



LON THOMAS & LON THOMAS & ASSOCIATES, INC. V BLM

180 IBLA 182

Decided December 10, 2010



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

LON THOMAS & LON THOMAS & ASSOCIATES, INC.  
v.  
BUREAU OF LAND MANAGEMENT

IBLA 2008-30

Decided December 10, 2010

Appeal from a decision of Administrative Law Judge Robert G. Holt affirming in part and reversing in part a calculation of damages by the Salt Lake (Utah) Field Office, Bureau of Land Management, for a mineral material trespass. UTU-77793.

Reversed.

1. Trespass: Generally

A party challenging a BLM trespass decision bears the ultimate burden of proving, by a preponderance of the evidence, that BLM erred in its determination of the trespass damages for the unauthorized extraction and removal of mineral material from an area of the public lands.

2. Trespass: Generally

BLM's calculation of the quantity of mineral material extracted and removed from the public lands based on measuring the area disturbed by operations, for the purpose of determining damages for a mineral material trespass, will be upheld where the trespasser fails to demonstrate, by a preponderance of the evidence, any error in the calculations of BLM's technical experts, either because BLM was not aware of baseline conditions or actual operations at the trespass site, or because the amount of material taken in trespass was differently reflected in records generated by the trespasser years after the trespass took place.

## 3. Trespass: Generally

A party who has removed mineral material from the public lands in trespass and then returned certain material to the removal site, without any prior authorization from BLM, will not be afforded any mitigation of trespass damages based on the value of the materials returned to the trespass site.

## 4. Trespass: Generally

Under section 304 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1734 (2006), and BLM policy pronouncements, BLM properly assesses the administrative costs incurred in investigating and prosecuting a mineral material trespass.

APPEARANCES: Ronald S. George, Esq., Salt Lake City, Utah, for Lon Thomas and Lon Thomas & Associates, Inc.; Christopher J. Morley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE ROBERTS

The Bureau of Land Management (BLM) has appealed from an October 10, 2007, decision of Administrative Law Judge (ALJ or Judge) Robert G. Holt affirming in part and reversing in part a December 6, 2002, decision of the Assistant Field Manager, Non-Renewable Resources, Salt Lake (Utah) Field Office, BLM, issued to Lon Thomas and Lon Thomas & Associates, Inc.<sup>1</sup> The case concerns BLM's calculation of damages for a mineral material trespass (UTU-77793 (formerly, UTU-77018)) committed by Thomas at two sites in secs. 17 and 20, T. 14 N., R. 17 W., Salt Lake Meridian, Box Elder County, Utah, in the Cotton Thomas Basin area of the Goose Creek Mountains in northwestern Utah.<sup>2</sup>

<sup>1</sup> In this opinion, we refer to "Lon Thomas" when we refer to the individual, "Thomas" when we refer to the company, and "Thomas" when we refer to the individual and the company collectively.

<sup>2</sup> The two sites encompass less than one acre of land situated in the NE $\frac{1}{4}$ SE $\frac{1}{4}$  of sec. 17 (Area 1) and the SW $\frac{1}{4}$ NE $\frac{1}{4}$  of sec. 20 (Area 2). Judge Holt termed Area 1 the "Granite Site," since gneiss, which was the material being excavated at that site, is considered "a type of granite," and termed Area 2 the "Quartzite Site," since quartzite

(continued...)

Thomas' liability for the extraction and removal of material from the two sites is not at issue, since BLM and Thomas have stipulated that Thomas extracted and removed material from the sites without authorization, committing a trespass, which they agree was innocent in nature, and not intentional. See Final Prehearing Order, dated May 8, 2007, at 1. Rather, what is at issue is whether and/or to what extent Thomas is properly charged damages for the trespass. At issue are the damages assessed for the extraction and removal of material from both sites, since Judge Holt overturned BLM's original and revised calculation of damages for the extraction and removal of materials from Area 1 and Area 2.<sup>3</sup> He did so based on his conclusion that the preponderance of the evidence supported Thomas' determination of the amount of material extracted and removed, as well as on the fact that Thomas' return of the material to Area 1 (but not to Area 2) mitigated any damages for the extraction and removal from Area 1. Judge Holt found Thomas liable only for \$1,505.33 (200.71 tons, valued at \$7.50/ton) for the extraction and removal of material from Area 2. Also at issue are the administrative costs assessed by BLM (\$6,138.07) for the entire trespass action, since Judge Holt concluded that BLM was not entitled to any such costs.

---

<sup>2</sup> (...continued)

was the material being excavated at that site. Decision at 2, 23. This land was originally patented, with a reservation of all coal and other minerals to the United States, pursuant to the Stock Raising Homestead Act (SRHA), 43 U.S.C. §§ 291-302 (1970). The surface estate is currently owned by Thomas, which is in the business of stone quarrying and fabrication for building and landscaping purposes. Thomas also operates 11 quarries (3 gneiss and 8 quartzite) in the Cotton Thomas Basin area, as well as two storage and processing yards in Oakley, Idaho, approximately 40 miles from the two sites at issue, and in Salt Lake City, Utah, approximately 175 miles from the two sites at issue. The mineral estate is considered to be public lands under the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1785 (2006). See 43 U.S.C. § 1702(e) (2006) (meaning of "public lands").

<sup>3</sup> BLM originally calculated trespass damages for the removal of 3,370 tons (valued at \$7.50/ton, totaling \$25,275) from Area 1 and 1,369 tons (valued at \$7.50/ton, totaling \$10,267.50) from Area 2, for a grand total of \$35,542.50. Following its December 2002 decision, BLM revised its calculations to reflect the removal of 2,318 tons (valued at \$7.50/ton, for a total of \$17,385) from Area 1, and 1,064 tons (valued at \$7.50/ton, for a total of \$7,980) from Area 2, for a grand total of \$25,365. BLM and Thomas have stipulated that the value of the material, for trespass damage purposes, is \$7.50 per ton, which represents the royalty value, *i.e.*, a percentage of the value of the material which would have been paid to the United States on the sale of the material. See Final Prehearing Order at 1; Order, IBLA 2003-99 (Mar. 10, 2005), at 3 n.4; *Nielson v. BLM*, 125 IBLA 353, 367-68 (1993).

## I. BACKGROUND

### A. BLM's October 1, 1998, Trespass Notice

The Materials Act of 1947, 30 U.S.C. §§ 601-604 (2006), and its implementing regulations (43 C.F.R. Part 3600), govern the proper sale or other disposal of mineral materials from the public lands. Under 43 C.F.R. § 3601.71(a), a person “must not extract, sever, or remove mineral materials from public lands under the jurisdiction of the Department of the Interior, unless BLM . . . authorizes the removal by sale or permit,” and a “[v]iolation of this prohibition constitutes *unauthorized use*.”<sup>4</sup> (Emphasis added.) Under 43 C.F.R. § 3601.72, “[u]nauthorized users are liable for damages to the United States, and are subject to prosecution for such unlawful acts [under 43 C.F.R. Subpart 9239].” And under 43 C.F.R. § 9239.0-7,

*[t]he extraction, severance, injury, or removal of . . . mineral materials from public lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass. Trespassers will be liable in damages to the United States, and will be subject to prosecution for such unlawful acts. [Emphasis added.]*

*See, e.g., El Rancho Pistachio*, 152 IBLA 87, 92 (2000); *Curtis Sand & Gravel Co.*, 95 IBLA 144, 94 I.D. 1 (1987).

BLM originally issued a trespass notice on October 1, 1998, pursuant to 43 C.F.R. § 9239.0-7, notifying Thomas that during a September 30, 1998, inspection,<sup>5</sup> Thomas had been extracting and removing mineral material consisting of

---

<sup>4</sup> At the time of issuance of the trespass notice at issue, the applicable regulation was 43 C.F.R. § 3603.1 (1998), which embodied the relevant language currently set forth in 43 C.F.R. §§ 3601.71 and 3601.72.

<sup>5</sup> BLM's inspection was initiated by a report of Lynn Kunzler, Senior Reclamation Specialist, Division of Oil, Gas and Mining, Utah Department of Natural Resources, who discovered the trespass on Sept. 16, 1998. *See* Transcript (Tr.) I at 29-35; Ex. B-1 at 2, 12. BLM received a telephone call from Kunzler on Sept. 18, 1998, reporting a “possible trespass” involving the removal of “Federal Minerals” from SRHA lands. Ex. B-1 at 2. Michael (Mike) Ford, Geologist, Salt Lake Field Office, BLM, accompanied by Kunzler, visited the two sites on Sept. 30, 1998, where they observed ongoing extraction/removal of mineral material from the two areas at issue. *See id.* at 4. Kunzler reported the discovery of two “new” quarries, which had not been observed the prior year during an Oct. 15, 1997, inspection. *Id.* at 27, 28.

(continued...)

gneiss, quartzite, and other stone, without a valid contract or other authorization, from SRHA lands situated in secs. 17, 20, 21, and 28, T. 14 N., R. 17 W., Salt Lake Meridian, Box Elder County, Utah, including the specific lands now at issue. See Tr. I at 37-38, 63-68, 74-85, 90-91; Ex. B-1 at 4-12, 27-29; Ex. B-7 at 233-35, 240-41; Ex. B-8 at 249.<sup>6</sup> BLM required Thomas to immediately cease such activity and to effect a settlement for trespass damages within 30 days of receipt of the trespass notice. Thomas received the trespass notice on October 6, 1998. See Tr. I at 92-93; Ex. B-1 at 22-25.

Thomas' immediate response to the October 1998 notice was to inform BLM that he was not aware that he was engaged in any trespass. See Tr. I at 93-94; Ex. B-1 at 30. However, BLM confirmed during an October 14, 1998, inspection that Thomas was still extracting and removing material from Area 1, but no activity was observed at Area 2. See Tr. I at 94-98, 107-08; Tr. III at 123; Ex. B-1 at 33, 36-37, 44, 79; Ex. B-7 at 236-37; Ex. B-8 at 244-246. Thereafter, on October 15, 1998, Thomas sought to resolve the trespass by offering to pay for the material taken from Area 1, and agreeing at BLM's insistence to immediately cease all operations. See Tr. I at 101-02; Ex. B-1 at 43-44. BLM confirmed during a November 3, 1998, inspection that Thomas had ceased all operations at both sites.

Ford, the BLM geologist who conducted the November 3 inspection, also undertook to determine, at that time, the quantity of material taken from both sites. He did so by measuring the size of the two holes which he concluded had been created by Thomas' excavation/removal activity, and then calculating the quantity of material originally contained in each of the holes, given an average depth of 1 and 1-1/2 feet.<sup>7</sup> See Tr. I at 103-11, 113-16, 120-28, 164-65; Tr. III at 159-63; Ex. B-1

---

<sup>5</sup> (...continued)

Using a Global Positioning System device, he estimated that the quarries covered 0.47 acres (Area 1) and 0.87 acres (Area 2). *Id.*

<sup>6</sup> The hearing before Judge Holt took place over three days, from May 15-17, 2007, with each day of testimony generating a separately paginated transcript. The three transcripts are cited by the judge, and will be cited by the Board, as Tr. I (May 15), Tr. II (May 16), and Tr. III (May 17).

<sup>7</sup> For each of the areas, Ford, with the help of an assistant, measured the centerline of the excavated area, placing stakes at 20- or 30-foot intervals along that line, and then measuring, on perpendicular lines from each stake, to the left and right boundaries of the area. See Tr. I at 105-06, 108-09. Finally, he measured the depth of the excavation at every point where the sidelines intersected the edge of the excavation. See Tr. I at 106-07, 109. In each case, Ford found the excavated area to vary in depth from zero to three feet at the edges. See Tr. I at 107, 111; Ex. B-1 at (continued...)

at 46, 49-59. Based on these measurements, Ford concluded that 3,370 and 1,369 tons of material had been extracted and removed, respectively, from Area 1 and Area 2.<sup>8</sup> See Tr. I at 116, 125-26; Ex. B-1 at 46, 52, 53, 58.

By letter dated November 4, 1998, Thomas notified BLM that, in light of BLM's unwillingness to discuss settlement of the trespass charges for extracting and removing gneiss from Area 1, either by allowing it to pay for the material or to make another suitable arrangement, it would be returning the gneiss, which "has been stockpiled in [its] sales yard." Letter to BLM dated Nov. 4, 1998, at 2. Thomas then notified BLM, by letter dated November 25, 1998, that the gneiss, which it later reported as consisting of 200 tons of material, had been returned during the period from November 5 through 13, 1998, and that Thomas had "covered the stone with fines and smoothed out the surface of the area." Letter to BLM dated Nov. 25, 1998, at 1; see Tr. I at 149-51; Tr. II at 219-22, 224, 227; Tr. III at 32-33; Ex. B-7 at 242. It is undisputed that Thomas did so without any prior authorization by BLM. See Tr. I at 151; Tr. II at 170; Tr. III at 33-35. Thomas also later reported to BLM that it had extracted and removed 200.71 tons of quartzite from Area 2, but that this was not returned to the site. See Tr. II at 130; Ex. A 1-3.

Thomas appealed to the Board from BLM's October 1998 trespass notice (IBLA 99-78). At BLM's request, the Board set aside the notice and remanded the case to BLM. See Order, IBLA 99-78 (Feb. 18, 1999). We did so in order to allow BLM to

---

<sup>7</sup> (...continued)

50, 59. Though he did not generally measure for depth inside the two areas, because he had only one day to work, Ford noted that part of the center of Area 1 was five to six feet in depth, and so he felt justified in his average depth assessment. See Tr. I at 111, 164-65, 180; Ex. B-1 at 51. He also reported a five-foot deep hole in the case of Area 2. See Tr. I at 201-02.

<sup>8</sup> Judge Holt noted that on Oct. 15 and 16, 1998, Thomas provided to Ford two tables listing monthly and total "production" of "granite" and "quartzite" from the Goose Creek Mountains during the 4-year period 1995-98. Decision at 9; see Tr. III at 124-25. Noting that the two tables reflected total production of 1,544.8 tons of granite and 266.97 tons of quartzite, Judge Holt concluded that this information should have alerted Ford to the fact that he "may have made substantial errors in his calculation" of 3,370 tons of gneiss and 1,369 tons of quartzite, respectively, from Areas 1 and 2. Decision at 8. At best, the tables reflect the production of "Granite" and "Boulders" from the Goose Creek Mountains. Ex. B-1 at 42, 45; see *id.* at 40, 44. It is not possible to determine whether and/or to what extent they reflect any production of gneiss and quartzite, respectively, from Areas 1 and 2. At the hearing, Thomas submitted a revised table for Area 2 (Ex. A 1-3), but no revised table for Area 1. See Tr. II at 144.

settle the trespass, to the extent it was taking place on lands not covered by mining claims, and to provide for the extraction of material, to the extent it was taking place on lands covered by mining claims. The effect of our order was to remand the matter to BLM to determine whether and to what extent the extraction and removal of material was authorized by the General Mining Law of 1872, 30 U.S.C. §§ 21-54 (2006), because it constituted an uncommon variety of minerals which was being extracted and removed under valid mining claims.<sup>9</sup>

*B. BLM's December 6, 2002, Decision*

By decision dated December 6, 2002, the Assistant Field Manager notified Thomas, pursuant to 43 C.F.R. § 9239.0-7, that Thomas had committed a mineral material trespass, and was liable for trespass damages in the amount of \$40,182.50, representing the value of the material removed (\$35,542.50) and the administrative costs incurred by BLM in investigating and resolving the trespass (\$4,640). BLM specifically determined that 3,370 tons of “[c]ommon variety gneiss” had been removed from a “hill-side quarry” in the NE<sup>1</sup>/<sub>4</sub>SE<sup>1</sup>/<sub>4</sub> of sec. 17, and that 1,369 tons of “[c]ommon variety quartzite” had been removed from an “active drainage” in the SW<sup>1</sup>/<sub>4</sub>NE<sup>1</sup>/<sub>4</sub> of sec. 20. Decision dated Dec. 6, 2002, at 2. Neither area was deemed to have been covered by a mining claim at the time of extraction/removal. *See* Tr. I at 65-66; Ex. B-1 at 13. BLM valued all of the mineral material, which was considered to be “building stone,” at \$7.50 per ton as of the time of the trespass. Decision dated Dec. 6, 2002, at 2. Thomas was required to pay a total of \$40,182.50, or enter into a suitable payment schedule within 30 days, failing which BLM “will pursue additional measures to collect this amount.” *Id.*

Thomas filed an appeal from BLM's December 2002 decision, which the Board docketed as IBLA 2003-99. Thomas argued that following BLM's October 1998 trespass notice, it had located mining claims covering both Area 1 and Area 2, that such location related back to the date of the removal of the materials, which are properly considered uncommon varieties of mineral, and that its removal of the

---

<sup>9</sup> Immediately upon remand, and prior to its December 2002 decision, BLM issued a Sept. 1, 1999, decision notifying Thomas that it was deemed to have engaged in a trespass by extracting and removing a common variety mineral, both within and outside its mining claims, from secs. 17, 20, and 21, T. 14 N., R. 17 W., Salt Lake Meridian, Box Elder County, Utah, resulting in trespass damages totaling \$176,350.71. Upon appeal (IBLA 2000-13), we referred the matter for a hearing and decision by an ALJ, by order dated Mar. 30, 2000. However, at BLM's and Thomas' request, BLM's September 1999 decision was set aside by a July 12, 2002, order of ALJ James H. Heffernan, and the matter was again remanded to BLM for consideration of the question whether the material removed from secs. 17, 20, and 21 was a common variety mineral.

materials was not a trespass.<sup>10</sup> SOR, IBLA 2003-99, at 26. Thomas further argued that, even accepting that a trespass occurred, BLM's calculation of trespass damages was in error because it was based upon an inaccurate assessment of the quantity of the mineral material removed. *Id.* at 34. Thomas asserted that its own records "indicate" that only about 210 tons of "uncommon variety gneiss" and "possibly" 200 tons of "broken surface stone and detritus" were removed from Area 1, but that all of this material was returned (along with an "additional 30 [percent] of similar material") between November 5 and 13, 1998. *Id.* at 28. Thomas stated that the material was covered over and the area was smoothed out, in order to resolve the trespass. *Id.* Thomas further asserted that its records "indicate" that only 201 tons of quartzite were removed from Area 2. *Id.* at 30; *see* Thomas Affidavit at 7. Thomas asked that BLM's December 2002 decision at least be modified to reflect the correct calculation of trespass damages. Thomas also requested a hearing.

*C. The Board's March 10, 2005, Order Referring IBLA 2003-99 for Hearing*

By order dated March 10, 2005, we granted Thomas' request for a hearing, referring the case to the Hearings Division, Office of Hearings and Appeals, in Salt Lake City, Utah, for assignment to an ALJ for the purposes of a hearing and a ruling on the merits of Thomas' appeal. We identified two principal issues: (1) whether the mineral materials extracted and removed from the lands at issue were uncommon varieties of mineral, thus obviating any finding of trespass; and (2) if the materials were common varieties of mineral, the appropriate trespass damages, including the amounts of the materials taken in trespass. *See* Order, IBLA 2003-99 (Mar. 10, 2005), at 6, 7.

