

UNITED STATES
v.
ROLAND G. & FRANCES W. KNIPE

IBLA 2003-283

Decided September 25, 2006

Appeal from a decision of Administrative Law Judge William E. Hammett, rejecting mineral patent application CACA 26770 A, and declaring the Elevator #4 placer mining claim, CAMC 29875, null and void.

Affirmed.

1. Mining Claims: Common Varieties of Minerals:
Generally--Mining Claims: Determination of Validity

In order to establish that a deposit of building stone is an uncommon variety locatable under the Common Varieties Act, the McClarty test requires that (1) there must be a comparison of the mineral deposit with other deposits of such minerals generally; (2) the mineral deposit at issue must have a unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special value must be reflected by the higher price which the material commands on the market or reduced cost of production resulting in substantially greater profit.

2. Administrative Procedure: Adjudication--Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Contest--Rules of Practice: Government Contests--Rules of Practice: Hearings

When the Government alleges that a mining claim is invalid because it was located for a common variety of decorative stone, the Government must present sufficient evidence to establish a prima facie case that the mineral deposit does not possess a unique property giving it a distinct and special value. When the Government's prima facie case has been made, the claimant has the ultimate burden of persuasion to show by a preponderance of the evidence that the mineral deposit in question is an uncommon variety, and therefore locatable. When the claimant fails to satisfy that burden, the claim is properly declared null and void.

APPEARANCES: Allan S. Haley, Esq., Nevada City, California, for appellants; Robert M. Simmons, Esq., and Rose Miksovsky, Esq., Office of General Counsel, U.S. Department of Agriculture, San Francisco, California, for the United States Forest Service.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Roland G. Knipe and Frances W. Knipe (appellants, contestees, or the Knipes) have appealed the May 29, 2003, decision of Administrative Law Judge William E. Hammett (ALJ Decision), determining that the Knipes have not established that the mineral deposit at issue is an uncommon variety of stone, therefore declaring the Elevator #4 placer mining claim (CAMC 29875) (the claim) null and void, and rejecting the Knipes' mineral patent application CACA 26770 A.

In June 1990, the Knipes filed a mineral patent application for the claim, consisting of 160 acres in Trinity County, California, approximately 50 miles northwest of Redding, California, in the east-central portion of the Klamath

Mountains.^{1/} The lands are located within the Shasta-Trinity National Forests.^{2/} (Forest Service Mineral Report (Mineral Report or Ex. 14) at 3.)^{3/} On August 8, 1991, BLM issued the First Half Final Certificate, noting that the Government would conduct an on-the-ground field examination to verify discovery.^{4/}

Richard W. Texeira, Mineral Examiner, Minerals Management Team, Forest Service, prepared a report of mineral examination, dated January 15, 1999, which the Bureau of Land Management (BLM) certified on August 23, 2000. The mineral report recommended that the patent application for the claim be canceled and a contest complaint filed. On September 14, 2000, BLM issued a contest complaint, on behalf of the Forest Service, alleging that the claim should be declared null and void because (1) the mineral deposit on the claim (consisting of rodingite or pegmatitic

^{1/} See ALJ Decision at 2, for a discussion of the ownership history of the claim.

^{2/} Surface management of the claimed lands is the responsibility of the Forest Service, U.S. Department of Agriculture. The subject lands became “reserved public domain,” “set aside for inclusion in the Shasta National Forest,” by Presidential Proclamation dated Oct. 3, 1905 (two months after the date that the claim was located), but remained open to mineral entry and location under the 1872 Mining Law. The lands within the claim include the N^{1/2}NW^{1/4}NE^{1/4}, N^{1/2}NW^{1/4}, SW^{1/4}NW^{1/4}, and N^{1/2}SE^{1/4}NW^{1/4} sec. 12, T. 39 N., R. 7 W., Mount Diablo Meridian, Trinity County, California. The confluence of the Trinity and the Little Trinity Rivers lies within the claim. (Ex. 14, at 3 and Map 3.) The pegmatitic gabbro at issue occurs on the claim in alluvial deposits within and adjacent to the streambed. (Ex. 16; Tr. 93, 95; Ex. A at 2; Ex. E (Photos E-2, E-3, E-4, E-6, and E-7).) As Judge Hammett explained, the claim was located for placer gold, and the original locators and subsequent owners mined the claim for placer gold until 1942. The concept of marketing the pegmatitic gabbro from the claim as a landscaping rock was developed sometime in the late 1980s. See ALJ Decision at 4.

^{3/} The Forest Service’s exhibits are identified with numbers and the Knipes’ exhibits with letters.

^{4/} In 1989, the Knipes made two sales of the pegmatitic gabbro, at \$55 per ton for 30 tons. (Ex. A, Atts. A-4, A-5.) In 1990, Knipes’ lessees submitted a Plan of Operations for mining the pegmatitic gabbro. (Ex. 14 at 9.) The Forest Service did not approve the plan, taking the position that the pegmatitic gabbro was not locatable, but offered to sell the mineral to the Knipes through a material sales contract, maintaining royalties in escrow pending the outcome of the patent application. (Tr. 42-43.)

gabbro ^{5/}) is a common variety stone and therefore not a valuable mineral deposit, locatable under section 3 of the Act of July 23, 1955, 30 U.S.C. § 601 (2000); and (2) even if there is a locatable mineral deposit on the claim, it is not in sufficient quantity or of sufficient quality to constitute a “discovery” of a valuable mineral deposit. ^{6/}

The Knipes timely filed an Answer on October 13, 2000, generally denying the allegations and requesting that mineral entry be affirmed and that mineral patent to the claim be issued. Judge Hammett held a hearing on July 1 and 2, 2002, in Sacramento California. The parties presented testimony, approximately 40 exhibits, and post-hearing briefs. ^{7/} Judge Hammett ruled that the Government had presented a prima facie case that the mineral deposit at issue is a common variety of stone which is not locatable, and that the Knipes had failed to overcome this case by a preponderance of the evidence. Therefore he declared the claim null and void and rejected patent application CACA 26770 A. ^{8/} The Knipes filed a timely notice of appeal of Judge Hammett’s decision and a petition for stay. The Board granted the stay by order dated October 1, 2003.

^{5/} The Knipes describe the mineral deposit as “a decorative rock variety, geologically classed as rodingite, an unusual and rare form of pegmatitic gabbro which they alleged occurred in unique large sizes on the claim, and which they had marketed under the name of “Trinity Black-and-White.” (SOR at 4.) The names “pegmatitic gabbro,” “rodingite” and “Trinity Black-and-White” are referred to interchangeably throughout the record and herein. See, e.g., Tr. 324; Ex. 14 at 10; Ex. A, B, & C. The parties agree that the proposed use for the material is as landscaping rock or decorative stone. (ALJ Decision at 16; Ex. A, at 1-2, 6; Ex. C, at 2.)

^{6/} The Forest Service also alleged that certain portions of the claim are non-mineral in character, that the Knipes are only authorized to patent 20 acres of the claim, and that the Knipes did not demonstrate that title to the claim passed to Roland Knipe.

^{7/} In support of its prima facie case, the Forest Service put on two witnesses, Peter Van Susteren (Tr. 25-71) and Richard W. Texeira (Tr. 72-248, 413-28). Contestees called Roland Knipe (Tr. 319-27), Ralph Mullican (Tr. 255-327), Richard Schmittel (Tr. 327-412), and Allan Haley (Tr. 365-370). The Forest Service re-called Texeira on rebuttal. (Tr. 413-28). The reports of Professor Robert Coleman of Stanford University, letters from rock yards, and other items/exhibits stipulated by the parties before the hearing were received in evidence.

^{8/} Since Judge Hammett found that the pegmatitic gabbro is a common variety of stone, he did not reach the other issues raised in this matter, including whether the claim contains a “discovery” of the pegmatitic gabbro.

Having carefully and fully reviewed the record, the pleadings and Judge Hammett's decision, and finding no error in that decision for reasons described below, we hereby adopt the decision as the opinion of the Board, and attach it to this decision.

[1, 2] The 1872 Mining Law authorized the location of mining claims containing "valuable mineral deposits." 30 U.S.C. § 22 et seq. (2000). Section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (2000) (Surface Resources Act of 1955 or Common Varieties Act), withdrew from the operation of the mining laws, any deposit of common varieties of sand, stone, gravel, pumice, pumicite, cinders and petrified wood. That same provision excludes from "common varieties" of deposits any deposit that "has some property giving it distinct and special value." As Judge Hammett explained, one guide to determining whether a mineral deposit is a common or uncommon variety, is the 5-step analysis set forth in McClarty v. Secretary of the Interior, 408 F.2d 907, 908-09 (9th Cir. 1969):

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

(ALJ Decision at 6, quoting McClarty, 408 F.2d at 908.)

Judge Hammett also quotes U.S. v. Rothbard, 137 IBLA 159, 171 (1996), which discussed the requirements for a prima facie case as follows: "A prima facie case that the mineral material is a common variety may be established by showing (1) that the mineral material is sand, (2) that the sand's price is similar to that paid for sand typically put to common variety use, (3) that the Government's witness has been unable to identify any special use for the mineral material commanding a higher price."

Judicial and Board precedent has established that the distinct and special value of the mineral deposit may be reflected by the higher price which the material commands or the lower cost of mining the material, but in each case, the linchpin of profitability must be some intrinsic property of the mineral deposit, rather than

extrinsic factors. McClarty, 408 F.2d at 909; United States v. LeFaivre, 138 IBLA 60, 67 (1997).

We also look to LeFaivre for a cogent description of the burden of proof:

When the government contests a mining claim alleging that the claim is invalid because it was located for a common variety mineral, the Government must present sufficient evidence to establish a prima facie case that the mineral deposit does not possess a unique property giving it a distinct and special value. See United States v. Multiple Use, Inc., 120 IBLA 63, 82 (1991); see also, United States v. Mineco, 127 IBLA 181, 187 (1993). Once the government has presented a prima facie case, the burden shifts to the contestee to overcome this showing by a preponderance of the evidence.

(ALJ Decision at 7, quoting LeFaivre, 138 IBLA at 67.)^{2/}

On appeal, the Knipes first assert that the Government did not establish a prima facie case that Trinity Black and White is a common variety of stone and assert that the Government's two expert witnesses, Mineral Examiner Texeira and Van Susteren, were not competent to obtain the opinions of potential buyers at rock yards regarding the mineral's value and uses, and had not proven that the stones they showed when requesting prices at the rock yards were, in fact, Trinity Black and White, rather than more common rocks. They also allege that Texeira had not proven whether the stones used for comparison were common or uncommon or used for the same landscaping purpose for which the mineral at issue would be used. (SOR at 7, 11.)

The Knipes next assert that Judge Hammett erred in concluding that they had failed to show by a preponderance of the evidence that two unique characteristics (color and hardness or strength) gave the stone a distinct and special value, as reflected in the ability of Trinity Black and White to command a marketplace price higher than the price of other types of landscaping stone. (SOR at 8; ALJ Decision at 21.) Specifically, the Knipes argue that it was error for Judge Hammett, on the basis of Texeira's testimony, to conclude that a wholesale price of \$139 per ton for Trinity Black and White delivered to Sacramento and the Bay Area was within the normal range of prices for similar rock. (SOR at 10.)

^{2/} All parties rely on LeFaivre for a statement of the proper burden of proof. (SOR at 6; Opposition at 9-10.)

