



UNITED STATES v. RESOURCE TECHNICS, LLC and STONE RESOURCES, LLC

184 IBLA 87

Decided July 31, 2013



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

UNITED STATES  
v.  
RESOURCE TECHNICS, LLC  
and  
STONE RESOURCES, LLC

IBLA 2012-233

Decided July 31, 2013

Appeal from a decision of Administrative Law Judge Robert G. Holt dismissing a contest complaint challenging the validity of placer mining claims. Contest No. UTU-87817.

Affirmed.

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

The test for determining whether a deposit of building stone is an uncommon variety that is locatable under the mining laws requires a claimant to meet the five criteria codified at 43 C.F.R. § 3830(b): (1) there must be a comparison of the mineral deposit with other deposits of such mineral generally; (2) the mineral deposit at issue must have a unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special value must be reflected by the higher price which the material commands in the market place.

2. Administrative Procedure: Burden of Proof--Evidence:  
Preponderance--Evidence: Prima Facie Case--Mining  
Claims: Contests

In a contest, the Government bears the burden of going forward with evidence sufficient to establish a *prima facie* case of the invalidity of the challenged mining claim. A

*prima facie* case is made when, on the basis of probative evidence of the character, quality and extent of the mineralization, a Government mineral examiner offers his expert opinion that a discovery of a valuable mineral deposit has not been made within the boundaries of a contested claim. The burden then shifts to the claimant to overcome that *prima facie* case by a preponderance of the evidence. To preponderate, the evidence must show that a proposition is more likely so than not so.

3. Administrative Procedure: Adjudication--Mining Claims: Generally--Mining Claims: Contests--Mining Claims: Determination of Validity--Rules of Practice: Government Contests--Rules of Practice: Hearings

In an appeal from a decision after a hearing on a mineral contest complaint, where the Administrative Law Judge weighed the evidence presented, considered the parties' arguments of fact and law, and issued a decision setting forth the evidence presented and conclusions reached, the appellant must show error in that decision with some particularity and support its claims of error with citations to the record or other evidence. Conclusory allegations of error do not suffice.

4. Evidence: Generally--Evidence: Sufficiency--Evidence: Weight--Rules of Practice: Evidence

Although this Board has *de novo* review authority, it ordinarily will not disturb an Administrative Law Judge's findings of fact based on credibility determinations where they are supported by substantial evidence. The basis for this deference is the fact that the judge who presides over a hearing has 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.

APPEARANCES: Christopher J. Morley, Esq., and Grant L. Vaughn, Esq., U.S. Department of the Interior, Office of the Solicitor, Salt Lake City, Utah, for the Bureau of Land Management; Ronald George, Esq., Salt Lake City, Utah, for Resource Technics, LLC, and Stone Resources, LLC.

## OPINION BY ADMINISTRATIVE JUDGE PRICE

The Bureau of Land Management (BLM) has appealed the June 7, 2012, decision (Decision) of Administrative Law Judge (Judge or ALJ) Robert G. Holt, finding that Resource Technics, LLC, and Stone Resources, LLC (collectively, Stone Resources), demonstrated, by a preponderance of the evidence, that six placer mining claims located for building stone, the North Canyon Stone (NCS) #1 through #6,<sup>1</sup> contain a mineral deposit constituting an uncommon variety that can be mined and sold at a profit, and dismissing the Government's Contest Complaint (Complaint) with prejudice.<sup>2</sup>

<sup>1</sup> The six claims are located in sec. 29, S½NW¼, N½SW¼; sec. 30, S½NE¼, N½SE¼, N½SW¼, SE¼SW¼, SW¼SE¼, T. 18 S., R. 13 W., Salt Lake Meridian. On May 1, 2009, the claim locators conveyed their interests to Resource Technics. Complaint at 2. On Jan. 1, 2009, Resource Technics leased the claims to Stone Resources. Contestant's Ex. A-50 (Letter from W. David Weston to Juan Palma, BLM State Director, dated Nov. 17, 2010). Weston is the registered agent for Stone Resources. Contestant's Ex. A-1 (Mineral Report, Attachment II-5 (Business Entity Search dated July 1, 2009)). Unless otherwise indicated, "Weston" means W. David Weston.

Location notices for nine claims were recorded by Weston, Haley Weston, Piper Weston, and Vicki Weston on Sept. 2, 2008. The claims, each of which contains 80 acres, were serialized as follows: NCS #1 (UMC 407678); #2 (UMC 407679); #3 (UMC 407680); #4 (UMC 407681); #5 (UMC 407682); #6 (UMC 407683); #7 (UMC 407684); #8 (UMC 407685); and #9 (UMC 407686). By decision dated Nov. 16, 2009, the NCS #7, #8, and #9 were declared forfeited for failure to submit the claim maintenance fee or file a waiver request on or before Sept. 1, 2009. Complaint at 2.

<sup>2</sup> It is not clear what legal consequence Judge Holt intended to impose in purporting to dismiss the contest complaint "with prejudice." Manifestly, "the power of the [D]epartment to inquire into the extent and validity of rights claimed against the Government does not cease until the legal title has passed." *Cameron v. U.S.*, 252 U.S. 450, 461 (1920). So long as legal title remains in the United States, the Department retains continuing jurisdiction to consider all issues in land claims. *Schade v. Andrus*, 638 F.2d 122, 125 (9th Cir. 1980); *Ideal Basic Industries, Inc. v. Morton*, 542 F.2d 1364 (9th Cir. 1976). The Government therefore properly may bring successive contests challenging claim invalidity based upon any number of charges (such as lack of a discovery, loss of a discovery, abandonment, improper location, loss of a market, etc.). Thus, in *Mulkern v. Hammett*, 326 F. 2d 896, 898 (9th Cir. 1964), for example, the court recognized that public land is not to be perpetually encumbered by a mining claim that may have once been valuable, but

(continued...)

