UNITED STATES v. UNITED MINING CORP.

142 IBLA 339 Decided February 10, 1998

Editor's Note: Secretary assumed jurisdiction - stayed pending Secretarial review, 63 Fed. Reg. 58411 (Oct. 30, 1998); rev'd in part and remanded to IBLA by Secretarial decision (May 15, 2000); petition for mandamus filed, United Mining Corp. v. Babbit, No. CV99-594-S-MHW (D. Idaho filed Dec. 17, 1999); dismissed with prejudice (settled) (D. Idaho March 4, 2002); Secretarial remand dismissed as moot, IBLA 2000-262 (Dec. 10, 2002).

United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

UNITED STATES
v.
UNITED MINING CORP.

IBLA 95-133 Decided February 10, 1998

Appeal from a decision by Administrative Law Judge Ramon M. Child that the KB-1 through KB-14 placer mining claims are null and void. IDI-29807.

Affirmed in part, vacated in part, and reversed in part.

1. Act of August 4, 1892--Mining Claims: Placer Claims

Neither South Dakota Mining Co. v. McDonald, 30 Pub. Lands Dec. 357 (1900), nor United States v. Bolinder, 28 IBLA 187 (1976), supports a conclusion that, as a matter of law, land embracing natural wonders are thereby removed from location under the mining law. 2. Act of August 4, 1892--Mining Claims: Placer Claims

The Building Stone Act of August 4, 1892, 30 U.S.C. § 161 (1994), provides that "[a]ny 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." However, following passage of the Common Varieties Act, 30 U.S.C. § 611 (1994), to be locatable, building stone must have some property giving it a distinct and special value.

3. Act of August 4, 1892--Mining Claims: Placer Claims

As a general matter, the term "building stone" includes "all stones for ordinary masonry construction, ornamentation, roofing, and flagging." Stone used in the construction of walls, nonstructural facings on buildings, fireplaces, hearths, and decorative stone around fireplaces, patios, fountains, monuments, and for general landscaping purposes have all been found to fall within the category of building stone.

4. Act of August 4, 1892--Mining Claims: Placer Claims

The use, rather than the value, determines the classification of a mineral material as building stone, locatable under the Building Stone Act, 30 U.S.C. § 161 (1994). High value of the stone can be used to identify the mineral as an uncommon variety of building stone, however.

5. Act of August 4, 1892--Mining Claims: Placer Claims

The term "chiefly valuable" is a term which was included in laws passed during the time when the United States was classifying lands as agricultural for disposal. Its use was primarily for determining the relative value of a given tract so that the lands could be disposed of pursuant to the correct statute. When building stone is found on the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, the land should be deemed chiefly valuable for building stone.

6. Act of August 4, 1892--Mining Claims: Placer Claims

The Building Stone Act is applicable for building stone having some property giving it a distinct and special value. To possess distinct and special value, the building stone must possess geological uniqueness giving it value and making it readily distinguishable from the common variety of the same stone.

7. Act of August 4, 1892--Mining Claims: Placer Claims

The term "chiefly valuable" contemplates a rational comparison of values, and the measurement of those values must be quantifiable and in terms applicable to both sides of the equation.

APPEARANCES: Kenneth D. Nyman, Esq., and Christ T. Troupis, Esq., Boise, Idaho, for United Mining Corporation; Kenneth M. Sebby, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management; Roger Flynn, Esq., Boulder, Colorado, for intervenors; 1/ Kenneth D. Hubbard, Esq., M. Julia Hook, Esq., and Scott W. Hardt, Esq., Denver, Colorado, for amici curiae. 2/

OPINION BY ADMINISTRATIVE JUDGE MULLEN

United Mining Corporation (United Mining) has appealed a November 1, 1994, Decision issued by Administrative Law Judge Ramon M. Child declaring the KB-1 through KB-14 placer mining claims null and void. Judge Child found the land subject to those claims to be more valuable for aesthetic and geological purposes than for the building stone found thereon or for any mining purposes.

The situs of the claims, the Big Wood River is located in south central Idaho, northwest of Shoshone, Idaho. (Ex. C-7, at 2.) The river bed is on the north central Snake River Plain, is virtually unnoticeable until one is very close to it, and is dry most of the time. (Tr. 87-88.) The river bed consists of two channels: (1) a broad shallow channel characterized by a shiny glaze or desert varnish ranging from 30- to 60-feet wide and 2- to 10-feet deep; and (2) a narrow, deep inner channel or canyon

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1/ By Order dated Apr. 6, 1995, the Board granted intervener status to the Committee for Idaho's High Desert and the Connecting Point for Public Lands.

2/ On Apr. 3, 1995, ASARCO, Battle Mountain Gold Company, Hecla Mining Company, Phelps Dodge Corporation, and Santa Fe Pacific Gold Corporation filed a Motion seeking permission to file an amici curiae brief. The Board granted amici curiae status in its Apr. 6, 1995, Order, supra, note 1.

varying between 1-foot and 30-feet wide and up to 40-feet deep. (Ex. G-6, at 10-11.) It has a number of bedrock erosional features, including channel variations, depositional and erosional segments, relict and coalescing potholes, and shaped boulders. (Tr. 102-103, 109; Exs. G-6-1 through 41; and Ex. G-10-1 through 11.)

The geologic features found in the section of the river channel subject to the claims resulted from the confluence of three circumstances: "(1) a homogeneous bedrock of basalt; (2) large flows of glacial meltwater at the end of the last period of alpine glaciation; and (3) a large source of durable igneous and metamorphic pebbles and cobbles transported from the northern mountains." (Ex. G-6, at 1; see Tr. 107-108.) These geologic features developed towards the end of the last ice age when glacial meltwater coming off the mountains carried large volumes of rock and sand to the Snake River plain. (Ex. C-8, at 1.) The flood waters migrated to weak areas in the basalt, and carved the basalt creating the above described geomorphological features. Id. Swirling action of driven pebbles and cobbles during high water flow carved grooves and cylindrical potholes into the basalt and produced a rock sculpture effect. Id. The potholes grew and expanded and, at times, merged, creating the deep inner channel. (Tr. 94-96; Ex. G-6, at 11.) The pothole erosion process included the generation of large water-worn boulders which broke free when the underlying rock was eroded away. These boulders were subjected to additional erosional sculpting as they rested on the canyon bottom, ultimately forming unique configurations. (Ex. G-6, at 17.)

In March 1991, United Mining entered into a lease agreement with John Hisel, the owner of private property on the Big Wood River channel a few miles south of the claims. (Tr. 222.) United Mining was granted the right to remove and sell water-sculptured basalt boulders, and Hisel was paid a royalty for the material removed. Shortly after the lease was finalized, Gary Ojala, a consulting geologist employed by United Mining, was directed to find additional supplies of water-sculptured basalt boulders, called Holystones boulders. 3/

After extensive field examination, Ojala identified what he believed to be the best source of sculptured basalt on a portion of the Big Wood River managed by the Bureau of Land Management (BLM or Bureau). He then approached Dr. Terry S. Maley, a geologist employed by the BLM Idaho State Office, to ascertain how United Mining might acquire the sculptured basalt found on BLM land. (Tr. 224.) Maley advised Ojala that he considered the material Ojala sought to be a common variety of building material and that Ojala could acquire the sculpted basalt through a mineral material sale. (Tr. 224.) Ojala testified that he believed the boulders to be an uncommon variety of building stone, but that it appeared that the most expeditious way of obtaining the stone was to apply for a mineral material sales contract. (Tr. 225.)

On June 14, 1991, United Mining submitted Mineral Material Sales Application IDI 28953 seeking to purchase 180 tons of boulders from the

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3/ For convenience, the water-worn basalt boulders are sometimes referred to as Holystone boulders. This term is used by United Mining to identify the water-worn boulders in promotional and sales material. See Tr. 256.

BLM-managed portion of the Big Wood River riverbed during a 1-year period. (Ex. C-16, Attachment B; Tr. 33, 223-25.)

On July 18, 1991, BLM established the Riverbed Lava Community Pit (IDI 28547) along a portion of the channel. 4/ The Bureau then began a formal environmental assessment of the boulder removal program described in United Mining's application.