These two issues go to the question of whether the unique properties of this pegmatitic gabbro give the mineral deposit a distinct and special value for its use as landscaping stone, as reflected in a higher market price than for stone typically put to common variety use. As Judge Hammett correctly explained in his decision, if we find that the answer to the question raised by the first issue is “yes,” then it is unnecessary to reach the remaining issues. (ALJ Decision at 5.)

We find that Judge Hammett carefully considered the testimony presented before him under oath, as well as the parties’ exhibits and pleadings in light of the analyses described in McClarty and Rothbard. On appeal before this Board, as in Rothbard, the contestee “revisits arguments presented at the hearing and declares that a different conclusion was warranted, disagreeing with [the ALJ’s] judgment of the weight to be given the evidence presented at hearing.” Rothbard at 163. In Rothbard, we noted that the Department “traditionally gives considerable deference to a Judge’s findings on questions of witness credibility” since the Judge, “as the trier-of-fact, had the opportunity to observe witness demeanor as testimony was given and to compare and weigh the testimony and exhibits.” Id., citing State Director for Utah v. Dunham, 3 IBLA 155, 163 (1971). Indeed, the Board “ordinarily will not disturb a Judge’s findings of fact based on credibility determinations where they are supported by substantial evidence.” United States v. Thompson, 168 IBLA 63, 77 (2006), citing United States v. Miller, 165 IBLA 342, 377 (2004).

Before Judge Hammett appellants raised issues related to Texeira’s credibility as an expert witness and his testimony regarding mineral and price comparisons. “Having considered the record as presented,” Judge Hammett found that Texeira, a certified mineral examiner, with approximately 16 years experience, having been involved in at least 35 mineral examinations at the time of the hearing, “qualifies as an expert witness with regard to geology and with regard to the conduct of mineral examinations, including mineral examinations involving the question of common variety.” (ALJ Decision at 14.) Although Judge Hammett found that the Knipes’ concerns regarding Texeira’s testimony about his conversations with rock yard operators and employees in 1991 and 1996 “are not without merit,” Judge Hammett adequately explained why he nevertheless concluded that “the Forest Service’s hearsay problems were not fatal to its prima facie case on the common variety issue.” (ALJ Decision at 15.) Judge Hammett also considered the Knipes’ argument that the Forest Service’s market research was “of negligible value” because it did not show that the material used for comparison was common variety, and found that, as in LeFaivre, U.S. v. Foley, 142 IBLA 176, 188 (1998), and U.S. v. Smith, 115 IBLA 398 (1990), the Government had met the first portion of the McClarty test which calls for

a “comparison of the mineral deposit in question with other deposits of such minerals generally.” ^{10/}

Judge Hammett also found that Texeira’s testimony met the second criterion for establishing a prima facie case that the pegmatitic gabbro is a common variety of stone by showing that the price paid for the stone was similar to that paid for stone put to a common variety use (ALJ Decision at 13), and that “the pricing information presented by Mr. Texeira is to some extent corroborated by other evidence,” including evidence presented by the Knipes. *Id.* at 15. The record amply supports Judge Hammett’s reliance on a June 2002 contract, presented by the Knipes, with the rock yard Klamath Forest Products in Weed, California (Ex. P), for \$65 per ton, as well as the Knipes’ actual sales of Trinity Black and White in 1989. *Id.* at 23; Tr. 262. ^{11/} Although Judge Hammett found that Trinity Black and White has unique color and durability, he did not find that appellants had met their burden of showing that this color and durability give the stone distinct and special value, as reflected either in the higher price which the material commands in the marketplace, or in reduced cost or overhead. (ALJ Decision at 21-27.)

After a thorough examination of the record and pleadings in this case, we have determined that Judge Hammett’s “findings and conclusions are supported by the record as a whole and are legally sound.” *Thompson* at 78. Appellants have failed to show error in Judge Hammett’s well-reasoned decision which we affirm, adopt, and attach hereto. *See United States v. Multiple Use, Inc.*, 120 IBLA at 76.

^{10/} Appellant’s argument seeking to debunk the Forest Service’s market survey of Trinity Black and White assumes a break in the chain of custody between specimens identified in the mineral examination and those taken to rock yards by Forest Service personnel. (SOR at 5, 7-8.) We note that this claim has no support in the record. *See, e.g.*, Tr. 93; Ex. 14 at 7, 11-12; Tr. 122; *see also* ALJ Decision at 11.

^{11/} The record also includes a letter, submitted by appellants, dated Nov. 16, 1990, in which Professor Coleman identifies the special and unique features of the deposit, but also reveals uncertainty regarding the stone’s value. He states: “The black and white nature of these rocks is unequalled because of the unusual metasomatic event that has changed the gabbro pegmatite into rodingite. There seems little doubt, from the petrological standpoint, that the deposit is rare and potentially has economic value in producing a distinctive decorative stone.” (Ex. B, at A-4, A-5) Similarly, the Knipes’ witness, Richard Schmittel (Tr. 327-412), with years of domestic and international mining experience, prepared a feasibility study for the Knipes, stating that “a retail market for the specialty stones must be developed.” (Ex. D, at 6.)

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.

Christina S. Kalavritinos
Administrative Judge

I concur:

James K. Jackson
Administrative Judge

UNITED STATES OF AMERICA,)	CACA 26770 A
Contestant,)	
)	
v.)	Involving the Elevator #4 Placer Mining
)	Claim (CAMC 29875)
)	
ROLAND AND FRANCES KNIPE)	
Contestee.)	
_____)	

DECISION

In this case, the United States of America, through the United States Forest Service, alleges that the Elevator # 4 placer mining claim should be declared null and void, primarily for two reasons: 1) the mineral deposit is a common variety and therefore not locatable under applicable law, and 2) even if there is a locatable mineral deposit on the claim, the Elevator # 4 does not contain a “discovery” of the mineral, as that term has been defined through applicable law. The Forest Service also alleges that certain portions of the claim are non-mineral in character, that the Knipes are only authorized to patent 20 acres of the claim, and that the Knipes did not demonstrate that title to the claim passed to Roland Knipe.

The Knipes deny these allegations. They seek to patent the entire 160-acre claim, and allege that they have fully complied with all of the requirements of applicable law.

The record consists of the transcript of a two-day hearing held in this matter, approximately 40 documentary exhibits (including maps and photographs), and post-hearing briefs filed by both parties. After reviewing the record, and for the reasons set forth below, this forum has determined that the Knipes have not established that the mineral deposit at issue is an uncommon variety of stone. Therefore, the mining claim is null and void.

Procedural Background

The Forest Service filed its complaint in this matter on September 14, 2000.¹ Through the complaint, the Forest Service charges that:

¹ “Technically, mining claim contest proceedings are initiated by BLM on behalf of the Forest Service. The Forest Service actively sought issuance of the complaint, its expert witnesses were * * * employees of the Forest Service, and its counsel is an employee of the [Department of Agriculture].” U.S. v. Multiple Use, 120 IBLA 63, 75 n 7 (1991).

A. Minerals have not been found within the limits of the claim in sufficient quantity or of sufficient quality to constitute a discovery of a valuable mineral deposit.

B. The mineral material found within the limits of the claim is not a valuable mineral deposit under section 3 of the Act of July 23, 1955 (69 Stat. 367; 30 U.S.C. 601).

C. The lands are non-mineral in character.

The Knipes timely filed their Answer on October 13, 2000, generally denying the above allegations. This forum held a hearing in this matter in Sacramento, California, on July 1 and 2, 2002. Following the hearing, the parties filed simultaneous Opening, Response, and Reply briefs. The parties have also each submitted supplemental briefing, in response to a request from this forum for additional briefing on the applicability of a particular case not previously referenced by the parties.

Factual Background

On August 1, 1905, eight individuals located the Elevator # 4 placer mining claim.² Ex G,³ pp 3-4. As located, the Elevator # 4 consisted of 160 acres, and included the N1/2 of the NW1/4 of the NE1/4, the N1/2 of the NW 1/4, the SW1/4 of the NW 1/4, and the N1/2 of the SE1/4 of the NW 1/4 of Section 12, T. 39 N., R. 7 W., Mount Diablo Meridian, Trinity County, California.⁴ Ex 14, p 3. The claim is in Northern California, approximately 50 miles northwest of Redding, California. Tr 27-28; Ex 2. Both the Trinity and Little Trinity Rivers flow through the claim, and their confluence lies within the claim. Ex 16.

The claim was held by the original locators until September 7 and September 18, 1905, when the original locators conveyed the claim by quitclaim deeds to Dodge Mining Company. Ex 14, Atts A-2 to A-4. The claim was then conveyed by a series of quitclaim deeds from J.W.S. Dodge to Margaret Morrison on July 13, 1942, from Margaret Morrison to Frank Trumble and Ralph W. Laverty on May 17, 1945, from Ralph Laverty to Loyd Karrer and Viola Karrer on January 12, 1961, and from Loyd Karrer and Viola Karrer to Frank Trumble on July 21, 1965. Ex 14, Atts A-7 to A-11. Thus, Frank Trumble acquired sole ownership of the claim on July 21,

² The eight original locators were W.S. Dodge, Mrs. W.S. Dodge, E. Dodge, C.B. Kingsbury, A.N. Kingsbury, Mrs. M.H. MacIlwaine, Mrs. A.K. Mallett and M.H. MacIlwaine.

³ The Forest Service exhibits are identified with numbers, while the Knipes' exhibits are identified with letters. Complete lists of the exhibits are at Tr pp 5-6, 253-54.

⁴ The parties stipulated to the admission of Contestees' Exhibit 16, a map which depicts the claim divided into 16 equal tracts containing 10 acres each.

1965. When he died, Frank Trumble left Donald Brain and “Roland Knight”⁵ each with undivided one-half interests in the claim. Ex 14, Att A-12. Finally, Mr. Brain conveyed his interest by quitclaim deed to “Roland Knipe” on August 27, 1977. Ex 14, Att A-13.

The Knipes filed a patent application with the Bureau of Land Management (BLM) on June 8, 1990. Exs F, A. Subsequently, in response to BLM concerns, the Knipes submitted an amended patent application and additional filings. See Exs B, C, H, I, J. On August 8, 1991, BLM issued Part 1 of the final certificate, but noted that the government would conduct an on-the-ground field examination to verify discovery. Ex K.

In their amended application, the Knipes describe the valuable mineral on the claim as “pegmatitic gabbro.” Ex A p 1. In the 1968 edition of the U.S. Bureau of Mines’s a dictionary of mining, mineral, and related terms (Bureau of Mines Dictionary), at page 801, pegmatite is defined as: “Those igneous rocks of coarse grain found usually as dikes associated with a large mass of plutonic rock of finer grain size.” Gabbro is defined, at page 474, as: “A fine to coarse, dark-colored crystalline igneous rock * * *.”

The Knipes also allege that the pegmatitic gabbro “has been positively identified as belonging to the *rodingite* group.” Ex A p 1 (italics in original). The Bureau of Mines Dictionary defines rodingite, at page 937, as: “A coarse-grained, gabbrolite rock * * *.” The Knipes have given the pegmatitic gabbro located on their claim the trade name “Trinity Black and White.” See, e.g., Ex A, p 1; Tr 83.