Prior to the hearing, BLM and Thomas stipulated that the question of whether the materials were common or uncommon varieties of mineral was an issue outside the scope of the pending appeal. *See* Final Prehearing Order at 1. They further agreed that Thomas had committed an innocent trespass, leaving only questions concerning appropriate trespass damages for resolution by Judge Holt and, if necessary, the Board.

*D. The Hearing and Judge Holt's October 10, 2007, Decision*

In his October 2007 decision, Judge Holt held that Thomas had established by a preponderance of the evidence that 200 tons (Area 1) and 200.71 tons (Area 2) of

---

<sup>10</sup> Thomas argued that the gneiss and quartzite at issue were properly located as uncommon varieties of mineral under 30 U.S.C. § 611 (2006), since they have unique properties which impart to them distinct and special values which are reflected in the prices they command in the marketplace. Affidavit of Lon Thomas, dated Jan. 21, 2003 (attached to Statement of Reasons (SOR) in IBLA 2003-99), at 5-6.

mineral material had been extracted and removed from the two sites, rather than BLM's calculated amounts of 2,318 tons (Area 1) and 1,064 tons (Area 2), for a total trespass tonnage of 3,382. *See* Tr. at 13, 132. He concluded that Thomas was liable for trespass damages in the total amount of \$1,505.33 (200.71 tons valued at \$7.50/ton) for the removal of material from Area 2. However, he concluded that Thomas was not liable for any trespass damages for the removal of material from Area 1 because Thomas had mitigated such damages by returning all of the material. Finally, he held that BLM was not entitled, under any authority, to assess any administrative costs for the trespass.

BLM appealed to the Board, asking us to reverse Judge Holt's rulings that Thomas had preponderated on the issue of the volume of mineral material removed from Areas 1 and 2; that Thomas had mitigated damages by returning all of the material removed from Area 1; and that BLM was not entitled to assess administrative costs for the trespass. For the following reasons, we agree with BLM and reverse Judge Holt's decision on all bases.

## II. BURDEN OF PROOF

[1] Thomas, as the party challenging BLM's trespass decision, bore the ultimate burden of proving, by a preponderance of the evidence offered at the hearing, that BLM erred in its determination of trespass damages for the extraction and removal of mineral material from the two areas at issue. *MSVR Equipment Rentals LTD*, 160 IBLA 95, 98 (2003); *H.E. Hunewill Construction Co., Inc.*, 137 IBLA 101, 107 (1996); *Richard C. Nielson*, 129 IBLA 316, 325 (1994).

BLM's calculation of the amount of material taken in trespass is, after the accumulation and analysis of all available data, ultimately based upon the professional opinion of BLM's technical experts. It is well established that BLM is entitled to rely upon that professional opinion, where it concerns matters within the realm of the expertise of the experts and where it is reasonable and supported by record evidence. *Fred E. Payne*, 159 IBLA 69, 77-78 (2003); *West Cow Creek Permittees v. BLM*, 142 IBLA 224, 238 (1998).

As the party challenging BLM's calculation of the amount of material taken in trespass, Thomas must show, by a preponderance of the evidence, error in the data, methodology, analysis, or conclusion of BLM's experts. Thomas' burden is to demonstrate, with objective evidence, *either* that "BLM erred when collecting the underlying data, when interpreting that data, or when reaching the conclusion," *or* that "a demonstrably more accurate study has disclosed a contrary result." *West Cow Creek Permittees v. BLM*, 142 IBLA at 238; *see Richard C. Nielson*, 129 IBLA at 325; *Pine Grove Farms*, 126 IBLA 269, 274 (1993). Conclusory allegations of error or a mere difference of professional opinion will not suffice to show that BLM erred in its

calculation of the amount of material taken in trespass. *West Cow Creek Permittees v. BLM*, 142 IBLA at 238; *Richard C. Nielson*, 129 IBLA at 325. Above all, the party “must show not just that the results of . . . [BLM’s analysis and conclusion] *could be* in error, but that they *are* erroneous.” *West Cow Creek Permittees v. BLM*, 142 IBLA at 8.

On appeal from Judge Holt’s ruling that Thomas carried its burden of showing by a preponderance of the evidence that BLM erred in its determination of trespass damages, BLM has the burden of demonstrating error in that decision. *Nielson v. BLM*, 125 IBLA 353, 356 (1993). We conclude that the record does not support Judge Holt’s ruling that Thomas carried its burden. We further conclude that BLM has demonstrated error in Judge Holt’s decision.

### III. ANALYSIS

#### A. Calculation of the Quantity of Material Taken in Trespass

BLM estimated the “approximate” quantity of the mineral material extracted and removed in trespass by assessing, during the November 3, 1998, field inspection, the acreage of the land deemed to have been newly disturbed by Thomas’ extraction and removal activities, and then calculating the volume and tonnage of material which must have been removed, given removal to an average depth of 1 and 1-1/2 feet across that acreage. BLM’s December 2002 decision reflected these calculations. Ex. B-1 at 46, 53; *see* Tr. I at 105-09, 111-16, 120-28, 163-65; Ex. B-1 at 47, 49-52, 54-59; Ex. B-7 at 243; Ex. B-8 at 250. BLM determined that Thomas had disturbed areas totaling 0.61 acres (Area 1) and 0.26 acres (Area 2), to an average depth of 1.5 feet, which translated to the removal of 3,370 and 1,369 tons of gneiss and quartzite, respectively, from Area 1 and Area 2, given the expected presence of 168 and 160 pounds, respectively, of gneiss and quartzite per cubic foot of material removed.<sup>11</sup> *See* Tr. I at 107, 111, 116, 120-22, 125-26; Ex. B-1 at 46, 49, 52, 53, 57, 58; Ex. B-3.

Subsequent to its December 2002 decision and the filing of Thomas’ appeal, BLM undertook to “refine” its original determination of the quantity of mineral material extracted and removed in trespass, which had been based upon on-the-ground measurements and paper/pencil calculations. Decision at 5. It did so using an “industry-accepted” computer program (SurvCADD), utilizing all of Ford’s data points, to more accurately determine the size of each of the excavated areas. Use of SurvCADD involved estimating the depths of each area at points other than the

---

<sup>11</sup> The pounds of gneiss and quartzite per cubic foot of material were taken from BLM’s Handbook for Mineral Examiners (H-3890-1 (Rel. 3-253 (May 10, 1989)) (Ex. B-3), and were not disputed by Thomas at the hearing. *See* Tr. I at 120-22, 126.

measured points, depending on the distance from the measured points to the other points.<sup>12</sup> *Id.*; see Tr. I at 131-33, 235-41, 243; Tr. II at 174; Ex. B-11 at 313, 315. Although no actual depth measurements were taken within each of the excavated areas, the computer program calculated various depths along the perpendicular lines established by Ford across the area, given the relative distances from the edges of the area and the perimeter depth measurements at either end of the line. Based upon the results achieved by the computer program, BLM concluded that 2,871.9 and 1,317.9 tons of gneiss and quartzite had been removed, respectively, from Area 1 and Area 2. See Tr. I at 132-33, 240-41; Tr. II at 196-97; Ex. B-11 at 312, 314.

BLM then adjusted the tonnage figures in order to account for “voids,” or open spaces, in the stone originally found in those areas. BLM further adjusted the tonnage figures for material which had not been removed from the areas but rather were deposited nearby as “waste.”<sup>13</sup> Decision at 5; see Tr. I at 74, 129-30, 134-42, 229-30, 241; Tr. II at 91-102; Tr. III at 132-33; Ex. B-7 at 233; Ex. B-8 at 249.

BLM’s final conclusion was that 2,318 and 1,064 tons of gneiss and quartzite had been removed, respectively, from Area 1 and Area 2, for a total volume of 3,382 tons of material removed in trespass. See Tr. I at 142.

In its original appeal from BLM’s December 2002 decision, Thomas did not seriously challenge BLM’s determinations regarding the acreage disturbed by Thomas’ extraction/removal operations, or the average depth of such operations, as of November 3, 1998. Thus, Thomas did not attempt to establish any error in BLM’s determinations or the calculations upon which those determinations were based. Rather, at best, Thomas asserted that its own records indicate that the volume of material removed was much less. SOR (IBLA 2003-99) at 28, 30. However, Thomas provided no records supportive of its assertion regarding the amount of gneiss removed from Area 1. In his January 2003 affidavit, Lon Thomas only asserted that a “visual examination” of that area shows that 3,370 tons, the amount originally calculated by Ford to have been removed from Area 1, “have not been removed.” He

---

<sup>12</sup> In addition, while it had originally been included by Ford, BLM also excluded the pad (or fill area), which had been created by Thomas as a truck turn-around in the southeastern corner of Area 1, from its revised calculation of the quantity of material taken from that area. See Tr. I at 160-62, 166-71; Tr. II at 235-36, 250-53; Tr. III at 47-48, 63-64, 71-74, 96-97, 103-06, 122, 161, 203-07; Ex. A-90; Ex. B-1 at 54; Ex. B-7 at 233; compare Ex. B-7 at 243 with Ex. B-1 at 55, 57.

<sup>13</sup> Based on an assessment of the geologic character of the land, BLM subtracted 5 and 15 percent, respectively, for voids and waste, in the case of Area 1, and 15 and 5 percent, respectively, for voids and waste, in the case of Area 2. See Tr. I at 135, 136-38.

did not estimate the volume removed or discuss the basis for his opinion. Thomas did, however, purport to provide evidence from its records supportive of the assertion that 201 tons of quartzite were removed from Area 2. *Id.* However, this documentary evidence (Ex. 2 attached to Thomas Affidavit) refers to “Windridge Production,” and notes that stone, in the form of “Boulders,” totaling 200.71 tons, was produced between October 1995 and September 1998. There is no evidence that this production specifically refers to the removal of quartzite from Area 2. Further, in any event, this evidence purports to be the applicable part of Thomas’ “production and sales records,” and may not reflect the amount of quartzite removed, both sold *and not sold*. See Thomas Affidavit at 7.

Because of the deficiencies and discrepancies in the evidence, we referred the case for a hearing, in part for the purpose of determining the appropriate trespass damages, including the quantity of the mineral material extracted and removed in trespass.

Based on the hearing record, Judge Holt considered the two alternative methodologies by which BLM and Thomas had calculated the quantity of material removed in trespass, noting that BLM relied on “measurements” of the area disturbed by extraction/removal operations, whereas Thomas relied on its “business records.” Decision at 1, 2. Based on this comparison, Judge Holt decided to accept Thomas’ records, even though Thomas’ production records had been destroyed, rather than BLM’s measurements, which he deemed to be “not reliable” because they were based on “unsubstantiated assumptions about the size of the holes Thomas excavated.” *Id.* at 2; see *id.* at 22 (“Thomas’ . . . calculation . . . was more reliable than the calculations made by BLM”).

Judge Holt noted that Ford and the other BLM employees who had participated in the trespass quantity calculations were “very well qualified” and had followed all internal BLM procedures. However, he was not convinced that they had reached valid conclusions, given that their determination of the quantity of material removed from the two areas “*depended upon Ford’s measurements of the excavated areas.*” Decision at 6 (emphasis added); see Tr. I at 105-16, 120-28, 235-41; Tr. II at 88-89, 168-69; Ex. B-1 at 46, 47, 49-59. He stated that BLM’s measurements were dependent upon Ford’s “assumptions” regarding the material excavated and removed from the two areas, a problematic approach, given that Ford “*had no information to verify the validity of his assumption that the measurements he took represented the dimensions of the mineral material that Thomas excavated [and removed].*” Decision at 8 (emphasis added). Judge Holt held that Thomas had preponderated on the evidence:

Thomas admitted from the beginning that he had taken stone from the two sites. He had firsthand knowledge of how he took the stone and the amount he took. He certainly had a better knowledge of the facts than

did BLM's witness who investigated after the events occurred and could only measure the dimensions of the holes he assumed Thomas had dug. *The known facts that Thomas possessed provide more persuasive evidence than the assumed facts that BLM adduced.* [Emphasis added.]

*Id.* at 16. Judge Holt added: "Credible evidence established that BLM made erroneous assumptions about how Thomas had extracted stone from the sites and the amounts he took . . . and [BLM] did not consider any evidence from Thomas about how he had excavated the sites or what quantities he had actually taken." *Id.* at 22.

1. *BLM's Lack of Knowledge of Baseline Conditions and Actual Operations Did Not Undermine Its Conclusions*

[2] Judge Holt stated that Ford simply did not know the actual nature and extent of Thomas' excavation/removal operations since, although he observed the two areas afterward, he had not seen the two areas before such operations occurred and had not talked to anyone who had witnessed such operations.<sup>14</sup> Decision at 6, *citing* Tr. I at 175-76; Tr. III at 163-66. He further noted that Ford's assumptions regarding such operations "differed dramatically" from the actual operations reported by Thomas. Decision at 6. He accepted Thomas' report of operations, as Thomas asserted they had actually occurred, over BLM's assumptions, based on

---

<sup>14</sup> Judge Holt noted that other evidence cast doubt on BLM's calculations regarding the amount of material taken from the two areas, specifically the fact that "Thomas did not have the capacity to remove the quantities that BLM calculated." Decision at 9. He pointed to the fact that Thomas testified that he used one truck, an old blue dump truck with a maximum capacity of 12 tons, which generally made 2 round trips each day from Area 1 to Oakley. *Id.*; *see id.* at 7, *citing* Tr. II at 225-26; and Tr. III at 16, 20); Tr. II at 277; Tr. III at 17; Ex. B-7 at 237, 240, 241. Noting that Thomas admitted to extracting/removing gneiss over a total of 30 days (or 24 work days), from September to October 1998, Judge Holt calculated that Thomas could have removed a total of only 576 tons (12 tons per truck load x 2 truck loads per day x 24 work days) during that time period, which undermined BLM's revised assessment of 2,318 tons. Decision at 9; *see* Tr. II at 26, 238-43, 275-76; Tr. III at 66, 70-71. Kunzler, who had not seen any mining activity at the time of his prior annual inspection, testified that operations had probably "been going for a couple of weeks . . . at most," as of Sept. 16, 1998. Tr. I at 34; *see id.* at 31-34. Similarly, Ford could not confirm with any certainty the length of time Thomas had been mining: "When I visited the site, the operator could have been mining that entire summer . . . and stopped and then went back in a few weeks before [Kunzler] showed up, started mining again and it looked like it was all brand new." *Id.* at 208-09; *see id.* at 193, 206-09.

direct observations of the holes left by the operations. He reached this conclusion primarily because he found Lon Thomas to be a credible witness and because he deemed his testimony to have been corroborated by other witnesses. He found Lon Thomas to be credible based upon his “demeanor” at the hearing and BLM’s inability to offer any “objective reason” to doubt his testimony. *Id.* at 11, 16. He also found Lon Thomas’ testimony to be corroborated by the testimony of Juan Hernandez, a laborer at Thomas’ Oakley yard in 1998, and Ernie Hale, a long-time acquaintance of Lon Thomas who supervised work at one of Thomas’ other quarries in 1998. *See id.* at 11-14. He stated that he found “no reason to conclude that Thomas lied about the amounts of stone he had taken or how he had excavated the sites.” *Id.* at 16.

We reject Judge Holt’s analysis. The record does not support the conclusion that Lon Thomas, alone or as supported by the corroborating witnesses, established by a preponderance of the evidence that BLM erred in its determination of the amount of material extracted and removed in trespass. That determination hinges on the validity of Ford’s assessment that the two holes he observed on November 3, 1998, provided a reliable basis upon which to calculate the amount of material extracted and removed by Thomas in trespass. As discussed below, the record shows that Ford’s calculations, as refined by SurvCADD, and using all of Ford’s data points and measurements, were not undermined by any of the evidence offered by Thomas at the hearing.

For Area 1, Judge Holt concluded that Ford had incorrectly included areas where Thomas had simply “moved top soil,” or where “the treads of the moving mechanical excavator had disturbed the surface without excavating any stone.” Decision at 7 (citing Tr. II at 238-45); *see* Tr. II at 234-37, 246-53, 268-69; Tr. III at 47-51, 206-07; Ex. A 90. Judge Holt further concluded for Area 2 that Ford incorrectly determined that Thomas had excavated the entire area, whereas he was convinced that Thomas had “only excavated [about six] small ‘catch holes’” measuring 4 to 5 feet in diameter and 3 feet deep, into which it had rolled stones obtained from the surface, rendering them easier to pick up and load into a truck. Decision at 7, *citing* Tr. II at 257-64; *see* Tr. II at 265, 269-70; Tr. III at 76-79. There is no basis for either of Judge Holt’s conclusions, since the record makes clear that Ford measured only that part of each area where a substantial hole, averaging 1 and 1-1/2 feet in depth, had in fact been dug. *See* Tr. I at 31-35, 44, 48-49, 70-88, 90-91, 107, 111, 113, 116, 125, 163-65, 176, 179-83, 185-86, 189, 191-202, 204-06, 215; Tr. II at 88-90, 98-99; Tr. III at 159-63; Ex. B-1 at 50, 51, 59, 77, 78, 81; Ex. B-7 at 229, 233-37, 243; Ex. B-8 at 245, 246, 249, 250; Ex. B-11 at 313, 315. The existence of a sizeable hole at each site is well documented in the record by photographs, diagrams, and field notes. There is no basis for Judge Holt’s conclusion that the holes were not accurately measured by BLM.

Ford initially determined, during his September 30, 1998, investigation, that the excavation of Area 1 measured 125 feet in length and from 54 to 145 feet in width, with an average depth of 3 feet, in the center of which was a deeper excavation which averaged 6 feet deep and measured 40 by 60 feet. *See* Tr. I at 68, 79-81; Ex. B-1 at 59, 77. When he returned on November 3, 1998, after further operations, Ford determined that the excavation measured 270 feet in length and from 54 to 145 feet in width (or 0.61 acres), with an average depth of 1 and 1-1/2 feet, in the center of which was a deeper excavation. *See* Tr. I at 78-79, 108, 111, 127-28; Ex. B-1 at 53, 57, 58, 81; Ex. B-7 at 233, 243. In the case of Area 2, Ford determined that the excavation of Area 2 measured 120 feet in length and from 45 to 125 feet in width (or 0.26 acres), with an average depth of 1-1/2 feet.<sup>15</sup> *See* Tr. I at 82-84, 87-88, 106-07, 116; Ex. B-1 at 46, 49, 51, 52; Ex. B-8 at 249, 250.

Judge Holt's conclusion that Ford simply made assumptions about what material had been taken from each of the two areas is based solely upon his finding that Ford had not seen the two areas prior to or during Thomas' operations and could not judge how such operations had affected each area or what material had been excavated and either removed, in the case of mineral material, or left on site, in the case of "top soil (overburden)." Decision at 8. However, Judge Holt ignores the fact that each disturbed area is surrounded by an *undisturbed area*, which Ford used as a baseline to judge the location of the original surface of the disturbed area, including the relative location of top soil (overburden) and mineral material. BLM correctly states, on appeal, that Ford "assumed that the surface was flat across the top edge of the pit," which, together with a level bottom running across the pit, from the base of one cut wall to the base of the other cut wall, compensated for any error in the assumption regarding the surface, especially since the actual holes were of varying depths.<sup>16</sup> SOR at 5, *citing* Tr. I at 105-11; and Tr. II at 88-90, 117-19; *see* Tr. I at 176,

---

<sup>15</sup> In the case of Area 2, Ford determined that the area had been excavated to some extent, but that the majority of work involved the removal of surface boulders which had originally filled the area, described as a naturally-occurring depression in the side of a hill where sliding rock would have come to rest, but which were almost gone. *See* Tr. I at 82-84, 197-200, 204-06. David Boleneus, a BLM geologist, seems to have agreed with Ford's assessment. *See* Tr. II at 98-99, 101-02, 104-08, 116, 117. Kunzler testified to the existence of a "pit . . . several feet deep" at Area 2, noting, however, that "[m]ost of the rock material appeared to be coming out of an old tal[us] slide area rather than being in a solid bedrock material." *Id.* at 34.