United Mining located the 14 KB placer mining claims on February 4 and 5, 1992, and filed the location notices for the claims with BLM on April 23, 1992. The claims embrace lands within secs. 3, 10, 11, 14, and 15, T. 4 S., R. 18 E., Boise Meridian, along the Big Wood River channel. 5/

The environmental assessment for United Mining's Mineral Material Sales Application was completed and the Environmental Assessment document (EA), dated April 22, 1992, was issued. This document is a part of Exhibit C-14 and contains a number of pertinent findings. Among them are:

> 1) "The Proposed Action" was "a mineral materials sale of 200 tons of basalt lava decorative stone boulders" to be removed "along a one-mile stretch of the Big Wood River (dry channel)" through an "exclusive contract." (EA at 1.)
>
> 2) The preferred alternative was the removal of material from a community pit. The applicant would remove 180 tons of mineral material from the community pit and do necessary reclamation in a 1-year period.

4/ Witnesses testifying for BLM gave conflicting testimony regarding the reason that BLM established a community pit. Bureau District Reality Specialist, Brown, testified that it was established to control stone sales. (Tr. 47.) District Manager Gaylor testified that BLM never intended to sell mineral material from the community pit, (Tr. 177), and that it was established to buy time while preparing withdrawal documents. (Tr. 183.) Maley testified that the pit was not established to withdraw the land from mineral location, but was established as a step in the process of selling stone to claimants. (Tr. 122-25.)

5/ Public lands within the Black Butte lava flow, including portions of the contested claims, are a part of the Lava Wilderness Study Area (WSA), created by BLM on Nov. 1, 1983. (Tr. 30; Ex. G-2.)

3) The proposed sale of decorative stone would help serve public demand for natural materials in landscaping and interior open space. * * * [The i]ntended market probably includes the northwest and west coast of the United States and metropolitan areas of the Pacific rim. Id.

4) The proposed sale to the claimants and community pit sales would "conform with multiple use recommendations." Id.

5) No cultural resources were found in the area of the proposed boulder removal. (Supra, at 7.)

6) Recreation values are limited. Id.

7) Removal of stone would not be permitted when water is flowing in the Big Wood River channel. Id.

8) "Visual resources of the area are Inventory Class II in the neighboring Lava Wilderness Study Area. The Lava WSA has been recommended by BLM as nonsuitable for wilderness designat[ion] * * *. The visual resources are Inventory Class III in the area outside the Lava Wilderness Study Area. Class II resources allow stricter management than Class III with the objective to retain the existing landscape character. Management activities may be seen but should not attract attention of the casual observer. Any change must repeat the basic elements of form, line, color, and texture in the predominant natural features of the characteristic landscape." Id.

9) "Air Quality, Areas of Critical Environmental Concern, Farm Lands prime or unique, Floodplanes, Native American Religious Concerns, Cultural Resources, Livestock, Threatened or Endangered Species, Wastes hazardous or solid, Water Quality surface or underground, Wetlands or Riparian Zones, Wild and Scenic Rivers, and Wildernesses" "would not be affected by the proposed action or alternatives." (Supra, at 8.)

On July 8, 1992, BLM published a Notice in the Federal Register proposing to withdraw the lands encompassed by the claims from mineral entry to protect the unique geologic sites along the Big Wood River for a 2-year period. 57 Fed. Reg. 30228-29 (July 8, 1992); see also Ex. 3. The Notice described the sites as containing a limited quantity of uniquely-shaped, water-worn lava boulders and beautiful stone sculptures, and as possessing

high public value for recreational pursuits such as viewing, photography, exploring, and hiking. 57 Fed. Reg. 30229 (July 8, 1992).

Bureau geologists and mineral examiners, Terry Maley and Peter Oberlindacher, conducted a further field examination of a portion of the Big Wood River channel between October 7 and November 5, 1992. In a report titled "Proposals to Extract Water-Worn Boulders from the Big Wood River in Portions of Sections 2, 10, 11, 14, 15, 21, and 22, T. 4 S., R. 18 E., B.M.," dated December 3, 1992, the examiners concluded that the area represented a unique geologic resource composed of the entire environment of the canyon including "the shape of the rock forms, the coloration of the rocks, the seemingly artistic manner in which the curiously sculpted forms blend together and most of all the special feeling one experiences in walking through the canyon composed of a myriad of remarkably unique sculptured rock." (Ex. C-8, at 6.) The examiners recommended that mining claims in the study area be invalidated, citing South Dakota Mining Co. v. McDonald, 30 Pub. Lands Dec. 357 (1900), and United States v. Bolinder, 28 IBLA 187 (1976), as a basis for declaring the claims null and void because they cover land described as a great natural wonder. (Ex. C-8, at 6, 10).

No action was taken on the EA until December 3, 1992, when Mary E. Gaylord, District Manager, Shoshone District, issued a Finding of Significant Impact stating that "I have reviewed this environmental assessment (ID 050-EA-91074) including the explanation and resolution of any potentially significant environmental impacts. I have determined that the proposed action will have significant impacts and will need an environmental impact statement if the proposed action were to be pursued."

(Ex. C-14.) In a December 4, 1992, letter addressed "Dear Public Land User," the District Manager states:

> Enclosed is our Final Environmental Assessment and Decision Record for EA # ID050-EA-91074 entitled River-Smooth Lava Material Sale Application—International Stone. The Final EA includes public comment letters received, and Bureau of Land Management responses to the concerns raised in the letter which pertain to the EA and the quality of impact analysis. The Final EA reflects modifications made in response to the comments and reflects new information developed since the preparation of the Draft EA."

(Ex. C-14.)

United Mining's June 14, 1991, Mineral Material Sale Application was rejected by BLM on January 28, 1993. (Tr. 42.) The notice of rejection was not made a part of the record, but BLM's district realty specialist testified that the application "was rejected as not in the public interest with the notation that the resource site was identified as a unique geologic resource and great natural wonder." (Tr. 42.) No appeal was filed.

On March 8, 1993, United Mining submitted a Notice of Intent pursuant to 43 C.F.R. § 3809.1-3, advising BLM of its intent to conduct mining operations on the KB claims by removing boulders from the claims. (Ex. G-15.) The Notice of Intent identified the KB claims as building stone placer claims. (Ex. G-15, at 1.) The Bureau responded by issuing a Decision dated March 17, 1993, prohibiting mining and removal of stone from the KB-1 through KB-14 building stone placer claims pending the outcome of the contest proceedings, (Ex. G-16), which were initiated by the filing of a contest Complaint on March 11, 1993.

In its Complaint, BLM alleged that:

> 1. The land involved embraces a great natural wonder that should be preserved for public benefit, and is not the

> type of resource Congress intended to dispose of under the Mining Law. See South Dakota Mining Co. v. McDonald, 30 L.D. 357 (1900); United States v. Bolinder, 28 IBLA 187, 196 (1976).
>
> 2. The land involved is not mineral land within the meaning of the mining laws because it contains formations and material valuable as natural curiosities, but not mineral substances usually developed by mining operations. See South Dakota Mining Co. v. McDonald, 30 L.D. 357 (1900).
>
> 3. The land involved is not chiefly valuable for building stone.

(Complaint, paragraph 5.)

United Mining answered, admitting and incorporating by reference, the identification of the claims as building stone placer claims set forth in Exhibit A to the Complaint. (Answer, paragraph 3.) United Mining denied BLM's charges, specifically alleging, inter alia, that the land was chiefly valuable for building stone. (Answer, paragraph 7.)

Judge Child held a formal hearing in Boise, Idaho, on April 4 and 5, 1994. At the outset of the hearing, counsel for BLM stipulated: (1) that there is a market for the type of building stone found on the claims; (2) that the values United Mining has received for the stone for the purpose of decoration and landscaping are quite significant; and (3) that the river-washed basalt boulders on the claims are an uncommon variety building stone. (Tr. 15-16.) Six witnesses were then called by BLM: BLM District Reality Specialist Harold Brown, who discussed the chronology of related land use actions in the area, (Tr. 23-50); Dr. John D. Hunt, a tourism expert, who addressed the potential value of the unique pothole region of the Big Wood River for tourism, (Tr. 50-70); Maley, a geologist assigned to the Idaho State Office, BLM, who had investigated the area, and who

described the processes by which the potholes and boulders were formed and the basis for his opinion that the Big Wood River channel contained the best example of pothole erosion and bedrock erosion in terms of diversity and quality he had ever seen, (Tr. 70-128; Ex. 6); Oberlindacher, another geologist assigned to the Idaho State Office, BLM, who examined the claimed area and opined that the uniqueness of the geologic attributes of the channel rendered the land chiefly valuable for its geologic significance rather than for building stone, (Tr. 129-52; Ex. 10-1 through 10-11); Shoshone District Outdoor Recreation Planner/Public Affairs Specialist Marty Sharp, who summarized the public response supporting the proposal to withdraw the area from entry under the mining laws, (Tr. 153-68); and Mary Gaylord, Shoshone District Manager, BLM, who recounted BLM's escalating awareness of the value of the resources of the Big Wood River and the consequent acceleration of management strategies to secure the resources for the public in perpetuity. (Tr. 169-205.) The Bureau also introduced 52 photographs of the area. (Ex. G-6-1 through 41 and Ex. G-10-1 through 11.)

