

**Editor's note: Appealed -- aff'd, Civ. No. 75-543 (D. Oreg. Aug. 4, 1977); aff'd, No. 77-3334 (9th Cir. Mar. 19, 1980)**

UNITED STATES  
v.  
GERALD D. HEDEN ET AL.

IBLA 73-139

Decided April 7, 1975

Appeal from decision by Administrative Law Judge Dean F. Ratzman dismissing four contest complaints involving six mining claims. (Contest Nos. OR-7695, OR-7696, OR-7699, OR-018354).

Reversed.

1. Mining Claims: Determination of Validity -- Mining Claims:  
Discovery: Generally

A discovery exists where minerals have been found within the limits of a claim and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

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

In order to prove that rhyolite used for building stone purposes is not a common variety of stone under Section 3 of the Act of July 23, 1955, a mining claimant must demonstrate that: (1) the mineral deposit has a unique property; and (2) the unique property gives the deposit a distinct and special value. Possession of a unique property alone is not sufficient. The unique property must give the deposit a value for a purpose to which other materials are not suited or if the deposit is to be used for the

same purposes as other minerals of common occurrence, it must possess some inherent property which gives it a special value for such use which value is generally reflected by the fact that the deposit commands a higher price in the market place or produces a substantially higher profit.

3. Mining Claims: Common Varieties of Minerals: Generally

Common varieties of a particular mineral material do not have to be physically alike or equally desirable for a given purpose. When the evidence shows that other deposits occur commonly in the area and are similarly used, the fact that the subject deposit has qualities which are particularly well suited to that purpose does not, of itself, alter its essential character as a common variety material.

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

A deposit of rhyolite cannot be determined to be an uncommon variety of mineral solely on the basis of its location, even though the location gives the deposit a competitive advantage due to proximity to market, as location is not a unique property inherent in the deposit but is only an extrinsic factor.

APPEARANCES: Lawrence E. Cox, Esq., Office of the Solicitor, Portland, Oregon, for appellant, the United States; Gale K. Powell, Esq., Bend, Oregon, for appellees.

OPINION BY ADMINISTRATIVE JUDGE RITVO

The Government has appealed from the September 11, 1972, decision of Administrative Law Judge Dean F. Ratzman, dismissing four contest complaints involving the Gerald D. Heden, Jr., Rock Hound, David, Stanley, Sharon, and Rock Hound #1 placer mining

claims. 1/ The claims were located subsequent to July 23, 1955, for a deposit of building stone. They are situated in secs. 20, 29 and 30, T. 15 S., R. 12 E., W.M., Deschutes County, Oregon.

On June 8, 1971, the Bureau of Land Management initiated four contest proceedings against the subject claims charging in each complaint that:

(a) the material found within the limits of the claims was not a valuable mineral deposit under Sec. 3 of the Act of July 23, 1955 (69 Stat. 367; 30 U.S.C. 601) [2/], and

(b) a discovery of a valuable mineral had not been made within the limits of the unpatented mining claims.

In their answers, contestees denied both charges and alleged that valuable minerals consisting of identified and named varieties of building stone 3/ with respect to each claim had been discovered.

On May 23, 1972, a hearing was held in Bend, Oregon. The Government's efforts in this proceeding were directed primarily toward showing that the deposits occurring on contestees' claims were common varieties of building stone not subject to location under the mining laws of the United States. 4/

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1/ The four contest complaints were: OR-7695 -- challenging the Gerald D. Heden, Jr., claim located by Gerald D. Heden; OR-7696 -- challenging the Rock Hound claim located by Gerald D. Heden, Sharon A. Heden, John D. Prichard and Diane E. Prichard; OR-7699 -- challenging the David, Sharon and Stanley claims located by Gerald D. Heden and Sharon A. Heden; and OR-018354 -- challenging the Rock Hound #1 claim located by John D. Prichard and Gerald D. Heden. All the contestees are appellants.

2/ Section 611 was intended, but the contestees were not misled (Tr. 55).

3/ Contestee Gerald D. Heden marketed four varieties of rhyolite stone under the trade names Oregon Trail, Purple Sage, Ochoco Fawn and Ochoco Cocoa (Ex. D).

4/ Section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1970), provides in pertinent part that:

"No deposit of common varieties of sand, stone, gravel, pumice, pumicite or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws \* \* \*. 'Common varieties' as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value \* \* \*." (Emphasis added.)

The deposit on the claims consists of a stone described as a platy banded rhyolite. Rhyolite is defined as:

The general name for fine grained igneous rocks having a similar chemical composition to granite commonly occurring as lava flows \* \* \*. [A Dictionary of Mining, Mineral, and Related Terms, 923, Bureau of Mines, U.S. Dept. of the Interior (1968).]