### *Background*

The six mining claims are located on public lands along the eastern flank of the House Range in northwestern Millard County, Utah, approximately 50 miles from Delta, Utah. The claims embrace four quarries named to reflect the color of the stone each produces: the Buckskin, Smoke, Mauve, and Burgundy quarries. The stone is derived from outcroppings of the Weeks Limestone formation. In the past, others have mined the lands embraced by the subject mining claims for building stone. Mert Hamilton, doing business as Rocanville Stone, last operated a quarry on the lands at issue. In 2008, Stone Resources purchased Hamilton's equipment and palletized inventory and then located the subject NCS mining claims.

In 2009, BLM prepared a Mineral Report for a common variety determination and concluded that the mineral deposit found within the claims did not constitute an uncommon variety of building stone. As a result, BLM initiated contest proceedings, charging that the NCS claims were null and void because the mineral deposit is not a valuable mineral deposit; the deposit did not constitute an uncommon variety of building stone; and the NCS #1, #2, and #6 claims were not distinctly marked on the ground.<sup>3</sup>

After a 4-day hearing in November 2011, in Salt Lake City, Utah, Judge Holt issued his Decision, concluding that Stone Resources had overcome BLM's *prima facie* case by a preponderance of the evidence.

### *Applicable Law*

Judge Holt correctly stated the law governing discovery:

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

later loses that value due to changed conditions. Nonetheless, "the filing of successive contests . . . for the sole purpose of seeking to exhaust a claimant, by causing him to run out of money or energy, and thus defeat the claimant by means other than a legitimate inquiry into the validity of the claim cannot be countenanced." *U.S. v. Miller*, 165 IBLA 342, 381 (2005). As the Supreme Court observed long ago, "the Land Department has no power to strike down any claim arbitrarily." *Cameron v. U.S.*, 252 U.S. at 460. The Government's contest complaint should have been dismissed without prejudice. *U.S. v. Hess*, 46 IBLA 1, 4 (1980). Judge Holt's decision is accordingly modified.

<sup>3</sup> The last charge was eliminated as a result of the parties' stipulation. See Prehearing Order filed on Nov. 8, 2011, ¶ 2 at 1-2.

A valuable mineral deposit exists where minerals are found on the claim of such quality and in such quantity that a person of ordinary prudence is justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. *Chrisman v. Miller*, 197 U.S. 313, 322-23 (1905); *Castle v. Womble*, 19 L.D. 455, 457 (1894). Thus, it must be demonstrated, as a present fact, that there is a reasonable likelihood that minerals can be extracted, removed, and marketed from a claim at a profit. *United States v. Coleman*, 390 U.S. 599[, 602-03 (1968)].

*United States v. Thompson*, 168 IBLA 64, 103 (2006), *aff'd* 2008 WL 564710 (D. Idaho 2008), *aff'd* 338 Fed. Appx. 570, 2009 WL 1974608 (9th Cir. 2009).

Decision at 3.

[1] With respect to building stone, as Judge Holt stated, the claimant must meet the five criteria established in *McClarty v. Secretary of the Interior*, 408 F.2d 907 (9th Cir. 1969), now codified at 43 C.F.R. § 3830(b). Decision at 4, and cases cited. Those criteria are:

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

*Id.* at 4.

[2] The parties' burdens in a Government contest are well-established and correctly set forth in the Decision. The Government bears the burden of going forward with evidence sufficient to establish a *prima facie* case of the invalidity of the challenged mining claim. *U.S. v. Carlwood Development, Inc.*, 177 IBLA 119, 128-29 (2009). A *prima facie* case is made when, on the basis of probative evidence of the character, quality and extent of the mineralization, a Government mineral examiner offers his expert opinion that a discovery of a valuable mineral deposit has not been made within the boundaries of a contested claim. *U.S. v. Pass Minerals, Inc.*, 168 IBLA 115, 123 (2006) (citing *U.S. v. Winkley*, 160 IBLA 126, 143 (2003)). The

burden then shifts to the claimant to overcome that *prima facie* case by a preponderance of the evidence. *Hallenbeck v. Kleppe*, 590 F.2d 852, 856 (10th Cir. 1979); *U.S. v. Winkley*, 160 IBLA at 142-43. To preponderate, the evidence must show that a proposition is more likely so than not so. Decision at 5 (citing *U.S. v. Feezor*, 130 IBLA 146, 200 (1994)).

