartz-types, used for the same purposes as the stone from their claims which have varied color patterns (Tr. 95). He stated that although the schist-type stone is not limited quantity-wise, as a decorative stone it is limited to a mosaic-type pattern (Tr. 96). He also testified:

* * * I am not aware of any quarry that produces exclusively multi-color flagstone. However, there are quarries that occasionally get a swirl or two in them, not pronounced like this, but there are maybe two shades of color in a piece of stone; this happens quite often but I'd say easily 95 percent of the flagstone quarried in Arizona is of a solid color, one color, and usually used in the patio, or cut guillotined for your other type of veneer stone. (Tr. 98.)

Another witness of contestees, John J. Blakeley, who is in the building materials and supply business in Phoenix emphasized the beauty of the stone (Tr. 102).

From my review of all of the evidence in the record it appears that variegated coloration in pattern effects in building stone

generally is not unusual by itself although the frequency of occurrence is less than the occurrence of solid color building stone, at least, of the sandstone in the Coconino formation. The summary of evidence by the Judge failed to include any of the testimony concerning building stone generally but was limited to the Coconino sandstone. This is apparent also from his summation of the evidence concerning the market for the material.

The Judge and the majority give lip service to the test in United States v. Minerals Development Corporation, 75 I.D. 127 (1968), that where a deposit of stone is used for the same purposes as other materials of common occurrence, the property deemed to make the deposit have a "distinct and special value" must command for the stone a significantly higher price in the market place than the common varieties of stone. 2/

2/ Dictum in McClarty v. Secretary of Interior, 408 F.2d 907, 909 (9th Cir. 1969), states that the market criteria outlined in the U.S. Mineral Development test "* * *" 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." The court then suggests that special and unique properties of the stone may give it an economic value not measureable by the retail market price. For example, a unique property may reduce the costs or overhead which would result in an increase of profit for the producer even though the market price of the stone would be no higher than the other varieties of building stone. Since the Court's decision in McClarty, however, this Department has adhered to the view in the U.S. Mineral Development case that the market place price is the significant factor in determining whether the unique property imparts a "distinct and special value" to the deposit where the material is sold for the same uses as common varieties of the mineral. The Atchison, Topeka & Santa Fe Railway Company v. Cox, 4 IBLA 279 (1972); United States v. Cox, 4 IBLA 279 (1972); United States v. Thomas, 1 IBLA 209, 78 I.D. 5 (1971); United States v. Rogers, A-31049 (March 3, 1970); United States v. Chas. Pfizer & Co., Inc., 76 I.D. 331, 346 (1969). In any event, there is no showing here that there would be any economic advantage in the McClarty sense due to the physical property of the stone.

I do not believe the contestees met their burden of proof to establish that the stone has a unique property which gives it a distinct and special value. I disagree with the findings that the preponderance of the evidence established that the variegated coloration gave the stone a distinct and special value as reflected in the market price.

It is difficult to determine what weight the Judge gave to the testimony of the witnesses in this case and to other evidence presented as he only summarized the evidence and stated his conclusions. As indicated, he made no analysis of the evidence or offered any reasons for his conclusions.

The majority finds that there was a "considerable amount of evidence" to support the Judge's finding that the stone in issue commanded a higher price in the market place. Let us consider this evidence.

Fink testified that at retail outlets in Phoenix building stone of types that included jasper, onyx, quartz, sandstone,

epidote, schist and others sold from \$ 35 a tone to \$ 200 a ton for a "real good rose quartz or some with a lot of pyrites" (Tr. 90). One load of stone from contestees' quarry was sold in his yard with one large stone selling for \$ 75, and a premium price for "all of it" (Tr. 92). There were no receipts to corroborate this. As to the rock displayed at the hearing, he thought it would command a price of \$ 50 (Tr. 93). Although he has been out of the business for a year and half, he stated that flagstone had been selling for two cents a pound, but the type of stone shown at the hearing could get five and six cents (Tr. 99). On a ton basis this would be a difference between \$ 40 and \$ 100 to \$ 120 a ton.