"Platy" refers to a structure in igneous rocks evidenced by thin plates or tabular sheets. Id. at 835.

In other words, the stone on the claims lies in deposits so that it may be removed in pieces two inches thick (actually 1 to 2 inches) or four inches (actually 3 to 5 inches), and 12 to 14 to 24 inches in other dimensions (Tr. 35, 42). A small percentage is much larger (Tr. 70, 100).

The stone is used for veneer facing on fireplaces, buildings (Tr. 4, 16), and for walks. There are other platy dimension stones, such as sandstone, which are used for similar purposes (Tr. 17).

From the evidence presented, the Administrative Law Judge found that the Bureau of Land Management had introduced a minimal prima facie case in support of the first charge in the complaints, but had not made a prima facie case in support of the second charge. The Judge further found that the contestees' proof had preponderated with respect to the first charge. He then concluded that the contestees had demonstrated that the rhyolite stone found within the limits of the contested claims was a valuable mineral deposit under Section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1970). Having determined that the Bureau had not sustained either of the charges in its complaints, the Judge dismissed the contests. 5/

On appeal, the Government argues that the decision declaring the rhyolite stone on the subject claims to be a valuable mineral deposit under Section 3 of the Act of July 23, 1955, was erroneous on the grounds that:

1. The deposits of stone found on these claims do not have any unique properties.
2. The unique properties contestees' [sic] claim for these deposits do not give the deposits a special and distinct value. 6/

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5/ Administrative Law Judge's Decision at 8.

6/ Contestant's Statement of Reasons in Support of Appeal at 1.

The Administrative Law Judge's conclusion that contestees had preponderated on the common variety issue was based on his misapplication of the legal requirements for proving the existence of a valuable mineral deposit to the facts of this case. After reviewing the evidence and the testimony, we conclude that the deposits on the contested claims are a common variety of stone within the meaning of the Act of July 23, 1955, and are not valuable mineral deposits subject to location under the mining laws of the United States.

#### TESTIMONY RELATING TO THE ISSUES IN DISPUTE

The only witness for the Government at the hearing was Robert Ciesiel. Mr. Ciesiel has a Bachelor of Science degree in geology (Tr. 5). From 1950 to 1957 he was employed as a field geologist for the Atomic Energy Commission, and from 1957 to 1962 he worked for the Commission as a mining engineer (Tr. 5). From 1962 on, Mr. Ciesiel has been employed as a mining engineer for the Bureau of Land Management (Tr. 5-6). In this capacity, his duties include the examination of mining claims believed to be invalid, and the examination, cataloging, appraisal and sale of Government-owned building stone and common variety minerals (Tr. 6, 40). He testified that his job is to price building stone and sell it, and that he had sold rhyolite (Tr. 52).

Ciesiel testified that rhyolite deposits cover over five percent of the surface area of Eastern Oregon (Tr. 38). While only a small percentage of it can be quarried, the amount usable as building stone is considerable (Tr. 38). The rhyolite outcropping on Cline Butte where the claims are located covers several miles (Tr. 38). Ciesiel testified that he knew of a number of other large rhyolite quarrying areas in operation. He gave as examples one on Duly Mountain, outside of Baker, which had two square miles suitable for use as building stone (Tr. 38), and another in Sucker Creek, south of Vale, where the quality of the stone was allegedly as good as that found on Cline Butte (Tr. 39). He was aware of other areas where sizable deposits occurred (Tr. 39). Ciesiel also testified that he knew of a number of Government material sales involving rhyolite (Tr. 52), and that a considerable amount of Oregon sandstone was marketed for building stone purposes (Tr. 54).

Mr. and Mrs. Gerald D. Heden were witnesses for the contestees. Mr. Heden testified that he had been in the rock-facing business for over 11 years (Tr. 64). Both of the Hedens testified that they had quarried stone all over Oregon and examined other outcroppings of rhyolite in Eastern Oregon. They concluded that from the standpoint of quality and quantity, the Cline Butte rhyolite was the only rhyolite available which could be feasibly and economically removed in large quantities on a continuous basis (Tr. 71, 83, 111).

The Hedens' testimony regarding their knowledge of the amount and quality of exploitable rhyolite deposits found in Eastern Oregon must be weighed in light of other revealing statements made by the contestees. For example, the following testimony was given by Mr. Heden:

Q. Do you know anything about the claim over at Baker?

A. I have never been over there to it.

(Tr. 76)

\* \* \* \* \*

Q. Now what do you attribute the economic value of these particular claims or in what manner do you attribute an economic value?