#### *Judge Holt's Decision*

Judge Holt determined that BLM had presented a *prima facie* case based upon findings and conclusions contained in the Mineral Report and the testimony of geologists and Certified Mineral Examiners Michael E. Ford and Victor C. Dunn, Utah State Office. Ex. A-1.<sup>4</sup> Ford prepared the Mineral Report and Dunn approved it as Reviewing Examiner. Ford inspected the claims and 276 pallets containing stone of various grades and thicknesses quarried by Hamilton, the previous operator. However, none of the pallets included veneer stone of less than 1 inch (1"-), and Hamilton produced very little thin veneer while he operated during the years represented by the sales data Stone Resources provided to Ford.<sup>5</sup> Decision at 7, 8. Ford acknowledged the North Canyon stone could be split along the thin layers of clay or calc-silicate sandwiching thin calcareous or limestone layers, but considered the stone to be incompetent as a building stone without a sealant because the calc-silicate layers absorb moisture, which causes the clay to swell and eventually fracture. *Id.* at 6. Ford compared the North Canyon deposit with stone produced by 11 other operators and concluded that other stone commanded a "much higher price" than North Canyon stone because they resist weathering and require no sealant to maintain them. *Id.* at 7. His opinion was the same with respect to use of North Canyon stone for ground cover. *Id.* Ford concluded that neither thinness nor surface color would command a higher price on the market or reduce costs or overhead,<sup>6</sup> and therefore the stone did not have a special and distinct value. *Id.* Dunn, the reviewing Mineral Examiner, agreed with Ford's conclusions.

Despite Stone Resources' assertion that BLM did not present evidence regarding the marketability of the ½"- veneer stone and ground cover, Judge Holt

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<sup>4</sup> The Government's exhibits are identified by the letter "A." Contestees' exhibits are identified by the letter "B."

<sup>5</sup> Stone Resources did not have an opportunity to conduct operations on its own behalf, because the Government prevented it from doing so, pending the outcome of the common variety examination. Tr. 489:20-25; 490:20-25.

<sup>6</sup> There is no question that Hamilton's revenues from sales of North Canyon stone significantly exceeded his operating costs, at least until 2008 when he operated for only part of the year due to rapidly declining health. See Mineral Report, Tables 2-5, Ex. A-1 at 35-38.

ruled that BLM had presented evidence of marketability on the issue as BLM defined it, *i.e.*, whether the stones analyzed constituted a valuable mineral deposit, and on that basis, determined that BLM had presented a *prima facie* case with respect to both charges of the Complaint. *Id.* at 8.

The Decision summarized the testimony given by Stone Resources' eight witnesses.<sup>7</sup> Dr. Kenneth Clifford, a metallurgy expert, testified that his tests showed that North Canyon stone absorbed "negligible" amounts of water and that the calc-silicate and limestone layers are competent. *Id.* at 8-10.

James C. Peterson, owner of the Henrietta quarry, obtained patent based on BLM's determination that his thin quartzite stone is an uncommon variety. He testified that his stone and the North Canyon stone are highly comparable, but that a thinner veneer covers more area per ton, a factor that commands a higher price. In his opinion, the market for Stone Resources' veneer stone was "almost unlimited." *Id.* at 10.

W. Elledge Bowers, an experienced architect, arranged for a demonstration application of the veneer stone. He also compared the markets for different veneer stones and ground covers. Based on that comparison, Bowers concluded that the North Canyon stone ½"- veneer was thinner than other veneer stones and could be sold at a higher price because it would cover a greater area per ton. He further testified that the North Canyon flat ground cover required a depth of only 1" to 1½" to achieve the same appearance and weed control as 2" to 3" of gravel. *Id.* at 11.

Richard Jones, a landscaping broker, testified that the North Canyon ground cover was durable, flat, and thin, which made it easy to walk on, and that less of the product would cover more area, warranting a higher price than other ground covers requiring 2¼" to 2½" depths to be effective. *Id.* at 12-13.

Guy P. Nuttall, a general contractor, witnessed the construction of a demonstration wall and a demonstration shower wall using North Canyon thin veneer stone. He explained that showers normally require a waterproof membrane between the wall and tiles, and that the application of natural stone to vertical surfaces requires wiring to hold them in place until the adhesive sets. He further explained that the wiring penetrates and compromises the waterproof membrane that prevents water from entering the wall. Nuttall testified that the North Canyon veneer stone was installed in the same way tile is installed, without the necessity of wiring the stone in place, something he had never seen, and that this conferred special value on the stone. *Id.* at 13-14.

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<sup>7</sup> For brevity's sake, we are omitting some of Judge Holt's many supporting citations to the record.

Steele Weston, Weston's son, testified to a stone marketing trip to 10 Western states while employed by Hamilton. He visited more than 50 stone yards and, at his father's request, took a sample of the North Canyon ground cover with him to gauge interest in the product. He testified that interest was high. Steele also testified that he and a worker split the North Canyon stone into ½"- sheets, producing 2½ tons in a 2-hour period, evidence of the ease and minimum expense with which the deposit can be mined. *Id.* at 14-15.

David Ryzak, a geologist and an expert in production geology, expressed his opinion that the North Canyon ½"- veneer stone and ground cover are an uncommon variety. He disagreed with the Mineral Examiners' opinions that the stone is not competent and the surface coloring would deteriorate and slough off, explaining his views with appropriate reference to published studies. *Id.* at 15. He noted that four nearby quarries had been patented because the stone they produced, like North Canyon stone, could be split into large thin sheets, but unlike North Canyon stone, the average thickness was ¾"- . *Id.* at 16. Ryzak concluded that North Canyon stone would command a higher price because the veneer covered 408 square feet per ton, compared to the 250 square feet per ton advertised by competitors. He similarly concluded that the ground cover would command a higher price by reason of greater coverage per ton. *Id.*

Weston, Stone Resources' principal representative, testified regarding his calculations to determine the quantity of veneer stone and ground cover that could be produced from each quarry, and he explained his pro forma income and expense analysis for the products he would sell. Judge Holt found that Weston adequately explained errors in the exhibits he prepared to illustrate his testimony and conclusions. *Id.* at 17-20.