After BLM rested its case, counsel for United Mining moved to dismiss the complaint on the ground that the Government had failed to present a prima facie case that the claims were invalid. (Tr. 210-217.) Judge Child took the matter under advisement. (Tr. 217, 220.) United Mining proceeded to present its case, introducing the testimony of two witnesses: Gary Ojala, consulting geologist, who discussed the events leading up to the location of the KB claims, the uncommon nature of the boulders, the existence of boulders of marketable quality on each claim, the estimated

quantity of stone on the claims, the steps he took to locate the claims, and his opinion regarding the distinction between building stone and decorative stone; and William Jeffery Smith, the founder of United Mining, who related the uses for Holystone boulders, the prices for that stone, his profit margin, and the potential future markets for the stone from the claims. (Tr. 252-97.) United Mining also tendered several exhibits, including receipts and invoices for stone sold from the Hisel property, (Ex. C-19-1 through 48), and photographs of some of the Holystone boulders United Mining had removed from the Hisel lease. (Ex. C-20-1 through 6.)

Both parties submitted extensive post-hearing pleadings, proposed decisions, and responses in support of their respective positions.

In his Decision, Judge Child denied United Mining's motion to dismiss the complaint for failure to establish a prima facie case, finding that the evidence presented by BLM regarding the determinative issues actually preponderated. (Decision at 5.) He then addressed four issues: (1) whether BLM had established a prima facie case--Judge Child found that the Government had presented a prima facie case; (2) whether the Building Stone Act of August 4, 1892 (Building Stone Act), 30 U.S.C. § 161 (1994), applied to the claims--Judge Child found that it did; (3) whether the comparative value of the claimed land for purposes other than mining was relevant under the Act of May 10, 1872, as amended (1872 General Mining Law), 30 U.S.C. § 22 (1994)--Judge Child found that it was; and (4) whether the claimed land was more valuable for mining purposes--Judge Child found that it was not.

Judge Child outlined the principles controlling a determination of the validity of a placer claim located for building stone as required by the

Building Stone Act. He stated that, for a building stone placer claim to be valid, the stone found on the claim must be an uncommon variety, there must be a discovery of a valuable mineral (i.e., the building stone can be extracted, removed, and marketed at a profit), and the claimed land must be chiefly valuable for building stone. Noting that there was no dispute that Holystone boulders were an uncommon variety of stone which could be extracted, removed, and marketed at a profit, the only remaining dispute was whether the land was chiefly valuable for building stone. He stated this question in terms of whether the value of the claimed land for mining purposes exceeded its value for aesthetic, scientific, and recreational purposes, and whether such a comparison of values affected the validity of the claims. (Decision at 5.)

Judge Child rejected United Mining's contention that the Building Stone Act did not apply to the claims because Holystone boulders derived their special value from their suitability for ornamental uses rather than for general building purposes. Judge Child found that an uncommon variety of building stone, locatable after the Common Varieties Act (30 U.S.C. § 611 (1994)) was passed in 1955, is stone that is used for purposes for which common building stone is unsuited. (Decision at 5-6.) He found that United Mining's attempt to differentiate between the stone's ornamental and structural use was meritless because the Building Stone Act and case law refer to ornamental application and landscaping as typical uses for building stone. He added that United Mining's consulting geologist admitted that building stone can be decorative and noted that Holystone boulders

had been sold or marketed to a masonry supply center, a building material supplier, and Japanese architects, and had been used for the entrance of a hotel. (Decision at 7.) Judge Child found that the few isolated sales of Holystone boulders for art work did not demonstrate a sustainable market for Holystone boulders for use in art work, declaring that the claimants had not established a discovery of a valuable mineral deposit under the general mining laws based upon sales of the boulders as art objects. (Decision at 7.) Judge Child concluded that the evidence indicated that the Holystone boulders were building stone, that the claims were subject to the Building Stone Act, and that there must be a determination regarding whether the claimed land was chiefly valuable for building stone. (Decision at 8.)

After finding the Building Stone Act applicable to the claims, Judge Child proceeded to consider whether the comparative value of the claimed land for purposes other than mining was relevant under the general mining laws. After acknowledging that the Department had rejected the comparative-values test for claims located under the 1872 General Mining Law, 30 U.S.C. § 22 (1994), in Cataract Gold Mining Co., 43 Pub. Lands Dec. 248 (1914), and that the Board had reaffirmed the rejection of that test in United States v. Kosanke Sand Corp. (On Reconsideration), 12 IBLA 282, 299-302 (1973), and In Re Pacific Coast Molybdenum Co., 75 IBLA 16, 33-34 (1983), Judge Child concluded that early Department decisions, Supreme Court decisions, and Congressional Acts weighed against following this precedent and in favor of the application of a comparative-values test

under the 1872 General Mining Law. (Decision at 8-11.) He concluded that, for any mining claim to be valid, the land must be more valuable for mining than for other purposes. (Decision at 11.)

Finally, Judge Child undertook a comparison of the building stone and the aesthetic and geologic resources. He cited evidence of the area's scenic and geologic uniqueness, noting testimony regarding the diversity, complexity, quality, and quantity of geological features of the bedrock erosion found in and around the claims. (Decision at 11.) He noted the BLM's witnesses' conclusion that the highest and best use of the land was preservation for the public, and he observed that none had attempted to place an estimate on the value of the land for aesthetic, scientific, and recreational purposes, but had cast its worth in terms of a natural wonder and treasure whose intrinsic value for aesthetic and geological purposes far exceeded the land's value for the mining of Holystone boulders. (Decision at 11.) Judge Child rejected United Mining's contention that the lack of any evidence of the value of the land for aesthetic and geological purposes precluded a finding that the land was more valuable for such purposes, holding that it was impossible to place a monetary value on irreplaceable, unique geological features that would be irretrievably lost if mining occurred, and concluded that the land was more valuable for geological and aesthetic purposes. (Decision at 11-12.) So finding, Judge Child declared the KB-1 through KB-14 building stone placer claims null and void because the claimed land was more valuable for aesthetic and geological

purposes than for any mining purposes, including mining of building stone. (Decision at 13.) This appeal followed.

In its Statement of Reasons for appeal (SOR), United Mining argues that the Building Stone Act does not govern the KB claims because the unrefuted evidence demonstrates that the best market for the water-worn boulders on the claims is for ornamental uses and as artwork rather than for structural purposes, and that the suitability of Holystone boulders for ornamental and art application removes the boulders from being classified as building stone locatable under the Building Stone Act. (SOR at 1-2, 7-8.) United Mining asserts that the KB claims are therefore governed by the 1872 General Mining Law, 30 U.S.C. § 22 (1994), which, it contends, is not susceptible to a comparative-values test, notwithstanding Judge Child's Decision to the contrary. (SOR at 2, 8-9.)

United Mining submits that, even if the comparative-values test were applicable to the KB claims, BLM has failed to establish that the land embraced by the claims is more valuable for nonmineral purposes. (SOR at 2.) United Mining challenges Judge Child's dismissal of any requirement that BLM present evidence that the claims are economically valuable for nonmining purposes and the Judge's conclusion that the land subject to the claims is an invaluable scientific and aesthetic treasure. United Mining argues that the Judge's interpretation of the general mining laws conflicts with numerous legislative Acts specifically recognizing the continuing validity of mining claims located in areas determined to be worth preserving in their natural state. (SOR at 10-11.) United Mining

further contends that aesthetic and environmental considerations have never been a part of the mining laws and that, if a comparison between the value of the claims for mining purposes and their aesthetic and scientific value were appropriate, BLM would be required to place an economic value on the nonmineral uses, since the term "valuable" in mining cases means "valuable in an economic sense." (SOR at 12-13.) Accordingly, United Mining seeks to have this Board reverse Judge Child's Decision and declare the KB mining claims valid.

In its Answer, counsel for BLM argues that the KB claims are building]stone placer claims under the Building Stone Act, that they are located on land chiefly valuable for aesthetic and geological purposes, and that, therefore, the claims are invalid. (Answer at 3.) Counsel for BLM also maintains that if the Building Stone Act were not applicable, the claims are invalid under the 1872 General Mining Law because the land is more valuable for aesthetic and geological purposes than for any mining purpose. Id.