Blakeley, through his "lumber connections in the Bay area," met the sales manager for one of the largest manufacturers of power poles in the Bay area, who has an interest in a stone yard. He wanted an exclusive setup to handle the stone in his area (Tr. 101). Blakeley's contact told him that regular Coconino flagstone was bringing retail around \$ 80 a ton in the Bay area, or four cents a pound, and that he could sell this stone, by selecting and grading it, at a premium of two to three cents a pound over this (Tr. 102.) Although Blakeley said he had customers for the stone, he had no idea how much stone could be sold. He stated:

A good many projects have been completed in the last two years' time here and those buildings are built once, never again. So, whatever comes up in the future, in other words, I have no way of looking into that with my crystal ball, but it has a terrific potential. (Tr. 103.)

I have already mentioned the testimony of another witness of contestees, Lee Butler, whose business is lumber. He showed samples of stone from the quarry to other lumber dealers and his thwarted sales of stone were to such dealers (Tr. 109).

In contrast to the optimistic statements as to what the stone might bring in the retail market place, actual sales receipts submitted at the hearing show a different picture. Although there is little foundation evidence to support them, the receipts or invoices are compiled together as Exhibit K. Although the Judge stated there were ten invoices totaling \$ 286.72, one is actually a duplicate billing statement of the same invoice (no. 6816) for \$ 24.72, including 72 cents tax. With the one duplication subtracted, our total of the receipts is \$ 262 without sales tax, or \$ 264.23 with the tax added. This still leaves a minor discrepancy with the Judge's computation, which apparently was in error. The dates of these items, description, and price (with tax stated when given on receipt) are as follows:

| | | | | | |
|----|----------|---------------------------------------|----------|--|-------|
| 1. | 10-28-67 | 1 1/2 building stone at \$ 45 per ton | \$ 67.50 | 21 sq. ft. of hearth stone at \$ | |
| | 2.50 | 52.50 | *** | 120.00 | |
| | | less a 30% discount | -36.00 | | 84.00 |
| | 8-10-69 | 20 lbs. picture flag stone rubble | | | |
| | | at .05 | 1.00 | 1 pair matched pieces, split flagstone | |
| | | (Picture flag) | 10.00 | tax | .04 |
| 7. | 3-1-67 | 20 sq. ft. mantle rock at 1.25 | 25.00 | | tax |
| | | | | | .75 |
| | | | 25.75 | | |
| 8. | 9-10-68 | (same duplicate billing), King-Ferris | | | |
| | | Supply Company, Invoice No. 6816, | | | |
| | | 2 18 x 36 sandstone | | | |
| | | 1 24 x 24 " | | | |
| | | 3 2 x 1 " | | | |
| | | 1 1 x 1 1/2 " | | | |
| | | 16 sq. ft. at 1.50 | 24.00 | tax | .72 |
| | | | 24.72 | | |
| 9. | | 4 sq. ft. sandstone at 1.50 | 6.00 | tax | .18 |
| | | | 6.18 | | |

The prices in the items listed apparently are the retail prices, not the price at the quarry. Except possibly for item 5, one piece of flagstone for \$ 7.50, and item 6 one pair of matched pieces of split flagstone (picture flag) for \$ 10, none of the other items reflect prices higher than the price of ordinary stone used for the same purposes. It is difficult, however, to evaluate the sales of the pieces of stone where a weight is not given since the usual comparison is on a per pound or per ton basis. This is true also with respect to the three other sales of single (or paired) stones noted by the Judge at \$ 15, \$ 30, and \$ 75, which were not corroborated by sales receipts. Those for which there were sales receipts (evidently the same type of picture stone) sold for much lower prices than the three sales which were not so corroborated.

It is evident that the primary use for which the material is expected to be sold is for traditional construction purposes for which common varieties of building stone can be used such as inside and outside veneering of homes and other buildings, landscaping, fireplace and patio construction. Contestees also urge that the stone can be used for floor and wall tile, for art pieces which can be mounted and displayed like pictures, and ornamental objects such as lamp posts and bases. Except for the art pieces, the record does not establish that these other alleged uses are

uses for which other common varieties of stone could not be put. For example, although a pleasing color of stone would be a factor in choosing stone to make a lamp or other decorative object, such an attribute may be found in common varieties of stone. The inherent value of the object would be due to the labor and skill in making the object rather than the inherent value of the raw material itself unless a higher price could be obtained for the raw material. As stated in McClarty v. Secretary of Interior, supra, at 909, the mineral deposit must have the unique property and not "the fabricated or marketed product of the deposit."