Judge Holt found all Stone Resources' witnesses to be credible. He found Clifford's, Peterson's, Bowers', and Steele Weston's testimony regarding splitting stone particularly persuasive. He appropriately accorded less weight to aspects of the witnesses' testimony he found less credible (*i.e.*, Steele's hearsay testimony and limited experience regarding marketing stone), or noted where testimony had been corroborated by more credible witnesses (*i.e.*, the testimony of Jones and Nutall). Judge Holt was persuaded that Weston "adequately justified the numbers he did use, and where appropriate, used conservative estimates." *Id.* at 20. The ALJ therefore found that Weston had "sufficiently demonstrated that he can mine and sell half-inch-minus veneer and ground cover at a profit," where BLM had only pointed out errors in the calculations, and failed to show on cross-examination or by direct evidence that Stone Resources would lose money on sales of those products. *Id.*

The Judge analyzed the *McClarty* factors at length, concluding that Stone Resources had shown by a preponderance of the evidence that the North Canyon

deposits satisfy the *McClarty* criteria, and that such evidence “went largely un rebutted because BLM had focused on the minerals a former operator had extracted from the deposits and not on the minerals Stone Resources intended to extract.” *Id.* at 29. The Judge declared the North Canyon deposit a valuable mineral deposit, finding that a prudent person would expend his labor and means to develop a mine. *Id.* at 31-32.

#### *BLM’s Burden on Appeal*

[3] In an appeal from a decision after a hearing on a mineral contest complaint, where the Administrative Law Judge weighed the evidence presented, considered the parties’ arguments of fact and law, and issued a decision setting forth the evidence presented and conclusions reached, the appellant must show error in that decision with some particularity and support its claims of error with citations to the record or other evidence. Conclusory allegations of error do not suffice. *U.S. v. McKown*, 181 IBLA 183, 203 (2011), *aff’d*, 908 F. Supp. 2d 1122 (E.D. Cal. 2012).

[4] Although this Board has *de novo* review authority, it ordinarily will not disturb an Administrative Law Judge’s findings of fact based on credibility determinations where they are supported by substantial evidence. 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 assess the weight to be given to conflicting testimony. *U.S. v. Rannells*, 175 IBLA 363, 383 (2008), and cases cited.

#### *The Parties’ Arguments on Appeal*

BLM advances two principal arguments on appeal: Judge Holt failed to give appropriate weight to the testimony of its expert witnesses, and he erroneously determined that the Mineral Examiners did not analyze ½"- veneer stone in preparing the Mineral Report. More specifically, BLM notes the Judge accepted its *prima facie* case, but claims he “then summarily dismiss[ed] it relying on Contestees’ creative theories about the future marketing of a product they mischaracterize.” Statement of Reasons (SOR) at 3. BLM argues that Stone Resources’ evidence consisted of “questionable geology (Decision at 20) and speculative marketing data produced at hearing over Contestant’s objection and corrected by Contestee on the witness stand,” and that Stone Resources’ witnesses “either concentrated on the calcareous limestone layer without the marketable color, or analyzed potential uses without accounting for the necessary application of a sealant to the incompetent calc silicate layer of the stone.” *Id.* BLM further argues that the Judge and the parties agree that the calc-silicate is the color-bearing layer that absorbs moisture and is incompetent, but that layer is “essential for marketing.” *Id.* at 6. BLM accordingly urges the Board to

reverse the ALJ and find that North Canyon veneer and ground cover is not an uncommon variety and is therefore not a valuable mineral deposit.

In their Response to the SOR, Stone Resources disputes BLM's assertions and conclusions, arguing that Judge Holt's decision is amply supported by the record and thus should be affirmed.

### *Analysis*

BLM strenuously argues that unless sealed, the thin stone is susceptible to absorbing moisture, and "that regardless of thickness, the stone is not competent without additional treatment because its color layer (the calc silicate or clay layer) absorbs moisture and becomes susceptible to the freeze-thaw cycle." *Id.* at 5. BLM reasons that since the color resides in the calc-silicate layer, the costs of purchasing and applying a sealant must be included in Stone Resources' financial analysis. *Id.* at 6, 7. The Mineral Report therefore compared North Canyon stone to other veneer stone that did not require a sealant. *Id.*

As BLM notes, it is undisputed that a portion of the color-bearing calc-silicate or mud layer on the North Canyon stone will be lost. BLM argues the stone will lose its color as a result, whereas Stone Resources' witnesses testified that some portion of the color-bearing layer is fused or bonded with the limestone layer as a result of the geologic processes involved in forming the North Canyon Stone studied and described by Drs. P.I. Nabelek, Jonathan S. Novick, Theodore C. Labotka, and others. Tr. 660:20-22; 661:11-19; 662:17-25; 663; *see also* Ex. B-4.

Tests were conducted on two sets of samples of the subject stone. One set of samples was polished; the other was not. Tr. 190:12-17; 190:22-191:6. The tests showed that neither set absorbed any appreciable amount of moisture. Tr. 193:23-194:2; 198:25-199:7. The conclusions Clifford drew from his tests are supported by Nabelek's, Novick's, and Labotka's published findings. Tr. 181:1-182:7. The record shows that Clifford was duly qualified as an expert metallurgist. He testified regarding the tests he had conducted to reach the conclusion that the North Canyon stone did not absorb moisture. On cross-examination, Clifford testified that even after belt sanding the test samples, the color remained, and he would not agree that what remained of the colored layer was incompetent. Tr. 191:1-13. He admitted he did not analyze or test the calc-silicate layer. Tr. 192:12-14. On re-direct, Clifford again acknowledged he had not tested the calc-silicate layer for water absorption, but stated that any absorbed moisture would not affect the "integrity of the calcareous member . . . sandwiched in between the two [calc-silicate] layers." Tr. 199:1-7. The Government did not conduct any similar tests.