The pegmatitic gabbro occurs on the claim in alluvial deposits, as depicted on Ex 16. Tr 93, 95; Ex A, p 2. The alluvial deposits are divided into an upper, uncemented zone and a lower, cemented zone. Ex A, Figure 4. Each party has submitted photographs portraying the pegmatitic gabbro on the claim, which show boulders and cobbles in various sizes intermingled with other types of stone. Ex 14, Photos 22-32 (Contestant’s photographs); Ex E (Contestees photographs). Although the parties’ experts differ with regard to the proportion of alluvial material that consists of pegmatitic gabbro, they each assumed for their reports that approximately 15% of the alluvial material on the claim greater than six inches in length consists of pegmatitic gabbro. Tr 101; Ex 14, p 7; Ex A, p 2; Ex D, pp 2-3.

The proposed use of the pegmatitic gabbro is as decorative stone or landscape rock. Ex A, pp 1-2, 6; Ex C p 2; Ex 14, p 1; Tr 83-84. As such, its value is derived from its proposed use and not from the value of its contained elements. See U.S. v. Multiple Use, 120 IBLA 63, 74 n 5 (1991) (“This distinction can be seen by comparing a talc deposit, which is mined and pulverized

⁵ The Forest Service argues that, because of name discrepancies on some of the conveyance documents, the Knipes have failed to demonstrate ownership in the claim. This forum does not reach this question, because of its finding that the mineral at issue is a common variety of stone.

to make talcum powder, to a deposit of galena (PbS), which is mined and smelted to recover lead.”).

According to the Knipes, the claim was located for placer gold, and the original locators and subsequent owners mined the claim for placer gold until 1942. Ex I, pp 2-3. The Forest Service states: “[T]here is no known record of gold production on the claim.” Ex 14, p 9. Various plans for mining gold on the claim were submitted to the Forest Service in the 1970s and 1980s. Ex 14, p 9; Tr 53-54. Although the claim shows evidence of disturbance from gold mining activities, the Knipes do not assert that they have a discovery of gold on the claim. See Ex 16 (showing roads and settling ponds); Ex 14, Photos 1 and 2; Tr 28-29, 322.

Instead, in the late 1980s, Mr. Lawler, a representative of the Trinity Management Group, “brought the idea of marketing the pegmatitic gabbro from the claim as a landscaping rock * * *.” Ex 14 p 9. The Knipes allege that in 1989 they made two sales of the pegmatitic gabbro, totaling 30 tons, at \$55 per ton. Ex A, Atts A-4 and A-5. In 1990, representatives of the Knipes’ lessees submitted a Plan of Operations for mining the pegmatitic gabbro. Ex 14, p 9. The Forest Service did not approve the plan because it took the position that the pegmatitic gabbro was a common variety of stone and not locatable. Tr 42. Instead, the Forest Service offered to sell the pegmatitic gabbro to the Knipes through a material sales contract, and keep any royalties paid by the Knipes in escrow pending the outcome of the patent application. Tr 42-43. According to Mr. Teixeira, the Knipes were at first interested in pursuing the sale, but later decided not to pursue it. Tr 92.

Issues Presented

In its Opening Brief, the Forest Service accurately characterized the issues presented in this matter as follows:

- 1) Is the decorative landscaping stone mineral deposit, also known as * * * Trinity Black and White, on the lands covered by the Elevator # 4 placer mining claim a common variety [of stone]?
- 2) If the decorative landscaping stone is determined to be an uncommon variety [of stone] and locatable, is there a discovery of a valuable mineral deposit within the Elevator # 4 claim?
- 3) If the decorative landscaping stone is locatable, and there is a discovery on the claim, which of the 10 acre parcels are mineral in character?
- 4) If the decorative stone is locatable and there is a discovery, do the Knipes * * * have a right to patent only 20 acres?

- 5) Did Contestees credibly demonstrate that title to the Elevator # 4 passed to Roland Knipe?

Forest Service Opening Brief, pp 2-3. If the answer to the first question is yes, then it is unnecessary to answer the remaining questions.. See U.S. v. Diana J. Foley, 142 IBLA 176, 191 (1998) (“[S]ince there is no locatable mineral deposit, there can be no discovery.”).

Analysis

Law Concerning Common Varieties

The 1872 Mining Law authorized the location of mining claims containing “valuable mineral deposits.” 30 U.S.C. § 22. Congress amended the 1872 Mining Law in 1955, to remove “common varieties” of certain minerals from the category of locatable minerals. 30 U.S.C. § 611 (Act of July 23, 1955 (hereinafter, the “Common Varieties Act”); 69 Stat. 311). Specifically, Congress provided:

No deposit of common varieties of sand, stone, pumice, pumicite, or cinders * * * 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,* That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. “Common varieties” as used in this subchapter and sections 601 and 603 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value * * *.

30 U.S.C. § 611. The pegmatitic gabbro is “stone” as that term is used in the statute.⁶ Although the statute applies specifically to claims located after the statute was enacted, it is applicable here because the Knipes do not assert that the claim is based on a discovery of pegmatitic gabbro made before 1955. See U.S. v. Silverton Mining and Milling Co., Inc., 1 IBLA 16, 20 (“The Act of July 23, 1955 is applicable to mining claims located before that date, but not perfected by a discovery prior thereto.”).

Any analysis of whether a particular mineral deposit “has some property giving it distinct and special value” begins with consideration of the guidelines set forth in McClarty v. Secretary of the Interior, 408 F.2d 907 (9th Cir. 1969), which are as follows:

⁶ The Bureau of Mines Dictionary, at page 1079, defines stone as: “Consolidated rock either in mass or in a fragment of pebble or larger size.” See U.S. v. Pierce, 75 I.D. 270, 279 (1968) (“The term ‘stone,’ in particular, is extremely broad in meaning, including material of igneous, sedimentary, or metamorphic origin and material of variegated mineral composition, ranging, for example, from white limestone to dark basalt.”).

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

McClarty, supra, 408 F.2d at 908; See United States v. Robert C. LeFavre, et al., 138 IBLA 60, 66 (1997) (following McClarty). The distinct and special value of the mineral deposit may be reflected not only by the higher price which the material commands, but by the lower cost of mining the material. McClarty, supra, 408 F.2d at 909. The key is whether some intrinsic property of the mineral deposit allows a person to receive substantially more profit from mining the deposit than that person would receive from mining a common variety of the mineral.

In this case, the pegmatitic gabbro is proposed for use as decorative stone or landscaping rock, a use to which ordinary varieties of stone are put. Supra, p 3; See Ex C, Att A-14 (showing moss rock as a common variety decorative stone); See also U.S. v. Smith, 115 IBLA 398, 410 (1990) (“The suggestion made on appeal that some of [the travertine] is similar to landscape stone used at the U.S. Botanic Gardens tends only to indicate that some of the material is a common limestone useful for landscaping.”) The Knipes do not argue that the stone is valuable for a unique purpose. Therefore, the fourth McClarty guideline listed above applies here, and the pegmatitic gabbro must have a distinct and special value for use as landscaping rock or decorative stone to be considered an uncommon variety of stone.

The Board has, in a number of cases, had occasion to determine whether a deposit of stone is an uncommon variety. See, e.g., U.S. v. Dunbar Stone, 56 IBLA 61 (1981) (Yavapai schist); U.S. v. Vaughn, 56 IBLA 247 (1981) (marble); Lefavre, supra, 138 IBLA 60 (lava rock). In LeFavre, the Board summarized the applicable law, stating in part:

It is not contended before the Board that the stone from the Flow Lava No. 1 claim has any use beyond those uses to which ordinary building stone is put. The controversy before us, therefore, centers on whether the deposit’s unique properties give it a distinct and special value for use as building stone as reflected either by the higher price which the stone commands in the marketplace or by reduced costs and overhead substantially increasing the profits realized from the sale of the stone at competitive prices.

The determination of whether the deposit has a distinct and special value must be grounded on the inherent, unique qualities of the deposit and not on extraneous factors such as the claim’s advantageous location. See United States v. Henri (On Judicial Remand), supra at 98-99, and cases cited. Nor may a finding that a deposit has a distinct and special value be predicated on the value of

a fabricated or marketed deposit of deposit. McClarty v. Secretary of Interior, supra at 909; see also United States v. Stevens, 14 IBLA 380, 391, 81 I.D. 83, 87 (1973). Rather, it is the value of the deposit as it is found on the claim that is controlling. Id.

Id., at 67. The Board found that the government established its prima facie case by presenting evidence showing that various stone companies would not pay more for the lava rock at issue, and might instead pay less, than they would pay for other building stone in the region. Id., at 68.

In response, Mr. LeFaivre argued that the stone on the claim was uncommon and unique, that he could manufacture a profitable product from the stone, and that the stone had value because the deposit was located near other claims. The Board found that Mr. LeFaivre had failed to show that the stone was locatable, because he had attempted to base his case on extrinsic factors, rather than intrinsic ones. LeFaivre, supra, 138 IBLA at 68. See U.S. v. California Soyland Products, Inc., 5 IBLA 179 (1972) (finding a deposit of “green tuffaceous building stone” to be a common variety); Compare U.S. v. McCormick, 27 IBLA 65 (1975) (finding a deposit of sand to be an uncommon variety); U.S. v. Pope, 25 IBLA 199 (1976) (finding a deposit of building stone to be an uncommon variety).

The Burden of Proof

The burden of proof for questions related to common variety is similar to that for the question of discovery:

When the government contests a mining claim alleging that the claim is invalid because it was located for a common variety mineral, the Government must present sufficient evidence to establish a prima facie case that the mineral deposit does not possess a unique property giving it a distinct and special value. See United States v. Multiple Use, Inc., 120 IBLA 63, 82 (1991); see also United States v. Mineco, 127 IBLA 181, 187 (1993). Once the government has presented a prima facie case, the burden shifts to the contestee to overcome this showing by a preponderance of the evidence.

United States v. Robert C. LeFaivre, et al., 138 IBLA 60, 67 (1997).⁷

⁷ The Board has also stated that in cases where a claimant’s answer to a complaint consists of a general denial, the government is not required to present a prima facie case that a deposit of mineral material is not an uncommon variety. Multiple Use, supra, 120 IBLA at 82 n 18. Here, the Knipes did make a general denial in their answer, and did not specifically assert that the pegmatitic gabbro on their claim was an uncommon variety of stone. Answer, p 2. Therefore, according to the Board’s discussion in Multiple Use, the Forest Service was not required in this case to make a prima facie case that the pegmatitic gabbro was not an uncommon variety of stone. In any event, this forum finds, as set forth below, that the Forest Service did

The precise nature of the government's burden is a matter which requires some additional consideration in this case. As set forth in further detail below, the government's case is to a large extent based on price comparisons conducted by the government's mineral examiner at various retail yards for landscaping and decorative stone. However, the government mineral examiner presented little detail showing that the types of stone to which he was comparing the pegmatitic gabbro were themselves common varieties of stone. The question is, to what extent must the government show that its "comparison stones" are themselves a common variety, in order to present a prima facie case that the stone at issue is a common variety?

This issue was the subject of the Board's decision in United States v. Mamie Vaughn, et al., 56 IBLA 247 (1981). In Vaughn:

BLM relie[d] heavily on market research undertaken in August 1977 by John Kavels, a BLM mineral examiner, comparing the average prices of marble from the Basins quarry and other stone used for the 'same purposes,' namely precast concrete panels, cultured marble, landscaping, and other miscellaneous uses. * * * This research indicated that Basins marble had an average price of \$29.60 per ton, while the average price for other stone used for the same purposes was \$35.66 per ton.