<sup>16</sup> BLM asserts that, while Judge Holt viewed BLM's trespass quantity determinations as based on unsubstantiated or erroneous assumptions, the "only assumption that has any real bearing on the correctness of BLM's measurement is BLM's assumption that *the previously existing surface of the pits was flat.*" SOR at 10 (emphasis added). BLM  
(continued...)

179-80; Tr. II at 111-13, 189-90 (“[I]t’s pretty reasonable to expect that the topography had been undisturbed previously and the contours would be relatively consistent with what’s adjacent”); Tr. III at 174-78; Ex. B-20. Thomas provided no reliable evidence contradicting Ford’s assumption regarding the topography of the surface of the undisturbed, or of the disturbed, areas.<sup>17</sup>

BLM accounted for any top soil (overburden) that was known to be present, as well as top soil (overburden) that *may* have been present. It did so by not including the pad (fill area) in its measurement of the excavated portion of Area 1. *See* Tr. I at 160-62, 167-70; Tr. II at 95-96. BLM further accounted for any waste that may have been present when it revised its volume calculations after the December 6, 2002, decision, attributing 15 and 5 percent of the material in each of the excavated areas to waste from Area 1 and Area 2, respectively. *See* Tr. I at 135-42, 219-20, 241; Tr. II at 94-95, 97, 101-02, 116-17; Tr. III at 103-06; Ex. A 90. Thomas offers no evidence to dispute BLM’s waste calculations.<sup>18</sup>

There is no basis for concluding that Ford had “no information” from which to verify his assumptions regarding the amount of mineral material taken from each

---

<sup>16</sup> (continued)

argues that any error in that assumption cannot explain the great difference between BLM’s and Thomas’ quantity conclusions (2,318 versus 200 tons, in the case of Area 1; and 1,064 versus 200.71 tons, in the case of Area 2): “It is mathematically implausible for the judge to believe that the discrepancy in the parties’ positions can be explained simply by finding that BLM’s assumption of a flat surface is erroneous.” *Id.* at 12, *citing* Decision at 10. We agree with this view.

<sup>17</sup> Hale testified that the surface of the disturbed area of Area 1 was originally not level, but rather was “a little bit of a bowl[.]” Tr. II at 31; *see id.* at 24, 32, 60-61. However, his testimony was “based on his recollection from hiking the area years before.” Tr. II at 60-61.

<sup>18</sup> Thomas is plainly concerned that, although BLM excluded the pad from its measurement of Area 1, BLM is nevertheless charging it for the fill material (including topsoil and waste). BLM did not subtract the quantity of the fill material on the pad from the quantity of the material deemed to have been taken from the excavated area. *See* Tr. II at 268 (“[Ford] counts all of the removal of the topsoil as removal of stone”), 269 (“[Ford] took the fill off from his calculation that had been removed, but he didn’t say that it came from anywhere. It had to come from somewhere.”). While the possibility exists that the fill area itself represented part of the excavated area, there is no evidence to support that conclusion. In any event, David Boleneus, Mining Law Geologist, Utah State Office, BLM, testified that his estimate of 15 percent waste at Area 1, which he termed “generous,” included the fill material on the pad area. *See* Tr. II at 96.

area. Decision at 8. It was not necessary to sustain the reliability of BLM's calculations that Ford, or any person testifying or providing evidence on behalf of BLM, be physically present when Thomas engaged in the unauthorized extraction/removal operations. In many cases, a BLM witness unavoidably will encounter the trespass scene after the conclusion of operations and will observe only the results of the trespass. In this case, Ford and other BLM personnel were met with the results of Thomas' unauthorized operations. In the absence of evidence that the holes were created for a purpose other than the excavation and removal of material, or that material taken from the holes was not removed from the Areas but was placed elsewhere within the Area's acreage, BLM was fully justified in concluding that the size of the holes provides an accurate measure upon which to base calculations concerning the quantity of material taken in trespass. *See, e.g., H.E. Hunewill Construction Co., Inc.*, 137 IBLA at 103; *Richard C. Nielson*, 129 IBLA at 322, 325; *Pine Grove Farms*, 126 IBLA at 270-74.

In reviewing Thomas' evidence regarding the scope of its operations, we see that Lon Thomas testified to very limited extraction and removal operations in Areas 1 and 2. Lon Thomas reported that operations in Area 1 lasted from approximately mid-September 1998 to early October 1998, consisting of moving top soil (overburden) from the area to be mined, and then extracting and removing a total of 200 tons of gneiss from part of the area that BLM determined had been subjected to operations. *See* Tr. II at 234-44, 249-52; Tr. III at 44-51, 56, 58-64, 70-71; Exs. A-80, A 90; Ex. B-7 at 233. He reported encountering "a little bit of waste[.]" Tr. II at 249; *see* Tr. III at 71-73; Ex. B-7 at 233. For Area 2, he reported that operations took place from June 1996 to September 1998, consisting of removing only 200.71 tons of quartzite from the surface of part of the area that BLM determined had been the subject of the operations. *See* Tr. II at 253, 258-66, 269-72; Tr. III at 17, 37-38, 76-79, 82-84, 87, 112-16; Exs. A 1-3, A 38, A 44; Ex. B-8 at 249.

Rex Larsen measured the excavated or disturbed areas on behalf of Thomas. Larsen had 15 years of experience in the rock business (including 10 years as a Thomas employee). However, Larsen took such measurements on May 1, 2007, almost 8 years after the operations had concluded in 1998. *See* Tr. I at 251-59, 296-300; Exs. A 80, A 81; Ex. B-8 at 249. Further, those measurements in no sense accurately reflect the full extent of operations, since the sites had already been at least partially reclaimed either by Thomas (Area 1) or by nature (Area 2), concealing the full breadth and/or depth of the excavations. *See* Tr. III at 111, 116-17. Moreover, Larsen's measurements and Lon Thomas' testimony are completely at odds with evidence of the holes created by the operations, which were observed, measured, and photographed by BLM in 1998, very soon after the conclusion of operations.

In addition, the corroborating testimony of Hernandez and Hale is of very limited value. Neither of them worked at Area 1 or Area 2, or even witnessed

extraction/removal operations at either site, during the time frame at issue. *See* Tr. II at 17, 35-37, 57. Rather, Hernandez observed the blue truck bringing several loads of granite into the Oakley yard during the first part of October 1998, and Hale observed the blue truck on several occasions bringing granite into the Oakley yard, after an excavator was moved to Area 1 “during the first part of September [1998].” Decision at 13, *citing* Tr. II at 8-13, 14; Tr. II at 26-29; *see also* Tr. II at 15-17, 19, 54. However, that testimony cannot be deemed probative of the full extent of operations at the two sites. When specifically asked what material was brought to the yard, Hernandez replied that he did not know, although he was otherwise clearly familiar with granite. *See* Tr. II at 17-18. Hale, however, seems to have been clear that it was granite. *See id.* at 28-29. Together, Hernandez and Hale only confirm that an undetermined amount of gneiss was brought to the Oakley yard in late September or early October 1998, kept there for a short period of time, and then taken from there to Area 1 in early November 1998. *See* Decision at 13; Tr. II at 12-13, 17-21, 29-32, 53-55.

Hernandez does not confirm the amount of material taken from either of the two sites at issue. Nor does Hale confirm the amount of material taken from Area 2. As to Area 1, Hale testified that “the [blue] truck . . . delivered about 200 tons [of gneiss] [from Area 1] to the [Oakley] yard.” Decision at 14; *see* Tr. II at 29, 42-43. However, he did not testify that this constituted the sum total of material taken from Area 1. Further, the 200 tons, which were said to have been placed in a single pile near the entrance to the yard, represented only the material that Thomas told Hale was material from Area 1, since Hale was present at the yard only 1 to 3 hours each day during the time frame at issue, and so did not personally observe all stone deliveries. *See* Tr. II at 40-44, 46-48, 53-54, 246. This left open the possibility that other material arrived at the Oakley yard, but was either not seen by Hale or not identified by Lon Thomas as having come from Area 1. Further, Lon Thomas confirmed Hale’s report that the pile Hale observed had been 30 feet long, 30 feet wide, and 10 feet high, and, like Hale, Lon Thomas estimated that it would have contained “[a]bout 200 ton[s].” Tr. III at 24; *see* Tr. II at 65-66; Tr. III at 22-24. Ford, however, testified that a pile of those dimensions would have contained about 400 to 500 tons. *See* Tr. III at 107-08.

In sum, we find no support for Judge Holt’s view that Hale and Hernandez confirmed the total amount of material taken in trespass from the two sites and corroborated Lon Thomas’ testimony on this highly critical “key point[.]” Decision at 16.

## *2. The Record Does Not Support Thomas’ Production Records*

Despite the fact that trespass charges have been outstanding against Thomas since October 1, 1998, Thomas failed to provide to BLM its original business records

for the time periods in question. These would include the notebooks claimed to have been maintained at Oakley and Salt Lake City, where a Thomas employee originally recorded the daily receipt of material from Thomas' various quarries, including the two sites at issue. Thomas generally kept "a whole year [of records] in one of those notebooks." Tr. II at 148. Thomas claims that those notebooks were later destroyed.<sup>19</sup> See Tr. II at 128-30, 139-40, 143-53, 225-26, 255, 285, 288, 296-97, 300, 302-03; Tr. III at 7-10, 20-22, 88. In effect, Thomas avers that the company destroyed valuable firsthand evidence that it must have regarded as probative of the amount of material actually taken from the two sites, even though this precise matter had been at issue since 1998. In these circumstances, Thomas hardly had a "logical reason" for destroying any of these records, and certainly none that can be explained on the basis that BLM never asked to see the documents. Those records, according to Lon Thomas, were at all times relevant to BLM's trespass charges and would have supported Thomas' longstanding opposition to those charges. Decision at 13. In any event, the Judge concluded that testimony that Thomas destroyed such records does not "diminish[] the value of the records that Thomas did provide." *Id.* at 12. We do not agree.

There are no original records for Area 1 reporting the volume of material taken from the site, since they appear to have been destroyed. See Tr. II at 145, 287-89, 292-95; Tr. III at 7-8. There is only a single document for Area 2, Exhibit A 1-3, prepared by Beverley Thomas, who is Lon Thomas' wife, Thomas' bookkeeper, and a Certified Public Accountant. Exhibit A 1-3 purportedly summarized the material taken from Area 2, as originally recorded by Thomas' employees in "a spiral notebook" (or receiving log) at the Oakley and Salt Lake City yards. Decision at 12; see Tr. II at 127-30, 139-40, 143-53, 287-89, 296-97, 302-03; Tr. III at 10, 12. Those notebooks were among the business records that were destroyed. There is no way of assessing the accuracy of Beverly Thomas' summarization of the material taken from Area 2.

Judge Holt stated that Ford did not consider Thomas' production records. Decision at 6. With respect to gneiss, he stated that such records, in the form of a 12-page table labeled "Payroll Palletizing Records" (Ex. A 1-4), compiled 8-9 years after the fact, disclosed that Thomas had only removed a total of 1,178.26 tons from two of its quarries (including Area 1) during the period from January 1997 through October 1998, whereas "nearly twice" that amount (2,318 tons) had been determined

---

<sup>19</sup> The assertion that Thomas destroyed important business records in the regular course of business is belied by the existence of what purports to be all of Thomas' sales invoices concerning gneiss and quartzite for 1998 (Ex. A-4). See Tr. II at 122-23.

by BLM to have been taken in trespass.<sup>20</sup> Decision at 7, *citing* Ex. A 1-4 at 12; *see* Tr. II at 130-31, 158, 294-95. While the records did not disclose the source of the gneiss, Lon Thomas testified that most of it came from the other quarry. *See* Tr. II at 155-56, 159-60, 217-20, 272, 294-95. Judge Holt acknowledged that the 1,178.26 tons did not include all of the material taken from Area 1, since it encompassed only material that had been “split” and palletized in preparation for sale, which was said to cover only 6 to 8 tons from Area 1. *See* Decision at 7-8; Tr. II at 130-31, 153-60, 218-20, 272. While Thomas asserted that a total of 200 tons of gneiss was extracted and removed from Area 1, no documentation was provided concerning the amount of unsplit, non-palletized material from Area 1. *See* Tr. II at 294-95; Tr. III at 21 (“[T]he pile[] at the Oakley yard got . . . a little bigger”). What is undeniable is that the production records provided by Thomas did not report all of the gneiss taken from Area 1, since they did not include the amount of material taken from Area 1 that was not split and palletized. There is no reason to conclude, on the basis of Thomas’ records, that Ford erred in determining that 2,318 tons of material had been taken from Area 1, as of the November 3, 1998, inspection.

With respect to quartzite, Judge Holt noted that Thomas’ records, in the form of a single-page table labeled “Windridge Production” (Ex. A 1-3), disclosed that Thomas had removed only a total of 200.71 tons from Area 2 during the period from October 1995 through September 1998, whereas “five times” that amount (1,064 tons) had been determined by BLM to have been taken in trespass. Decision at 8, *citing* Tr. II at 127-30; Ex. A 1-3; *see* Tr. II at 142-43, 146, 253.

In these circumstances, we conclude that Thomas’ testimony, being of dubious validity, is of limited evidentiary value. Judge Holt’s findings are simply inconsistent with the record. Thomas has failed to establish, by a preponderance of the evidence, that BLM erred in its calculation of the quantity of material taken in trespass from Areas 1 and 2, which was based on on-the-ground measurements of the holes actually left by trespass operations. *See MSVR Equipment Rentals LTD*, 160 IBLA at 99.

### 3. *The Dissenting Opinion*

Judge Holt mistakenly concluded that Thomas established by a preponderance of the evidence that it removed far less material from the trespass sites than BLM’s experts calculated. His ruling was based upon his conviction that Lon and Beverley

---

<sup>20</sup> Exhibit A 1-4 reports the palletization of a “Product” listed as “GRMA03,” which is described, in the cover sheet to Ex. A 1-1, as “Mountain Ash Granite Rubble 3-4”[.]” Not listed on Ex. A 1-4 are “GRMA04” (“Mountain Ash Granite Rubble 5"-1”) or “GRMA09” (“Mountain Ash Granite Boulders 2-6”), which are also reported to have been material taken from Area 1. This is despite the fact that sales of that material continued even after trespass operations. *See* Exs. A 1-1, A 1-2.

Thomas were believable witnesses, to the exclusion of evidence to the contrary. In his dissenting and concurring opinion, Judge Jackson perpetuates, and in many respects amplifies, the legal and factual shortcomings in Judge Holt's analysis.

In *United States v. Rannells*, 175 IBLA 363 (2008), the Board saw no reason to disturb Administrative Law Judge William E. Hammett's finding that the testimony of Government witnesses was not supported by evidence in the record, stating:

Although the Board has *de novo* review authority, we have repeatedly expressed reluctance to disturb an administrative law judge's findings of fact based on credibility determinations *where they are supported by substantial evidence*. *United States v. Miller*, 165 IBLA at 377; *United States v. Aiken Builders Products*, 149 IBLA 267, 271 (1999); *United States v. Higgins*, 134 IBLA 307, 316 (1996); *United States v. Carlo*, 133 IBLA 206, 211-12 (1995). The basis for this deference is the fact that the Judge who presides over a hearing has the opportunity to observe the demeanor of the witnesses and is in the best position to judge the weight to be given to conflicting testimony. *United States v. Miller*, 165 IBLA at 377; *Yankee Gulch Joint Venture v. BLM*, 113 IBLA 106, 136 (1990); *United States v. Whittaker*, 95 IBLA at 271. [Emphasis added.]

175 IBLA at 383. The Board agreed with Judge Hammett that "BLM's experts showed repeated inability to provide the foundation for the very calculations that they claimed established the lack of discovery." *Id.*

*United States v. Rannells* demonstrates clearly that the key to a proper application of the principle that the Board will defer to an ALJ's findings with regard to matters of credibility is that they must be "supported by substantial evidence." In this case, Judge Holt's findings are not supported by substantial evidence. We are concerned that in reaching his conclusions he rejected the findings of the Department's experts, contrary to the principle that the Department is entitled to rely upon the professional opinions of its experts on matters within their areas of expertise, when those conclusions are supported by the evidence. *See, e.g., Bill Barrett Corporation*, 177 IBLA 214, 236 (2009), and cases cited. Judge Holt specifically found that "[a]ll the BLM witnesses were very well qualified and followed all internal procedures for calculating the quantities taken from the two trespass sites." Decision at 6; *see also id.* at 17. BLM's experts documented what they found with photographs, field notes of measurements, and schematics of the pit shapes used for the calculation of volume. *See Exs. B-1, B-7, and B-8.* The measurements were interpreted through BLM's sophisticated computer program, SurvCADD, and made generous allowances for depressions. The approach taken by the ALJ and Judge Jackson serves to undermine the work of the Department's experts, and signals that

the professionalism they bring to their work will be for nought should an ALJ decide, against the clear weight of the evidence documented by the experts, and in the absence of any corroborating evidence introduced by the claimants, that the claimants are believable.

In *United States v. Feezor*, 130 IBLA 146, 200 (1994), the Board provided the following definition of “preponderance of the evidence”:

To establish the preponderance of the evidence means to prove that something is more likely so than not so; in other words, the “preponderance of the evidence” means such evidence, when considered and compared with that opposed to it, has more convincing force and produces in your minds belief that what is sought to be proved is more likely to be true than not true.

*See also South-East Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767, 778 (6th Cir. 1970); *Winston L. Thornton*, 106 IBLA 15, 19-20 (1988); *Thunderbird Oil Corp.*, 91 IBLA 195, 201 (1986). Lon and Beverley Thomas offer little, other than their uncorroborated testimony, that serves to meet their burden to prove, by a preponderance of the evidence, that the conclusions reached by BLM’s experts were erroneous.

Judge Jackson in his dissenting and concurring opinion accepts as true Thomas’ assertion that granite removed from Area 1 was stored in a segregated stockpile at the Oakley yard and later returned to that site in early-to-mid November 1998. The fallacy in this analysis lies in the assumption, which has no basis in the record, that the only material removed from Area 1 was stored at the Oakley yard and was then returned to Area 1. Thomas’ unilateral and unauthorized removal and return of material to Area 1 effectively prevents any verification of the amount of material removed from Area 1. There is no way to confirm how much, if indeed any, of the material from Area 1 found its way to Oakley yard. There is certainly no evidence to support the conclusion that *all* material removed from Area 1 wound up stored at the Oakley yard. In fact, according to Ford’s measurements and photographs, far more material was removed from Area 1 than was stored there. There is no way of knowing, based on this record, where the rest of that material wound up.