A. What do you mean economic value?

Q. Well as regards to rock located in any other area?

A. Well it's better rock. I haven't got any other rhyolite located so I really can't classify it with another one. I haven't seen too much to tell the truth. I haven't seen anything else that they are working. (Emphasis added.)

(Tr. 79)

\* \* \* \* \*

Q. Now are you familiar with the area of Sucker Creek that Mr. Ciesiel spoke of?

A. No.

(Tr. 86)

\* \* \* \* \*

Q. Now I believe it is Exhibit 2, the banded, the gray, does that occur there at Cline Butte?

A. Yes, this sample is from the Little John. Yes, this is a Stone from Cline Butte.

Q. Now, is that a banded rhyolite?

A. I guess so. I'm not really qualified to really tell you what is a rhyolite or not. I know that everything up there on Cline Butte, to my knowledge, is rhyolite. (Emphasis added.)

(Tr. 86)

Heden's testimony was generally vague and uncertain, and demonstrated a total absence of any reliance on specific, factual data. The Government's witness, on the other hand, based his testimony on an examination of the Cline Butte area plus extensive knowledge of the mineral inventory of Eastern Oregon (Tr. 39-40). He further performed a thorough investigation of the building stone market and presented evidence indicating the comparable price per ton of competing building stones.

Ciesiel examined the subject claims in 1966, 1970, and again in 1972 just prior to the hearing. (Tr. 8, 34, 60). Exhibit 1, introduced through Ciesiel, shows an outline of the Cline Butte area and the claims at issue. The locations of quarries are drawn on the exhibit. One quarry is shown on the northwest corner of the Sharon claim; two others are situated in the northern part of the Rock Hound claim. There is no indication of any quarrying being done on the Gerald D. Heden, Jr., David, Stanley or Rock Hound #1 claims. In addition to the three quarries noted on the contested claims, two and a part of a third are located on the Little John claim and there are two on the Brown Rock claim, neither here in issue. Other quarries on private land on the Butte include one in the southeast corner of section 16, one just north of and extending over the Little John claim, and three on the extreme southwest corner of section 30 (Ex. 1, Tr. 28-29).

During his examination of the Cline Butte area, Ciesiel obtained a mineral sample, Exhibit 2, from the Little John claim, 7/ which is adjacent to the northern boundary of the Stanley claim, and about 1,500 feet southwest of the David and Gerald D. Heden, Jr., claims. Ciesiel testified that the sample came from the center of the general area of the contested claims and represented rock similar to that which is found on the subject claims (Tr. 13). The sample

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7/ The Little John mining claim was contestees' major working on Cline Butte during the 11 years that a market was developed for the subject rhyolite. The claim was contested in 1970, and declared null and void by decision dated October 19, 1971 (Tr. 97, Contestant's Statement of Reasons in Support of Appeal at 5).

is a platy-banded rhyolite, gray-brown in color. Ciesiel stated that the only difference between the sample and stones on the subject claims is that some of the rhyolite on the contested claims has more of a brownish quality (Tr. 12-14).

Ciesiel took the sample to rock dealers in Boise and Caldwell, Idaho, Napa, California, and Beaverton and Portland, Oregon (Tr. 16). The Beaverton dealer informed Ciesiel that similar rhyolite stone sold for \$73 per ton, and that other types of platy-banded stone sold for the same price (Tr. 17). The Portland dealer did not estimate a price for the stone (Tr. 18), and the Boise and Caldwell dealers stated that the sample would sell for the same amount as other platy rhyolite or similar veneer stones on the market (Tr. 18). <sup>8/</sup>

Ciesiel next testified that other building stone was used for the same purposes as the rhyolite on the contested claims. He presented a sandstone, Exhibit 3, obtained from a stone dealer in Beaverton, which was being marketed at \$73 per ton (Tr. 19). Exhibit 4, a platy rhyolite, was obtained from the same dealer, who alleged the stone to be Ochoco Fawn. It also sold for \$73 per ton (Tr. 21). Ciesiel also obtained a gray-banded rhyolite, Exhibit 5, from the Beaverton dealer. This stone sold for \$73 per ton (Tr. 23). Exhibit 6 is a platy rhyolite stone obtained from a dealer in Baker. It is orange-gray with the trade name Moon Mesa, and sells for \$57.57 per ton wholesale (Tr. 32, 79).