Id., at 251. The Appellants argued that the BLM was comparing the stone on their claims with other uncommon stones, and therefore that BLM had not established a common variety price. Although the Board did not discuss the question in terms of whether BLM had established a prima facie case, the Board held:

The market research offered by BLM provided the prices for other materials used for the same purposes as marble from the Basins quarry. These materials included granite, feldspar, scoria, and quartzite. There is no indication whether these materials were themselves common or uncommon varieties of stone * * *. It is a prerequisite for an adequate comparison that the stone in question be compared with deposits of common varieties in order to determine if it has a distinct and special value reflected by a higher market value. * * * The mere fact that the materials are used for the same purpose is not sufficient. If the stones for comparison are uncommon varieties, each exhibiting a distinct and special value, it would be virtually impossible for a stone to meet the test unless its characteristics were such as to command the highest market value. The Government failed to establish that the stones used for comparison purposes were, in fact, common varieties.

Vaughn, supra, 56 IBLA at 251-52. The Board found the stone at issue in Vaughn to be an uncommon variety of stone. Id., at 252.

establish a prima facie case to that effect.

Neither party mentioned the Vaughn case in their post-hearing briefs, and this forum requested additional briefing on the applicability of Vaughn to the present case. Specifically, this forum asked the parties to brief the question of “whether the Forest Service has established that the stones it used for comparison in this matter were common variety stones.” Request for Additional Briefing, p 2.

In their response, the Contestees argued that the Forest Service evidence in this case was similar to the evidence presented in the Vaughn case, because the Forest Service had merely compared the pegmatitic gabbro to other stones used for similar purposes, without showing that the comparison stones were a common variety. Contestees’ Additional Briefing, p 2. They argue that at least one of the types of stone used for comparison – Yuba Blue boulders – was an uncommon variety of stone. Id., at 4. Moreover, the Contestees argued: “[T]he Forest Service in this case goes one step further by not only comparing contestees’ Trinity Black & White rock with other uncommon stones, such as Yuba Blue boulders, but by comparing it with unnamed stones in Table 1, designated as neither common nor uncommon.” Id., at 4. Although the Contestees do not explicitly argue that the Forest Service failed to make a prima facie case as a result, they argue that the Forest Service’s market research is “of negligible value.” Id., at 4-5.

For its part, the Forest Service argues that it has a minimal burden to show that material being used for comparison is itself common variety: “As a matter of law, a deposit of stone is a common variety; there is no particular showing necessary, other than it is stone.” Contestant’s Supplemental Brief, p 5. Therefore, the Forest Service argues, to the extent it had an initial burden to show that the stones it used for comparison were a common variety, it met that burden by establishing that the comparison materials were stone. Id., at 9. The Forest Service distinguishes the Vaughn case by arguing that in Vaughn, the claimants presented evidence showing that the deposits used by the Government for comparison were uncommon, whereupon “[t]he burden then shifted to the Government to introduce evidence rebutting that the deposits were uncommon * * *.” Id., p 5.

If Vaughn stands for the proposition that an agency must show, as part of its prima facie case that a stone is common variety, that all of the material used for comparison is a common variety as well, then this proposition does not appear to be well recognized by the Board. Instead, in several common variety cases, the Board has found that the Government established a prima facie case where it compared the material at issue to other similar material. See U.S. v. Robert C. LeFaivre, 138 IBLA 60, 68 (1997) (prima facie case established where comparison made to “other building stones locally available”); U.S. v. Diana J. Foley, et al., 142 IBLA 176, 188 (1998) (prima facie case established where mineral examiner “viewed other deposits of building stone” and “investigat[ed] the market for building stone * * *.”); U.S. v. Smith, 115 IBLA 398 (1990) (prima facie case established where comparison was made to “other similar stone”).⁸

⁸ A number of Board cases which consider the question of common variety do not explicitly discuss whether or how the government established a prima facie case. See, e.g., U.S.

In light of these cases, and in light of the fact that Vaughn did not specifically discuss the requirements for a prima facie case, this forum concludes that the Government does not have to show that the material it uses for comparison is itself a common variety in order to establish a prima facie case. Rather, this forum accepts the Forest Service's interpretation that the Vaughn case applies when the claimant, in attempting to rebut the government's prima facie case, puts on evidence which tends to show that the material the government used for comparison was an uncommon variety. This interpretation is consistent with the first portion of the McClarty test, which calls for a "a comparison of the mineral deposit in question with other deposits of such minerals generally." Supra, p 6.

In U.S. v. Ray Rothbard, 137 IBLA 159 (1996), the Board adopted a decision by an Administrative Law Judge (ALJ) finding that a certain deposit of sand was a common variety. Rothbard, at 164. In his decision, citing U.S. v. Multiple Use, 120 IBLA 63, 82 (1991), the ALJ discussed the requirements for a prima facie case as follows: "A prima facie case that the mineral material is a common variety may be established by showing (1) that the mineral material is sand, (2) that the sand's price is similar to that paid for sand typically put to common variety use, (3) that the Government's witness has been unable to identify any special use for the mineral material commanding a higher price." Rothbard, at 171. Substituting the word "stone" for "sand," this forum will apply the above criteria to this case.

a. The Forest Service Established a Prima Facie Case that the Pegmatitic Gabbro on the Claim is a Common Variety of Stone.

The Forest Service bases its case primarily on the mineral report prepared by Richard W. Texeira, a certified mineral examiner employed by the Forest Service, as well as Mr. Texeira's testimony. The report identifies the mineral deposit at issue as a deposit of pegmatitic gabbro. Ex 14, pp 1, 7-8, 10. In his testimony, Mr. Texeira described the mineral deposit as a "rodingite, which is a metamorphic pegmatitic gabbro." Tr 97. This evidence is sufficient to establish that the mineral material at issue is stone.

With regard to making a showing that "[stone's] price is similar to that paid for [stone] typically put to common variety use," the Forest Service entered the following evidence. In the Mineral Report, which was entered into evidence as Exhibit 14 without objection (Tr 16), Mr. Texeira states his opinion that the proposed use of the rock is for landscaping purposes. He based this on the Geologic Report and addendum accompanying the Knipes' patent application (Exs A and C), as well as other statements made by the attorney and consultants for the Knipes. Ex 14, p 10.⁹

v. Dunbar Stone, 56 IBLA 61 (1981); U.S. v. McCormick, 27 IBLA 65 (1975); U.S. v. Pope, 25 IBLA 199 (1976).

⁹ The experts from both sides appeared to agree that the pegmatitic gabbro could not be used as a veneer. Tr 109 (Texeira); Tr 295 (Mulligan); See Ex 14, p 14.

The Mineral Report then describes Mr. Teixeira's discussions with a number of persons at various businesses in the Sacramento and Redding areas which sell rock for landscaping purposes (also known as "rock yards"). Ex 14, p 11. After naming the persons he contacted, Mr. Teixeira states:

I showed them each a sample of the rock they [the Knipes] propose to market as Trinity Black and White and asked for their opinion as to the relative value of the pegmatitic gabbro compared to other types of landscaping rocks. All felt the pegmatitic gabbro was different but would retail at prices near the low end of the price range for landscaping rock products. None had tried to sell this product nor did they see anything unique or distinctive in this rock that would lead them to believe it would demand a significantly higher price in the landscaping rock market.

Ex 14, pp 11-12. Mr. Teixeira made a similar round of visits to rock yards in 1996, although in describing those visits, Mr. Teixeira did not provide the names of the people to whom he spoke. With regard to these visits, he states: "Their response was generally that they were willing to buy one or two tons of pegmatitic gabbro to see how it might sell, but that there was no established market for that particular type of rock." Ex 14, p 12.

Mr. Teixeira found that the retail price of landscaping rock is normally about double what the rock yard pays for the rock. Therefore, he estimated that at the purchase price reported by the Knipes for the pegmatitic gabbro they sold in 1989, \$55 per ton, the pegmatitic gabbro would retail at a rock yard for \$110 per ton. Ex 14, p 12. Mr. Teixeira then compared the projected retail price of the pegmatitic gabbro to a range of retail prices for several types of "common" variety rocks used for landscaping purposes," such as "[v]olcanic fieldstone," "[m]oss rock," and "[g]ranitic cobbles." Ex 14, pp 12-13. Mr. Teixeira found a range of prices covering \$50 to over \$400 per ton. Mr. Teixeira concluded from this that the pegmatitic gabbro is "near the bottom of the price scale for landscaping rocks." Ex 14, p 13.

He makes a similar comparison using information derived from his visits to rock yards in 1996. Ex 14, p 13, Table 1. In this case, he does not differentiate between various types of rocks, but provides price ranges and mean prices for "cobble-sized material" at each yard he visited in 1996. In determining which rocks to include, he states:

Rock with prices reflecting value added labor such as tumbling or hand cutting were not included. Pumice or "Feather Rock" was also not included since its price per pound is much higher than other cobble-sized rock due to its very low density. Flat or flagstone type rocks were also not included since their prices tend to be higher and would normally be used for a different purpose than the pegmatitic gabbro.

Ex 14, p 13. The mean retail prices of the cobble-sized material ranged from \$127 to \$275 per ton. Id. Based on this, and again using a “suggested retail price” of \$110 per ton for the pegmatitic gabbro, Mr. Texeira repeated his conclusion that “the pegmatitic gabbro would not command a higher price in the market place.” Id.

Mr. Texeira made a similar survey of rock yards in 2002, approximately two weeks before the hearing. Tr 119, 122. Specifically, he visited nine rock yards, five in the San Francisco area, and four in the Sacramento area. Tr 122. He “showed them the sample,” and asked the people at the rock yards to name the price they might be willing to pay for the Trinity Black and White. Tr 123. He further described his 2002 visits to rock yards:

* * * I asked them to show me rocks of similar rounded to subrounded type materials and if they would be willing [to] divulge what price they paid for that material, in other words what their wholesale price was if they bought it. * * * I asked them if they saw anything special or distinct about the rock, the Trinity Black and White, if they thought it would sell at a higher price than other rocks used for the same purposes.

Tr 123. The wholesale prices of rocks “similar to Trinity rocks” ranged from \$50 to “close to \$200 per ton.” Tr 123. He later stated that in his “recent survey” he found that “the purchase price for the Trinity Black and White would range from a low of \$60 a ton to a high of \$160 a ton with an average being approximately \$126 per ton.”¹⁰ Tr 154. This price was for rock delivered to the rock yard. Tr 154.

The Forest Service prepared two exhibits summarizing Mr. Texeira’s 2002 visits to rock yards, one for his survey of rock yards in the San Francisco area and one for his survey of rock yards in the Sacramento area. Proposed Exs 20, 21. These exhibits are by far the best evidence of Mr. Texeira’s visits to rock yards, because they provide the names of people he spoke with at each rock yard, the dates of each visit, and a summary of his conversations. Id. They also provide charts showing the prices of various cobble and boulder sized material at the rock yards.