The only evidence offered by Thomas regarding the volume of granite removed from Area 1 are “Payroll Palletizing Records” which were generated by Beverley Thomas some 8 or 9 years after the material was removed. The original notebooks were destroyed years earlier. Other than Beverley Thomas’s testimony, nothing relates the contents of the Thomas exhibits to the volume of trespass material in fact removed. While they are offered to show sales of materials removed from the trespass pits, they do not show the volume of materials in fact removed. For example,

Exhibit A1-4 was offered as a record of rock that Thomas' workers split and placed on pallets. Beverley Thomas admitted that one could not determine from the Exhibit if a pallet had come from Area 1 or 2 or whether the material on a pallet had been returned to either of those areas. *See Tr. II* at 159-60. Lon Thomas also admitted that it is impossible to tell from Exhibit A1-4 which pallets came from a specific area. *See Tr. II* at 220, 224. There is thus no evidence to support Judge Holt's conclusion that this Exhibit represents a record of total materials removed in trespass from Area 1.

A major problem with Judge Jackson's dissenting and concurring opinion is that it obfuscates the issue before us, *i.e.*, the amount of material removed from Areas 1 and 2 in trespass. In referring to the records generated by Beverley Thomas in preparation for the hearing, Judge Jackson states that those records are accurate because they cover periods long before any trespass occurred, *i.e.*, 1995, 1996, and 1997. With regard to the "palletizing records," he states that they were presented to show the "gross magnitude" of BLM's error. He finds Thomas to have presented an "overwhelming case" that BLM's calculations were in error, when in reality he can point to no convincing basis for accepting their uncorroborated testimony over that provided by the Government's experts. BLM correctly states that "the record shows no evidence directly controverting BLM's measurements or the assumptions BLM used in making those measurements." SOR at 7. Under the approach taken by Judges Holt and Jackson, an alleged trespasser can show error in BLM's calculations simply by testifying that he or she took less material.

Judge Jackson views Beverley Thomas' explanation for the destruction of the notebooks as credible and logical, observing that it rings true. We find Thomas' failure to immediately produce the records to rebut BLM's trespass charges to be contrary to logic and common sense. The most persuasive evidence that Thomas possessed—the original spiral notebooks showing the source and quantity of material delivered to the Oakley and Salt Lake City yards—was never produced by him. *See Tr. II* 287-88; *Tr. I* at 143; *Tr. I* at 149-52. Thomas generally kept "a whole year [of records] in one of those notebooks." *Tr. II* at 148. Thomas could have produced those documents at any time to show the exact quantity of material removed from Area 1 and Area 2. Thomas did not, and by the time of the hearing, those records had apparently been destroyed.

Thomas initially produced two tables listing monthly and total "production" of "granite" and "quartzite" from the Goose Creek Mountains during the 4-year period 1995-98. Decision at 9; *see Tr. III* at 124-25. Those tables are not relevant to a determination of the amount of material removed from Area 1 and Area 2. Nor do any of the "production" records provided at the hearing provide a basis for making that determination.

Even the ALJ recognized that the best evidence of the amount of material removed would be a truck load count. In questioning Ford, he asked, “would a reasonable way to determine how much had been taken out be to count the number of trucks that left the site and volume they took out?” Tr. III at 151. To which Ford responded, “[y]es.” *Id.* While it later became clear in his decision that Judge Holt apparently believed that the testimony of Lon and Beverly Thomas provided such information, he erred in giving such weight to that testimony in light of their failure to produce the records that could have corroborated their testimony and answered all the lingering questions in this case, including the exact dates of delivery to the yards, the number of truck loads delivered (as well as the vehicle or vehicles used), and amount of material that was removed from each area and delivered to yards. Such evidence could have constituted the substantial evidence necessary to support Judge Holt’s credibility determinations.

The ALJ and Judge Jackson fault BLM’s experts for not knowing what the trespass sites looked like before the trespass. The Judges accept Lon Thomas’ testimony that Area 2 began as a “naturally occurring depression,” that Thomas “excavated catch holes” into which “quartzite boulders” were “rolled” or “collected,” and then the “quartzite boulders” were “extracted and removed.” Under this scenario, the pits observed and measured by BLM’s experts were actually *created* by Thomas to ease its operations and not from the unauthorized removal of material. Judges Holt and Jackson appear to place no value whatever upon the only “objective” evidence introduced at the hearing, *i.e.*, the documentary evidence recorded by BLM’s experts during their inspections. The approach taken by the ALJ and Judge Jackson undermines the rule they purport to follow, and sends the unfortunate signal that uncorroborated testimony, if offered by a witness deemed believable at a hearing, trumps the professional opinion of the Department’s experts regarding matters within the realm of their expertise, even when that opinion is supported by record evidence. We cannot endorse such an approach.

We turn now to the remaining questions regarding whether Judge Holt properly held (1) that Thomas had completely mitigated the damages for the extraction and removal of material from Area 1, precluding any recovery for such damages, and (2) that BLM was not entitled to recover any administrative costs for the entire trespass proceeding. In both cases, we will be guided by the longstanding principle, under applicable Departmental regulations and case law, that the “measure of damages” in the case of a mineral material trespass on public lands is governed by “the laws of the State in which the trespass is committed,” unless a different rule is prescribed or authorized by Federal law. 43 C.F.R. § 9239.0-8; *see Nielson v. BLM*, 125 IBLA at 366-68.

## B. Return of the Material to the Site Does Not Mitigate Trespass Damages

[3] Judge Holt concluded that Thomas' return of the material removed from Area 1 justified mitigating all of the trespass damages assessed for extraction/removal from Area 1. He noted that the common law provides that a person who "takes another's property" commits the tort of conversion, for which he is liable for damages in "the value of the property taken." Decision at 17, *citing Benton v. State Division of State Lands & Forestry*, 709 P.2d 362, 365 (Utah 1985), and cases cited. However, he noted that the common law "also recognized that the damages [for conversion] may be mitigated, or reduced, where the convertor has returned the property." Decision at 17, *citing* Restatement (Second) of Torts § 922 (1977).<sup>21</sup>

Judge Holt applied sections of the Restatement that provide that the damages for a conversion are or may be "diminished" by the "return" or by the "tender of return" of the converted property. Decision at 18, *quoting* Restatement (Second) of Torts § 922 (1977). The Restatement provides that "[t]he amount of damages for the conversion of a chattel is diminished by its recovery or acceptance by a person entitled to its possession." *Id.* Judge Holt concluded that Thomas tendered a return of the material converted because, while "BLM did not explicitly authorize Thomas to return the granite to the trespass site, . . . neither did BLM explicitly prohibit the return." Decision at 18.

The Restatement provides that "[t]he amount of damages may, in the discretion of the court, be diminished by a tender of return of the chattel to one entitled to its possession" if three conditions are met, as follows:

- (a) [the chattel at issue] was converted in good faith and under a reasonable mistake, and
- (b) its value to the one entitled to possession is not substantially impaired, and
- (c) the tender is made promptly after discovery of the mistake and is kept open.

---

<sup>21</sup> BLM complained that Judge Holt had, *sua sponte*, raised and decided the question of whether Thomas was entitled under the Restatement (Second) of Torts (1977) to the complete mitigation of trespass damages for the removal of material from Area 1, and whether BLM was barred from recovering any administrative costs. SOR at 18, 23-24. While BLM may have lacked an opportunity to brief either matter before Judge Holt, it has had an adequate opportunity to do so before the Board.

Restatement (Second) of Torts § 922 (1977). Judge Holt concluded that all three conditions were satisfied. He found that the parties stipulated (1) that the trespass was innocent; (2) that the value of the returned material to BLM was not substantially impaired, and indeed was “enhanced” by the fact that it would be easier for a subsequent operator to extract and remove; and (3) that the return occurred “within a month” of the October 1998 trespass notice.<sup>22</sup> Decision at 19. He further exercised his discretionary authority, as described by the Restatement, to diminish the damages for conversion because BLM’s refusal to settle the trespass “left Thomas with no other practical choice” but to resolve the trespass by returning the material. *Id.* at 19. Judge Holt stated: “Because BLM asserted that Thomas took many more times the material than Thomas knew he took and because he still possessed the converted material, he did the logical thing and returned it [to the place] from where he got it.” *Id.* at 20.

There is no suggestion that the Restatement (Second) of Torts has been adopted as part of “the laws of the State” of Utah, and is appropriately considered in determining the measure of damages under 43 C.F.R. § 9239.0-8. Utah law does appear to follow the general principles concerning the mitigation of damages in the case of a conversion, as set out in the Restatement. *See Whittler v. Sharp*, 135 P. 112, 115 (Utah 1913). Under such rules, a conversion will generally be deemed to have occurred where there has been “a wrongful exercise of control over personal property in violation of the rights of its owner.” *Frisco Joes, Inc. v. Peay*, 558 P.2d 1327, 1330 (Utah 1977). Where minerals, having been severed from the land and reduced to the status of personal property, are taken and carried away from the land, there is said to be no material difference between a conversion and a trespass. 75 Am. Jur. 2d Trespass § 12 (2007), at 24. However, “[t]he measure of damages of conversion is the *full value* of the property.” *Allred v. Hinckley*, 328 P.2d 726, 728 (Utah 1958) (emphasis added). Thus, where the full value of the property is sought, the action lies in conversion and not in trespass. *Benton v. State Division of State Lands and Forestry*, 709 P.2d at 365.

---

<sup>22</sup> We cannot agree that Thomas engaged in a return or tender of return of all of the material originally taken, since it is admitted that 80-100 tons of the material returned to the site was *not material taken from Area 1*. *See* Tr. III at 24-25. BLM also argues that, because 20-30 tons of that material consisted of “fines,” *i.e.*, “stone and dust residue” left over from the splitting and palletization of stone at the Oakley yard, or what it calls “storage yard waste,” it was not comparable to the original material. SOR at 17 n.7, 18. Regardless of whether any of this additional material constituted material comparable to what had originally been taken, Thomas did not engage in a return or tender of return of that portion of the material originally taken from Area 1. We express no opinion on whether Thomas is entitled to recover that material or its value from BLM, since BLM has yet to rule on the question.

The difficulty with applying the common law rules governing conversion in Thomas' case is that BLM is not seeking the full value of the mineral material at issue, but rather the royalty value that would have been received had BLM approved a mineral material sale. BLM seeks damages for trespass, not damages for a conversion. See 53A Am. Jur. 2d Mines and Minerals, § 399 (2006), at 619; *Curtis Sand & Gravel Co.*, 95 IBLA at 150-52, 94 I.D. at 4-5; *Harney Rock and Paving Co.*, 91 IBLA 278, 285-89, 93 I.D. 179, 183-85 (1986), discussing *Knife River Coal Mining Co.*, 70 I.D. 16 (1963). What is at issue in the present case is, clearly, a mineral material trespass. Under 43 C.F.R. § 2920.1-2(a), “[a]ny use, occupancy, or development of the public lands, other than casual use as defined in § 2920.0-5(k) of [43 C.F.R.], without authorization under the procedures in § 2920.1-1 of [43 C.F.R.], shall be considered a trespass.” What must control, under 43 C.F.R. § 9239.0-8, is the measure of damages prescribed by State law for the “trespass” at issue, unless Federal law prescribes or authorizes a different rule.

We find no Federal law providing for the mitigation of mineral material trespass damages. Further, Judge Holt offers no evidence that the doctrine of mitigation applies in the case of a mineral material trespass or any trespass, as a matter of common law, in the State of Utah. BLM states that it has been unable to find a single Utah case, whether or not applying the Restatement, “in which a mineral materials trespasser was allowed to mitigate damages by employing self-help and returning materials to the trespass site.” SOR at 20. Nor can we find any such case, and thus we do not regard State law as supportive of the principle that a mineral material trespasser is permitted to mitigate damages for a trespass by returning the material taken in trespass.<sup>23</sup> See *Nielson v. BLM*, 125 IBLA at 366-68.

BLM also argues that Thomas lacked any legal authority to return material taken in trespass to the public lands, whether it constituted the exact material that had been taken in trespass, other material, or a combination of the two, and that, in any event, the act of returning the material, without any prior authorization by BLM, amounted to a further unauthorized use of the public lands, *i.e.*, a second act of trespass under 43 C.F.R. § 2920.1-2(a). See SOR at 18-19. BLM states, “Thomas failed to provide any legal authority to support the contention that return of the materials to the trespass site completely mitigated BLM’s damages.” *Id.* at 17; see Thomas’ Post-Trial Brief at 10-11; Thomas’ Reply Brief at 6. Nor can we find any authority that would allow a party who has taken material in trespass from the public lands to simply turn around, upon receipt of notice of that trespass, and return the

---

<sup>23</sup> Since we conclude that the common law of conversion, as set forth in the Restatement, is not applicable in the case of mineral material trespass, there is no need to adjudicate whether Thomas satisfied the three conditions for finding that its return or tender of return qualified for a diminishment of damages under the Restatement. See SOR at 20-22.

material to the public lands, without authorization from BLM, regardless of whether the consequences are beneficial or adverse to the interests of the United States.<sup>24</sup> To the contrary, we agree with BLM that such an action would constitute a separate unauthorized use of the public lands for which the party would be liable in damages. *See* 43 C.F.R. § 2920.1-2. A party, such as Thomas, who has taken mineral material from the public lands in trespass and then returned certain material, perhaps the returned material or perhaps not, without any prior authorization from BLM, will not be afforded any mitigation of trespass damages based on the value of the materials returned to the trespass site.<sup>25</sup>

Judge Holt concluded that Thomas engaged only in a tender of return, and not a return. That characterization is a legal nicety. The plain fact of the matter is that Thomas returned the extracted/removed material to the public lands without any prior BLM authorization. Judge Holt has allowed Thomas' unauthorized return of that material to completely mitigate damages originally suffered by the United States. We cannot sanction such an approach. Nor do we find any justification in the record for concluding, after the fact, that the return of certain materials completely mitigated the damages suffered by reason of the original trespass. We conclude that Judge Holt erred in holding that Thomas' trespass damages for extracting and removing mineral material from Area 1 were mitigated by a return or tender of return of the material.

### *C. BLM Properly Assessed Administrative Costs for the Trespass*

[4] Judge Holt concluded that BLM improperly assessed Thomas for the administrative costs incurred by BLM in investigating, prosecuting, and otherwise resolving the entire trespass matter. There is no dispute that BLM incurred total administrative costs in the amount of \$6,138.07 in connection with the trespass action, especially in connection with determining the quantity of mineral material

---

<sup>24</sup> Permitting a trespasser to return material taken in trespass would require BLM to determine whether the material returned is the same material originally taken, which may not always be possible to ascertain with any certainty, and also to determine that it is not hazardous to the environment. As stated by BLM: "A situation where BLM would need to expend resources to take samples and conduct analysis to verify the acts of a trespasser borders on the absurd." SOR at 19 (citing Tr. III at 194-95).

<sup>25</sup> Thomas asserts that he could not have committed a second trespass since he owned the "surface rights" to the land, adding: "It is only a trespass to remove stone, not to return it." Response to SOR (Response) at 10. Thomas overlooks the fact that the mineral material at issue is owned by the United States. While he was certainly authorized to traverse the surface of the land at issue, which he owned, Thomas points to no authorization from BLM to return material owned by the United States and removed in trespass.

taken in trespass and otherwise determining the amount of trespass damages. See Tr. I at 145-49; Tr. II at 170-73; Ex. B-10 at 259-62. Thomas did not challenge the Department's authority to recover administrative costs. See, e.g., Thomas's Post-Hearing Brief at 13-14. Judge Holt *sua sponte* raised the issue, and BLM was unaware that its authority to recover administrative costs was subject to question until Judge Holt issued his decision. He ruled that BLM was not entitled to recover *any* administrative costs for a mineral material trespass. He stated that while BLM's applicable policy provides for the recovery of such costs, no statute, regulation, or "binding precedent of the Board . . . expressly authorize[s] collection of administrative costs for a mineral trespass." Decision at 22.

Judge Holt began with 43 C.F.R. § 9239.0-7, under which a person extracting mineral material from the public lands without authorization will be liable for "damages to the United States." Under 43 C.F.R. § 9239.0-8, such damages will be measured as "prescribed by the laws of the State in which the trespass is committed, unless by Federal law a different rule is prescribed or authorized." Decision at 20.

Turning to the question of Federal law, Judge Holt recognized that BLM's policy, as set forth in its *Handbook on Mineral Material Trespass Prevention and Abatement* (H-9235-1 (Rel. 9-358 (Apr. 15, 2003))) (Ex. B-2), authorized the recovery of administrative costs. Decision at 20. The *Handbook* states that, in addition to the value of mineral materials removed, "[t]respass liability includes . . . all costs of trespass resolution[] (i.e., administrative costs)." Ex. B-2 at 150; see *id.* at 134, 151, 154, 160-61. However, Judge Holt concluded that the *Handbook* "ha[d] not been promulgated as a regulation," and thus did not have the force and effect of law. Decision at 20 (citing, e.g., *Pamela S. Crocker-Davis*, 94 IBLA 328, 332 (1986)).

Judge Holt noted that, while the Board had, in *Henry Deaton*, 101 IBLA 177, 182 (1988), approved the recovery of administrative costs under section 304(a) of FLPMA, 43 U.S.C. § 1734(a) (2006), the Board's decision was overturned by the U.S. District Court for New Mexico in *Deaton v. Lujan*, No. 88-345 SC (D. N.M. Apr. 25, 1989). As stated by Judge Holt, the District Court "reasoned that BLM had not promulgated a regulation allowing such costs and that BLM's actions in processing the trespass did not confer a private benefit but rather benefitted the general public."<sup>26</sup> Decision at 21. He further noted that, while the Department later

---

<sup>26</sup> *Deaton* involved an unauthorized use of the public lands, consisting of the "erecti[on] [of] structures and fixtures associated with a water well," and *not a mineral material trespass*. 101 IBLA at 177. When the Board issued its decision in *Deaton*, on Feb. 17, 1988, the Department had just promulgated regulations, effective Jan. 28, 1988, governing the unauthorized use of the public lands. The regulations specifically provide liability for trespass damages, including "administrative costs

(continued...)

promulgated 43 C.F.R. § 2920.1-2(a), providing for the recovery of administrative costs where activity on the public lands was not authorized under section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2006), the Board held in *Summit Quest, Inc.*, 120 IBLA 374, 378 (1991), that this regulation did not apply in the case of a mineral material trespass. Decision at 21-22.

Finding no controlling Federal law, Judge Holt turned to State law where he found that Utah Code Ann. § 40-1-12 (2007) provides for an offset for the costs of extraction/removal where the trespass was innocent and for three times the value of extracted ores where the trespass was willful. However, he stated that “the statute does not mention additional damages for administrative costs and neither do the reported decisions that have interpreted the statute.” Decision at 21.