In support of its position, counsel for BLM disputes United Mining's contention that the water-worn Holystone boulders are not building stone, citing United Mining's designation of the claims as building stone placers in its notice of intent to operate and United Mining's Answer to the contest Complaint in which United Mines admitted BLM's allegation that the claims were building stone placer claims and specifically alleged that the land was chiefly valuable for building stone. (Answer at 5.) Counsel for BLM further asserts that the uses of the Holystone boulders for landscaping

and for structures such as waterfalls clearly falls within the Department's broad definition of building stone uses and that case law confirms that stone used for ornamentation and landscaping is considered to be building stone. (Answer at 5-6.)

Counsel for BLM acknowledges that Judge Child's interpretation of the 1872 General Mining Law, 30 U.S.C. § 22 (1994), manifested by his application of a comparative-values test directly contradicts precedents of the Federal courts and this Board, but urges adoption of that analysis, suggesting that the issue merits reconsideration. (Answer at 6-7.) Counsel for BLM submits that lands having value for some other significant public purpose (such as preservation as a natural feature, a scenic landscape, or geologic resource) are not mineral lands within the mining laws and contends that United Mining has failed to satisfy its burden of demonstrating that the land is mineral in character, and thus has not demonstrated the validity of its claims. (Answer at 18-19.)

Finally, counsel for BLM asserts that land included within the KB claims is not chiefly valuable for building stone or for mining purposes because it has greater value for geological and aesthetic purposes. (Answer at 19.) Counsel argues that, because the Building Stone Act expressly provides that land entered for building stone must be chiefly valuable for building stone, the Building Stone Act and the 1872 General Mining Law require the Department to weigh the value of the land for naturally sculpted boulders as a mineral commodity against the value of the land for aesthetic and geological purposes. (Answer at 20.) Counsel admits

that the monetary value of the individual boulders can be determined by objective criteria, but argues that the far greater value of the land is for aesthetic and geological purposes, which cannot be subjectively quantified or reduced to a dollar amount because its uniqueness renders it "irreplaceable." (Answer at 20-21.)

Counsel for BLM acknowledges BLM's burden of establishing a prima facie case that the lands are not chiefly valuable for its mineral, urges the Board to find that it has met this burden through its evidence of the aesthetic and geological character of the land subject to the claims, and asks the Board to affirm Judge Child's Decision in all respects.

United Mining has filed a Reply Brief, focusing on the issue of whether BLM has carried its burden of proof by establishing that the KB claims are more valuable for aesthetic and geological purposes than they are for building stone. United Mining contends that the Judge misapplied the comparative-values test by finding that BLM carried its burden, "despite the absence of any evidence that the area is economically valuable [for] any other purpose." (Reply at 2.) United Mining asserts that the Judge erred when finding that "the land represents an invaluable aesthetic and scientific treasure and is therefore not `chiefly valuable' for the extraction of stone" Id. United Mining states that the "comparison of values" test had its genesis in statutes providing for the allotment of public lands for mineral and agricultural purposes, which precluded agricultural entries on lands more valuable for minerals and that, accordingly, early Departmental decisions addressing the "chiefly valuable" criteria

required only that the land be more valuable for the specific mineral than for agricultural purposes. (Reply at 2-5.) While United Mining acknowledges that the phrase "chiefly valuable" as defined in the regulations governing the mineral leasing program, 43 C.F.R. § 3500.0-5(j), has expanded the comparison to include the land's value for any nonmineral disposition, it points out that the regulatory definition requires a comparison of economic values, "not the subjective impressions of the trier of fact concerning intangible virtues." (Reply at 5-6.)

In its summation, United Mining states:

> [T]he Interior Department has long recognized that the phrase "chiefly valuable" came from early decisions comparing mineral and agricultural uses, and requires only a comparison of the economic value of a claim for mineral extraction with its economic value for agricultural purposes. And even in those regulations and decisions in which the Interior Department has broadened the scope of the inquiry to include non-agricultural uses, the Department has always required that the comparison be based on present economic values.

(Reply at 6.)

In their briefs, amici curiae and intervenors address only the issue of whether the 1872 General Mining Law incorporates a comparative-values test. The amici curiae argue that Judge Child incorrectly concluded that a mining claim located under the 1872 General Mining Law is valid only if the Department determines that the lands subject to the claim are more valuable for mining purposes than for all other purposes, asserting that the Judge's flawed analysis contradicts more than a century of Departmental and judicial precedent which establishes that both the Department and the

U.S. Supreme Court have long rejected the use of the comparative-values test in favor of the prudent person test of claim validity.

Intervenors Committee for Idaho's High Desert and Connecting Point for Public Lands support the use of a comparative values test under the 1872 General Mining Law. They contend that nonmineral values are necessarily considered when mining claim disputes center on conflicts between competing public land uses, that the comparative values test coexists with the prudent person and marketability tests, that the comparative values test complements existing Department consideration of nonmineral values in mining disputes, and that Federal land and mineral policy is best served by reaffirming the comparative values test.

[1] As noted above, BLM cites two cases, South Dakota Mining Co. v. McDonald, 30 Pub. Lands Dec. 357 (1900), and United States v. Bolinder, 28 IBLA 187 (1976), as supporting its position that Congress intended to exclude land from disposal under the Mining Law if that land "embraces a great natural wonder that should be preserved for public benefit," as well as its position that, if the land contains formations and material valuable as natural curiosities, the land "is not mineral land within the meaning of the mining laws." We will begin by examining those cases.

A good discussion of the South Dakota case is found in the Bolinder decision, and we find it appropriate to incorporate that discussion into this decision:

> In South Dakota, two parties claimed land which contained a cavern described as a great natural wonder. One party sought the land under the homestead laws and the other under the mining laws. The mining claimant protested against the homestead entry asserting the land to be mineral in character and the homestead

entry fraudulent. After initial consideration, the Department ordered a further hearing on the issues in the case, stating, as quoted at 30 L.D. 359:

> This action is not to be construed as a determination of the question, so ably argued by the attorneys on each side, as to whether land chiefly valuable for its crystalline deposits can be entered under the mining laws of the United States.

After the second hearing, the Commissioner of the General Land Office (predecessor of the Bureau of Land Management) found the land to be nonmineral in character but held the homestead entry for cancellation because there was insufficient evidence of cultivation and improvement to establish the good faith of the entryman as a homestead claimant. On appeal, these findings were sustained. As pertinent to the question involved here, there is only the following discussion at 30 L.D. 360 sustaining the finding of nonmineral character of the land:

> Large quantities of crystalline deposits, and formations of various kinds, such as stalactites, stalagmites, geodes, "box-work," "frost-work," etc., etc., are found in the cavern. Specimens of these deposits and formations have been made the subject of sale at remunerative prices by the contending parties, not as minerals but as natural curiosities. Charge has also been made for admittance to the cavern and for the privilege of viewing its many natural wonders. The record clearly demonstrates that it is the source of revenue which these things furnish that the respective parties are striving to control.
>
> The testimony introduced by the protestant company for the purpose of showing that the cavern contains valuable deposits of gold, marble, building stone, paint rock, and other mineral substances, falls far short of proving the land to be mineral in character within the meaning of the mining laws. It is not shown to contain deposits, in paying quantities, of any of the substances mentioned, or of any other substance such as is usually developed by mining operations. No serious effort has ever been made to develop the land, or any part of it, as a mining claim. The decision of your office holding the land to be non-mineral is clearly correct.

The question which was left open when the second hearing was ordered, i.e., whether land chiefly valuable for crystalline deposits may be considered mineral in character, was not resolved

> by the Departmental decision after that hearing. The two paragraphs quoted above do not answer the question. Instead, it is apparent that the finding of nonmineral character of the land was based upon the lack of a good faith mining operation. The exploitation of the cave and its contents were considered as outside a normal mining operation.

United States v. Bolinder, supra, at 194-96 (emphasis added).

A careful reading clearly discloses that South Dakota turns on a finding that the claim was "not shown to contain deposits, in paying quantities, of any of the substances mentioned, or of any other substance such as is usually developed by mining operations. No serious effort has ever been made to develop the land, or any part of it, as a mining claim." South Dakota Mining Co. v. McDonald, supra, at 360 (emphasis added). The Acting Secretary reached this finding by applying the "prudent man test," found in Castle v. Womble, 19 Pub. Lands Dec. 455 (1894). The prudent man test is satisfied if "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." Id. at 457.