The evidence as to sales of stone for art pieces is not convincing. The highest alleged value received for an individual piece (or pair achieved by splitting the stone) was stated by Blakeley to be \$ 75. There is no other information concerning that stone. That price is significantly different from the \$ 30 for the split stone shown on exhibit D (Tr. 69), which is also significantly different from the \$ 15 received for a somewhat similar stone in size and coloration shown on exhibit C (Tr. 67-68). There is more difference in the prices received for these stones than for the alleged difference in the estimated prices that can be received for the stone as compared with ordinary flagstone as stated by contestees' witnesses. At most, these sales show that the price may depend greatly upon the buyer's inclination, and

the fact that it is a negotiated price. There is certainly no evidence to support any finding that the stone can be marketed profitably for art pieces, and these few isolated sales are not sufficient to establish a unique use to satisfy the "distinct and special value" test. United States v. California Soyland Products Inc., 5 IBLA 179, 193 (1972).

In analyzing the evidence as to the sale of the material for building and decorative work, I find there is a distinction between the testimony of contestees' witnesses as to any actual sales of the material and the possible value of the material in the market place. Testimony as to what market conditions might be, in contrast with evidence of what sales have been made, is simply opinion evidence.

Even if we consider all of the witnesses for contestees as experts regarding stone, although three of them testified they were primarily in the lumber business, rather than the stone business, there is little probative evidence to support their opinions that the stone has a distinct and special value in the market place, and that it can be marketed profitably. The price Fink estimated could be received for the stone as flagstone was in the middle range for building stone. Although he was optimistic about the "terrific"

market potential, he could not state what the present or future market could be. Any opinion by Blakeley as to a market in the California Bay area is based upon hearsay, what one of his lumber contacts in California told him the price for the stone should be in that area in comparison with the price for ordinary Coconino sandstone being sold there. He agreed the price customers are willing to pay for the stone to a great extent is dependent upon which type of rock they prefer (Tr. 104). The essence of his testimony is because he and some of his lumber contacts liked the stone it should command a higher price than ordinary stone. Is such testimony a sufficient basis for a conclusion that the stone has a distinct and special value because it can be sold at a distinctively higher price than ordinary sandstone? I think not.

I realize the difficulties of proof in establishing a "distinct and special value" of stone where the special property allegedly giving it that value is a variegated coloration and the vagaries of the market place are dependent upon the aesthetic tastes of the potential buyers and, undoubtedly, upon the marketing skills of the sellers in large part. For this reason, where the facts of actual sales corroborated by some documentary proof reflect an entirely different picture from that based upon mere opinion alone, the opinion testimony cannot be given the same

weight as where the opinion testimony is corroborated. The actual sales prices shown in the evidence, with the exceptions noted previously, were no higher and possibly less than the market place price for common varieties of stone. The evidence also supports an inference that the variegated coloration pattern might be a negative factor in marketing as well as a plus factor due to the difficulties in achieving uniformity of patterning (Tr. 105-107). This would be true where a large volume of stone would be desired rather than one or two pieces.

In short, I have weighed all of the evidence in the record and must reach a different conclusion from that reached by the Judge and the majority as to the "distinct and special value" of the stone and the marketability at a profit. The documented facts as to market prices and conditions support the opinion testimony of the Government's mineral examiner that the stone does not have a unique property giving it a distinct and special value, but do not support the conflicting opinion testimony of contestees' witnesses. Some of the price estimations of contestees' witnesses are not of a price which is significantly higher than that for which common varieties of stone can be sold. Other estimations are merely optimistic speculations of a possible potential market and possible prices. Since a speculative market is not sufficient to establish

marketability as indicated in Barrows v. Hickel, 447 F.2d 80, 83 (9th Cir. 1971); see also United States v. Stewart, 5 IBLA 39, 79 I.D. 27 (1972); a fortiori, a finding as to a distinct and special value must rest on more than mere conjecture and speculation.