Ciesiel testified that he examined the inventory of the stone dealer in Portland and that all the platy rhyolites sold for the same amount as other types of facing stone (Tr. 26). The inventory of the stone dealer in Bend included platy rhyolite, tuff and sandstone. A price list indicated that the six local rhyolite stones sold for \$70 per ton (Tr. 26-27).

On cross-examination Ciesiel admitted that he never inquired whether any of the rock inventory examined at the various stone dealers represented material from the contested claims (Tr. 41). The following colloquy then occurred:

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<sup>8/</sup> The contestees objected to the admission of Exhibit 2 on the grounds that the mineral sample came from adjacent land and not from the subject claims, and should not be used as evidence as to whether the stone on the disputed claims would bring the same or a higher price in the market place (Tr. 15-16). The Judge admitted the exhibit for the purpose of showing rhyolite of gray color generally in the area, but not as evidence of coloration of the stone on the contested claims (Tr. 16).

Q. You wouldn't question that there is an extensive deposit of rather high quality building stone located on these mining claims, would you?

A. It's rather extensive.

Q. And it's high quality?

A. As a building stone, yes.

Q. And it's uniform?

A. Yes.

Q. And it has very good access for removal?

A. Yes, it does.

Q. And it has good access for the physical removal at the quarry sites? In other words, it is easy to remove?

A. Yes, uh huh.

Q. And also, there is good access to get it to the market?

A. Yes, there is.

Q. And you don't feel that those things which I have used, added up, would constitute sufficient basis to make this a valuable deposit?

A. In order to be a valuable deposit, it has to be unique and there is nothing unique about that stone.

Q. Where did you find the word unique, is that in the Statute or does it say distinct, special, economic value? Now didn't we go over the terms? The closeness to market, the ease of removal, the extensive quantity, the extensive quality, aren't those the words of the Statute which say that common varieties have no distinct, economic value for such use. Aren't those special, economic values attributable to this stone? Yes or no?

A. Yes.

(Tr. 58-59)

On re-cross-examination, Ciesiel was asked whether he thought there was a commercially valuable deposit at Cline Butte. He answered in the affirmative (Tr. 62-63). On re-direct, he clarified what he meant by a commercially valuable deposit, defining it as stone which could be quarried for a profit (Tr. 63).

On the basis of his examination of the claims and investigation of the market, Ciesiel concluded that the material on the subject mining claims was a common building stone having no unique features any different from any other common stones used for the same purpose, and would not bring a greater price in the market place than other building stones used for the same purpose (Tr. 33, 34).

The contestees introduced three samples of stone which allegedly came from the contested claims: Exhibit A, Oregon Trail; Exhibit B, Ochoco Cocoa; and Exhibit C, Ochoco Fawn. Heden testified that the Oregon Trail stone could be found on the Stanley, Rock Hound, Sharon and other areas on the Butte (Tr. 92), Ochoco Cocoa stone was available on the Rock Hound claim (Tr. 92), and Ochoco Fawn stone was located on the Gerald D. Heden, Jr., David, Stanley, Rock Hound, Brown Rock and Little John mining claims (Tr. 92-93). On cross-examination, Heden admitted that he could not precisely identify the source of his samples as he had obtained the stones from his storage yard (Tr. 94-95).

Contestees cited the following properties as a basis for alleging that the stones on the contested claims were unique: (1) attractive coloring (Tr. 45, 46, 104); (2) large deposits, uniform in quality with respect to each variety of stone (Tr. 46, 73); (3) two-inch thickness rather than the more common four-inch stone, making it easier to process and use (Tr. 76-77); (4) unusual hardness making the stones water resistant (Tr. 80, 84); (5) the stones were rhyolite marketed in conjunction with distinctive, commercial trade names (Tr. 103, 105); (6) the claims are easily accessible year round, being serviced by convenient dirt and paved roads, and are located close to marketing areas (Tr. 81); and (7) the standard size of the stone removed was a minimum of 14 inches across, with sizes running 20 inches easily obtained, and some pieces were as large as three by six feet (Tr. 69-70).

Mr. Heden stated that the unique features possessed by the stones on the contested claims resulted in not only a profitable mining operation (Tr. 83), but in addition, the ability to obtain a greater than average price for the stones (Tr. 72, 99, 105).

On cross-examination, the Government questioned Heden regarding his allegation that the stones had a competitive advantage in the market place. The following exchange occurred:

Q. Your testimony to a question by your counsel that you got a greater price for your stone, now are you telling us that you sell your stone for more and you expect to get more for your stone than, say the people that market their stone from Moon Mesa?