The basis for the holding in South Dakota Mining Co. v. McDonald is unmistakable. The statement therein that "specimens * * * have been made the subject of sale at remunerative prices by the contending parties, not as minerals, but as natural curiosities" was offered as proof that the claim was not being held for legitimate mining purposes. This case does not support BLM's broad assertion in paragraph 5 of its Complaint that the "land involved embraces a great natural wonder that should be preserved for

public benefit, and is not the type of resource Congress intended to dispose of under the Mining Law." If the evidence in the case now before us had demonstrated that United Mining had contemplated charging admittance to the site and selling pieces of the material for curiosities or keepsakes, it would be proper to cite South Dakota Mining in a complaint alleging that its claims are not valid. 6/ However, there is no question that United Mining intends to conduct a mining operation on the claims.

Similarly, the holding in United States v. Bolinder, 28 IBLA 187 (1976), does not support the legal conclusion expressed in BLM's Complaint. In Bolinder, BLM had appealed an administrative law judge's decision finding a deposit of geodes subject to appropriation under the General Mining Law. After the above quoted discussion of the facts leading to the South Dakota decision, the discussion in Bolinder continued:

> There is no doubt that a geode is composed of recognized mineral substances which would be individually locatable under the mining laws unless found to be a common variety subject to 30 U.S.C. § 611 (1970). The testimony at the hearing indicated that geodes possess an economic value in trade and the ornamental arts, apart from whatever commercial value may be attributed to their uniqueness as a so-called "natural curiosity." The appellees testified that the geodes are removed through mining operations which they conduct or which are conducted by third parties with the particular appellee receiving a share of the geodes removed (Tr. 56-59, 113-15, 120).

* * * * * * *

6/ If claims are held for the purposes other than mining, as was concluded in the South Dakota case, the question of discovery need not be addressed to reach a finding that the claims are invalid. See U.S. v. Zimmer, 81 IBLA 41 (1984); United States v. Elkhorn Mining Co., 2 IBLA 383 (1971), aff'd, Elkhorn Mining Co. v. Morton, Civ. No. 2111 (D. Mont. Jan. 19, 1973). Even when a discovery can be shown to exist, "proof of bad faith can invalidate a claim, since in such a situation the mineral values are incidental to the purpose for which the land is claimed." In re Pacific Coast Molybdenum Co., supra, at 35.

> We find no justification for ruling that geodes per se are not subject to location under the mining laws. Where a mining claimant has located his claim on a sufficient quantity of geodes and is conducting actual mining operations to extract the geodes, we hold that such a mineral deposit is subject to location under the mining laws. Furthermore, there is simply no evidence upon which we could make a finding that these deposits of geodes are not valuable mineral deposits.

United States v. Bolinder, supra, at 199-200.

As can readily be seen, nothing in either South Dakota or Bolinder supports either BLM's assertion or Judge Child's conclusion that, as a matter of law, land which might be described as embracing a natural wonder is thereby removed from location under the mining law, without requiring any affirmative Departmental or Congressional action to effectuate such a result.

We now find it appropriate to reiterate certain of the facts that were uncontested at the time of the hearing. To the extent that Judge Child based his Decision on the following facts, which were either stipulated or were admitted at the time of the hearing, we affirm his Decision. Counsel for BLM stipulated that the Holystone boulders were "an uncommon variety of building stone"; that the Holystone boulders have unique properties imparting a distinct and special value; and that the Holystone boulders were locatable under the Building Stone Act. Counsel for BLM further stipulated that the Holystone boulders could be extracted, removed, and marketed at a profit. (Tr. 15; Decision at 5.) There is no argument that the claims were monumented and posted in a manner that met Federal and state requirements. (Tr. 122.) We also find that the third allegation of the Complaint states that the claims are identified on Exhibit A to the

Complaint, that all of the claims that are subject to this appeal (KB-1 through KB-14 (IMC 169640 through IMC 169653)) are individually described as building stone claims, and that the Answer filed by United Mining "[a]dmits the allegations of Paragraph 3 that the mining claims are * * * identified as set forth in Exhibit A to the Complaint, a copy of which is attached hereto and incorporated herein by reference." (Answer at 2).

We are aware that United Mining agreed that the claims are building stone placer claims. In United States v. Williamson, 43 IBLA 264 (1980), the Complaint alleged that certain lands subject to a special use permit issued by the Forest Service were not open to entry. At the hearing, the claimant stipulated to the correctness of this allegation, but, on appeal, the Board recognized that parties may not stipulate to an erroneous theory of law. United States v. Ideal Cement Co., 5 IBLA 235 (1972), aff'd sub nom. Ideal Basic Industries v. Morton, 542 F.2d 1364 (9th Cir. 1976). As a result, the allegation that the lands were not open to entry because they were subject to a special use permit was dismissed, and the Board vacated the stipulation erroneously entered into by the parties. United States v. Williamson, supra, at 276. Notwithstanding United Mining's admission that the claims are building stone placer claims, we deem it appropriate to examine whether, as a matter of law, the claims are building stone placer claims.

[2] The pertinent part of the Building Stone Act provides that "[a]ny 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." 30 U.S.C. § 161

(1994). After the Building Stone Act was enacted, various mineral materials used in construction, including sand and gravel, were deemed locatable under the Building Stone Act. 7/

The scope of materials locatable under the Building Stone Act was substantially altered in 1955 when Congress passed the Common Varieties Act, 30 U.S.C. § 611 (1994). The Common Varieties Act made common varieties of mineral materials no longer locatable under the Building Stone Act. However, as noted by the Supreme Court, the Building Stone Act remained "entirely effective as to building stone that has `some property giving it a distinct and special value' (expressly excluded under § 611)." United States v. Coleman, 390 U.S. 599, 605 (1968); McClarty v. Secretary of the Interior, 408 F.2d 907, 908 (9th Cir. 1969); United States v. Haskins, 59 IBLA 1, 42-43 n.26 (1981).

[3] On appeal, United Mining insists that the Holystone boulders are decorative stone locatable under the General Mining Law and not building stone subject to the Building Stone Act. It contends that building stone is used as a structural component of a building and decorative stone which is used in landscaping, for aesthetics and visual affect, or for decorative purposes, is not building stone. United Mining acknowledges that stone used as a structural component of a building could also be decorative, but argues that decorative stone is not normally part of a building.

At the hearing, in response to questions by Judge Child, United Mining witness, Ojala, characterized decorative stone used next to an elevator

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7/ Mineral material which is principally valuable for use as fill, sub-base, ballast, riprap, or barrow was never locatable. U.S. v. Verdugo & Miller, Inc., 37 IBLA 277, 279 (1978).

lobby or as a fireplace mantel as building stone with a decorative component. (Tr. 245-46.) Ojala also testified as to the planned uses of the stone from the claims, stating that United Mining intended to use the boulders for landscaping and decorative stone similar to the uses of the Holystone boulders from the Hisel property. (Tr. 249.) United Mining also cites Smith's testimony concerning the uses of the stone from the Hisel property (in a waterfall, (Tr. 263), the entryway of a hotel, (Tr. 276), and as art work, (Tr. 267, 278)) as evidence that the water-worn boulders are not building stone. Smith also indicated that the stone had been sold to a masonry supply company, (Tr. 265), and a building materials supplier, (Tr. 273-74), and that he was attempting to market the stone to Japanese architects for use in oriental architecture. (Tr. 281-82.)

Ojala acknowledged that the distinction he made between building stone and decorative or landscaping stone might not be one applicable in law. (Tr. 245.) By definition, the term "building stone" includes "all stones for ordinary masonry construction, ornamentation, roofing, and flagging." A Dictionary of Mining, Mineral, and Related Terms, U.S. Bureau of Mines (1968), page 149 (emphasis added). There is clear precedent for a finding that stone used in the construction of walls, fireplaces, patios, and for general landscaping purposes falls within the category of building stone. United States v. Melluzzo, A-31042 (July 31, 1969). Similarly, mineral material used for nonstructural facings on buildings, decorative stone around fireplaces, or for landscaping has been deemed to be building stone. United States v. Shannon, A-29166 (Apr. 12, 1963); see also United States

v. Gardner, 14 IBLA 276, 282 (1974) (stone used for construction of fireplaces is used as building stone but when used for artifacts is not used as building stone); United States v. Chartrand, 11 IBLA 194, 239 (1973) (Thompson, dissenting in part) (traditional construction purposes for building stone include landscaping, fireplace, and patio construction); United States v. U.S. Minerals Development Corp., A-30407 (Apr. 30, 1968) (stone used as veneer in walls, in fireplaces and hearths, and in patio floors); United States v. Melluzzo, A-29074 (May 20, 1963) (stone used as decorative stone in fireplaces, patio walls, fountains, and for entryway floors).