Therefore, there is no basis for finding that the stone deposit within the W 1/2 SW 1/4 NE 1/4 of Section 3 is an uncommon variety, and I would reverse the Judge on this point, or require a further hearing before deciding the issue finally.

I also disagree with the Judge's and the majority's finding that a prudent man could expect to market the stone at a profit. In addition to establishing that there is a market, this requires an analysis of the claimant's expected monetary returns with his expected costs. Adams v. United States, 318 F.2d 861 (9th Cir. 1963). The evidence in this regard is not persuasive. All of the evidence concerning retail prices did not reflect the actual money to be received at the quarry. There is little information on this. This might vary depending on whether the claimant or his purchaser were to pay the transportation costs, the costs of loading and unloading. Fink testified that he figured the price of quarried stone at \$ 15, with

his truck hauling it, and the quarrymen loading the truck (Tr. 94, 100). His hauling costs were \$ 6 a ton into the Phoenix area (Tr. 94). It is not apparent how this cost is broken down, i.e., if it includes labor as well as gasoline and maintainance costs of the trucks and any capital amortization for the cost of the trucks. Fink also testified that it might be necessary in quarrying flagstone to quarry 400 to 500 tons to obtain 100 tons of 1 inch thick stone (Tr. 98). There is little probative evidence which would support a conclusion that the stone from the claims can be marketed at a profit.

Contestees contend that they were prevented from establishing proof of the marketability of the stone because the Forest Service prevented them from doing so. The record shows a letter from Forest Service personnel to Lee Chartrand advising him that there was no locatable mineral on the claims and that he should not remove it (Ex. L). Chartrand testified that the access road to his claims was blocked and this prevented him from getting to the claims (Tr. 111-113). Witnesses of the Forest Service denied blocking the road but stated that a timber purchaser may have done so under the terms of his timber sale contract which contracts generally provide for closing roads built for timber sales after the timber is removed. Although Chartrand was offered a special permit to remove

the material pending this contest with the money to be placed in escrow depending upon the outcome (Ex. 6), he refused to do so. The notice or warning by the Forest Service that the stone is a common variety does not relieve the claimants of the burden of showing that the stone can be marketed at a profit. Cf. Barrows v. Hickel, *supra*, at 84, citing an earlier decision in the same case, United States v. Barrows, 404 F.2d 749, 752 (9th Cir. 1968), cert. den., 394 U.S. 974 (1969), which held that a court injunction preventing removal of material from a claim could not be permitted to prejudice the Government's asserted rights to a mining claim.

It appears that the Judge and the majority of this Board have been swayed in their conclusion in part, although not expressly articulated, by this alleged thwarting of the sale of the 100 tons of stone under the alleged arrangement with Butler. Lee Chartrand refused to go into any type of arrangement with the Forest Service to permit him to remove the stone with the money to be placed in escrow, stating that this would be an admission that the stone is not locatable. Where there is a controversy as to whether a stone deposit is of a common or an uncommon variety, we would not consider a claimant who enters into such a contractual arrangement with the Forest Service pending resolution of a contest as admitting that the stone is a common variety. Such an arrangement would be advantageous because the claimant could extract and sell the stone about

which there is a controversy and by his sales have evidence as to the value of the stone on the market place. In view of the difficulties of proof inherent in a determination as to "distinct and special value" such an arrangement might well afford a claimant an opportunity to establish clear proof of value in the marketplace. If the variegated coloring of this stone is so highly desirable that it can actually capture a higher price in the market place, I believe a further hearing in this case would be useful to afford the claimant the further opportunity of making an arrangement with the Forest Service to remove the stone and market it to establish the "distinct and special value". A further hearing would also afford the parties the opportunity to supply the deficiencies in the proof concerning profitability of the operations, and concerning whether the land is chiefly valuable for the building stone.

I cannot, however, on the basis of the present record sustain the Judge's findings on these matters, nor can I conclude that the claimant has met his burden of proof by establishing a preponderance of evidence on the crucial issues in this case. The credibility of the witnesses' testimony and the weight to be given to that testimony in this case is not fully dependent upon their demeanor. Furthermore, review by federal administrative agencies of their judges' (hearing examiners) decisions is not the same as federal appellate court

review of lower court findings, and the administrative agency may weigh all of the evidence to make its decision and reverse a judge's findings on the evidence even where credibility and demeanor of witnesses are involved. F.C.C. v. Allentown Broadcasting Co., 349 U.S. 358, 364 (1955).