We reject Judge Holt’s analysis, since we conclude that the matter is governed by Federal law and that State law does not apply.<sup>27</sup> Section 304(a) of FLPMA authorizes the Secretary of the Interior to establish “reasonable filing and service fees and reasonable charges[] and commissions with respect to applications and other documents relating to the public lands.” 43 U.S.C. § 1734(a) (2006). Section 304(a) of FLPMA authorizes BLM to require a trespasser to reimburse it for administrative costs incurred in resolving a trespass, so long as such costs “apply directly to documents relating to the public lands, e.g., trespass notices and bills for collection.” We maintain that *Henry Deaton*, 101 IBLA at 182, reflects the proper construction of section 304(a) of FLPMA with respect to the assessment of

---

<sup>26</sup> (...continued)

incurred by the United States as a consequence of such trespass.” 101 IBLA at 180 (quoting 43 C.F.R. § 2920.1-2(a)). However, the Board found that the applicable regulation for purposes of determining trespass damages for the unauthorized use at issue was 43 C.F.R. § 9239.0-8. See 101 IBLA at 180. In finding liability for administrative costs, the Board relied on section 304(a) of FLPMA and not the new regulations. See 101 IBLA at 182.

<sup>27</sup> BLM notes that the State statute cited by Judge Holt applied, by its terms, only in the case of damages for extracting or selling ore “from any mine” of the plaintiff where “the defendant . . . holds, under color of title adverse to the claims of the plaintiff, in good faith.” Utah Code Ann. § 40-1-12 (2007). BLM argues that the statute is inapplicable, since Thomas holds no property interest in the mineral estate, in good faith, under color of title adverse to the United States. See SOR at 29. We agree.

administrative costs incurred in a trespass action. *See also Penasco Valley Telephone Cooperative, Inc.*, 55 IBLA 360, 368 n.11 (1981).<sup>28</sup>

BLM recognizes that the Board's decision in *Deaton* was overturned by the District Court in *Deaton v. Lujan*, but argues that the Board is not bound by an unpublished decision of a single Federal court which has the effect of overturning longstanding Departmental policy. BLM argues that although the District Court's opinion was binding on the parties in *Deaton*, it does not constitute precedent that generally binds the Board. SOR at 25 (citing *Alamo Ranch Co., Inc.*, 135 IBLA 61, 71 (1996)). We agree with BLM.<sup>29</sup>

---

<sup>28</sup> Other cases involving mineral material trespass in which the Board recognized the authority of BLM to recover administrative costs include *Mississippi Potash*, 158 IBLA 9, 11 (2002); *Kenneth Snow*, 153 IBLA 371, 374 (2000); *El Rancho Pistachio*, 152 IBLA 87, 95 (2000); and *Granite Construction Co.*, 137 IBLA 151, 154 (1996). As noted by BLM, "the Department has continuously interpreted section 304 as providing authority to recover administrative costs in trespass cases." SOR at 24, citing "Mineral Material Trespass Prevention and Abatement," *BLM Manual Handbook*, H-9235-1 (Rel. 9-358 (Apr. 15, 2003)), at 134, 150, 154, 160-61.

<sup>29</sup> The record reflects that in a memorandum dated June 14, 1989, the Associate Solicitor, Energy and Resources, recommended against filing an appeal from the District Court's decision in *Deaton v. Lujan*. He cited the fact that BLM had no regulations implementing section 304(b) of FLPMA at the time of the trespass at issue. He also stated that "the costs assessed are not great enough to warrant an appeal." Memorandum of Associate Solicitor at unp. 3; *see also* SOR at 25, n. 10 ("It is not surprising that the United States apparently did not appeal *Deaton v. Lujan* because the administrative costs sought by BLM in that case amounted to \$870.45 (*see* 101 IBLA at 179), which obviously would be exceeded by the costs of the appeal, and because the court chose not to publish its decision."). Such interdepartmental correspondence should not be interpreted as providing the authority suggested in Judge Jackson's dissenting and concurring opinion. A memorandum transmitting an Associate Solicitor's recommendation regarding appeal in a given case does not constitute the position of the Department as represented by the Department of Justice in litigation. Moreover, as it is not invested with the authority of an M-Opinion, it is not binding on this Board.

Moreover, we conclude that *Deaton v. Lujan* was wrongly decided.<sup>30</sup> The District Court held that BLM was not entitled to recover administrative costs for resolving a trespass because, although “the Secretary may have the power to assess [administrative] costs, the power has not been exercised” because there is no applicable regulation. *Deaton v. Lujan* at 3. Further, the District Court held that the Department’s application of section 304(a) of FLPMA was inconsistent with *Nevada Power Co. v. Watt*, 711 F.2d 913, 931 (10th Cir. 1983), a right-of-way application case, in which the Tenth Circuit reviewed that provision and its legislative history in the context of “an *applicant* who is seeking to obtain some private benefit from the public domain,” and ruled that administrative costs “can not be charged where ‘the service can be primarily considered as benefitting broadly the general public.’” *Deaton v. Lujan* at 4 (quoting *Nevada Power v. Watt*, 711 F.2d at 930) (emphasis in original).

Section 304(a) of FLPMA applies by its terms to “applications *and other documents* relating to the public lands.” 43 U.S.C. § 1734(a) (2006) (emphasis added). We adhere to the view expressed by the Board in *Deaton* that BLM’s authority under section 304(a) of FLPMA to exact “reasonable charges . . . *with respect to applications and other documents relating to the public lands,*” encompasses the authority to impose reasonable charges with respect to a notice charging a party with trespass on the public lands and seeking recovery of trespass damages. *Henry Deaton*, 101 IBLA at 182 (quoting 43 U.S.C. § 1734(a) (2006)) (emphasis added). The Tenth Circuit specifically held in *Nevada Power v. Watt* that the Department may determine

---

<sup>30</sup> As stated in *Marathon Oil Co.*, 149 IBLA 287, 291 (1999):

[T]his Board has expressly declined to follow isolated decisions of Federal courts in limited circumstances even while recognizing that such a decision is the law of the case. *See, e.g., Amoco Production Co.*, 144 IBLA [135,] 140 [(1998)]; *Conoco, Inc.*, 114 IBLA 28, 32 (1990); *Oregon Portland Cement Co. (On Judicial Remand)*, 84 IBLA 186, 1990 (1984); *Gretchen Capital, Ltd.*, 37 IBLA 392, 395 (1978). The Board has eschewed following Federal court decisions primarily in those situations where the effect of the decision could be extremely disruptive to existing Departmental policies and programs and where, in addition, a reasonable prospect exists that other Federal courts might arrive at a differing conclusion. *Amoco Production Co., supra*.

*See also Alamo Ranch Co., Inc.*, 135 IBLA 61, 71 (1996), and cases cited. We conclude that those conditions are present in this case. First, application of the District Court’s ruling would be disruptive of the Department’s policies and programs, as reflected in the Board’s precedent and in the Department’s *Handbook*. Second, as we demonstrate, the District Court misconstrues section 314 of FLPMA and *Nevada Power v. Watt*, and thus there is a reasonable prospect that other Federal courts might arrive at a differing conclusion.

the reasonable charges that may be exacted pursuant to section 304(a) of FLPMA “by individual, *ad hoc* litigation,” *i.e.*, Departmental adjudication rather than rulemaking. 711 F.2d at 927 (quoting *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947)). In addition, as we have noted, *Nevada Power v. Watt* was unrelated to administrative costs incurred as a result of trespass. As BLM argues, “if the *Deaton v. Lujan* court were correct in its apparent view that section 304 applies only where there is an ‘applicant,’ it would render superfluous section 304’s reference, in addition to ‘applications,’ to ‘and other documents relating to the public lands.’” SOR at 27 (quoting section 304(a) of FLPMA).

We agree with the District Court’s analysis in *Deaton v. Lujan* to the extent it construes section 304(a) of FLPMA as requiring administrative charges to be “reasonable.” In *Nevada Power v. Watt*, the Tenth Circuit stated that “[t]he touchstone of the Secretary’s determination is *reasonableness*,” noting that “the Secretary is vested with considerable discretion in performing the weighing mandated by section 304(b),” although he “*must* provide a reasonably articulate record showing the bases of the determination.” 711 F.2d at 927, 928. Among the section 304(b) reasonableness factors, the Department is required to take into account “the monetary value of the rights or privileges sought by the applicant, . . . that portion of the cost incurred for the benefit of the general public interest rather than for the exclusive benefit of the applicant, [and] the public service provided.” 43 U.S.C. § 1734(b) (2006).

We differ with the District Court’s conclusion in *Deaton v. Lujan* that, in the case of a trespass, BLM’s efforts afford a benefit only to the public at large, since the trespasser never “obtain[ed] any private benefit[.]” *Deaton v. Lujan* at 5. The trespasser clearly obtained a private benefit in the present case, in the form of the mineral materials taken in trespass, for which it can potentially reap a profit from their subsequent sale. The principal recovery sought by BLM is the value of those materials to the United States. In effect, the trespasser has forced BLM to sell the materials to it—the trespasser--by in fact “expropriating” them. *Id.* BLM has been compelled to afford the trespasser the privilege of taking materials from the public lands for private use, which privilege has a definite “monetary value” in the form of value of the materials taken. 43 U.S.C. § 1734(b) (2006). Clearly, BLM has a public interest in ensuring the recovery of trespass damages, such that the United States receives the value of the material taken in trespass and is made whole. However, we cannot separate the benefit received by the trespasser, where the United States is essentially forced to sell the material to the trespasser, from the public interest in recovering the value of the material. We cannot discern any “portion of the cost” that was incurred “for the benefit of the general public interest *rather than* for the exclusive benefit of the [trespasser].” *Id.* (emphasis added). We also find no provision of a “public service” by virtue of such a sale. *Id.* Nor do we find present any

“other factors relevant to determining the reasonableness of the costs.” *Id.*<sup>31</sup> Thomas presented no evidence and little if any argument showing that the costs are unreasonable.

Judge Jackson finds support for his view that BLM lacks authority to collect administrative costs in Solicitor’s Opinion, M-36987, “BLM’s Authority to Recover Costs of Minerals Document Processing,” dated December 5, 1996. However, we find nothing in that opinion that supports the view that a rulemaking is *necessary* before BLM can charge a trespasser with administrative fees incurred by BLM as a result of a mineral materials trespass. As the Solicitor’s Opinion acknowledges, section 304(a) indeed provides: “*Notwithstanding any other provision of law, the Secretary may establish reasonable filing and service fees and reasonable charges . . . with respect to applications and other documents relating to the public lands and may change and abolish such fees, charges, and commissions.*” 43 U.S.C. § 1734(a) (2006) (emphasis added). What Judge Jackson fails to acknowledge is that under *Nevada Power v. Watt*, the Department may establish cost recovery procedures through adjudication rather than rulemaking. The Independent Offices Appropriations Act (IOAA), 31 U.S.C. § 9701 (2006), provides that “[t]he head of each agency . . . *may prescribe regulations establishing the charge for a service or thing of value provided by the agency.*” (Emphasis added.) We do not agree that such regulations are mandatory. The Tenth Circuit stated emphatically that “[t]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.” 711 F.2d at 927 (quoting *Securities & Exchange Comm’n v. Chenery Corp.*, 332 U.S. at 203).

Certainly, we hold the view that the Secretary *may* promulgate regulations to govern recovery of administrative costs in minerals trespass cases; however, we are

---

<sup>31</sup> We find further support for the recovery of administrative costs in the fact that BLM provides for such recovery in the case of applicants or successful bidders for material sales contracts. In 43 C.F.R. § 3602.11(c), the Department provides that a party seeking a sale of mineral material from an area of the public lands that is not a community pit or common use area “must pay a processing fee as provided in [43 C.F.R.] §§ 3602.31(b) [which governs noncompetitive sales] and 3602.44(f) [which governs competitive sales].” Both of these regulations generally provide that BLM “will charge” the purchaser or the successful bidder for a purchase of mineral material “a processing fee on a case-by-case basis as described in [43 C.F.R.] § 3000.11.” 43 C.F.R. §§ 3602.31(b), 3602.44(f). Under 43 C.F.R. § 3000.11(b), “[f]or case-by-case fees, BLM measures the ongoing processing cost for each individual document and considers the factors in Section 304(b) of FLPMA on a case-by-case basis.” We conclude that the administrative costs at issue constitute the ongoing processing costs for the trespass notice and related documents, which costs are in line with the section 304(b) reasonableness factors.

equally convinced that it would be detrimental to BLM's ability to adjudicate minerals trespass cases should we hold that the Department may recover such costs *only* if it promulgates such regulations. Such an approach would serve to shield one who engages in mineral materials trespass from the payment of reasonable fees and expenses—the very expenses that an individual acting lawfully is required to pay. We reject such an interpretation of section 304(a) of FLPMA.

We therefore hold that BLM is entitled to recover the administrative costs incurred in processing the trespass notice and related documents, considering the reasonableness factors of section 304(b) of FLPMA.<sup>32</sup> We conclude that Judge Holt erred in holding that BLM was not entitled to recover administrative costs in connection with the resolution of the mineral material trespass at issue.<sup>33</sup>

#### IV. CONCLUSION

We conclude that Thomas failed to carry its burden to demonstrate, by a preponderance of the evidence, that BLM's determination of the amount of mineral materials removed from Areas 1 and 2 was in error. We conclude, as a related matter, that BLM met its burden to demonstrate error in Judge Holt's decision.

---

<sup>32</sup> The Department is also required to consider “actual costs (exclusive of management overhead) . . . [and] the efficiency to the government processing involved.” 43 U.S.C. § 1734(b) (2006). The BLM charges at issue concern its actual costs incurred in resolving the trespass, inclusive of labor and indirect costs associated with the efforts of the BLM employees involved in resolving the trespass, but exclusive of management overhead. *See* Tr. II at 172, 175-77; Ex. B-2 at 160-61; Ex. B-10 at 259-62. We also find no inefficiency in BLM's processing of the trespass matter that would detract from the reasonableness of the charges.

<sup>33</sup> Thomas asks the Board, in the event that we rule that BLM can recover administrative costs, to remand the case to Judge Holt to decide if it is appropriate to award costs to BLM “in this case.” Response at 16. We decline to do so, since we can decide whether an award is appropriate, exercising our *de novo* review authority. *See, e.g., Nielson v. BLM*, 125 IBLA at 356; *John Aloe*, 117 IBLA 298, 301 (1991). We are not persuaded by Thomas to reduce costs because BLM would, were it found entitled to \$1,505.33, succeed in recovering only “about 5% of what [it] w[as] seeking at the beginning of the hearing and less than 1% of wh[at] [it] w[as] initially asking [for],” especially where such costs were “not reasonably incurred,” because Thomas has been willing to pay such damages since the very beginning. *Id.* We now find that BLM is entitled to much more in the way of damages. In any event, we know of no justification for reducing an award of administrative costs based on BLM's degree of success in pursuing the trespass action.

We affirm BLM's determination that Thomas removed 2,318 and 1,064 tons of gneiss and quartzite, respectively, from Area 1 and Area 2, for a total volume of 3,382 tons of material removed in trespass. *See* Tr. I at 142. At the stipulated trespass damages of \$7.50 per ton, Thomas is liable for damages totaling \$25,365.00. We reverse Judge Holt's ruling that Thomas mitigated the damages by returning mineral materials to Area 1. We reverse Judge Holt's ruling that BLM was not authorized to recover administrative costs incurred in investigating and resolving the trespass, and hold that the record supports the assessment of administrative costs of \$6,138.07. The record thus supports BLM's determination that Thomas is liable for a total of \$31,503.07 in damages for the trespass at issue in this matter.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is reversed as stated.

\_\_\_\_\_/s/\_\_\_\_\_  
James F. Roberts  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
Bruce R. Harris  
Deputy Chief Administrative Judge

ADMINISTRATIVE JUDGE JACKSON DISSENTING IN PART AND CONCURRING  
IN PART

I must respectfully dissent from my colleagues' view that Judge Holt erred in considering and weighing the evidence presented at a 3-day hearing. Because I find substantial (if not overwhelming) record evidence supports Judge Holt's findings that substantially less granite and quartzite were taken in mineral trespass than had been assumed and estimated by BLM, I would affirm. I also dissent from the majority's conclusion that a rulemaking is unnecessary before BLM can require that it be reimbursed for administrative costs. While I concur with the majority in holding that Judge Holt erred in allowing trespass damages to be mitigated, I disagree with their reasoning and rationale. Each of these issues are separately discussed below.

I. JUDGE HOLT'S DETERMINATION THAT THOMAS PREPONDERATED  
IN DEMONSTRATING THAT IT REMOVED SUBSTANTIALLY LESS  
THAN HALF THE AMOUNT ESTIMATED BY BLM IS SUPPORTED BY  
THE RECORD AND SHOULD BE AFFIRMED.

Based on measurements of the sites by Michael Ford, BLM, and his resulting "estimate of volume," BLM determined that Thomas had removed 3,370 tons of granite from "a hill-side quarry" (Area 1) and 1,360 tons from "an active drainage" (Area 2) in mineral trespass. Decision dated Dec. 6, 2002. Thomas appealed that decision and requested a hearing, claiming to have removed only about 410 tons from Area 1 and 300 tons of quartzite boulders from Area 2. Statement of Reasons (SOR) in IBLA 2003-99 at 28, 30; *see* Lon Thomas affidavit at ¶¶ 32-36 and its attached "[t]rue and correct copies of applicable portions of Appellant's production and sales records with respect to Area 2"; *see also* 180 IBLA at 188-89 (procedural history of this case). BLM countered that a hearing was unnecessary because its estimates were made by "an experienced mineral examiner," Answer in IBLA 2003-99 at 4; Thomas replied that a hearing was necessary so it could "prove that the quantity of stone claimed to have been removed by [Thomas] is not accurate." Reply in IBLA 2003-99 at 3. By order dated March 10, 2005, we identified this conflict between BLM's estimates and Thomas' proffer and referred this matter for a hearing to determine the amount of stone that had been removed in mineral trespass.<sup>1</sup>

---

<sup>1</sup> Sometime after IBLA 2003-99 was filed but before commencement of that hearing, BLM revised its estimates by using a computer program to more accurately calculate volume based on Ford's measurements and then adjusting that volume to account for waste and voids (assumed to total 20% at each site). Since neither waste nor voids

(continued...)

After a 3-day hearing, Judge Holt found that Thomas' evidence preponderated in demonstrating that BLM's estimates were in error. The majority would reverse because Judge Holt's findings relied (at least in part) on the testimony of Lon Thomas and contemporaneous summaries prepared by Beverly Thomas, which they disparage as "uncorroborated," of "dubious validity," and "limited evidentiary value." 180 IBLA at 201, 205. We have never before required that testimony be corroborated before it can be relied on to resolve a disputed factual issue, nor held that testimony must be corroborated before it can constitute substantial evidence on appeal; I would not do so in this case. Moreover, I find the record on appeal fully supports Judge Holt's weighing of the evidence, including corroborating testimony by Juan Hernandez, Ernie Hale, and others, and his finding that only a fraction of the amount assumed and estimated by BLM had, in fact, been removed in mineral trespass from Areas 1 and 2.