Inexplicably, however, the Forest Service failed to identify these documents to the Knipes before the hearing, in direct contravention of this forum’s Pre-Hearing Order. The Pre-Hearing Order required the parties to exchange exhibit lists and copies of exhibits, unless the parties believed that copies were unnecessary. The order specifically stated: “This forum may exclude from the record any proposed exhibits not included on the list, or not exchanged in the absence of a stipulation.” Notice of Hearing and Pre-Hearing Order, p 1. However, the Forest Service did not include descriptions of Proposed Exhibits 20 and 21 on its exhibit lists. See Contestants Exhibits, dated June 21, 2002, and Contestants Exhibits – Supplemental, filed June 24, 2002. At

¹⁰ Mr. Texeira was later asked about price increases in decorative rock, and responded that prices for rock products had increased between 20 and 100 percent between 1990 and 2002. Tr 228.

the hearing, the Forest Service did not attempt to enter these documents into evidence until after the Knipes had presented their case-in-chief. Tr 425. The Knipes objected to the entry of these documents, and this forum decided to reserve ruling on Proposed Exhibits 20 and 21. Tr 425. This forum did not entertain further testimony with regard to these documents.

After further considering this matter, and the parties' discussion of this matter in their post-hearing briefs, this forum has decided not to allow Proposed Exhibits 20 and 21 into evidence. It was clear to this forum that the Knipes were surprised by the proposed exhibits. That is exactly the type of situation this forum was attempting to avoid when it issued its Pre-Hearing Order. This type of surprise does nothing to further this forum's truth-seeking function, and is simply unfair to the other party. The Forest Service argues that the exhibits were proper rebuttal exhibits, but this forum cannot believe that the Forest Service began the hearing with any doubt about whether it would ultimately offer the exhibits into evidence. In the absence of any effort on the part of the Forest Service to provide copies of these exhibits to the Knipes before the hearing or even during the presentation of its case-in-chief, the exhibits are hereby rejected, and this forum does not rely on them in making this decision.¹¹

However, Mr. Texeira's testimony about his 2002 visits to rock yards, which was presented during the Forest Service's case-in-chief, is hereby allowed. The Knipes were provided with an opportunity to cross-examine Mr. Texeira with regard to this testimony.

Thus, Mr. Texeira estimated a retail price for the pegmatitic gabbro based on prior sales made by the claimants and based on his discussions with rock yard employees, and compared that price to the prices being charged for other types of stone being put to a common variety use (landscaping rock). He did this three times over the course of ten years (1991-2002). In each case, he found that the estimated price for the pegmatitic gabbro was either on the low end or in the middle range of prices paid for other types of stone used for landscaping. Accordingly, Mr. Texeira met the second criterion for establishing a prima facie case that the pegmatitic gabbro is a common variety of stone, by showing that the price paid for the pegmatitic gabbro was similar to that paid for stone put to a common variety use. See LeFaivre, *supra*, 138 IBLA at 68 (marketing study revealed that price for stone at issue was equal to or lower than "other building stone in the region"); U.S. v. Dunbar Stone, 56 IBLA 61, 67 (1981) (comparison of price lists showed prices to be similar); U.S. v. Ray Rothbard, 137 IBLA 159, 174-75 (1996) (price of sand at issue fell within range of prices for competing sands).

Finally, with regard to the third criterion for a prima facie case, although Mr. Texeira did not directly testify that he was unable to identify a special use for the pegmatitic gabbro which

¹¹ This forum also reserved judgment on the admission of Ex 19. This forum has decided to allow that exhibit because the Forest Service listed it in its supplemental exhibit list. However, that exhibit, related to the costs of mining, is not relevant to the common variety issue upon which this decision is based.

would command a higher price, he did present evidence from which it can be inferred that this was the case. He testified as follows concerning the uses for pegmatitic gabbro:

Q (Ms. Miksovsky): And what would be the uses for the Trinity Black and White in the market.

A: It could be used for landscaping purposes, for * * * dry stream beds, ornamental boulders in the yard, accent pieces for landscaping.

Generally several of the rock yard operators commented on the weight. It probably wouldn't serve well as veneer which would be putting up mortaring and making a wall out of it.

Tr 109. In addition, he did not compare the pegmatitic gabbro on the claim to "flat or flagstone type rocks," because "their prices tend to be higher and [they] would normally be used for a different purpose than the pegmatitic gabbro." Ex 14, p 13.

Therefore, this forum finds that the Forest Service met the three criteria for a prima facie case that the pegmatitic gabbro on the claim is a common variety of stone, as those criteria are stated in Rothbard, supra, 137 IBLA at 171.

The Knipes assert that the Forest Service has failed to establish a prima facie case that the pegmatitic gabbro on the claim is a common variety. Their first challenge is to Mr. Texeira's qualifications as an expert witness. The Knipes state: "On voir dire, Mr. Texeira admitted he had never qualified as an expert witness on the issue of common versus uncommon variety rock, nor had he ever even appraised an uncommon variety deposit for the Forest Service or anyone else." Knipes' Opening Brief, p 7.

Having considered the record as presented, I find that Mr. Texeira qualifies as an expert witness with regard to geology and with regard to the conduct of mineral examinations, including mineral examinations involving the question of common variety. He holds a Bachelor of Sciences Degree in geology, attended a 20-week BLM course on Mining Claim Validity Examination Procedures, is a certified mineral examiner, had been a mineral examiner for approximately 16 years at the time of the hearing, and had been involved in at least 35 mineral examinations at the time of the hearing. Tr 72-74. He had also applied the McClarty criteria in conducting classifications of minerals. Tr 79-80.

The Knipes also challenge the price comparisons conducted by Mr. Texeira, alleging that they are based on "hearsay and misinformation." Knipes' Opening Brief, pp 17-18. The Knipes raised numerous objections to Mr. Texeira's testimony concerning his conversations with rock yard operators and employees in 1991 and 1996, as reflected in Mr. Texeira's mineral report. Tr 110-13, 122. The concerns raised by the Knipes in this regard are not without merit. In general, Mr. Texeira did not keep, or at least demonstrate that he kept, good records of his 1991 and 1996 conversations with rock yard personnel. With regard to Mr. Texeira's visits and phone calls to

rock yards, it is not possible to derive from the record, other than in a very general sense, who in particular said what in particular on any particular date. Nor is it possible to trace the pricing information set forth in the Mineral Report to particular conversations, or to particular observations Mr. Texeira may have made about prices.

The rules of evidence are somewhat more relaxed in administrative hearings than elsewhere, so that hearsay evidence may be allowed. See David Q. Tognoni, 138 IBLA 308, 319 n 8 (1997). However, the less specific hearsay evidence is with regard to identity, content, and time, the less weight it should be given. In this case, the lack of specificity with regard to the Forest Service's hearsay evidence does reduce the weight of that evidence.

Nevertheless, Mr. Texeira did specify, in his mineral report, the individuals he spoke with in 1991 (Ex 14, p 11), and he did specify the rock yards that he visited in 1991 and 1996. This provided the Knipes with an opportunity to visit these same rock yards, or interview these same people, and acquire and present countervailing evidence. In addition, the prices used by Mr. Texeira were not entirely based on what employees told him, but were in part based on posted prices or price lists. Tr 237-38.

Furthermore, the pricing information presented by Mr. Texeira is to some extent corroborated by other evidence. For example, Mr. Texeira stated that rock yard operators in 1991 would pay approximately \$15 more per ton for the pegmatitic gabbro than they would pay for moss rock. Ex 14, p 12. This fact was corroborated by evidence presented by the Knipes. Ex C, Atts A-4, A-11. Therefore, this forum does not view the Forest Service's hearsay problem as being fatal to its prima facie case on the common variety issue.

b. The Knipes Did Not Show By A Preponderance of the Evidence that the Pegmatitic Gabbro is an Uncommon Variety of Stone.

The Knipes' case is primarily based on three strands of evidence: a report and addenda written by David Lawler; a report authored by Richard Schmittel together with Mr. Schmittel's testimony, and the testimony of Ralph Mullican.

Mr. Lawler is apparently the person who first conceived of the idea that the pegmatitic gabbro on the claim could constitute a valuable mineral deposit which might legitimize the claim. He prepared a "Geologic Report" for the Knipes in April, 1990, and supplemented this report with two addenda which focused more on the question of common variety. Exs. A, B, and C. Early in the hearing, the Forest Service objected to the admission of these exhibits, on the basis that Mr. Lawler was not available as a witness for cross-examination. Tr 9. At the time of the hearing, Mr. Lawler was employed by BLM as a mineral examiner. According to Mr. Corbin, counsel for the Knipes, he asked the BLM if Mr. Lawler could testify, and BLM stated that such testimony "would potentially be a conflict and present an embarrassment for the government." Tr 10. This forum agreed that Mr. Lawler's testimony would present a conflict of

interest for Mr. Lawler, and allowed the reports to come into evidence over the Forest Service's objection. Tr 11-12.

Mr. Schmittel received a degree in "Engineer of Mines" from the Colorado School of Mines in 1967. Tr 328. Since that time, he worked as a mining engineer for a company which conducted underground barite mining in Greece. Tr 329. He directed a feasibility study for mining marble while he was in Greece. Tr 329-30. In 1976, he worked as a short term consultant for a project involving the mining of travertine in Colorado. Tr 330. He then worked as a consultant and was involved in gold and platinum mining operations. Tr 332-33. His work involved the decorative stone business on two occasions, one involving a feasibility study for a "polished granite proposal in Canada," and the other a feasibility study for a landscaping stone project in California. Tr 338-39.

Mr. Mullican received an Associate of Arts degree in Civil Engineering in 1969. After that, he went into business for himself selling "moss rock" to a rock yard. Eventually, he started selling the rock directly to contractors at a retail price. Tr 258. In 1988, he began to mine and market "Yuba Blue," which he described as a "metamorphic basalt." Tr 259-60.

In analyzing the evidence presented by the Knipes, it should first be noted that the Knipes do not dispute the government's assertion that the proposed use for the landscaping material is as landscaping rock or decorative stone. Ex A, pp 1-2, 6; Ex C, p 2; Therefore, this forum will first determine whether the Knipes have established that the pegmatitic gabbro on their claim has unique properties in comparison with other deposits of stone. Next, this forum will determine whether the Knipes presented evidence with regard to whether those unique properties give the pegmatitic gabbro a distinct and special value for use as landscaping rock or decorative stone.

The unique properties which the Knipes claim for the pegmatitic gabbro on their claim include color and appearance, strength or toughness, size, ability to take a polish, and rarity. These properties are discussed in turn.

(b)(1) The Knipes Established That the Pegmatitic Gabbro Has Two Unique Properties

(b)(1)(A) Color and Appearance

In his report, Mr. Lawler made the following claim concerning the appearance of the pegmatitic gabbro:

Its unique mineralogy as a pegmatitic gabbro containing large phenocrysts (large single crystals) of feldspar, and amphibole/pyroxene minerals combined with a spectacular interlocking crystal habit imparts unique textural characteristics to the Trinity Black and White product * * *.

Ex B, p 4. As part of his examination, Mr. Lawler contacted a number of rock yard operators in northern California. Mr. Lawler's report includes letters from these rock yard operators commenting on samples of pegmatitic gabbro.¹² A number of these letters commented on the unique appearance and color of the stone. See Ex C, Att A-1 ("unprecedented colors," "large crystal characteristics"), Att A-2 ("large crystal size and interlocking crystal textural characteristics"), Att A-4 ("unique and striking in appearance," "the large interlocking crystals create a pattern that has considerable appeal"), Att A-7 (" * * * I have never seen the interlocking crystals in a commercially available rock.").