Ryzak testified that he did not agree with the Mineral Examiners' conclusion that the calc-silicate layer would eventually erode off the calcareous layer as the result of freeze-thaw cycles. Tr. 661:1-9. Citing Nabalek's and others' work, Ryzak testified that the incompetent portions of the calc-silicate will slough or break off, leaving a calc-silicate layer that "is so strongly bonded that there really is no longer a separation of these layers." Tr. 663:18-25; 664:17-25. According to him, this bonded area is "a very thin layer, fractions of a millimeter." Tr. 666:24 to 667:12. Ryzak further testified that it was not possible for the calc-silicate color to be weathered off the limestone layer, and he pointed to the exposed talus on the claims that had been subjected to weathering for many, many years and still retained its color. He averred the color would greatly outlast any use to which the stone would be put by Stone Resources. Tr. 667:11-20. BLM's cross-examination did not probe this testimony. Moreover, the parties' photographs show a good deal of weathered stone in the quarries, some of which surely dates from early mining operations,<sup>8</sup> and yet it all remains clearly identifiable by color.

Ford was recalled as a rebuttal witness. While counsel elicited his conclusion that the North Canyon stone he observed would break down as it weathered, he was not questioned about Contestees' testimony to the effect that some portion of the color-bearing calc-silicate layer is permanently bonded to the calcareous layer. Dunn was also recalled as a rebuttal witness, but the gist of his testimony was that he remained of the opinion that the North Canyon stone did not meet the *McClarty* criteria. He was not asked to respond to the points made by Clifford and Ryzak.

Steele Weston's testimony was consistent with the testimony of Clifford and Ryzak. The only witness with any experience in splitting and handling the North Canyon stone, Steele testified that he could split the "higher portions" of the calc-silicate layer, but near the limestone layer, the calc-silicate and calcareous layer are "one and the same rock" and the two cannot be separated. Tr. 601:13-25; 602:1. He explained that a good quarryman would clean the stone with his chisel to "knock off any excess fracturing or flaking from the incompetent layers." Tr. 602:16-24. On cross-examination, BLM explored other aspects of Steele's testimony, but asked no questions about the bonding between the two layers of laminae as revealed by his experience in splitting the stone.

Weston similarly testified that the upper or outer portion of the calc-silicate will weather and slough off, and that it is permeable. Tr. 222:22-25. While Weston is not a geologist, he had researched the topic, and he identified the authorities he relied upon for his opinion, which included Nabelek's work. Tr. 223:12-25; 224:2-8.

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<sup>8</sup> According to the Mineral Report, mining claims have been located in the North Canyon area for at least 35 years, but suggests that mining and quarrying have taken place far longer than that. Ex. A-1 at 1, 10, 20.

He testified that the calc-silicate layers had “bled into the calcareous layer, such that they are welded together and are essentially a permanent feature.” Tr. 233:16-18. Weston referred to this welded boundary as a “calc-silicate residue” that might be subject to “some very limited amount of weathering,” but that such weathering was “absolutely insignificant.” Tr. 236:10-17. The welded boundary would retain the color because it is “interbedded” in the calcareous layer. Tr. 239:24-25; 240:1-5. He pointed to the physical evidence found on the North Canyon claims, stating that there was no stone that had been weathered down to the limestone layers – *i.e.*, there was no bare, black- or gray-surfaced limestone. Tr. 237:21 to 238:1-9.

On cross-examination, Weston explained his understanding of the geologic process or events that had welded the two layers together, stating that 400° water had caused reactions on both sides of the boundary layer as it moved under “terrific” pressure. Tr. 470:1-24. Weston acknowledged that he had never performed any test or examination to determine where the welded boundary begins and ends, but again stated that relevant literature confirmed the phenomenon he described. Tr. 477:1-12. BLM counsel questioned the witness in an effort to establish what counsel referred to as a “line of demarcation between the calcareous laminae and the calc-silicate,” but Weston clarified his testimony, explaining that there is no such “line” and that mineralogical studies would be necessary to determine where, precisely, the stone had been changed by geologic processes and events. Tr. 479:19-25 to 480:1-13; 531:8-25. He steadfastly maintained that the incompetent material would fall away or be chiseled off, that the stone that remains is competent for its intended purposes, and that he had seen no evidence to the contrary.

In contrast, Dunn asserted that there was not “much bonding” between the two layers because “there wasn’t much to make that material, either through crystallization or what have you, to adhere.” Tr. 75:3-13. He did not explain his conclusion or cite any relevant source or authority in support.

We again note that the parties’ photographs show stone in the quarries that has lain around or been exposed for many years, yet all of it is identifiable by its color. Those photographs did not show stone that had been weathered down to the bare gray or black limestone laminae, and no such stone was among the physical samples provided to the Board. *See, e.g.*, Exs. A-1, Att. IV-37, 38, 44, 47, 50; B-8; B-12.

The Government did not undermine this evidence directly by submitting countering evidence or on cross-examination.