A. *Substantial Evidence, Testimony, and Credibility*

The issue of substantial evidence and the credibility of witnesses was extensively addressed early in the history of this Board. In *State Director for Utah v. Dunham*, 3 IBLA 155, 78 I.D. 272 (1971), a cattleman testified that fewer cattle were in grazing trespass than had been identified by a BLM employee and that his trespass was not willful because his cattle had escaped through a broken fence. The hearing officer believed the cattleman; BLM claimed error in his choosing to believe the cattleman and the weight he gave to that testimony. We first explained the inherent imponderables of credibility:

It is axiomatic that there are no prescribed rules or methods of evaluating the credibility of oral testimony. In the brief time that the witness testifies, it is difficult for the trier of the facts to ascertain whether the witness is telling the truth. More important in this regard than knowledge of the substantive law and the law of evidence is the natural and acquired shrewdness and experience by which an observant [person] forms an opinion as to whether a witness is or is not telling the truth. The most acute observer would never be able to catalogue the nuances of voice, the passing shades of expression, or the

---

<sup>1</sup> (...continued)

excluded from Ford's original estimates, BLM tacitly concedes his estimates and its Dec. 6, 2002, decision were in error. Rather than seeking a third remand so as to issue a new decision reflecting these revisions, BLM based its case before Judge Holt on these revised estimates.

unconscious gestures which he had learned to associate with falsehood; and if he did, his observations would probably be of little use to others. Every [person] must learn matters of this sort for himself, and though no sort of knowledge is as important to a hearing officer, no rules can be laid down for its acquisition. No process is gone through the correctness of which can be independently tested. The judge or hearing officer has nothing to trust but his own nature and acquired sagacity.

3 IBLA at 158-59, 78 I.D. at 273-74; *see* 3 IBLA at 159-63, 78 I.D. at 274-78 (citing *NLRB v. James Thompson & Co.*, 208 F.2d 743, 745-46 (2d Cir. 1953); *United States Steel Co. v. NLRB*, 196 F.2d 459, 467 (7th Cir. 1952); *Broadcast Music, Inc. v. Havana Madrid Restaurant Corp.*, 175 F.2d 77, 80 (2d Cir. 1949); *Creamer v. Bivert*, 113 S.W. 1118, 1120-21 (Mo. 1908)). We then affirmed the hearing officer's decision and held:

Witnesses are on occasion affected by bias, partisanship, overzealousness, and other constraints. We do not intend to suggest any failing in the witnesses in the hearing below. We simply must accord proper weight to the fact findings of a hearing examiner where they depend primarily on the credibility of the witnesses and are supported by substantial evidence. As indicated above, the appellant has chosen to make such findings the gravamen of his appeal.

In that frame of reference, examining the fact findings of the examiner, we see no compelling reason to reverse them. Admittedly, the appellee's testimony was not free from contradiction. However, the cold words of a record are no substitute for the exercise of the examiner's evaluation of the veracity of the witnesses. We find that the examiner's conclusions are supported by substantial evidence.

3 IBLA at 162-63, 78 I.D. at 275-76 (footnote omitted); *accord United States v. Chartrand*, 11 IBLA 194, 212, 80 I.D. 408, 417-18 (1973).

We have consistently affirmed credibility determinations and related findings of fact, holding that such testimony either provided substantial evidence for the decision on appeal (if determined to be credible by a hearing officer) or failed to

preponderate (if determined not to be credible by a hearing officer).<sup>2</sup> As cogently summarized in *BLM v. Carlo*, 133 IBLA 206 (1995) (*Carlo*):

It is well established that the Board has full authority to reverse findings of fact made by an Administrative Law Judge. *See, e.g., United States v. Knoblock*, 131 IBLA 48, 101 I.D. 123 (1994); *United States v. Collord*, 128 IBLA 266 (1994). At the same time, however, this Board has also noted that, where the resolution of disputed facts is influenced by the Judge's findings of credibility, which are in turn based upon the Judge's reaction to the demeanor of the witnesses, and such findings are supported by substantial evidence, they ordinarily will not be disturbed by the Board. The basis for this deference is the fact that the Judge who presides over a hearing has the opportunity to observe the witnesses and is in the best position to judge the weight to be given to conflicting testimony. *See, e.g., Yankee Gulch Joint Venture v. Bureau of Land Management*, 113 IBLA 106, 136 (1990); *United States v. Whittaker*, 95 IBLA 271, 286 (1987); *United States v. Ramsey*, 84 IBLA 66, 68 (1984); *United States v. Chartrand*, 11 IBLA 194, 80 I.D. 408 (1973).

Admittedly, we have, on occasion, reversed an Administrative Law Judge's fact-finding even when it was implicitly based on credibility determinations (*see, e.g., Lawrence E. Willmorth*, 64 IBLA 159 (1982)). But, the predicate of our action in those cases was the existence of other facts of record which, to our mind, *fatally compromised the testimony which the Administrative Law Judge found credible*. Absent the existence of such evidence, we must exercise

---

<sup>2</sup> For findings affirmed based on the credibility of witnesses, see *United States v. Miller*, 165 IBLA 342, 377-78 (2005); *United States v. Pearson*, 148 IBLA 380, 390 (1999); *Yankee Gulch Joint Venture v. BLM*, 113 IBLA 106, 136, 137-38 (1990); *United States v. Whittaker*, 95 IBLA 271, 284, 286 (1987), *aff'd*, No. 87-140-GF-PGH (D. Mont. eb. 8, 1989); *BLM v. Ericson*, 88 IBLA 248, 258 (1985) (since testimony relied on by hearing officer "was neither inherently incredible nor inconsistent, there is no apparent basis for this Board to reject it"). For findings affirmed because proffered testimony was not incredible or lacked a factual foundation, see *United States v. Rannells*, 175 IBLA 363, 383-84 (2008) (*Rannells*); *United States v. Aiken Building Products*, 95 IBLA 55, 58 (1986); *Holland Livestock Ranch*, 52 IBLA 326, 347, 350, 8 I.D. 275, 287 (1981), *rev'd*, 714 F.2d 90 (9th Cir. 1983); *United States v. Melluzzo*, 32 IBLA 46, 74-75 (1977), *aff'd sub nom. Melluzzo v. Watt*, 674 F.2d 819 (9th Cir. 1982). *See also United States v. Longley*, 175 IBLA 60, 69 (2008); *United States v. Pass Minerals, Inc.* 168 IBLA 115, 149, 155-56 (2006).

extreme caution in challenging findings of fact which are premised on the demeanor of the witnesses who testify before an Administrative Law Judge. See *State Director for Utah v. Dunham*, 3 IBLA 155, 78 I.D. 272 (1971).

133 IBLA at 211-12 (emphasis added); accord *United States v. Rothbard*, 137 IBLA 159, 163 (1996) (“The Department traditionally gives considerable deference to a Judge’s findings on questions of witness credibility. If resolution of a case depends primarily on such findings, those findings will not lightly be set aside.”); *United States v. Higgins*, 134 IBLA 307, 316 (1996).

My research has failed to uncover any case in which we have held that testimony must be corroborated before it can be relied upon by an ALJ in making findings of fact or considered on appeal as substantial evidence. To the contrary, we have consistently held that credibility determinations and related findings of fact will not be disturbed absent compelling evidence that such testimony was fatally deficient or lacked a demonstrable basis in fact.<sup>3</sup>

Evidence corroborating (or contradicting) testimony may provide support for determining whether a witness is to be believed, but it is neither the *sine qua non* of credibility nor a prerequisite for making findings of fact based on testimonial evidence. I would not engraft such a requirement on nearly 40 years of Board precedent.<sup>4</sup>

---

<sup>3</sup> We affirmed an ALJ finding that BLM failed to establish a *prima facie* case in *Rannells* because its cost estimate was based on speculation (e.g., the BLM Mineral Examiner was unable to explain the basis for his estimates, and its contractor used erroneous assumptions in identifying transportation costs). 175 IBLA at 383-84. In *Willmorth*, the claimant testified that he honestly believed he had good title under the Color of Title Act. We reversed the hearing officer’s finding that this testimony demonstrated good faith under that Act because the record conclusively showed his belief was not reasonable as he knew or should have known that the lands at issue were or could be owned by the United States. 64 IBLA at 162-63. Neither of these circumstances are here presented.

<sup>4</sup> Although it may be unclear whether the majority is holding that testimony must be corroborated before it can be credible or that credible testimony is not substantial evidence unless corroborated by others, see 180 IBLA at 205, I find neither is supported by or consistent with our case law. I would not establish what appears (at least to me) to be a new standard that would allow our second-guessing of credibility determinations and findings of fact made by ALJs.

The only evidence that arguably conflicts with Judge Holt's credibility-based findings of fact are BLM estimates of how much stone was removed from Areas 1 and 2. These estimates assumed the surface of each area was flat before activities began at these sites, but this assumption is questionable (if not expressly contradicted by the record).<sup>5</sup> Since estimates are only as accurate as the assumptions upon which they are based, it logically follows that the validity and accuracy of BLM's assumptions and resulting estimates may be challenged by demonstrating that its assumptions are inaccurate or inapplicable (e.g., by showing the surface was not flat or a depression was not filled with stone), or by other evidence demonstrating it was not possible to remove as much stone as estimated by BLM or that substantially less stone had, in fact, been removed from the trespass site.<sup>6</sup> Such a challenge was mounted in this

---

<sup>5</sup> Hale, a contractor who formerly worked for Thomas, testified Area 1 was a bowl before activities began, not "level straight across" (as assumed by BLM). Tr. II at 32. Confirming his familiarity with this site, he stated:

It's one of the most beautiful sites that you rarely see out on the Alpine areas where the turf, the mountain vegetation, comes right into a stone area. And the stone has been eroded, this is a soft granite. And so the surface level is here and the stone erodes out into a little bit of a bowl and you can see granules of the granite that had frozen and thawed.

And it's neat, you can look in there and you could find little crystals of calcium sites. So I was exploring those and it was a favorite place of mine to pick up mineral specimens and get pieces of mica, muscovite mica, and find them there that big.

*Id.* at 31; *see id.* at 60-61. Since BLM assumed an average excavation depth of only 1½ feet, it logically and mathematically follows that even a 10 inch bowl would result in an estimation error of more than 50%. *See* Tr. I at 163-64, 175.

Ford and David Boleneus, a BLM expert, testified that Area 2 was a natural depression, which Ford assumed had been filled with quartzite boulders to create a level surface in performing his calculations. Tr. I at 197, 206; Tr. II at 98-100, 107, 109. Lon Thomas testified that he gathered scattered boulders from the surface of this depression and that it had not been filled with stone (as assumed by BLM). *Id.* at 258-65. Ford and Boleneus agreed Area 2's appearance was consistent with Lon Thomas' description of how he gathered stone from that depression. Tr. I at 197-98; Tr. II at 103-04, 108-10.

<sup>6</sup> To the extent the majority holds Thomas could meet its burden only by showing error in BLM's measurements or calculations or by presenting incontrovertible business records, I disagree. I would not exclude consideration of evidence relevant to the issue to be decided (*i.e.*, how much stone was actually removed in mineral trespass) or implicitly overrule our consideration of such evidence in

(continued...)

case and, as found by Judge Holt, credible evidence was presented to support that challenge.

BLM witnesses testified that they did not believe Lon Thomas or any other evidence that would contradict its estimates. See testimony of Ford, Tr. III at 151-55, 170, and his supervisor, Glenn Carpenter, BLM Field Office Manager, Tr. II at 179-80, 188, 207-08. Judge Holt therefore went to considerable lengths in detailing his determinations concerning the credibility of Thomas' witnesses and the weight he gave to their testimony and documentary evidence (*i.e.*, Lon Thomas, Beverly Thomas and her contemporaneous production summaries, Ernie Hale, and Juan Hernandez). Decision at 11-14. Moreover, Judge Holt recognized that for him to affirm BLM's estimates,

I would have to conclude that Thomas lied in key parts of his testimony and presented misleading documents. I cannot make such a finding because I found his evidence consistent and credible. But to find that Thomas' evidence preponderates requires only that I find that BLM made incorrect assumptions about the size of the holes Thomas dug. I can make such a finding without impugning the integrity of any BLM witness.

Decision at 17. The majority has no similar reticence and would effectively impugn the integrity of Lon Thomas, Beverly Thomas, and other witnesses under claim that their testimony and documents were uncorroborated and therefore insufficient to support Judge Holt's findings of fact. Since BLM's estimates were based on assumptions that are questionable at best, I fail to see how they "fatally compromised the testimony which the Administrative Law Judge found credible." *Carlo*, 133 IBLA at 212. Unlike the majority, I would defer to Judge Holt's credibility determinations and to his weighing of the evidence based on those determinations.

*B. Substantial Evidence Supports Judge Holt's Finding that Thomas Removed Significantly Less than 2,300 Tons of Granite (Gneiss) from Area 1.*

To rebut BLM's revised estimate that 2,318 tons of granite were removed from Area 1, Thomas presented evidence showing its capacity for removing stone from that site, where and how that stone was managed, the appearance of Area 1 after stone was returned to it, and a contemporaneous production summary prepared by its bookkeeper (also a certified public accountant and Lon Thomas' wife). As discussed

---

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

*Richard C. Nielson*, 129 IBLA 316, 325 (1994) and *Pine Grove Farms*, 126 IBLA 269, 273, 274 (1993). It was up to Judge Holt to weigh that evidence; I can discern no clear error in his doing so in this case. See discussion *infra*.

below, I find the evidence presented on each of these bases demonstrates that substantially less than half the amount estimated by BLM was removed in mineral trespass from Area 1 and that Judge Holt's findings of fact are supported by substantial evidence. Accordingly, I would affirm his ruling that Thomas preponderated in demonstrating error in BLM's estimate.

1. Maximum Granite Removal Capacity was Less than 580 Tons.

Based upon the credibility of the witnesses and their consistent, uncontroverted testimony, Judge Holt found the maximum amount of granite that could have been hauled from Area 1 during Thomas' trespass was 576 tons. Decision at 9. Activities at Area 1 began in mid-September 1998.<sup>7</sup> Lon Thomas testified that only his company's blue truck removed stone from that site, that it took granite from Area 1 to the Oakley yard where that granite was placed in a separate stockpile, and that these activities ceased immediately after his meeting with Ford on October 15, 1998. Tr. II at 225-27, 246, 250, 288, 296. Hale and Hernandez, a Thomas employee, confirmed that only Thomas' blue truck was observed hauling granite to the Oakley yard in late September and the first half of October 1998 and that this stone was placed in a separate stockpile near the yard's front gate. Tr. II at 11-12, 15-16, 19, 28-29, 43-44, 47-48, 54.

Lon Thomas testified that his company owned three trucks, the blue truck with a capacity of 10-12 tons, a 1-ton white truck he routinely used and kept at his home in Park City, Utah, and a "mid-line" that was used for deliveries and kept at Thomas' Salt Lake City yard. Tr. III at 12-14, 16, 17. He stated the blue truck could make up to two hauls per day from Area 1 but that it rarely did so and had actually made only 15-20 hauls from Area 1. Tr. III at 17, 20. Hale and Hernandez confirmed that one or two hauls were made per day and that it would take more than 5 hours per haul to load at Area 1, drive that load to the Oakley yard (1¾ hours), unload at the yard (1 hour), and then return to Area 1 (1¾ hours). Tr. II at 15-16, 41-42; *see also*

---

<sup>7</sup> Hale testified the excavator he had been using at the Autumn Gold quarry was moved to Area 1 in the second week of September when it became too cold for his crew to work at Autumn Gold; Lynn Kunzler, Senior Reclamation Specialist, Utah Department of Natural Resources, testified that activities at Area 1 began in early-to-mid September. Tr. II at 26, 37; Tr. I at 31-34; Ex. B-1 at 38 (Kunzler memo dated Oct. 13, 1998). Lon Thomas conceded that site activities began a couple of days before Kunzler visited it on Sept. 16, 1998. Tr. III at 19-20.

Testimony by Ford, Tr. III at 126-28, 145.<sup>8</sup> Hale, Hernandez, and Lon Thomas also testified that the blue truck frequently broke down and was typically available only 3 or 4 days per week. Tr. II at 12, 17, 29, 59-60, 225-26.

Judge Holt found that Thomas' blue truck could have made 48 hauls between mid-September and mid-October 1998 (*i.e.*, 2 hauls every work day); Ford agreed that only the blue truck took granite from Area 1 to the Oakley yard and conceded that counting hauls would be a reasonable way to determine how much stone had actually been removed in mineral trespass. See Tr. III at 150-51, 181, 209-10. Judge Holt then calculated that if the blue truck were loaded to capacity (12 tons), Thomas could have removed 576 tons (48 x 12) of granite from Area 1 during the period of its trespass. Decision at 9. The Majority relegates Judge Holt's finding and determination to a footnote and apparently dismisses its import because granite might have been removed from that site for a period longer than was demonstrated by the evidence. See 180 IBLA at 194 note 14.

Judge Holt determined how much stone could have been removed from Area 1 based on evidence adduced at the hearing. He reviewed the credibility of witnesses in detail, *see* Decision at 11-16, and it was upon their testimony that he determined that no more than 576 tons could have been removed from that site, noting that "BLM's revised calculation (2,318 tons) is more than four times Thomas' maximum hauling capacity." Decision at 9, 10. Unlike the majority, I am unpersuaded that Ford's speculation that excavation could have been occurring all that summer is sufficient to fatally comprise the credibility of Kunzler and other witnesses, whose demeanor Judge Holt observed and expressly commented upon. From my review of the record, it is more than sufficient to affirm Judge Holt's finding and determination that Thomas' maximum capacity to haul granite from Area 1 was 576 tons and his ruling that Thomas preponderated in demonstrating that BLM's 2,318-ton estimate was in error. *See Pine Grove Farms*, 126 IBLA at 274.<sup>9</sup>

---

<sup>8</sup> Jesus Hurtado assisted Thomas at Area 1 in loading and then driving the blue truck to the Oakley yard, but he was no longer employed by Thomas and his whereabouts was then unknown. Tr. II at 274-78.

<sup>9</sup> The mineral material trespasser in that case introduced evidence that it was impossible to remove as much stone during its trespass as had been estimated by BLM. We held this evidence was adequately rebutted by the record which showed that equipment similar to what was used by the trespasser could remove as much stone as had been estimated by BLM. *See* 126 IBLA at 273. The record of this case is devoid of any similar evidence to rebut or otherwise counter the consistent testimony of the several witnesses who testified before Judge Holt.

2. The Amount of Granite Removed, Managed, and Later Returned was Less than 500 Tons.

Based also on the credibility of witnesses and their consistent, uncontroverted testimony, Judge Holt found that granite removed from Area 1 was stored in a segregated stockpile at the Oakley yard and later returned to that site in early-to-mid November 1998. Decision at 4, 8. Hale and Hernandez testified that granite unloaded at the Oakley yard during the period of trespass was placed in a separate stockpile, which Hale stated grew to roughly 30 x 30 x 10 by mid-to-late October 1998.<sup>10</sup> Tr. II at 11, 15, 19, 46-47, 55-56; Tr. III at 24. Both Hale and Lon Thomas believed this stockpile contained roughly 200 tons. Tr. II at 29, 65-66; Tr. III at 22-24. Ford estimated it contained 400-500 tons of granite.<sup>11</sup> Tr. III at 107-08. Hale and Hernandez testified that the contents of this stockpile were taken to Area 1 in early-to-mid November and that it was a “big deal” to return stone to a quarry. Tr. II at 12-13, 18, 29, 31, 32, 54-56, 70; *see* Tr. III at 33. After that granite was returned, Area 1 appeared “fuller than it was” before Thomas began activities at that site, as observed by Hale in late November 1998 and later confirmed by Rex Larsen, an expert witness for Thomas. Tr. I at 251-59; Tr. II at 28-32, 63, 231; *see* Ex. A6, A7, A38.