Mr. Mullican testified that while some stones have a little bit of brownish color, the Trinity Black and White he observed has a bluish cast. Tr 311. According to Mr. Mullican, this bluish cast "makes it special." Tr 311. Mr. Schmittel characterized the Trinity Black and White as a unique and beautiful stone. Tr 347. He also submitted a letter from Ann McCormick, owner and president of Mid Valley Rock who states "The attributes of the stone caught our attention, not only for its unique interlocking crystals * * *, but for its unique colors." Ex R.

Mr. Teixeira testified that the "vast majority" of stones he saw in his visits to rock yards were "earth tones, grays, light greens, tans, off whites, with some dark blue, dark grays." Tr 126. He also noted in his report that the rock yard operators he spoke to "all felt that * * * the color of the pegmatitic gabbro was different." Ex 14, p 11.

Accordingly, this forum finds that the Knipes established by a preponderance of the evidence that the pegmatitic gabbro had a unique color and appearance compared to other stones used for landscaping purposes.

(b)(1)(B) Strength or Toughness

Mr. Lawler's report claims that the pegmatitic gabbro has a "property of strength and durability * * * compared to common variety decorative stone, due to the low iron content and interlocking crystal habit of the contained minerals * * *." Ex B, p 4. Professor Robert Coleman, a member of the Geology Department for Stanford University, commented on the strength of the pegmatitic gabbro in a letter to Mr. Lawler, stating:

The boulder and cobble size of the black/white decorative stone results from [its] intrinsic tensile strength which exceeds that of common building and decorative stones such as gabbro, granite, sandstone, or marble. In fact, these black/white decorative stones can be compared to nephrite jade[,] the strongest rock known to man.

¹² As the Forest Service points out, the record does not contain any evidence concerning the sample or samples upon which the letter authors were basing their opinion. It is not clear from the record that those samples actually came from the claim. Contestant's Reply Brief, p 3. This limits the probative value of the letters.

Ex C, Att A-12.¹³ Professor Coleman also noted that the pegmatitic gabbro is resistant to “surface weathering, exceeding the durability of the finest monumental granites.” *Id.* Of the 10 rock yards that wrote to Mr. Lawler, 6 commented on the “durability” of the stone. Ex C, Atts A-1 to A-3, A-9 to A-11.¹⁴

Mr. Mullican testified that the Yuba Blue he mined was tougher than common rock, and did not scratch easily. Tr 266. He agreed that moss rock had to be handled carefully to avoid scratching: “[Y]ou have to put it on with a piece of machinery and take it off with a piece of machinery, and that starts eating into your profits really fast.” Tr 268. Mr. Mullican tested some samples of Trinity Black and White for hardness. Tr 272. When he cut the stone, he found that it was harder than some of the types of Yuba Blue. Tr 273.

Mr. Texeira testified that the “permanence of the stones was comparable to other stones used in the landscaping business. Tr 133. He stated that “[s]trength wise” the pegmatitic gabbro would be “comparable to most other * * * cobble type rocks.” Tr 133. He noted that based on Mr. Coleman’s letter, the rock was “quite strong,” but stated: “[T]he stone would be comparable to most basalts or quartzites, granites as far as strength and durability, as far as its use for landscaping purposes.” Tr 135.

In weighing this evidence this forum finds that the Knipes have established by a preponderance of the evidence that the pegmatitic gabbro on their claim is an unusually strong stone and durable stone. Specifically, this forum finds that the specific statements from Mr. Lawler and especially Mr. Mullican, who actually tested the pegmatitic gabbro for strength, outweigh the testimony of Mr. Texeira in this regard.

(b)(1)(C) Size

The reports from the Knipes’ experts, Lawler and Schmittel, indicate that the Knipes are primarily asserting that the pegmatitic gabbro which is 6" or greater is the material upon which they base their patent application. *See* Ex A, p 4 (“A very large grizzly has been designed to separate the larger decorative rock from the minus 6 inch material.”); Ex D, p 2 (“I conducted two random surface clast counts of +6" stones.”) The experts assumed for purposes of their analyses that the pegmatitic gabbro represents about 15% of the alluvial material on the claim

¹³ The Forest Service argues that the record does not demonstrate that the rock samples analyzed by the two scientists actually came from the Elevator # 4 placer mining claim. Forest Service’s Reply Brief, pp 5-6. However, Mr. Lawler’s report states in part: “The decorative rock material has been examined in detail recently by Dr. Robert Coleman and Mr. Schiffman * * *.” Ex A, p 1. This forum infers from the context of this statement that the decorative rock material to which Mr. Lawler is referring is material from the claim

¹⁴ Attachment A-8, listed as pending in the table of contents, is not included in the report.

which is six inches or greater, although their estimates varied between 5% and 58%. Supra, p 3; Ex D, p 3 (Schmittel, 18%-28%); Ex A, p 2 (Lawler, 20%-58%); Ex 14, p 7 (Texeira, 5%-10%).

In his first letter to Mr. Lawler, Professor Coleman comments generally on the size of rodingite specimens “from the Trinity peridotite,” noting that they “form large spectacular rocks” and that “[t]he occurrence of these large boulders in the Trinity is unusual as most occur[r]ences of rodingites [consist] of small pieces * * * less than ½ meter in diameter.” Ex A, Att A-1. Mr. Mullican testified as to the desirability of larger sized stone for landscaping material:

Q (Mr. Corbin) Now, another factor that makes a stone special such as Trinity Black and White and the Yuba Blue, if you can get it in larger sizes, right?

A Larger size. I love larger size. Larger size means fast.

Q And what about the industry, do the end users love large rocks?

A They use both. And cobble. If you are doing a stream environment, you put larger rocks on the edge and you put excess rocks to protrude out in the stream and bottom of the stream is smaller. There is a market for all of it.

Generally smaller rock is lower priced and it can be sorted with grizzlies. It is a by-product of some gravel operations. And you wouldn't want to buy a high-end stone just for that. You would buy a high end stone for your edges around the pools.

Tr 317. On cross-examination, Mr. Mullican clarified that by “large stone” he meant three to four feet (or possibly five to seven feet). By smaller rock he meant two to four feet. Tr 317-18.

Size was one of the factors Mr. Schmittel used to compare the pegmatitic gabbro on the claim with other types of decorative rock. Tr 345, 352. The photographs taken by Mr. Schmittel, which are entered as Exhibit E, were taken in part to “illustrate the size * * * of the stones.” Tr 349. The photographs show a number of pegmatitic gabbro boulders on the claim which have an average long dimension of approximately three to four feet. Tr 351-55. Exhibit E-8 depicts a pegmatitic gabbro boulder on the claim with a maximum dimension in excess of ten feet, while exhibit E-9 shows a boulder with a maximum dimension of approximately six feet. Tr 357-58. These were the two largest boulders Mr. Schmittel could find on the claim. Tr 399-400. The Knipes entered into the record a letter from Anna McCormick, Owner and President of Mid Valley Rock, which noted that one of the attributes of the stone which caught her eye was its “large size,” which she stated was “surely in high demand.” Ex R.

When Mr. Schmittel was asked on cross-examination about the proportion of Trinity Black and White on the claim which was the size of the rock in Exhibit E-1 (four feet at its longest dimension (Tr 351-52)), he could only hazard a “pure speculative guess.” Tr 399. This guess was “in the 20 to 30 percent range.” Tr 399. He did not provide an estimate with regard to

the proportion of Trinity Black and White that was six inches or greater, but stated that in general approximately 50% of the alluvial gravels on the claim consists of material that is six inches or greater. Tr 400, 393-94. He further stated that he expected to see larger sizes of the pegmatitic gabbro below ground. Ex D, p 3; Tr 400.

To the extent that the Knipes are alleging that the size of the pegmatitic gabbro on their claim is unique compared to other stones used for landscaping purposes, it is hard to deduce the precise size that they believe is unique. Although rock yard operator Anna McCormick states in her letter that the “large size” of the stone “caught her attention,” it is not clear from the record what size she is talking about. Ex R. The Knipes have not explicitly changed the assertion made in their patent application that the “uncommon” mineral deposit on their claim consists of pegmatitic gabbro which is six inches or greater. Clearly, this size is not in itself unique. Both sides agree, as set forth above, that 50% of the alluvial material on the claim is greater than 6 inches, and that a large proportion of mineral material on the claim which is greater than six inches consists of stone other than pegmatitic gabbro. See Ex 14, p 7 (Mr. Texeira estimated that of the plus 6 inch material on the claim, 75%-80% consisted of “peridotite or serpentine,” 15%-20% consisted of “nonpegmatitic gabbro or diorite,” and 5%-10% consisted of pegmatitic gabbro).

Accordingly, this forum finds that the Knipes have not established by a preponderance of the evidence that the relative size of the pegmatitic gabbro on their claim is a unique property of the stone. Although the Knipes presented some evidence that the pegmatitic gabbro on their claim may occur in larger sizes than other stone generally, they have not presented specific enough evidence which would allow this forum to determine that a certain specific size of the pegmatitic gabbro is an uncommon variety of stone.

(b)(1)(D) Ability to Take a Polish

Mr. Mullican testified that the ability of the pegmatitic gabbro on the claim to take a polish was “exceptional.” Tr 273. However, the Knipes did not present sufficient evidence to show that the ability of the pegmatitic gabbro to take a polish was uncommon. See U.S. v. Stevens, 14 IBLA 380, 391 (1974) (“The mere fact the stones may be polished is not sufficient to meet the uncommon variety test, as hardness, the prime requisite for polishing, is a property common to many types of stone found in great abundance.”). Moreover, the Knipes have not shown that the ability of a rock to take a polish is an important quality for a rock which is to be used for landscaping purposes. According to Mr. Mullican, the advantage of having an ability to take a polish was that the stone could be used for tile or counter tops. Tr 285. However, the Knipes have not shown that there is any market for the use of the pegmatitic gabbro for such purposes, and have not compared the pegmatitic gabbro with other stones used for such purposes.

(b)(1)(E) Rarity of Rodingite

The Knipes argue that the pegmatitic gabbro on their claim is rodingite, and that “rodingite is found in only a very few locations in the world * * *.” Knipes’ Opening Brief, p 2. The Knipes primarily rely upon Professor Coleman’s letters for their assertion that the pegmatitic gabbro on their claim is unique. Knipes’ Opening Brief, pp 33-34. However, the evidence provided by Professor Coleman’s letters concerning the rarity of rodingite does little to support the Knipes’ assertion that the pegmatitic gabbro on their claim is an uncommon variety of stone. That rodingite is found only in several broad areas worldwide, such as “Oregon and California,” does not mean that rodingite must be considered to be an uncommon variety. Moreover, although Professor Coleman notes that the size of the rodingite specimens in the “Trinity peridotite” is larger than that of most other “occurrences of rodingites,” he does not specify that this is true for the specimens on the claim.

Mr. Teixeira stated that he spoke with Professor Coleman, and that Professor Coleman’s opinion was based on the geological rarity of rodingite. Tr 242-43. As the Board has pointed out, all deposits of stone can be described as unique if enough properties are considered. See Multiple Use, 120 IBLA at 78, n 13. Therefore, this forum finds that the Knipes have not shown that the alleged “rarity” of the pegmatitic gabbro is a unique property of the stone.