BLM nonetheless points to Clifford’s statement that the calc-silicate member is “incompetent as *any* component of a ‘building stone’ for sale to the public.” SOR at 6

(citing Ex. B-19 at unpaginated 1, 5 (BLM's emphasis)).<sup>9</sup> We do not find the statement to be inconsistent with, or contrary to, Stone Resources' evidence, because Stone Resources does not intend to make use of the incompetent aspect of the calc-silicate layers. Thus, when they met at the quarries, Weston and Ford agreed the palletized stone was properly characterized as incompetent, and they agreed that it would require a sealant. *See, e.g.*, Ex. A-1 at 7, 30, 42. Weston so informed would-be purchasers of the palletized stone in Stone Resources' 2009 Customer Price List, advising "Caution: In high desert climates with extreme freezing temperatures the stone is suitable for inside installation. Outside installations require adequate sealing to preserve the life of the stone." Ex. A-1, Att. III-6. On direct examination, Weston explained that Hamilton had been primarily interested in patio stone 1¾" to 2" and was not concerned about the calc-silicate layers, because he sold to markets that are not subject to freeze-thaw temperatures. Tr. 245:15-24. Weston asserted then, and maintained throughout the contest proceedings, that the Government's focus on the palletized stone was misplaced, because he was interested in only the thin, calcareous laminae. Tr. 246:10-17; *see also* Contestees' Answer to Interrogatories, No. 1. According to Weston, the palletized stone that Ford examined and photographed was the "internal laminae of calc-silicate," not the "thin stone with no internal calc-silicate laminae" Weston claims is competent and that Stone Resources claims is an uncommon variety. Tr. 336:1-17. Cross-examination elicited nothing to the contrary. Tr. 517:6-25.

We agree with BLM that no one disputes the characteristics and weaknesses of the calc-silicate laminae, but we agree with the ALJ that Stone Resources' evidence preponderated and showed the stone that remains after the incompetent, unbonded calc-silicate is removed is competent for the intended purposes and that some visible degree of color is embedded in the bonded layer. BLM simply never succeeded in negating or rebutting that testimony: the Mineral Examiners did not address the assertion in the Mineral Report or on direct examination, and BLM did not otherwise establish a basis for rejecting Stone Resources' contention or show reason to question the authorities on which it relied. The evidence amply supports Judge Holt's conclusion that the stone is competent for the intended purposes.

BLM next challenges the Judge's conclusion that it failed to examine the ½"-veneer and ground cover that Stone Resources claims is an uncommon variety and

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<sup>9</sup> The quoted language is in Ex. B-19 at hand-paginated p. 3. The complete statement is as follows: "It is my understanding that Stone Resources is only interested in quarrying the calcareous member of the Weeks Limestone and rejects the calc-silicate member as being incompetent as any component of a 'building stone' for sale to the public." Clifford's statement of his understanding hardly suffices to negate the evidence of his test procedure and conclusions or Ryzak's corroborating testimony.

instead focused on Hamilton's past production, which included little or no thin veneer. BLM argues that Judge Holt erroneously determined that Stone Resources merely purchased equipment and inventory and otherwise had no interest in Hamilton's claims until it located the North Canyon Stone claims in 2008. Although it concedes "some confusion around the transfer of interests," BLM states that the principals of Stone Resources located the North Canyon #1 through #9 claims in 2007, allowed them to lapse in August 2008, and they then located the North Canyon Stone #1 through #9 claims in September 2008. SOR at 7-8. The operations Ford observed in 2008 therefore took place while Weston owned the claims. *Id.* at 8. BLM thus disputes the Judge's assertion that it "relied on the wrong information from a previous owner." *Id.* at 9.

BLM points out that the Mineral Report considered Weston's undated mineral report prepared for the North Canyon claims (Mineral Report, Ex. A-1, Att. III-3),<sup>10</sup> and it included prices for "Thin ½" minus." BLM argues that contrary to the ALJ's findings, a "wide range of thicknesses" was examined and necessarily included thin stone. *Id.* at 10. This argument ignores the fact that the Mineral Examiner acknowledged in the Mineral Report that "[d]uring the course of this examination, the author could not locate any pallets of building stone in the size range of ½" minus, or any stone that could truly be marketed as being 1" minus." Ex. A-1, at 39, 46. Weston confirmed the absence of thin stone among the Hamilton pallets, or at least the absence of any that was not "tied up as a two-inch block of patio or an inch-and-quarter of select stone." Tr. 497:11-13; 498:4-8. In any event, we think it plain that the Mineral Report and the Government's case was founded on the prior operation; the Government did not seriously examine the operation Stone Resources envisions because it was convinced the North Canyon stone is incompetent for any purpose in the absence of a sealant and that the stone would soon lose the color that is "essential for marketing." SOR at 6. For the reasons discussed above, however, we do not agree that BLM preponderated on the issue of whether the North Canyon stone absorbs moisture or can or will rapidly lose all its color as a result of weathering and exposure to moisture.