If BLM’s estimate was even remotely accurate, one is then left to speculate as to what became of more than 1,800 tons of granite (2,317 tons less the 400-500 ton Area 1 stockpile) and how such a large volume of stone could have been moved in so short a period of time (*i.e.*, 8 hauls per day every day for a month) without anyone observing that level of activity, including Ford and Kunzler during September and October or Hale, who regularly drove by that site in September and October. *See* Tr. III at 179. Rather than engaging in speculation to accept BLM’s estimate, Judge Holt found it to be in error. *See* Decision at 17.

The consistent testimony of Thomas’ witnesses, coupled with Ford’s estimate of how much stone was in the Area 1 stockpile, demonstrates that less than 500 tons of granite was returned to Area 1 (*i.e.*, the segregated stockpile plus 60-90 tons from

---

<sup>10</sup> Hale testified there was a much larger stockpile (1,500 tons) of “bone hard granite” at the Oakley yard in July and that a new stockpile of different, “soft” (eroded) granite was begun in September 1998. Tr. II at 44-47; *see* Tr. II at 217-18.

<sup>11</sup> It is a relatively easy mathematical exercise to calculate how much stone could have been in that stockpile. Assuming the stockpile constituted the base of a pyramid, it would have a calculated volume of 6,072 cubic feet and weigh 510.05 tons. *See* Ex. B-3 (granite weighs 168 pounds per cubic foot). If adjusted for voids and waste (assumed by BLM to be 20%), this stockpile would weigh roughly 410 tons and be within the 400-500 ton range estimated by Ford.

the same formation but a different quarry, Tr. III at 25-26), and it is undisputed that this site was then fuller than before. Yet under BLM's estimate, either a substantial hole should have remained or 200 hauls (15 hauls per day) must have been made to that site during early-to-mid November 1998, but there is no suggestion, much less a scintilla of evidence, that either of these circumstances exists or occurred. This, too, is sufficient for me to find that substantial evidence supports Judge Holt's finding that BLM erroneously estimated that 2,318 tons had been removed in mineral trespass, based not only on the size of the Area 1 stockpile (200-500 tons), but also on Area 1's appearance after 500 tons of granite were returned to that site.

3. The Contemporaneous Production Summary Shows that Less than 476 Tons of Granite were Produced from Area 1.

In response to BLM's trespass notice and in an effort to settle that trespass on October 15, 1998, Thomas provided BLM with a summary of granite produced from its three granite quarries, including Area 1, which showed that 1,544.8 tons of granite had been produced from those sites between 1995 and 1998. Ex. B1 at 44-45; Decision at 9; *see* Decision at 10 ("BLM's calculation of the volume taken from the granite site (3,370 tons) was twice the production that Thomas' records (provided to BLM) showed that he mined from three area granite quarries during the previous four years (1,544.8 tons)"). Thomas also presented "Payroll Palletizing Records" showing that 1,178.26 tons of granite had been split and palletized for sale between January 1997 and October 1998. Ex. A1-4; *see* Decision at 7. These palletizing records were introduced to show the patent unreasonableness of BLM having estimated that 2,318 tons were removed from Area 1 over a single 30-day period in September and October 1998.<sup>12</sup> Decision at 7; *see* Tr. II at 158-60. Referring to these records, Judge Holt found that "BLM's revised calculation of the volume taken from the granite site (2,318 tons) exceeded Thomas' records of all [its] granite production during 1997 and 1998 (1,178.26 tons) by nearly two times." Decision at 7, 10.

The majority does not just weigh this evidence differently than did Judge Holt, they dismiss it entirely by viewing his consideration of these records to be legally insufficient to support Thomas' challenge to BLM's estimate. The majority apparently holds it was error for Judge Holt to consider the October 1998 granite production summary because Thomas failed to present the original handwritten notebooks

---

<sup>12</sup> Contrary to standing directives that newly received stone be split and palletized last to avoid cherry picking easy-to-process stone (yard personnel were paid by the pallet, not by the hour), yard personnel removed, split, and palletized 3 or 4 pallets of granite from the Area 1 stockpile. Tr. II at 219-20; Tr. III at 97-100. Thus, the 1,178.26 tons reflected in these palletizing records included 6-8 tons from Area 1. Decision at 7-8; *see* Tr. II at 221-22.

prepared by yard personnel that had been used to prepare that summary,<sup>13</sup> thereby precluding this Board from assessing its accuracy, *see* 180 IBLA at 200, but neither BLM<sup>14</sup> nor Judge Holt were so constrained at that hearing. Judge Holt extensively considered these missing notebooks and why they were destroyed, concluding that Beverly Thomas' testimony and explanation were credible and logical. Decision at 12-13 ("She believed the summary contained the relevant information" and after 9 years, "had not thought to pull the notebooks from the other stored records for 1998 when these business records were destroyed."). Having had the opportunity to assess her credibility and explanation, I would not find error in Judge Holt considering this summary or assume, as the majority does, that "Thomas destroyed valuable firsthand evidence that it must have regarded as probative of the amount of material actually taken." 180 IBLA at 200.

Even if these notebooks had been presented at the hearing, they would not be the Holy Grail the majority perceives them to be. Yard personnel identified the weight and type of stone received at the yard in these notebooks, not where that stone came from. Based upon her familiarity with what was produced at Thomas' several quarries, Beverly Thomas could generally identify source based upon stone type. For quartzite boulders, an apparently unique type of stone that was sold under the trade name "Windridge," only one and possibly two of Thomas' quarries produced that type of stone. Granite, a far more ubiquitous and common type of stone, was

---

<sup>13</sup> As materials arrived at the yard, yard personnel entered each load's identification and weight into a notebook, which was then used by Thomas' bookkeeper-accountant to prepare reports, including the production summaries provided to BLM in October 1998 and presented at the May 2007 hearing. Tr. II at 127-30, 139-53, 225-26, 253-55, 285-303; Tr. III at 7-12, 20-22; *see* Exs. A1-3, B-1 at 41-42. Notebooks were used by personnel at both the Oakley and Salt Lake yards; Beverly Thomas considered both sets of notebooks in preparing her production summaries. Tr. II at 151-52; 288-92.

<sup>14</sup> BLM long knew Thomas' production summary showed that only 475.42 tons had been produced from all three of its granite quarries during September and October 1998, that Thomas strongly disagreed with its estimate, and that Thomas had records showing that only a fraction of that amount had been removed from that site, yet BLM never requested those records. Decision at 13; *see* Petition for Stay in IBLA 2000-13 at 18. BLM was under no obligation to make such a request, but its failure to do so even after we referred the matter for hearing is inexplicable. Order dated Mar. 30, 2000 (IBLA 2000-13). Having eschewed making such a request and only questioning the accuracy of these summaries at the hearing 9 years later, I would not infer (as the majority apparently does) that an inability to present these notebooks at hearing supports BLM's claim that more stone was removed than is reflected on Beverly Thomas' summaries that were provided to BLM in mid-October 1998.

more problematic because it was produced at Area 1 and Thomas' other nearby quarries. The fact this summary was provided to BLM before Ford prepared his initial estimate and included production for periods long before any trespass at Area 1 occurred (1995, 1996, and 1997) appears to support its accuracy. When viewed in this context and recognizing that Beverly Thomas or another equally knowledgeable person was needed to decipher the information contained in these notebooks, her explanation of why she did not retain them over the 9-year pendency of this dispute is logical and rings true, as determined by Judge Holt, and belies the majority's suggestion that she intentionally destroyed them to avoid confirming BLM's estimate.

The majority takes a different tack with the palletizing records, disregarding them because "they did not include the amount of material taken from Area 1 that was not split and palletized." 180 IBLA at 201. Since these records were presented to show the gross magnitude of BLM's error, I find no error in Judge Holt considering them to determine whether Thomas preponderated in challenging the accuracy of BLM's estimate. The production summary shows Thomas produced 1,234.76 tons from its 3 granite quarries in 1997 and 1998, and its palletizing records show that 1,178.26 tons of granite were split and palletized in 1997 and 1998, indicating that the yard's granite inventory was roughly the same in January 1997 as in January 1999.<sup>15</sup> More importantly, these palletizing records show that less than half as much granite was received and processed at the Oakley yard from 3 quarries over a 2-year period than was estimated by BLM as having been removed from Area 1 over a single 30-day period. I simply would not affirm an estimate where there is so great and obvious a difference between BLM's estimate and available records supported by credible testimony. In my view, these documents provide yet another basis upon which to find, as did Judge Holt, that BLM's estimate was in error.

While reasonable minds may differ on the weight to be accorded a specific document or a particular witness' testimony, I simply find no basis in logic or law for this Board to overrule Judge Holt's evaluation of the evidence and reverse his determination that Thomas preponderated in showing error in BLM's estimate. Viewed separately, Judge Holt's findings concerning each of the above-identified bases are supported by substantial record evidence; viewed collectively, I find these bases and the record upon which they are based to present an overwhelming case that BLM erred in its estimate (e.g., the production summary showing that Thomas produced 475.42 tons of granite during September and October 1998 is in remarkable agreement with the size of the Area 1 segregated stockpile (estimated by Ford at 400-500 tons), the amount of material returned to that site (500 tons) and its appearance thereafter, and Thomas' maximum hauling capacity (576 tons), regardless of breakdown, weather, or other uses for that truck). I must, therefore,

---

<sup>15</sup> Lon Thomas testified that his company was in the business of selling stone, not in stockpiling stone as inventory. Tr. III at 297-300.

disagree with the majority's view that "Judge Holt's findings are simply inconsistent with the record" and their affirming BLM's estimate that 2,318 tons of granite were removed in mineral trespass from Area 1. 180 IBLA at 201.<sup>16</sup>

C. *Substantial Evidence Supports Judge Holt's Finding that Thomas Removed Significantly Less than 1,000 Tons of Quartzite (Boulders) from Area 2.*

It is undisputed that the site from which quartzite boulders were removed in mineral trespass, Area 2, was a naturally occurring depression (*i.e.*, an "active drainage"). See 180 IBLA at 196 note 15; BLM Decision at 2. The dispute between the parties was whether that depression was filled with stone to create a level surface (as assumed by Ford in his estimate) or whether surface boulders within that depression were rolled into excavated "catch holes" to facilitate collection and removal (as adduced by testimony). Only if this factual dispute was resolved in BLM's favor could Judge Holt sustain BLM's estimate. See Decision at 17. The issue decided by Judge Holt was whether the Area 2 depression had been filled with stone to create a level surface (as assumed by Ford in his volume calculations), or if framed in terms of Thomas' burden at the hearing, whether its evidence was sufficient to demonstrate that it gathered surface boulders within that depression and rolled them into excavated holes from which they were extracted and later removed.

Based on his weighing of the evidence, including the quartzite boulder production summary for 1995-1998, testimony on how these boulders were collected at Area 2<sup>17</sup> and who they were for, and Ford's admission that he had no knowledge of "what the original surface looked like or how Thomas had excavated it," Judge Holt found that "Thomas' method of mining the quartzite site took large surface boulders with very little excavation, contrary to BLM's assumption that Thomas had excavated all of the disturbed area" and that "BLM's original calculation of the volume taken

---

<sup>16</sup> The majority would affirm BLM's estimate because it finds Lon Thomas' testimony that only 200 tons were removed from Area 1 to be of "dubious validity" and "limited evidentiary value." 180 IBLA at 201. Regardless of Lon Thomas' belief as to how much stone was removed, the clear weight of the evidence detailed above is more than sufficient, at least for me, to show that BLM's estimate was in gross and irreconcilable error as determined by Judge Holt based upon substantial record evidence.

<sup>17</sup> Ford conceded that Area 2 appeared as if Thomas had only been gathering surface stone from that site; David Boleneus, a BLM expert, testified that if Thomas had only recovered scattered boulders from Area 2, it would look like the pictures Ford took of that area. Tr. I at 204-05; Tr. II at 103-05. Thus, Ford's observations are not in conflict with direct testimony by Lon Thomas and others as to that area's appearance before operations began or how they were conducted.

from the quartzite site (1,269 tons) was five times the production that Thomas' records showed that he mined from all his quartzite during the previous four years (266.97 tons)." Decision at 10, 11; *see id.* at 7, 8, 9. Recognizing his finding was based largely on Lon Thomas' testimony, Judge Holt extensively discussed his demeanor and credibility in weighing the evidence presented. *Id.* at 11-16. As elaborated below, I would more closely hew to our precedent and defer to Judge Holt's weighing of that evidence.

Thomas adduced testimony that Area 2 was not filled with boulders to create a flat surface (as assumed by BLM), explaining that it excavated a series of pits or "catch holes," gathered surface boulders by rolling them into those pits for easier extraction, and then transported them to the Oakley yard. Tr. II at 34, 254-70; *see* Tr. I at 34, 82-84, 197-200, 204-06; Tr. III at 79, 87, 202.<sup>18</sup> Although Ford questioned whether it made sense to proceed in that manner, Lon Thomas explained that gathering boulders (not loose stone) was economical because they were to satisfy the specific needs of one of his customers, which gave rise to his earlier belief they were of uncommon variety. Tr. I at 197, 204; Tr. II at 258-65, 269-70; Tr. III at 76-79, 202.

Shortly after receipt of BLM's trespass notice, Lon Thomas faxed a summary of monthly quartzite boulder production to Ford. This contemporaneous summary showed that only 266.97 tons of quartzite boulders had been produced by Thomas from 1995 through 1998. Ex. B-1 at 40-42. At the hearing, Lon Thomas presented a revised production summary, Ex. A1-3, with the only difference being that its revision deleted boulders produced in 1995 (66.87 tons), apparently because Lon Thomas later recalled that Area 2 did not come into operation until 1996.<sup>19</sup> *See* Tr. II at 282.

Based on these production summaries, the testimony adduced at hearing, and his assessment of witness credibility, Judge Holt determined that Thomas preponderated in challenging BLM's 1,037-ton estimate and in demonstrating that 210.7 tons of quartzite boulders were removed from Area 2 in mineral trespass. I would not, as the majority does, reverse Judge Holt as I find no clear error in his weighing of the evidence or that the testimony he relied on was "fatally comprised." *See IMC Kalium Carlsbad, Inc.*, 170 IBLA 25, 40 (2006) (absent clear error in

---

<sup>18</sup> The pits ("catch holes") described by Lon Thomas were visible in Ford's after-the-fact photographs of this site. Tr. II at 258-59, 263-65; Tr. III at 75-77.

<sup>19</sup> Although the 1998 summary may be deserving of greater weight than one prepared several years after the fact, the Government did not explore this discrepancy at the hearing and was apparently satisfied that Thomas' operations at Area 2 began in 1996.

evaluating the evidence, “this Board will not substitute its weighing of that evidence for [the ALJ’s]”); *Carlo*, 133 IBLA at 211-12.

In sum, the burden at hearing was on Thomas to show, by a preponderance of the evidence, that BLM’s estimates were in error. *See West Cow Creek Permittees*, 142 IBLA 224, 236 (1998) (an appellant must show not just that study results relied upon by BLM “could be in error, but that they are erroneous”); 180 IBLA at 190-91; *see also Pine Grove Farms*, 126 IBLA at 273, 274; *Richard C. Nielson*, 129 IBLA at 325. Judge Holt evaluated the credibility of Thomas’ witnesses, weighed the evidence presented, and determined that Thomas had preponderated in showing that BLM’s estimates were in error. *See* Decision at 17. The majority characterizes Lon and Beverly Thomas’ testimony as being of “dubious validity” and “limited evidentiary value,” to conclude: “Judge Holt’s findings are simply inconsistent with the record.” 180 IBLA at 201. I would not so disparage Judge Holt’s determinations of the Thomas’ credibility, nor would I exclude consideration of contemporaneous production summaries or ignore the consistent, uncontroverted testimony of others. Rather, I would defer to Judge Holt’s findings of fact based on his weighing of the evidence presented (absent clear error, of which I discern none), including the credible testimony of witnesses (absent compelling evidence that such testimony was fatally compromised) where, as here, he had “the opportunity to observe the demeanor of the witnesses and is in the best position to judge the weight to be given to conflicting testimony.” *Rannells*, 175 IBLA at 383. Accordingly, I would affirm Judge Holt’s findings of fact and his determination that Thomas met its burden of showing error in BLM’s estimates.

II. ABSENT A REGULATION REQUIRED UNDER 31 U.S.C. § 9701, THE INDEPENDENT OFFICES APPROPRIATION ACT (IOAA), BLM MAY NOT REQUIRE COST REIMBURSEMENT FOR PURSUING AN ACTION IN MINERAL MATERIAL TRESPASS.

The majority holds that section 304(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1734(a) (2006) (FLPMA), enables BLM, without notice to the public or a rulemaking, “to require a trespasser to reimburse it for administrative costs incurred in resolving a trespass, so long as such costs ‘apply directly to documents relating to the public lands, e.g., trespass notices and bills for collection.’” 180 IBLA at 211 (quoting *Henry Deaton*, 101 IBLA 177, 182 (1988)). The majority maintains *Henry Deaton* “reflects the proper construction of section 304(a) of FLPMA” and was wrongly reversed in *Deaton v. Lujan*, No. 88-345 SC (D. N.M. Apr. 25, 1989) (*Deaton*). 180 IBLA at 211, 213-15. I disagree because I believe the District Court correctly held that the IOAA requires a rulemaking before BLM can recover costs under FLPMA.

While this Board is not bound by the decisions of Federal District Courts in New Mexico on matters arising out of activities in the State of Utah, we have repeatedly held that we will follow an adverse-to-the-Department final decision by a Federal court unless “the effect of the decision could be extremely disruptive to existing Departmental policies and programs and . . . a reasonable prospect exists that other Federal courts might arrive at a different conclusion.” *Marathon Oil Co.*, 149 IBLA 287, 291 (1999), and cases cited; *accord Union Oil Company of California*, 167 IBLA 263, 278 (2005); *see Alamo Ranch Company, Inc.*, 135 IBLA 61, 71 (1996). Requiring both these conditions reflects the deference we accord Federal courts and the limited circumstances under which this Board may elect not to follow their decisions. BLM has neither demonstrated nor claimed that the District Court decision in *Deaton* has been or could be “extremely disruptive” to the Department. In my view, more than nothing should be shown (or at least alleged) before this Board disregards the final decision of a Federal court on a controlling issue of law.<sup>20</sup> But even if we were to dispense with this eminently reasonable requirement, I find scant (if any) prospect that any other Federal court would reach a different result than was reached in *Deaton* in light of applicable case law, the opinion of the Solicitor in advising the Director, BLM, on its authority to recover costs under FLPMA, and the positions espoused by BLM in multiple cost recovery rulemakings.