(b)(2) The Knipes Failed to Establish That the Unique Properties of the Pegmatitic Gabbro Give the Pegmatitic Gabbro a Distinct and Special Value For Use as Landscaping Rock or Decorative Stone

As set forth above, the Knipes established that the pegmatitic gabbro on their claim has two unique properties, its color or appearance and its toughness or durability. Supra, pp 17-19. However, it is not enough to show that stone has unique properties – it must also be shown that the unique properties give the stone a distinct and special value. LeFaivre, supra, 138 IBLA at 66. As set forth above, the key is whether some intrinsic property of the stone allows a person to receive substantially more profit from mining the stone than that person would receive from mining a common variety of stone, either because the intrinsic property brings the stone a higher price in the marketplace or because the intrinsic property allows the stone to be mined at less cost.

Mr. Lawler’s report argues that the unique properties of the pegmatitic gabbro result in a higher price “compared to common variety decorative rock.” Ex B, p 5. He claims that “the Trinity Black and White Decorative Rock is highly prized by commercial rock yards due to its combination of unique textural and durability properties * * *.” Ex B, p 5. The latter claim is based on letters from various rock yards which are addressed to Mr. Lawler. For example, in a letter dated November 14, 1990, Victor Thomas, the General Manager of Lyngso Garden Materials, Inc., states:

It is the opinion of our firm that the Trinity Black/White Decorative Stone represents a unique and distinct variety in the marketplace based on its durability and strength, large crystal size and interlocking crystal textural characteristics when compared with other decorative rock types.

It is the opinion of our firm that the Trinity Black/White Decorative Stone commands a higher price on the market (\$55/ton) than other varieties of decorative stone (for example, Sonoma Moss rock, granite, etc.) due to its unique qualities.

Ex C, Att A-2. Similarly, Ray Wetmore of County Building Materials states in a letter also dated November 14, 1990:

As the primary purchasing agent of County Building Materials, my opinion is that the Trinity Black/White Decorative Stone represents a unique and distinct variety not currently available in the marketplace. Due to it's [sic] unprecedented colors, durability and strength, along with its large crystal characteristics, it would be a great asset to the decorative rock industry.

It is the opinion of our firm that the trinity Black/White Decorative Stone commissions a greater price on the market (\$55/ton) than other more typical varieties of decorative stone (for example, Sonoma Moss rock, granite, etc.) due to its unparalleled qualities mentioned above.

Ex C, Att A-1. Most of the other eight letters assert some variation on the theme that the authors expect the pegmatitic gabbro to bring a higher price, either because of its durability or its unique appearance, or both. Ex C, Atts A-3 to A-7, A-9 to A-11.

Although the letters vary in both wording in content, there are enough similarities among the various letters to cause this forum to question the extent to which the letters truly represent the views of the authors, as opposed to the coaching of Mr. Lawler. Moreover, the letters do not show that the pegmatitic gabbro commands a higher price as landscaping rock than the wide variety of other stones which are used for landscaping purposes. At best, the letters show that certain rock yards were willing to pay more for the pegmatitic gabbro than they pay for some other types of stone used for landscaping purposes, such as moss rock. The letters leave many questions open, such as whether the pegmatitic gabbro, while commanding a higher price than some types of landscaping rock (which may be on the low end of the scale), nevertheless commands a similar price to other types of rock used for landscaping purposes which would be classified as common variety stone.

A similar problem is present for the chart presented on the last page of Exhibit C. In this chart, Mr. Lawler compares the expected price of the pegmatitic gabbro per ton to the price of moss rock per ton at a number of rock yards. The chart shows that the rock yards surveyed

would typically pay \$55-65 per ton for the pegmatitic gabbro as opposed to \$35-40 per ton for moss rock. However, although he alleges that moss rock is a common variety, Mr. Lawler does not show that the price for moss rock is typical or average for the various types of stone used for landscaping purposes.

The Knipes suffer from the same problem with regard to 2002 prices. The Knipes offered evidence by Mr. Mullican and Mr. Schmittel, to the effect that certain rock yards would buy Trinity Black and White for \$139 per ton. Tr 309. The Knipes also presented a contract with a rock yard, Klamath Forest Products in Weed, California, which is the closest town to the claim. The rock yard offered to pay the Knipes \$65 per ton for Trinity Black and White on consignment, delivered to the rock yard's site. Ex P, Tr 367-68. Although this contract supports the Knipes' assertion that the pegmatitic gabbro on their claim is marketable, which is a separate issue, it does little to support their case that the pegmatitic gabbro is an uncommon variety of stone. Other than the actual sales of pegmatitic gabbro in 1989, the contract is the strongest evidence in the record concerning the price that a willing buyer would pay for the pegmatitic gabbro on the Knipes' claim. It is an actual, signed contract, as opposed to the estimates based on hearsay provided by Mr. Teixeira, Mr. Mullican, and Mr. Schmittel. The price of \$65 per ton is near the bottom of the range of prices (\$50-\$200) for landscaping rock or decorative stone set forth by Mr. Teixeira. Supra, p 12.

In his report, Mr. Teixeira discussed his findings concerning the color of the pegmatitic gabbro:

The rock yard operators all felt that although the color of the pegmatitic gabbro was different, it was not an advantage in marketing. Earth tone colors such as tan or gray are consistently in demand in the landscaping rock market. There is no market established for the color of the pegmatitic gabbro. Normally only a limited amount of colorful rock, including rocks with contrasting colors such as black and white, can be used in landscaping at a particular site.

Ex 14, p 11. As set forth above, Mr. Teixeira also testified concerning his observations in rock yards to the effect that the "vast majority" of stones he saw in his visits to rock yards were "earth tones, grays, light greens, tans, off whites, with some dark blue, dark grays." Tr 126. Although this evidence helped to establish the appearance of the pegmatitic gabbro as a unique property of the stone, it also tends to establish that the black and white colors of the pegmatitic gabbro are not in high demand.

The Board addressed the issue of the extent to which coloration can make a particular mineral deposit uncommon in U.S. v. Dunbar Stone, 56 IBLA 61, 65 (1981). In Dunbar, the claimants argued that the schist on their claims was more beautifully colored than other available schist. The Board declined to find that the schist was an uncommon variety based on its coloration, stating:

Attractive coloration, even if unusual, does not distinguish a deposit of stone from other deposits of the same stone so as to justify the conclusion that the deposit has a distinct and special property, where comparable stone is abundant and is found with varied colorations. * * * This is because beauty of coloration is inherently subjective. One type of coloration from among the infinite variety of nature may appeal to some persons, and this coloration may in fact be unusual. However, the fact that one deposit of a material may bear this coloration does not make it unique, as there are often deposits which will do the same job to the full satisfaction of the other persons. Appellant makes no price distinction based on the various colors * * *.

Dunbar Stone, *supra*, 56 IBLA at 65 (citations omitted). Thus, although the Board left open the possibility that a showing of price distinctions based on color might lead to a finding of uncommon variety, the Board made clear that the appearance of stone is generally a weak basis for distinguishing between common and uncommon varieties of stone.

In this case, the Knipes have not shown that the color or appearance of the pegmatitic gabbro on their claims is so striking or unusual that it gives the stone a “distinct and special value” which is “reflected by the higher price which the material commands in the marketplace.” The letters from rock yard operators do not show this; at best, these letters show that there may be a market for the pegmatitic gabbro and that the pegmatitic gabbro may be worth more than some other types of stone, such as moss rock. The testimony of Mr. Schmittel and Mr. Mullican provides their relative opinions about the beauty of the pegmatitic gabbro, but does not show how that “beauty” leads to a higher price in the marketplace. Accordingly, this forum finds that the Knipes have not met their burden of showing that the color or appearance of the pegmatitic gabbro on their claim makes their stone an uncommon variety of stone within the meaning of 30 U.S.C. § 611.

With regard to the property of strength and durability, Mr. Texeira asserts that this property does not give the pegmatitic gabbro any greater value in the marketplace, and in fact reduces its value in the marketplace. Forest Service’s Opening Brief, pp 9-10. Mr. Texeira commented on the strength of the pegmatitic gabbro on the claim in his report:

All of those rock yards questioned commented on the high density or weight of the rock. Although breakage is a factor in flat, thin rocks * * *, the strength or “permanence” was not significant to the operators contacted. Most felt the high density would increase transportation costs since less rock volume could be shipped in a 25 ton load. Higher density would result in less rock volume per ton to the consumer. Since rocks are sold on a per ton basis, this would result in a higher cost per square foot to the consumer to cover an area. Many homeowners want to be able to move the landscaping rocks in their yard and look for rocks 200 pounds or less. The high density would result in smaller specimens of the

pegmatitic gabbro versus other lighter rocks being utilized to fill this segment of the market. * * *

[T]he high density and strength of the rock * * * is not a characteristic that results in an advantage for this rock in the market place and appears to be a detriment. The strength, or lack of it, is not an issue for cobble or specimen type landscaping rock and is not a property for which consumers would be willing to pay a higher price.

Ex 14, p 14. Mr. Texeira repeated these conclusions in his testimony. Tr 133-35, 208-210.

Although the Knipes have succeeded in showing that the pegmatitic gabbro is an unusually tough stone, the Knipes have failed to meet their burden of showing that the strength or durability of the pegmatitic gabbro leads to a higher price in the marketplace. The Knipes' evidence concerning pricing does not differentiate between price increases obtained as a result of the pegmatitic gabbro's appearance versus the pegmatitic gabbro's strength. Therefore, the weaknesses in that evidence, as set forth above, apply to the property of strength as well. Furthermore, this forum finds Mr. Texeira's assertion that the high density of the stone may be a detriment to be rational and credible. See McCormick, supra, 27 IBLA at 83 (low density of mineral material cited as one of the factors making the material an uncommon variety, because "a ton of the subject material will cover a 20 percent greater area."). Therefore, the Knipes have failed to show that the strength or permanence of the pegmatitic gabbro on their claim is a property that gives the stone a "distinct and special value" which is reflected in a higher price in the marketplace.

In general, the Knipes did not attempt to make a showing that the types of stones to which the Forest Service compared the pegmatitic gabbro were themselves uncommon varieties of stone, as the claimants successfully argued in the Vaughn case. Supra, p 8. The one exception is "Yuba Blue." The Knipes argue that "Yuba Blue" is an uncommon variety of rock, although Mr. Texeira used it as a comparison stone in his market study. Contestees' Additional Briefing, p 3. On the other hand, the Knipes agree that moss rock, another stone used by Mr. Texeira for comparison, is a common variety stone. Id., pp 3-4. In terms of specific prices, the Knipes appear to contend that the price which can be obtained for Yuba Blue, which sells for a wholesale price of \$139 per ton and a retail price of \$280 per ton, reflects a "distinct and special value" for that stone.¹⁵ Id., p 3. By contrast, the Knipes appear to contend that the price of moss

¹⁵ In his testimony, Mr. Mullican discussed some specimens of Yuba Blue that he considered "jewelry grade" stones because they had "infusions of reds." Tr 262. He planned on selling these stones for between \$5,000 and \$30,000 dollars. Tr 262. The record does not contain the weight of these stones, so it is not possible to use these stones for comparison to the pegmatitic gabbro. However, the implication is that these stones would retail for much more than the \$280 retail price Mr. Mullican received for his "average" Yuba Blue. Tr 262.

rock, or the common variety price which should be used for comparison, is \$35-\$40 per ton. Id., p 3.