BLM complains that Stone Resources failed to explain what it would do with the significant waste that would result from producing the ½" ground cover. SOR at 10. The record is to the contrary. Stone Resources was quite clear regarding its plans for the waste stone. The Mineral Report noted the existence of "several hundred tons of discarded waste material" around the Mauve quarry, that Weston stated that waste at each quarry is "about 45%," and stated that the Examiner had not calculated the tonnage or volume of waste generated by the current operation. Ex. A-1 at 24. Ford observed the waste piles within each. *Id.* at 24, 25. He specifically acknowledged Stone Resources' plan to screen and sell undersized pieces

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<sup>10</sup> BLM states that the report was prepared in 2009. SOR at 8.

from existing and future waste piles as ground cover, which would reduce the current percentage of waste from 45 percent to 20 percent of the total volume of limestone produced. In addition, Stone Resources would sell the oversized and “excessively thick” stone as large landscape rock. *Id.* at 27-28. While the Mineral Report described Stone Resources’ plan of operations with respect to the waste and selling it as ground cover, it did not identify any flaw in Weston’s calculations or his mining plan.

In testimony, Ford stated that there would be a great deal of waste, which he assumed or understood would be sold as ground cover. Tr. 153:5-23; 154:2-6; 155:8-13, 21-22; 156:3-4. Dunn likewise testified that in the splitting process “you could end up with a lot of waste product trying to – trying to come up with that half-inch material.” Tr. 79:19-22. In his opinion, a lot of waste would be generated that would have to be discard[ed],” though he also seemed to acknowledge Stone Resources’ plan to sell it as ground cover. Tr. 88:7-12, 15-16. If the Government believed disposal of the waste presented a significant impact on the profitability of any future mining operation, it should have analyzed the issue in the Mineral Report and elicited testimony from its Mineral Examiners. It did not do so, instead resting on the Examiners’ ultimate conclusion that North Canyon stone is not an uncommon variety.

Finally, BLM dismisses Stone Resources’ marketing and financial data as merely “speculative.” Answer at 9.<sup>11</sup> BLM complains that contestees’ financial data was not presented to BLM before the hearing, was accepted in evidence over its

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<sup>11</sup> Citing a statement made by Weston on cross-examination, BLM also argues Judge Holt was wrongly convinced by Weston’s “theoretical” mining operation. Answer at 11. We quickly dispose of that contention by providing the complete context for Weston’s statement. On direct, Weston stated that he had never conducted mining operations on the North Canyon quarries or witnessed them, but he intended to use a forklift attachment on a front-end loader to lift out blocks of laminae. Tr. 389:7-14; 480:17-24; 481:8-10. On cross-examination, Weston was asked how he would remove the stone from the hillside. Tr. 480:25. He responded that he had questioned the previous operators to compare it with his experience with Lon Thomas, another operator, “to see if their methods could not be improved.” Tr. 481:2-7, 12-13. When asked if he would mine using a method other than using a front-end loader, Weston acknowledged he has “some ideas with respect to how I might mine differently,” that they are “highly theoretical,” and that he had not had an opportunity to “actually apply them and see.” Tr. 482:1-4. In advancing this argument on appeal, BLM ignores Weston’s next statement: “But it has struck me in my conversations with them that what they are doing, given the circumstances, was a very practical method of removing the stone.” Tr. 482:5-6. Weston clearly did not abandon his plan to mine using a front-end loader in favor of his theoretical ideas as BLM appears to suggest.

objections, and that it became a “moving target” as the ALJ allowed them to correct it on the stand. *Id.* It concedes North Canyon stone can be sold at a profit, but argues that neither this fact nor Stone Resources’ speculative financial data defeats BLM’s *prima facie* case nor demonstrates the stone is an uncommon variety. More particularly, BLM argues that Judge Holt’s decision should not be sustained merely because Stone Resources “propose[s] to market only thin calcareous limestone without accounting for the preservation of the incompetent calc silicate that gives the stone its marketable color.” *Id.* at 10.

### *Judge Holt’s McClarty Analysis*

#### *Comparison with Other Deposits Generally*

The Mineral Examiner did not compare Stone Resources’ thin calcareous stone to other deposits generally. Instead, he compared the several categories Hamilton produced and palletized to five corresponding product categories produced by 11 Western quarries to conclude the North Canyon stone sold at an equal or lower price. Decision at 21. However, Stone Resources compared its thin veneer stone to four nearby patented deposits of thin building stone that BLM had previously determined to be an uncommon variety of building stone,<sup>12</sup> and it compared its deposit to other deposits of building stone generally, considering more than twice as many as BLM. The North Canyon thin veneer stone is, without exception, thinner than that offered by 23 other quarries offering a thin veneer stone. Tr. 308:22 to 309:2; Ex. B-24. It therefore weighs less and would cost less to transport. Ex. B-23 at 3. Northern Stone Supply sells a comparable uncommon variety veneer stone that is ¾" - to ¾" and covers less than 250 square feet, whereas the North Canyon stone is more consistently ⅜" - and covers more than 400 square feet. Decision at 22 (citing Ex. B-23 at 2). Oakley Stone also sells an uncommon variety thin stone, but it is ¾"-. Unlike other comparable stone, North Canyon stone can be installed on vertical surfaces like tile, without wire supports, making it especially suitable to wet installations such as bathrooms and showers. *Id.* at 23 (citing Tr. 450:23 to 451:16; 462:18 to 463:20).

Further, the North Canyon ground cover was superior to that of its nearest competitors in that it is flat, ⅛" thin, durable, easy to walk on, accommodates

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<sup>12</sup> Dr. Terry S. Maley prepared the mineral report for Northern Stone Supply’s patent application and approved the mineral report prepared for Oakley Stone’s patent application. Exs. B-16-B, 17B. Maley is a well-respected economic geologist who taught mining law and authored numerous articles and several books on the subject during his tenure with BLM. *See, e.g., Mineral Law* (6th Ed. 1996); *Mining Law from Location to Patent* (1985); *Mineral Title Examination* (1984).

wheelchairs, and remains where it is installed. *Id.* at 22 (citing Ex. 23 at 4-6; Ex. B-30; Ex. B-32).