I would not defer to the Judge's findings in this case where there is so little basis to support them and where there is an absence of findings and reasons on some of the material issues of the case. Furthermore, I cannot concur in the majority's findings for the same reason.

This Department has recognized many times that the sale of minor quantities of material at a profit does not demonstrate the existence of a market for the material which would induce a man of ordinary prudence to expend his means in an effort to develop a valuable mine on the claim. United States v. Edwards, 9 IBLA 197 (1973), and cases cited therein.

In this case not only is the evidence lacking that the few sales were made at a profit, but the actual sales did not establish that the stone commanded a higher price in the market place as required to establish that it is an uncommon variety of stone.

I would not rest a determination that the stone in this case has a distinct and special value and is marketable at a profit merely upon conjectural and speculative opinions, contradicted by other opinion and by specific proof of sales. I would require the claimants in order to meet their burden of proof in this case where value is dependent upon aesthetic tastes and not upon any firm marketplace standards to show more definite evidence of actual market transactions which would corroborate the opinions expressed that it could be sold for higher prices than common varieties of stone and to show more evidence as to profitability. In the absence of such proof, I would conclude the claimants have not established their preponderance of evidence in a case of this type.

Therefore, I would reverse the Judge's decision as to the 40 acres for the reason the claimants have not met their burden of proof. Alternatively, in view of the ambiguities in the proof as to other issues and the claimant's alleged inability to consummate a sale of the stone because of the blocking of the road and Forest Service warnings, I would remand the case for a further hearing on all of the material issues which must be resolved before a final determination that any of the claims is valid.

Joan B. Thompson, Member

I concur:

Martin Ritvo, Member

Mr. Frishberg, dissenting in part:

I concur in that part of the majority and dissenting opinions affirming Judge Luoma's decision holding Picture Rock Claims Nos. 1 through 7, Arizona Picture Rock Claims 1, 3 and 4, and portions of Arizona Picture Rock Claims 2 and 5 null and void. I also agree with the majority's conclusions that the building stone found in that 40 acres possesses a property giving it a distinct and special value and, hence, is locatable. 30 U.S.C. § 611 (1970). However, I dissent from the majority's affirmation of the holding below that 40 acres within Arizona Picture Rock Nos. 2 and 5 contain a discovery of a valuable mineral deposit.

I share the dissatisfaction of Mrs. Thompson and Mr. Ritvo with the majority's treatment of the failure of the Judge to find that the land is chiefly valuable for building stone. As pointed out in the dissent, such a conclusion is required by 30 U.S.C. § 161 (1970). Contestant alleged that the land is not chiefly valuable for building stone. Accordingly, once the Judge held that the building stone on 40 acres was locatable and that such stone could be marketed at a profit, he was required to find that the land was chiefly valuable therefor before concluding that a discovery existed. He did not do so, nor does the record support such a conclusion.

Accordingly, I would reverse the decision below as to the 40 acres in question and remand for further hearing, directing that the parties be ordered to present detailed evidence on 1) the highest value of the 40 acres involved for other purposes, including but not necessarily limited to the value of the timber thereon, and 2) the value of the locatable building stone thereon. In order to determine the latter, it is necessary to ascertain the amount of such stone on the claims, the cost of its extraction, removal and sale, and its selling price. While there is evidence as to the selling price of the stone, there is little in the record, as pointed out by Mrs. Thompson, as to its total amount or as to the cost of marketing it.

I am aware of the hardship imposed by a remand. Hearings and appeals cost time and money. Moreover, their lack of finality is highly frustrating. Nevertheless, before the Secretary may divest the Government of its land, he must satisfy himself that all statutory standards are met. So too, therefore, must this Board and the Administrative Law Judge. That the contestee preponderates or is more persuasive than the contestant does not necessarily mean that all statutory requirements are met. Were this a proceeding wherein only the contestee appeared, he would still be required to present

evidence sufficient to satisfy the pertinent statute before a patent could issue. He has not done so, nor has he been required to do so in this case.

Newton Frishberg, Chairman