#### A. Case Law

The Associate Solicitor for Energy and Resources evaluated *Deaton* but recommended against an appeal because there was no rule authorizing cost recovery for a trespass and FLPMA did not override the IOAA requirement that cost reimbursement be by regulation.<sup>21</sup> Correspondence to U.S. Department of Justice

---

<sup>20</sup> As discussed below, BLM has engaged in multiple rulemakings that establish reasonable fees and charges under section 304 of FLPMA and its authority to recover administrative costs for pursuing trespasses on the public lands, timber trespasses, and willful grazing trespasses, but for reasons unexplained by counsel or this record, BLM has not taken similar action for mineral trespasses. It belies logic and common sense to suggest that BLM’s failure to engage in a rulemaking and promulgate a regulation required under the IOAA would be “extremely disruptive” to Departmental programs.

<sup>21</sup> As now codified at 31 U.S.C. § 9701 (2006)(emphasis added), the IOAA provides:

- (a) It is the sense of Congress that each service or thing of value provided by an agency (except a mixed-ownership Government corporation) to a person (except a person on official business of the United States Government) is to be self-sustaining to the extent possible.

(continued...)

dated June 14, 1989, at 2-3 (citing *Alaskan Arctic Gas Pipeline Co. v. United States*, 831 F.2d 1043 (Fed Cir. 1987) (*Alaskan Pipeline*), and *Alyeska Pipeline Service Co. v. United States*, 624 F.2d 1005, 1010 (Ct. Cl. 1980) (*Alyeska*). The majority maintains our decision in *Henry Deaton* was wrongly reversed by the District Court and holds that no rulemaking is required by the IOAA before BLM could recover its costs under FLPMA. 180 IBLA at 215.

The sum total of our analysis of this issue in *Henry Deaton* is reflected in the following sentence: “Section 304 of the Federal Land Policy and Management Act permits BLM to assess reasonable charges for applications and other documents relating to the public lands.” 101 IBLA at 182. This statute states:

[T]he Secretary *may establish* reasonable filing and service fees and reasonable charges, and commissions with respect to applications and other documents relating to the public lands and may change and abolish such fees, charges, and commissions.

43 U.S.C. § 1734(a) (emphasis added). But even if FLPMA stated the Secretary may “assess” or recover its administrative costs, BLM still could not avoid the IOAA requirement that a regulation be promulgated, the very issue considered in both *Alaskan Pipeline* and *Alyeska*.

The Mineral Leasing Act (MLA) provision at issue in *Alaskan Pipeline* and *Alyeska* expressly provides that applicants “*shall reimburse* the United States for administrative and other costs incurred in processing the application.” 30 U.S.C. § 185(l) (2006) (emphasis added); *see Alaskan Pipeline*, 831 F.2d at 1046. The Department claimed its authority to recover administrative costs was this MLA directive, not the IOAA. Both appellate courts disagreed, concluding that the MLA

<sup>21</sup> (...continued)

(b) *The head of each agency (except a mixed-ownership Government corporation) may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be--* (1) fair; and (2) based on (A) the costs to the Government; (B) the value of the service or thing to the recipient; (C) public policy or interest served; and (D) other relevant facts.

(c) This section does not affect a law of the United States--(1) prohibiting the determination and collection of charges and the disposition of those charges; and (2) prescribing bases for determining charges, but a charge may be redetermined under this section consistent with the prescribed bases.

“must be read in conjunction with the expressed requirement of the IOAA that implementing regulations be in effect at the time the costs sought to be recovered are incurred,” and holding that the Department cannot recover its costs “prior to the promulgation of [] implementing regulations.” *Alaskan Pipeline*, 831 F.2d at 1047-48; *see Alyeska*, 624 F.2d at 1011. Other courts in other contexts have held that notice and comment procedures are required to establish fees consistent with the IOAA. *See Engine Manufacturers Assoc. v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994); *Diapulse Corp. of America v. Fed. Drug Admin.*, 500 F.2d 75, 79 (2d Cir. 1974); *see also National Cable Television Assoc. v. Fed. Communications Com.*, 554 F.2d 1094, 1100, 1104-05 (D.C. Cir. 1976); 4 *Principles of Federal Appropriation Law* 15.D.3.c.(1), Office of the General Counsel, U.S. General Accounting Office (2d Ed. 2001) (need for regulations to establish fees and user charges). Since the MLA directive was insufficient to trump the IOAA in these Federal appellate cases, I find no basis for summarily dispensing with the IOAA in this case<sup>22</sup> and therefore disagree with the majority’s view that a rulemaking is unnecessary or their implicit view that the above-cited appellate decisions are irrelevant to a proper disposition of this appeal. *See* 180 IBLA at 215-16.

#### B. *The Solicitor’s M-Opinion*

In partial response to recommendations by the Office of the Inspector General that BLM take expedited action to establish user fees, the Solicitor issued an opinion analyzing BLM’s authority to recover its costs for processing minerals documents and discussing its rulemaking options. M-36987 (Solicitor Opinion) (Secretary Babbitt concurring) (Dec. 5, 1996); *see* Solicitor Opinion M-37008, *Binding Nature of Solicitor’s Opinion on the Office of Hearings and Appeals* (Secretary Babbitt concurring) (Jan. 18, 2001); *Rannells*, 175 at 377 n.14. The Solicitor Opinion recognized section 304(a) of FLPMA authorizes the Secretary to “establish reasonable filing and service fees and reasonable charges . . . with respect to applications and other documents relating to the public lands,” 43 U.S.C. § 1734(a), but that “*FLPMA did not repeal the IOAA in the context of public land management*” and that the IOAA authorizes cost recovery for “a service or thing of value” only by regulation. Solicitor Opinion at 3, 5 (emphasis added). He then reviewed applicable case law under both FLPMA and the IOAA, opining that if BLM “provides a special benefit to an identifiable beneficiary, the costs associated with it may be recovered, whether or not there is incidental public benefit associated with the action” and that “regulations implementing the cost recovery measures for minerals document processing will have to include consideration of the ‘reasonableness’ factors [of FLPMA section 304(b), 43 U.S.C. § 1734(b)].” *Id.* at 13 (citing *Nevada Power v. Watt*, 711 F.2d 913, 925 (10th Cir.

<sup>22</sup> Where we have eschewed following a Federal appellate court decision, we have done so where there is a split in the circuits, but there is no such split on the issue here presented.

1983) (recognizing that FLPMA's "reasonableness" factors are more restrictive than under the IOAA)).<sup>23</sup>

The Solicitor also reviewed BLM documents that identified certain mineral cost recovery actions/documents as "not subject to Cost Recovery" because BLM did not believe it had sufficient statutory authority to recover its costs due to "the public benefits that flow from these agency actions." Solicitor Opinion at 16-17. Where the Solicitor determined that such costs were recoverable under statutory and case law because an identifiable recipient received a special benefit, he opined that in "promulgating regulations, BLM will have to determine its actual costs for each type of action for which it has cost recovery authority," noting that "[i]n the course of establishing the regulatory framework for cost recovery and determining individual fees, each of the 'reasonableness factors' must be considered." *Id.* at 17; *see* 31 U.S.C. § 9701(c)(2). The Solicitor determined that the cost of inspecting and taking enforcement action against "authorized facilities" were recoverable under 43 U.S.C. § 1734(b) because they conferred a benefit on lessees/operators of such facilities by allowing them "to continue operations which would not be possible without such compliance with applicable statutes, regulations, lease terms, and plans of operations or exploration plans from which these agency actions derive." Solicitor Opinion at 21.

---

<sup>23</sup> The majority's reliance on *Nevada Power* is singularly misplaced. 180 IBLA at 213-14, 215. The issue addressed by the 10th Circuit in that case was whether BLM's cost reimbursement rule under the IOAA and section 304(a) of FLPMA adequately addressed the reasonableness factors identified in FLPMA section 304(b). *Nevada Power*, 711 F.2d at 926-27; *see* Solicitor Opinion at 11-14, 33-34 (discussing the practical import of *Nevada Power* on BLM's rulemaking options). Those rules were set aside because they did "not reveal the effective consideration that must be given to each of the 304(b) factors" and were therefore "inconsistent with FLPMA and in excess of the authority therein granted." *Nevada Power*, 711 F.2d at 926, 927. It was in addressing how those factors must be considered by BLM in its rulemaking on remand, that the court suggested BLM could address them either in the rule itself or on a case-by-case basis in implementing a general rule. *Id.* The Court neither suggested nor implied that a rulemaking was unnecessary, only the details of how that rule might be written or implemented.

Having determined that these costs could be recovered under FLPMA<sup>24</sup> and the IOAA, it was then incumbent upon BLM to engage the rulemaking process and establish reasonable service fees and charges, including criteria for making case-by-case determinations. See 43 C.F.R. § 3000.11 (case-by-case determinations for processing fees). The Solicitor Opinion echoes the earlier views of the Associate Solicitor, including his determination that a rulemaking mandated by the IOAA was required before BLM could require reimbursement of its administrative costs under FLPMA. More importantly for this case, it is fully consistent with appellate court decisions holding that the Department's statutory authority to recover its administrative costs "must be read in conjunction with the expressed requirement of the IOAA that implementing regulations be in effect at the time the costs sought to be recovered are incurred." *Alaskan Pipeline*, 831 F.2d at 1048 (citing *Alyeska*, 624 F.2d at 1010); *but see* 180 IBLA at 215 ("we find nothing in [the Solicitor Opinion] that supports the view that a rulemaking is necessary before BLM can charge a trespasser with administrative fees incurred by BLM as a result of a mineral trespass").

C. *BLM Cost Recovery Rulemakings Under FLPMA*

After and consistent with the Solicitor Opinion, BLM proposed rules to establish fees for recovering the cost of processing certain documents relating to BLM's minerals programs while it continued to work on establishing fees and charges for other documents and activities (e.g., inspection and enforcement activities). 65 Fed. Reg. 78440, 78442 (Dec. 15, 2000). As presaged in the Solicitor Opinion, this proposal stated:

The IOAA and section 304 of FLPMA authorize BLM to charge applicants for the cost of processing documents through rulemaking, which BLM is proposing to do through this rule.

*Id.* at 78440. BLM repropoed these rules and proposed additional rules for recovering its costs to process minerals documents, again stating that the "IOAA and section 304 of FLPMA authorize BLM to charge applicants for the cost of processing documents through the rulemaking process, which BLM is proposing to do through this rule." 70 Fed. Reg. 41532, 41533 (July 19, 2005). It then added:

This proposed rule covers only some of the documents for which BLM has the authority to recover processing costs. The BLM intends to

---

<sup>24</sup> While not entirely free of doubt, it would appear that a mineral trespasser may obtain a "benefit" from its trespass to the extent it sold stone removed in trespass or would have good title to sell that stone as a consequence of BLM's successful pursuit of a trespass action. See Solicitor Recommendation at 2 (water obtained by trespassing on public lands provided a benefit to the trespasser).

continue to work on establishing and collecting fees for other documents including those addressed in the Solicitor's December 5, 1996, M Opinion on this subject (M-36987). In the future, we expect to identify and propose fees for additional processing activities.

*Id.* BLM then promulgated rules “to amend its mineral resources regulations to increase certain fees and to impose new fees to cover BLM’s costs of processing documents relating to its minerals programs.” 70 Fed. Reg. 58854 (Oct. 7, 2005). BLM made clear a rulemaking was required before it could recover its costs, stating that the “IOAA and [s]ection 304 of FLPMA authorize BLM to charge applicants for the cost of processing documents by issuing regulations, which BLM is doing in this rule.” *Id.* Despite statutory authority recognizing that these fees and costs could be recovered under FLPMA, BLM stated these rules were prospective and would apply only to applications submitted after their effective date. 70 Fed. Reg. at 58855, 58862. If a regulation was unnecessary under the majority’s view of the law, the Department’s discussion of retroactivity in that rule would be a *non sequitur* and legally irrelevant to requiring reimbursement of administrative costs before that rule was promulgated.

Multiple BLM rulemakings that establish fees and charges under FLPMA further confirm that a rulemaking is necessary before BLM can require cost reimbursement for a mineral trespass. The Department has established FLPMA rules specifying that a trespasser on the public lands (excluding grazing, mineral, and timber trespasses) “shall be liable to the United States for . . . administrative costs incurred by the United States as a consequence of such trespass.” 43 C.F.R. § 2920.1-2(a); 52 Fed. Reg. 49114, 49115 (Dec. 29, 1987); *see also* 43 C.F.R. § 2808.11(a)(1) (trespass in connection with a right-of-way). BLM has since promulgated similar rules for timber and willful grazing trespasses (but not for nonwillful grazing trespasses). 43 C.F.R. § 9239.1-3(a)(1) (timber trespass); 43 C.F.R. § 4150.3 (grazing trespass); *see* 56 Fed. Reg. 10173 (Mar. 11, 1991); 53 Fed. Reg. 10224 (Mar. 29, 1988). BLM has yet to pursue a rulemaking to recover its costs for investigating and pursuing a mineral trespass; I would not excuse BLM’s failing to pursue through proper rulemaking procedures in this case. *See Summit Quest, Inc.*, 120 IBLA 374, 379 (1991).

As discussed, the case law requires a rulemaking mandated by the IOAA before the Department can require reimbursement of its administrative costs. *Alaskan Pipeline*, 831 F.2d at 1048; *Alyeska*, 624 F.2d at 1010; *see Sohio Transportation Co. v. United States*, 766 F.2d 499, 502 (Fed. Cir. 1985); *Deaton* at \*3. Neither BLM nor the

majority has cited any case to the contrary; my research has found none.<sup>25</sup> The Solicitor also shares the view that a rulemaking is required to implement section 304 of FLPMA before cost reimbursement can be required, both in recommending against an appeal in *Deaton* and, more importantly, in advising BLM on the limits of its authority to recover the cost of processing minerals documents under FLPMA. Solicitor Recommendation at 2-3; Solicitor Opinion at 3-6.<sup>26</sup> Moreover, the Department has recognized in multiple rulemakings that the IOAA and its rulemaking requirement apply to the recovery of costs for processing minerals documents under FLPMA. Solicitor Opinion at 37; 70 Fed. Reg. at 58854; 70 Fed. Reg. at 41533; 65 Fed. Reg. at 78440. I would affirm Judge Holt's ruling that administrative costs for pursuing a mineral trespass have not yet been authorized by a regulation under FLPMA, as required by the IOAA.

### III. MINERAL TRESPASS DAMAGES WERE IMPROPERLY MITIGATED UNDER THE CIRCUMSTANCES OF THIS CASE.

I concur with the majority's conclusion that Judge Holt erred in mitigating Thomas' damages, but disagree with its rationale and ruling that the common law has no applicability to a mineral trespass and that Thomas committed a second trespass when it returned stone to Area 1. In my view, the general common law of tort and property, both real and personal, applies to a mineral trespass, and it is under that law that I find error in Judge Holt's mitigation of damages in this case.

Damages in tort for a trespass on real property are based on use of and injury to that realty. Since a mineral estate is an interest in real property, a similar rule applies under Federal law. *See* 43 C.F.R. § 2920.1-2(a). Once a mineral is severed from that estate, it becomes personalty, and if removed from the surface estate, a tortious conversion of that personalty. The removing party is then liable in tort for the value of the converted personalty (*e.g.*, a mineral severed from the Federal mineral estate). After the injury is remedied (*i.e.*, the injured party is made whole through damages), the injured party cannot require the return of the converted property and loses any claim of ownership to that property. The common law concept of mitigation is similar but applies only to converted personalty. An innocent

---

<sup>25</sup> On occasion, the Board has affirmed decisions that included an assessment of administrative costs, but in no other case has the issue here presented been raised, discussed, or decided. *See e.g.*, cases cited by the majority, 180 IBLA at 212 note 28.

<sup>26</sup> As the Solicitor recognized, it is Departmental policy to recover its costs "unless otherwise prohibited or limited by statute or other authority." Solicitor Opinion at 6 (quoting 346 Departmental Manual 1.2A). The IOAA, earlier discussed in his opinion, is just such a statute of prohibition and limitation. *See Alaskan Pipeline*, 831 F.2d at 1048; *Alyeska*, 624 F.2d at 1010.

tortfeasor may mitigate his liability in tort for a conversion by tendering the converted personalty in a substantially unimpaired condition. Since its rightful owner then has full use of his property as before the conversion occurred, his recovery of general damages based on value can be reduced through mitigation and his recovery then limited to its lost use and injury to that personalty by the tortfeasor.

I disagree with the majority's view that a mineral trespass is so fundamentally different from the torts of trespass and conversion that the common law is inapplicable or that the law of the state where the trespass occurred must expressly address damages for a mineral trespass. 180 IBLA at 207-08. A mineral trespass is defined by rule as the unauthorized "extraction, severance, injury, or removal of . . . mineral materials from" the Federal mineral estate, other than for personal use on one's surface estate. 43 C.F.R. § 9239.0-7; *see also* 43 C.F.R. § 3601.71. These rules specify that a mineral trespasser is liable in damages to the United States as prescribed by state law, unless a different rule is required under Federal law. 43 C.F.R. § 9239.0-8. In the absence of specifically applicable state or Federal law, I believe the general law of tort and property applies to a mineral trespass.

Extractions from and injury to the Federal mineral estate are common law trespasses on real property, and the severance and removal of a Federal mineral is then a common law conversion. The quantum of damages for each of these torts is well established under the common law. If a mineral trespasser only removes stockpiled Federal minerals from the surface estate, he is liable for damages in tort for conversion but may mitigate those damages by returning them from whence they came. However, where a trespasser not only removes mineral materials from the mineral estate, but also extracts and severs them, his trespass is more than the sum of its parts. Such trespassers are differently situated from those who simply remove mineral materials and may not unilaterally compel BLM to accept a tender simply by returning it. BLM must accept that tender for mitigation to apply, and if it does so, the returned mineral may again become a part of the Federal mineral estate and be the subject of an action in mineral trespass if later removed. The record shows Thomas extracted, severed, and removed stone from the Federal mineral estate and that BLM refused to accept its return and tender. Under these circumstances, I find there can be no mitigation for this mineral trespass and, therefore, concur in reversing Judge Holt ruling on that issue.<sup>27</sup>

---

<sup>27</sup> The return of converted personalty cannot be required once the injured party is made whole through damages. Since a trespasser cannot be compelled to return converted mineral materials absent his agreement to do so, it follows that BLM loses  
(continued...)

I also disagree with the majority's ruling that Thomas committed a second trespass when it returned granite to Area 1. 180 IBLA at 208-09. There could be no mineral trespass because the act of return is the direct opposite of the prohibited act of removing mineral materials "from the public lands." 43 C.F.R. § 3601.71; *see* 43 C.F.R. § 9239.0-7. Nor can there be a trespass under 43 C.F.R. § 2920.1-2(a) by placing that stone on one's own surface estate. Since I can discern no legal basis for concluding that Thomas committed a trespass against the United States by returning and placing stone on privately owned lands, I would expressly reject BLM's claim that a second trespass occurred in this case.

\_\_\_\_\_  
/s/

James K. Jackson  
Administrative Judge

---

<sup>27</sup> (...continued)

any claim to own those mineral materials once damages are paid, as is true for any other converted personalty under the common law. Once damages are paid in this case, Thomas should be able to remove and sell these mineral materials without claim by or liability to the Federal government; a contrary view would suggest that BLM will be liable for storing its stone on Thomas' surface estate.