The ALJ found Stone Resources' evidence more persuasive, noting that only 3 of the 11 quarries BLM used for its comparison sold ½"- veneer, and 1 of those is an uncommon variety. We affirm the Judge's determination.

#### *Unique Property*

Based on the palletized stone Hamilton mined, BLM concluded that the total percentage of thin stone was no more than 4.2 percent of the production he reported, and the thinnest was 1" to 2". Decision at 25 (citing Ex. A-1 at 49, Tables 2-5 at unp. 35-38). In Judge Holt's view, BLM failed to present any evidence regarding how much thin stone could be mined. Decision at 25. He found that Contestees' evidence regarding the extent of the deposit of thin stone established a unique deposit. *Id.* (citing Tr. 360:14 to 368:14; 655:2 to 656:13; Exs. B-18A through B-18D; B-1 at 8). He likewise found Stone Resource's evidence regarding the splitting characteristics of the stone more convincing, because BLM presented no direct evidence to the contrary. Our review of the record supports the ALJ's view of the evidence and his conclusion that the North Canyon stone possesses a unique property in that it is easily split into large ½"- plates. Decision at 26.

#### *Special and Distinct Value*

Judge Holt determined that the uniquely thin North Canyon stone has a distinct and special value by reason of its light weight and flatness. BLM does not challenge that conclusion on appeal, and we otherwise find no basis for questioning the Judge's ruling.

#### *Distinct and Special Value for Building Stone*

Judge Holt was persuaded that the evidence showed that the light weight of the veneer makes it especially valuable in vertical applications, and that the flatness of the mining waste makes it especially valuable as a ground cover. *Id.* at 27-28 (citing Tr. 312:6-17; 451:16 to 452:3; 462:18 to 463:20; Ex. B-1 at 12-13). Our review of the record shows that the ALJ's conclusion is well supported.

#### *Distinct and Special Value is Reflected in Higher Prices or Reduced Costs*

Pointing to Bowers' and Peterson's testimony, Judge Holt determined that the final *McClarty* criterion had been met. The North Canyon veneer stone covers 400 square feet compared to thicker veneers; the ground cover requires a depth of only 1¼" to be effective, compared to other covers that require a depth of 2" to 3", or twice the amount of North Canyon stone, and it remains where it is installed, unlike

gravel or wood mulch. This far superior coverage, he concluded, would command a higher price. The ALJ found BLM's evidence less convincing because BLM compared the previous owner's costs and prices for various categories of stone to conclude that North Canyon revenues "are typically equal or lower than the operating costs for each grade of building stone produced." Decision at 29 (citing Ex. A-1 at 56). For the following reasons, we perceive no error in this ruling.

BLM's Table 6 shows a comparison of 2008 prices<sup>13</sup> and reflects Hamilton's wholesale price per ton of \$205 for thin, ½"- veneer, though he apparently had little or no commercial interest in marketing a thin veneer.<sup>14</sup> According to Table 6, only 3 of the 11 suppliers produce ½"- veneer. Table 6 showed a price of \$341.25 per ton for Northern Stone Supply's uncommon variety thin ½"- veneer.<sup>15</sup> In contrast, Bowers surveyed 23 other quarries that sell thin veneer stone. Ex. B-24. He reported that only Stone Resources could produce ½" to ¼" veneer at a projected price FOB quarry of \$350 per ton with coverage of 400 square feet. Only Northern Stone Supply and Oakley Stone have veneers even approaching the thinness of the North Canyon stone. Northern Stone Supply offers ¼" to ¾" uncommon variety quartzite flagstone for a price FOB quarry of \$341.25 (\$236.25 for quartzite) that covers 250 and 180 square feet, respectively. Oakley Stone's uncommon variety ¾"- quartzite flagstone is offered FOB quarry at \$310 and covers 250 square feet. *Id.* at 2. Judge Holt therefore reasonably concluded from this data that North Canyon ½"- veneer stone would command a higher price by reason of its thinness, lighter weight, and superior coverage, or at least a price similar to that of the thicker uncommon variety stone veneers that afford considerably less coverage.

#### *Conclusion*

Judge Holt correctly held that BLM had presented a *prima facie* case of invalidity and, for the reasons discussed above, he properly determined that Stone Resources successfully overcame the Government's case by a preponderance of the evidence.

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<sup>13</sup> Because Hamilton mined for only part of 2008, BLM generated a 2008 price per ton by averaging his 2007 receipts. Ex. A-1, Table 6 at 40, n. 8.

<sup>14</sup> As noted, the Mineral Report concluded that no more than 4.2% of the total production was thin veneer while Hamilton operated a quarry.

<sup>15</sup> The 2004 retail price sheet from which BLM extrapolated Northern Stone Supply's 2008 price per ton does not list a ½"- quartzite veneer specifically identified as such. However, the price sheet does list a ¾"- Rocky Mountain Sunset Bronze quartzite and Rocky Mountain quartzite E-Z set ¼" to ⅝" miniature flagstone. Ex. A-1, Att. III-10-1, 10-4.

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

\_\_\_\_\_/s/\_\_\_\_\_  
T. Britt Price  
Administrative Judge

I concur:

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