[4] United Mining also believes the high value of the stone on the claims precludes classifying the stone as building stone. That value, however, rather than excluding the stone from the building stone category, identifies the stone as an uncommon variety of building stone. See United States v. Thomas, 1 IBLA 209, 217 (1971); United States v. U.S. Minerals Development Corp., supra. It is the projected use of Holystone boulders, not the value of the Holystone boulders, that determines whether the stone is building stone or mineral material locatable under the General Mining Law. 8/ To the extent that Judge Child found the Holystone boulders to be building stone, subject to the Building Stone Act, we affirm his Decision.

Having found the KB claims to have properly been located as building stone placer claims, we find it unnecessary to revisit the question whether

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8/ We recognize that, if the weight of the evidence was that the primary use of Holystone boulders removed from the Hisel property was for artwork, the use may properly be considered as other than for building stone. However, it was not demonstrated that a sustainable market would exist if the stone was sold exclusively as artwork.

the comparative-values test applies to claims located under the 1872 General Mining Law, 30 U.S.C. § 22 (1994), and we hereby vacate that portion of Judge Child's Decision finding the comparative-values test applicable to the 1872 General Mining Law. 9/

[5] In its Complaint, BLM alleged that the KB claims are not valid because the land embraced by those claims was not "chiefly valuable" for building stone. On appeal, United Mining advances two reasons for its belief that Judge Child committed reversible error when finding that the land subject to the KB claims was more valuable for aesthetic and geological purposes than for building stone. First, it argues that there is no legal basis for treating either aesthetics or the preservation of a geological resource as a land use of the type contemplated by Congress in 1892, when Congress enacted the Building Stone Act. Second, it alleges that BLM failed to present any meaningful evidence that would allow a proper and sustainable valuation of the land for its aesthetic and geological value such as would permit a meaningful determination of whether the land subject to the claims was chiefly valuable for building stone. In addressing these assertions, we must first decide what the drafters of the Building Stone Act intended when employing the term "chiefly valuable."

When attempting to derive the meaning properly ascribed to a statutory phrase, it is often helpful to look at the meaning attached to the same

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9/ Under the 1872 General Mining Law, "if the discovery of a valuable mineral deposit be shown, a valid claim exists, regardless of a more beneficial use to which the land might be put." United States v. Kosanke Sand Corp. (On Reconsideration), supra, at 302. See also In Re Pacific Coast Molybdenum Co., supra; United States v. Osborne (Supp. on Judicial Remand), 28 IBLA 13, 43 (1976); Cataract Gold Mining Co., supra.

phrase in other legislation adopted or in effect at the same time, the meaning ascribed by those who originally drafted regulations to implement the Act, and contemporary court interpretation of the phrase.

In 1891, there were numerous statutes providing for the disposal of public lands. These included agricultural entries under the Homestead and Desert Land Act, Scrip and similar Acts, grants to state and railroads, townsite entries, mineral entries (lode, placer and mill site); and sales under Acts such as the Timber and Stone Act. Each of these dispositive vehicles had provisions to ensure that the land was suitable for the intended purpose. For example, homestead entries, railroad grants, and state land grants would not be issued if the land was known to be mineral in character. A mineral patent would not be issued without proof that the land was mineral in character. The legal litmus test applied to all of these statutory provisions was whether the land was deemed to be mineral in character. If the land was mineral in character, it could be acquired only through the mining laws. If it was nonmineral in character, it was subject to appropriation under the other public land laws, as long as it was of a character contemplated by the statute being applied. 10/

Examination of what Congress intended when it used the phrase "chiefly valuable" has been undertaken before. In Yankee Gulch Joint Venture v. BLM, 113 IBLA 106, 159 (1990), we quoted with approval the following BLM explanation of the term "chiefly valuable" found in 49 Fed. Reg. 17892, 17893 (Apr. 25, 1984):

> The term "chiefly valuable" is an antiquated term which was included in the law at a time when the United States was

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10/ For example, the character of the land subject to homestead entry was not the same as land subject to desert land entry.

> classifying lands as agricultural for disposal. Its use was primarily for determining the relative value of a given tract so that the lands could be disposed of pursuant to the correct statute.

The Timber and Stone Act of June 3, 1878, 20 Stat. 89, provided a means for acquiring land if the land was "chiefly valuable" for building stone. Shortly after passage of the Building Stone Act in 1892, the Acting Secretary held that it was possible to acquire building stone lands under either the Timber and Stone Act or the Building Stone Act, so long as the land was chiefly valuable for building stone. Forsythe v. Weingart, 27 Pub. Lands Dec. 680 (1898). Thus, the Department's contemporary interpretation of the term "chiefly valuable for" in the Timber and Stone Act is particularly instructive when attempting to understand the meaning of that term in the Building Stone Act.

The Department's regulations for the Timber and Stone Act, published November 30, 1908, defined lands chiefly valuable for timber as

> lands which are more valuable for timber than they are for cultivation in the condition in which they exist at the date of the application to purchase, and therefore include lands which would be made more valuable for cultivation by cutting and clearing them of timber. The relative values for timber or cultivation must be determined from the conditions of the land existing at the date of the application.

37 Pub. Lands Dec. 289, 290 (1908). The regulations further state that "[t]he foregoing regulations apply to entries of lands chiefly valuable for stone * * *." Id. at 297. These two sections were unchanged in the regulations printed in 1911. See 40 Interior Dec. 238 through 259 (1911).

This interpretation, and its application to the Building Stone Act, was clearly and firmly stated in a decision issued by Secretary of the Interior Bliss shortly after passage of that Act:

> It may be well to note in this connection, that soon after the decision in the case of Colin v. Kelly, [12 Pub. Lands Dec. 1 (1891)], wherein lands containing stone, useful only for building purposes, were held not subject to the operation of the mining laws, Congress, by act of August 4, 1892 (27 Stat. 348), especially declared that lands "chiefly valuable for building stone" should be enterable "under the provisions of the law in relation to placer mineral claims." It would thus seem that Congress regarded even the ruling in that case as a departure from the liberal construction theretofore adopted by the Land Department to such an extent as to demand legislative action disapproving the result thereof.
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> Sufficient has been said to show what has been the long-continued practice of the Land Department, and to point out the danger and harmful results of a departure from that practice at this late date. Independently of these things, however, it may be added that the construction, as an original proposition, appears to be clearly right. The Department, therefore, in concluding this branch of the case, adheres to the rule:
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>> That whatever is recognized as a mineral by the standard authorities on the subject, whether metallic or other substance, when the same is found on the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, should be treated as coming within the purview of the mining laws.

Pacific Coast Marble Co. v. Northern Pacific R.R. Co., 25 Interior Dec. 233, 244-45 (1897).

United Mining acknowledges that the land subject to its claims contains geologic and aesthetic values, but maintains that Congress did not intend to have "geologic" and "esthetic" values weighed when ascertaining whether the land is chiefly valuable for building stone. The provision in the Building Stone Act, 30 U.S.C. § 161 (1994), declared that lands "chiefly valuable for building stone" should be enterable "under the provisions of the law in relation to placer mineral claims." As noted above, when this law was enacted the Department restated its adherence to the pronouncement made 24 years previously that, whenever a mineral is found on

the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, that deposit should be treated as coming within the purview of the mining laws. This interpretation does not include a comparison of the "aesthetic" and "geological" value. An evaluation strictly on the basis of the land's "aesthetic" or "geological" worth with no regard to its worth for agricultural purposes does not comport with the intent of Congress when it enacted the Building Stone Act, 30 U.S.C. § 161 (1994), or with the Department's clearly stated interpretation of that Act since that time.