According to Mr. Texeira, Yuba Blue boulders from two to four feet in size retailed in 1991 at between \$220 and \$240 per ton. Ex 14, p 12. This was in the high average range for the landscaping stones used in Mr. Texeira's comparison. Id., pp 12-13. Accounting for inflation, this estimate is similar to Mr. Mullican's assertion that at the time of the hearing he was selling Yuba Blue for a retail value of \$280. Tr 262. However, even if Yuba Blue is assumed to be an uncommon variety of stone, this fact does not support the Knipes' case that the pegmatitic gabbro on their claim is also an uncommon variety. The Knipes sold approximately 24 tons of their pegmatitic gabbro to two rock yards for \$55 per ton. Es A, p 6. Although the retail price that the pegmatitic gabbro subsequently sold for is not set forth in the record, Mr. Texeira estimated that the retail price is generally about double the wholesale price. Ex 14, p 12. This estimate was unrebutted, and was in fact supported by Mr. Mullican's testimony that his Yuba Blue sold for \$139 per ton at rock yards and retailed for \$280 per ton. Therefore, to the extent that the rock yards sold the pegmatitic gabbro purchased from the Knipes, they probably sold it for no more than \$110 per ton retail value, which is at best one-half of the retail price for Yuba Blue.

On the other hand, a retail price of \$110 per ton in 1989 is comparable to moss rock, which, according to Mr. Texeira, retailed for between \$80 and \$260 per ton. Therefore, if moss rock is assumed to be common, as both parties assert, the comparable price of the pegmatitic gabbro does not reflect a "distinct and special" value for use as landscaping stone.

Similarly, if 2002 prices are used, the best evidence for the price of the pegmatitic gabbro in 2002 is the contract submitted by the Knipes, in which a rock yard agreed to pay the Knipes \$65 per ton for the pegmatitic gabbro. This price is much closer to the wholesale price of moss rock, even if the Knipes own limit of "\$35-\$40" per ton for moss rock is used, than it is to the wholesale price of \$139 per ton, which the Knipes claim makes Yuba Blue an uncommon variety of stone. Moreover, the \$65 per ton is much less than Mr. Texeira's estimated average wholesale price of \$126 per ton in 2002. Therefore, even if Yuba Blue is assumed to be an uncommon variety of stone, the Knipes have not shown by a preponderance of the evidence that the pegmatitic gabbro on their claim has a distinct and special value for use as landscaping stone which is reflected by a higher price in the marketplace.

In any event, the Knipes have not shown that \$139 per ton wholesale, in 2002, should be considered a price which indicates that a stone has a distinct and special value for use as landscaping rock. This price lies within the \$50-\$200 range of wholesale prices which Mr. Texeira found in his 2002 survey of rock yards, and is not far above the average price of \$126 per ton estimated by Mr. Texeira. See U.S. v. Rothbard, 137 IBLA 159, 174 (1996) ("Rainbow mason sand" found to be a common variety when its price, \$15.00 per cubic yard, fell "within the range of prices for competing mason sands: \$6.00 to \$20.50 per cubic yard.").

In addition, the Knipes have not shown that \$35-\$40 per ton remains an appropriate price for moss rock.¹⁶ Mr. Teixeira found retail prices of moss rock to range in 1991 from \$80 to \$260 per ton, which would translate into wholesale prices of \$40 to \$130 per ton. This would indicate that \$40 per ton would be on the low end for moss rock, instead of representing a typical price for moss rock. The letters to Mr. Lawler from rock yard owners, written in late 1990 and early 1991, gave the range for moss rock at \$34-\$45 per ton. Ex C, Atts A-4, A-11. Mr. Lawler's price chart containing price quotes from October to November of 1990, contain price quotes of \$35-\$40 per ton. Thus, without any basis in the record, the Knipes are asserting that the price for moss rock has remained the same over the past 12 years. Mr. Teixeira testified that rock prices have increased between 20% and 100% between 1990 and 2002. Tr 228. Therefore, this forum finds that the Knipes have not shown that the price of moss rock was \$35-\$40 per ton in 2002.

The Knipes had Mr. Teixeira's report, and their experts could have visited the same rock yards visited by Mr. Teixeira to rebut his evidence. However, they did not rebut the price comparisons made by Mr. Teixeira in his report. See Tr 394 (Mr. Schmittel did not observe prices for decorative stones when he visited rock yards). They have not shown that Mr. Teixeira improperly compared the pegmatitic gabbro with uncommon varieties of stone, and they have not shown that Mr. Teixeira's price estimates for the other varieties of stone, or for the pegmatitic gabbro itself, were inaccurate. The Knipes did not succeed in showing that more would be paid for the pegmatitic gabbro than would be paid for the wide variety of landscaping rocks set out in the Forest Service's report. Because Mr. Teixeira's report reflects a more comprehensive comparison of prices, the Knipes have not shown by a preponderance of the evidence that the pegmatitic gabbro on their claim has a "distinct and special value" which leads to a higher price in the marketplace.

Nevertheless, even though the Knipes have not shown that the pegmatitic gabbro would receive a higher price in the marketplace, a finding that a deposit of stone is an uncommon variety may be based on certain inherent properties of the stone which result in reduced cost or overhead. See McClarty v. Secretary of Interior, 408 F.2d 907, 909 (9th Cir. 1969). Thus, even though the price paid for the stone may be the same as that paid for common varieties of stone, the stone may be an uncommon variety if reduced costs lead to substantially greater profits. On remand in the McClarty case, the Board found that the unique qualities of the stone at issue made the stone "cheaper by half to quarry and prepare for market." U.S. v. McClarty, 17 IBLA 20, 45 (1974). Therefore, the Board decided that the stone in that case was an uncommon variety.

It is important to distinguish between inherent properties of the stone deposit and extrinsic factors when determining whether the reduced cost of mining a particular deposit of

¹⁶ The Knipes state in their supplemental brief that "moss rock is still selling for \$35 per ton," relying on testimony from Mr. Mullican. Knipes' Supplemental Brief, p 3. However, Mr. Mullican was talking about the price of moss rock after "15 years in the business." Tr 268. Because Mr. Mullican started his business in 1969, the \$35 per ton price refers to the price of moss rock in 1984, not in 2002. Tr 257.

stone makes the stone an uncommon variety. See LeFaivre, supra, 138 IBLA at 67. An example of an extrinsic factor leading to lower costs would be the proximity of the deposit to the market. The fact that a certain deposit is close to a market, which results in lower transportation costs and increased profit as compared to other deposits of stone, cannot lead to a finding that the deposit is an uncommon variety, because proximity to the market is an extrinsic factor. See U.S. v. Verdugo and Miller, 37 IBLA 277, 281 (1978).

In their testimony, both Mr. Mullican and Mr. Schmittel commented on the ease with which the pegmatitic gabbro on the claim could be recovered. Mr. Mullican compared the deposit of Yuba Blue which he mines with the deposit of pegmatitic gabbro on the Elevator # 4. Tr 269. The Yuba Blue deposit is in a steep canyon, with a 350 foot rise. Tr 269. Mr. Mullican looked at some of the photos that Mr. Schmittel took of the claim site and noted that the claim has a paved road “right next to your supply.” Tr 277. Mr. Mullican called this “extremely unusual.” He testified that not having to take the rock out of a canyon would affect the cost of production. Tr 277.

For his part, Mr. Schmittel compared the potential extraction of the pegmatitic gabbro on the claim with the extraction of marble in quarries. Tr 347-48. Mr. Schmittel stated that when extracting marble from quarries, it is necessary to drill “close centered holes” along the stone and then attempt to break the stone along the weakness provided by holes. Tr 347. When asked to compare the ease of extraction of marble with the ease of extraction of the pegmatitic gabbro, Mr. Schmittel stated:

A * * * [T]here is no comparison. It is so easy to take these large stones out of the alluvial deposit that there is no comparison. We are talking literally lots of dollars a ton.

Q (By Mr. Corbin) You don't have any blasting involved?

A No.

Q The stones you observed are not cemented?

A No.

Q What about removing the alluvium between them, in other words the dirt in lay terms, it is not costly, is it?

A It is not. You can easily remove it with a simple screen.

Tr 348. The Knipes argue that the ease with which the pegmatitic gabbro could be recovered is one of the factors which makes it an uncommon variety of stone. Knipes' Opening Brief, pp 3-4.

However, the fact that the pegmatitic gabbro is next to a paved road, and not in a deep canyon with limited access, is an extrinsic factor which should be discounted when determining whether the material is common variety. See U.S. v. Smith, 66 IBLA 182, 188 (1982) (“direct access to highway” an extrinsic factor). Similarly, the fact that the material is on the surface, and not covered with overburden, is an extrinsic factor. See U.S. v. Multiple Use, 120 IBLA 63, 94 (1991) (“The presence or lack of overburden is of no consequence. * * * [O]verburden is not an intrinsic quality of the pumice being sold.”).

The Board has held that if material is naturally fractured, “so as to preclude the necessity for drilling, blasting, or other quarry work,” this can be an intrinsic factor which leads to the conclusion that the material is an uncommon variety. U.S. v. McCormick, 27 IBLA 65, 84 (1976) (citing additional Board precedent to that effect). The Knipes appear to rely on this concept when they compare the ease of recovering the pegmatitic gabbro with the ease of recovering marble. However, the Knipes have not made a valid comparison, because in cases where the uses for a stone are uses to which ordinary varieties are to be put, the deposit of stone must have some distinct and special value for such use. Supra, p 6. In this case, the use proposed for the pegmatitic gabbro is as landscaping rock. However, other types of stone used as landscaping rock, such as moss rock, can also be mined without the necessity for drilling, blasting, or other quarry work. Ex 14, p 12 (“[T]he Oregon Moss Rock and River Washed Rock are gathered off the surface by hand or with small hoists or loaders * * *.”). Thus, the fact that the pegmatitic gabbro can be obtained without drilling or blasting does not give it a distinct and special value for use as landscaping rock – other types of landscaping rock can also be obtained this way.

Even if the ease with which the pegmatitic gabbro can be recovered gave it a distinct and special value for use as landscaping rock, the Knipes have not presented specific cost figures showing the extent to which the ease of recovery leads to a greater profit. Compare U.S. v. McClarty, 11 IBLA 20, 45 (1974) (“Heatherstone is cheaper by half to quarry and prepare for market * * *.”). Therefore the Knipes have failed to show that the ease with which the pegmatitic gabbro on their claim can be recovered is a property that makes the stone an uncommon variety of stone.

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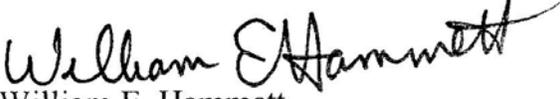
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Conclusion

For the above reasons, this forum finds that the pegmatitic gabbro on the Elevator # 4 placer mining claim (CAMC 29875) is a common variety of stone which is not locatable. Therefore, the Elevator # 4 placer mining claim (CAMC 29875) is hereby declared null and void, and patent application CACA 26770 is hereby rejected.

Because this forum finds that the pegmatitic gabbro is a common variety of stone, this forum does not reach the other issues raised in this matter, such as whether the claim contains a discovery of the pegmatitic gabbro. Supra, pp 4-5.

Issued at Sacramento, California. Dated: May 29, 2003


William E. Hammett
Administrative Law Judge