[6] Judge Child held that geologic uniqueness could render a claim invalid. The Supreme Court stated that the Building Stone Act remains "entirely effective as to building stone that has `some property giving it a distinct and special value' (expressly excluded under § 611)." United States v. Coleman, supra. To possess distinct and special value, the building stone must be geologically unique. Its uniqueness gives it value and makes it readily distinguishable from the common variety of the same stone. 11/

[7] On appeal, United Mines objects to the basis for Judge Child's "value" determination and maintains that Judge Child did not properly weigh the relative values when ascertaining whether the land is chiefly valuable for building stone. The term "chiefly valuable" contemplates a

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11/ The testimony of the BLM witnesses establishes that the geomorphic alteration of the basalt rendered common variety basalt locatable building stone. If a claim located on a deposit of building stone can be deemed invalid because the deposit is "geologically unique," locatable building stone must be unique, but not too unique, distinct, but not too distinct, and special, but not very special. There is no basis for a conclusion that a prudent man would not expend time and means to develop a mine because the deposit might be too unique.

rational comparison of values, and the measurement of those values must be quantifiable, using units of measurement applicable to both sides of the equation. 12/ Accepting an unquantifiable statement of value, such as a conclusion that the land is "unique," or "priceless," or "irreplaceable," for one use and demanding a value of the same land quantified in a dollar amount for the other use would render any decision arbitrary. The evidence presented by BLM established that the land is geologically unique. It did not establish a quantifiable value for that land.

We are in full agreement with the observations regarding the dissenting opinions found in Deputy Chief Judge Harris' concurring opinion.

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 of Judge Child is affirmed in part, and vacated in part, and reversed in part.

R.W. Mullen
Administrative Judge

We concur:

James L. Byrnes
Chief Administrative Judge

James L. Burski
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

12/ The fact that one or more persons express an opinion that the land is "unique," or "priceless," and "irreplaceable" does not establish value. The same has been said about the London Bridge, the Elgin Marbles, and Van Gogh's "Irises." A value has been found for each of these objects.

DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS CONCURRING:

I concur with the opinion authored by Judge Mullen and his conclusion that Judge Child erred in holding that the land embraced by the KB-1 through KB-14 placer mining claims "is more valuable for aesthetic and geological purposes than for building stone or for any other mining purpose." In his opinion, Judge Mullen found that the claims contain an uncommon variety of building stone making the land embraced by the claims locatable as building stone placer claims under the Building Stone Act, 30 U.S.C. § 161 (1994), and that the Holystone boulders can be extracted, removed, and marketed at a profit. With these findings, the dissenters do not disagree.

The divisive issue in this case is what is meant by the term "chiefly valuable," as used in the Building Stone Act. Judge Mullen explores the history of the Building Stone Act and concludes that one need only compare the value of lands for mineral purposes with the value of land for agricultural purposes to satisfy the chiefly valuable test of the Building Stone Act. He states that if building stone is found on the public lands in sufficient quantity and quality as to render the land more valuable for the minerals than for agricultural use, the land must be considered to be chiefly valuable for building stone under the Building Stone Act. He holds that "aesthetic and geological purposes" may not be considered as a comparable use under the chiefly valuable test.

The dissenters, on the other hand, find little difficulty in extending the chiefly valuable test to include a comparison of values other than for agricultural purposes. In fact, they find no limitation on the ability

of the Department to engage in a broad-ranging public policy determination considering the values of any other competing uses for the land in determining whether land is chiefly valuable for building stone. Judge Arness concludes that the lands are not chiefly valuable for building stone in this case because he finds that "BLM [the Bureau of Land Management] established that the contested lands are geologically unique and that their disturbance by mining will constitute the destruction of a natural wonder unlike any other in the world." Also, the dissenters would not require any quantification of the value of the lands for retention and preservation thereby adopting Judge Child's view in this case that the balancing of economic values is unnecessary.

I cast my vote with Judge Mullen for a limited construction of the term "chiefly valuable." Following the period of acquisition of the public domain, the Federal Government engaged in a policy of disposition of those lands, first, for the purpose of raising revenues, and, later, to encourage the settlement and development of the West. Settlement laws required that lands disposed of not be known to be mineral in character at the time of disposition. If lands were known to be mineral in character, disposal could only occur under the mining laws. Thus, the term "chiefly valuable" was inserted in the Building Stone Act as a test to determine the proper statute under which disposal of lands would take place.

For purposes of leasing certain minerals pursuant to the Mineral Leasing Act, 30 U.S.C. §§ 262, 272, 282 (1994), the Department has defined the term "chiefly valuable" as follows:

> (j) Chiefly valuable means a valuable deposit where there is no significant conflict between the extraction of sodium,

> sulphur or potassium and any non-mineral disposition of the lands. Where such extraction conflicts with other disposition, the lands shall be deemed chiefly valuable for sodium, sulphur or potassium extraction if the economic value of the lands for extraction of such minerals exceeds its economic value for any non-mineral disposition.

43 C.F.R. § 3500.0-5 (emphasis added). It was recognized in the drafting of that regulation that "chiefly valuable" was "an antiquated term which was included in the law at a time when the United States was classifying lands as agricultural for disposal. Its use was primarily for determining the relative value of a given tract so that the lands could be disposed of pursuant to the correct statute." 49 Fed. Reg. 17892-93 (Apr. 25, 1984) (emphasis added). Thus, under the Mineral Leasing Act, chiefly valuable determinations are limited to comparisons of the economic value of mineral extraction with the economic value for any nonmineral disposition.

The chiefly valuable test of the Building Stone Act remains a part of the law today; however, the policy of disposition of public lands no longer exists. It has been replaced by a policy of retention and management of public lands. Nevertheless, the Building Stone Act requires a comparison of values for the purpose of disposition, not retention.

The dissenters ignore any distinction between disposition and retention and easily adapt the Building Stone Act to the 20th century. I believe any adaptation of the Building Stone Act to the 20th century should be accomplished by Congress.

In his dissent, Judge Irwin cites the case of United States v. Melluzzo, 76 Interior Dec. 181, 188-89 (1969), as evidence that the Department has engaged in comparative value analysis beyond the historical context of the Building Stone Act in building stone cases. In Melluzzo, the

mining claims were contested on two bases: the land embraced by the claims was not chiefly valuable for building stone and there was no discovery of a valuable mineral deposit. In addressing the chiefly valuable issue, the Department held the claims to be invalid because the lands on which the claims were located were more valuable for nonmining purposes (residential), than for building stone.

No previous Departmental precedent is cited in Melluzzo for undertaking such a comparison, and it is not supported by cases examining the question of whether lands are mineral in character. For example, in State of Washington v. McBride, 18 Pub. Lands Dec. 199 (1894), the State of Washington protested a mineral patent application for six mining claims alleging that the lands covered by the claims passed to the State upon its admission to the Union. The State presented evidence that the lands had significant value as town lots with values ranging from $3,000 to $6,000 per acre. However, the Secretary of the Interior found the evidence of nonmineral values to be "immaterial" because "whatever its value for such purpose may be, it would still be disposed of under the mining laws, if in fact mineral land." Id. at 207. He did acknowledge, however, that such evidence could be used to establish that mining claims had been located for nonmining purposes.

Unlike the present case, there was in Melluzzo an independent ground for declaring the claims invalid—lack of discovery of a valuable mineral deposit. Moreover, it is clear from the facts of the Melluzzo case that the Government could have contested the claims on the basis of lack of

good faith. Thus, the comparative value of the land for residential purposes would have been relevant in Melluzzo to show that the claims had been located under the mining law for nonmining purposes.

Even assuming that Melluzzo supports an expanded inquiry to include nonagricultural uses, such uses would be limited to competing values for disposition of the lands, and the method to evaluate competing uses would be, as the Department has always required, to compare present economic values.

However, based on the dissenters' logic, the Government may now assert that retention of lands embraced by building stone placer mining claims is more valuable than exploitation of the minerals, and, regardless of the evidence supporting marketability of the mineral deposit, the Government may prevail without presenting any quantitative evidence of the value of retention.

While I personally believe, based on the record in this case, that retention of the lands in public ownership would be desirable, a result that could be accomplished by Congress or the President, Appellant has shown that the lands in question are chiefly valuable for building stone and the contest complaint must be dismissed.

For these reasons, I concur in the opinion authored by Judge Mullen.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

David L. Hughes
Administrative Judge

ADMINISTRATIVE JUDGE IRWIN DISSENTING:

By the time the Bureau of Land Management (BLM) acted to protect the Big Wood River channel as a unique natural formation, the United Mining Corporation had already claimed the right to remove some of the features that make it unique. After a contest hearing, Administrative Law Judge Ramon Child held the lands are not "chiefly valuable for building stone" under the Building Stone Act, 30 U.S.C. § 161 (1994), but are more valuable for their aesthetic and geological characteristics. The majority reverses Judge Child on this issue. 1/ The majority thus decides the Big Wood River channel is chiefly valuable as a source of boulders that can be removed, weighed, priced, and conveyed for gardens in Japan and lobbies in Las Vegas.

The majority holds that the "term `chiefly valuable' contemplates a rational comparison of values, and the measurement of those values must be quantifiable, using units of measurement applicable to both sides of the equation." (Majority opinion at 372-73.) In my view, this approach does not comprehend the difference between the value of natural formations left in place as they were created and the value of things bought and sold in the marketplace. There is not a marketplace for buying and selling unique formations in their natural settings on public lands. Under the majority's rationale, presumably the formations in what became Arches National Park

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1/ Finding the claims were properly located under the Building Stone Act, the majority also vacates Judge Child's holding that the lands are more valuable for purposes other than mining under the 1872 General Mining Law, 30 U.S.C. § 22 (1994). The majority thus avoids BLM's suggestion that we reconsider our decisions stating there is no comparative values test under the General Mining Law.

could have been sold for building stone unless enough people had paid to go and see them where they are.

Fortunately, the Big Wood River channel can still be protected. The Department could compensate United Mining Corporation for its claims and recommend the area be withdrawn. 43 U.S.C. § 1714 (1994). Or, based on the scientific interest of the area, the President could declare it a national monument. 16 U.S.C. § 431 (1994). Either would preserve for future enjoyment and study the integrity of a special place formed at least 7,000 years ago.

But these measures would not have been necessary. The language of the Building Stone Act of 1892 is that "[a]ny 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." Nothing in this language precludes taking aesthetic and geological values into account when determining whether the lands are chiefly valuable for building stone. The "chiefly valuable" language of the Building Stone Act derived from the "valuable chiefly for timber [or stone], but unfit for cultivation" language of the much-abused Timber and Stone Act of 1878. 2/ But the historical origin of this language likewise does not preclude present-day consideration of whether lands unfit for cultivation are more valuable for building stone or for other purposes. In United States v. Meluzzo, 76 Interior Dec. 181, 188-89 (1969), the

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2/ Sec. 1, Act of June 3, 1878, Ch. 151, 20 Stat. 89. See Gates, History of Public Land Law Development, U.S. Government Printing Office, Washington, DC, 1968, at 470, 485, 550-52.

Department held claims under the Building Stone Act invalid because the lands were more valuable for nonmining (in that case, residential) purposes.

When it has been possible to compare quantified values of the lands for building stone with quantified values for other uses, we have done so. U.S. v. Chartrand, 11 IBLA 194, 220-221, 80 Interior Dec. 408, 421-22 (1973); United States v. Meluzzo, supra, at 186-87. But those decisions do not mean we cannot or should not make a judgment when it is more difficult to compare the value of mining the land for building stone with the value of the land for other purposes, especially in a case such as this when the record strongly supports the existence of extraordinary aesthetic and geologic values. Making judgments under the Building Stone Act about whether less quantifiable values would properly outweigh the value of lands for building stone would not differ from the kind of judgments we make when reviewing BLM determinations in other contexts involving "subjective" values, e.g., whether an area is properly designated as wilderness.

In A Lost Lady Willa Cather wrote of the loss of vision in the depression era when the Building Stone Act was passed:

> By draining the marsh Ivy had obliterated a few acres * * * and had asserted his power over the people who had loved those unproductive meadows for their idleness and silvery beauty * * *. All the way from the Missouri to the mountains this generation of shrewd young men, trained to petty economies by hard times, would do exactly what Ivy Peters had done when he drained the Forrester marsh. [3/]

Removing the boulders from the Big Wood River channel would be like draining the Forrester marsh. Petty economies.

3/ Cather, A Lost Lady, Alfred A. Knopf, New York, New York, 1923, at 89-90.

In my view, we should conserve such an unusual example of the forces that created our tiny place in the universe. Thomas Fairchild Sherman has written:

> The land—its rocks and waters, people, plants, and animals—are joined in a continually unfolding pageant through time. The scenes are changed by forces as tangible and immense as those that tore Pangaea asunder, or by energies as subtle and mysterious as the migration of butterflies or the passions of human adventure. We participate in only a few moments of the pageant, yet each moment has the whole eternity within it. If we see the eternal, we will honor the moment and cherish the earth and all its wildernesses of life. [4/]

I dissent.

Will A. Irwin
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

4/ Sherman, A Place on the Glacial Till, Oxford University Press, New York, New York, 1997, at 176-77.

ADMINISTRATIVE JUDGE ARNESS DISSENTING:

The lead opinion concludes that a consideration of the statutory phrase "chiefly valuable," appearing in the Building Stone Act, is limited to a choice between whether land is valuable for mining or agriculture, and finds that geologic uniqueness cannot be a measure of both validity and invalidity under the Act. The concurring opinion attempts to lend credence to those conclusions by refining the lead opinion's references to historic justification. I disagree with both of those opinions.

Judge Child found as a fact that "Holystone," the material claimed by Appellant, was located for and can be used as building stone, but that the claimed land is more valuable for aesthetic and geologic purposes than for either building stone or other mining purposes. (Decision at 12.) Applying the Building Stone Act, he then concluded that the mining claims at issue are valuable for building stone, but that the evidence does not support a conclusion that the land in question is chiefly valuable therefor. Id.

The Building Stone Act provides, pertinently: "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 mining claims."

The words "chiefly valuable" plainly require that there be a comparison of competing values, if there are any, to determine whether Appellant's mining claims are valid under the Building Stone Act. The lead and concurring opinions assume this inquiry is qualified by an historic understanding that the Department, when determining whether lands are "chiefly

valuable for building stone," must make a market analysis comparison between competing agricultural and mining uses. There is, however, no language in the statute to limit the Department in this way, nor has the Department promulgated regulations to this effect. Neither opinion cites any legislative history indicating that Congress intended the language to be so limited. "[T]he meaning of * * * [a] statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, * * * the sole function of the courts is to enforce it according to its terms." Caminetti v. United States, 242 U.S. 470, 485 (1916). I find no ambiguity in the statute to justify an attempt to read the plain meaning out of the statutory words "chiefly valuable." I agree with Judge Child that an analysis of the evidence produced at hearing shows that Appellant's claims are null and void because Appellant failed to make the showing required by the 1892 Building Stone Act that they were chiefly valuable for mining.

In the course of offering evidence to make a prima facie case that Appellant's mining claims were invalid, the Bureau of Land Management (BLM) established that the contested lands are geologically unique and that their disturbance by mining will constitute the destruction of a natural wonder unlike any other in the world. This sweeping statement of fact is based upon the expert opinion of two of BLM's staff geologists; it has not been challenged by Appellant, who characterizes the Holystone material as "geological diamonds," (Tr. at 267), and agrees the material is unique. While Appellant presented some evidence concerning commercial value, no attempt

was made to deprecate the showing made by BLM concerning the value of conserving the resource. Appellant's witnesses limited their testimony to a showing of commercial values as evidenced by actual sales (a point conceded by BLM), and did not attempt to show their claim was superior, in any way, to the public interest in preserving the stream bed in its present condition. On the record presented to us, we must therefore accept the testimony of BLM's experts as a valid statement of resource conditions on the claims.

The error inherent in the reasoning pursued by the lead (and concurring) opinion on this point is revealed by the conclusion that "geologic uniqueness" may not render a claim for building stone invalid because it is precisely the same "geologic uniqueness" that defines building stone as a locatable mineral. Nothing, in this view, can ever compare to an interest arising under the Mining Law unless it can be shown to produce a better commercial profit margin. This approach is not, however, a reasoned response to the statutory requirement that a claimant prove his claims are chiefly valuable for building stone. It is rather an attempt to substitute the "marketability test" originated in United States v. Coleman, 390 U.S. 599, 603 (1968), for the statutory requirement that a building stone claimant show his claims are "chiefly valuable" for that material.

When there is no ambiguity in the wording of a statute, it may not be varied simply because someone may for other reasons appear to deserve relief. Hamilton Brothers Oil Co., 123 IBLA 229, 232 (1992); and see U.S. v. Locke, 471 U.S. 84, 109 (1984). What the lead and concurring opinions

do, in order to avoid making the comparison of competing interests required by the Building Stone Act, is to impose a marketability test on the Department while at the same time shifting the burden of persuasion from Appellant to the Government. This approach is inconsistent with the statute and with unbroken prior Departmental practice; to pursue it is error.

Accordingly, I dissent; because Appellant did not sustain the burden of persuasion by showing that the claims at issue are chiefly valuable for building stone, I would affirm Judge Child's Decision.

Franklin D. Arness
Administrative Judge

I concur:

John H. Kelly
Administrative Judge