A. Yes. I might as well explain this. Basically you can get on the wholesale market about \$45 a ton for any stone that you can put on a wall. All right, now then if you bring this stone out of Central Oregon and get \$45 for a ton for it and in the Portland area on a wholesale market, you have got a \$10 haul in it. Now then, you get that out of Arizona. That haul costs you \$21. I mean the stone is used the same down there, the flagstone or something like that, the use of it is the same. It's used for facing but I'm getting -- basically they are getting \$25 a ton for their stone at the quarry and I am getting \$35, so it's a more valuable stone that comes in.

Q. But you sell yours for \$45 a ton I believe that was your testimony and they would also get about \$45 a ton for theirs.

A. Yah, if he brought it up from Arizona. This is the delivered price in Portland. [9/] (Emphasis added.)

(Tr. 99-101)

9/ There was additional testimony given by Mr. Heden relating to the price his stone received at the wholesale and retail levels.

"Q. You heard Mr. Ciesiel's testimony to the effect that this stone saleable in Portland is approximately \$73 a ton. Is this the retail price that you are talking about?

\* \* \* \* \*

"A. [The Portland dealer] mentioned that she got a price in the nature of \$90 to \$100 a ton for our stone. And I don't know where she came up with the price of \$73. I really don't know what she is selling it for.

"Q. What is your wholesale price to her?

"A. We have been wholesaling at 45 to her."

(Emphasis added.) (Tr. 70-71)

\* \* \* \* \*

"Q. Just one last question. Wouldn't the last two prices that you mentioned be for the use of the rock as stepping stones?

"A. Yes, but a dollar and a quarter for your four-inch stone per foot is not uncommon.

"Q. But you have no knowledge as to that.

"A. I really don't have any knowledge."

(Emphasis added.) (Tr. 109)

APPLICABLE LAW

[1] It is well-settled that in order for a mining claim to be valid there must be discovered within the limits of the claim a valuable mineral deposit. 30 U.S.C. § 21 et seq. (1970). A discovery exists,

\* \* \* [w]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine \* \* \*.

Castle v. Womble, 19 L.D. 455, 457 (1894). This test, the prudent man rule, has been refined to require a showing that the mineral in question can be extracted, removed and presently marketed at a profit, the so-called marketability test. United States v. Coleman, 390 U.S. 599, 602 (1968).

[2] There is evidence in the record establishing that the contestees have been profitably exploiting deposits of minerals in the Cline Butte area (Tr. 63, Government's Statement of Reasons in Support of Appeal at 2). That a stone deposit on a mining claim can be profitably exploited is not enough by itself to validate the claim. United States v. Heldman, 14 IBLA 1 (1973). The claimant must still establish that the deposit is not a common variety of building stone.

In United States v. DeZan, A-30515 at 7 (July 1, 1968), the Department interpreted Section 3 of the Act of July 23, 1955:

\* \* \* [as] requiring a deposit of an uncommon variety of sand, stone, etc., to meet two criteria: (1) that the deposits have a unique property and (2) that the unique property give the deposit a distinct and special value. Possession of a unique property alone is not sufficient. In applying these criteria, the Department has held, there must be a comparison of the deposit under consideration with other deposits of similar materials. It must have some property which gives it value for purposes for which the other materials are not suited, or if the deposit is to be used for the same purposes as other minerals of common occurrence, it must possess some property which gives it a special value for such uses which value is reflected by the fact that it commands a higher price in the market place.

[3] With respect to criterion (1) contestees have listed a considerable number of distinct properties found in the rhyolite

on the subject claims which they argue make the deposits unique. Under Departmental decisions, mineral deposits having unique properties such as those alleged by the contestees are still considered to be common varieties under the mining laws if such unique properties do not give the mineral a distinct and special value: (1) unique and attractive coloring -- United States v. California Soyloid Products, Inc., 5 IBLA 179, 183 (1972); United States v. Melluzzo, 76 I.D. 181, 185 (1969), set aside and remanded on other grounds, 77 I.D. 172 (1970) ("\* \* \* variety in coloration appears to be the common attribute of the vast amounts of decorative building stone \* \* \*"); United States v. United States Minerals Development Corp., 75 I.D. 127, 128 (1968); (2) deposit large in size and uniform in quality -- United States v. Heldman, *supra* at 5; (3) thickness, easier to process -- United States v. California Soyloid Products, Inc., *supra*; (4) hardness and resistance to weathering -- United States v. Kincanon, 13 IBLA 165, 171 (1973); (5) particular geologic stone with trade name -- United States v. Melluzzo, *supra*; United States v. United States Minerals Development Corp., *supra* ("Rosado" stone); United States v. DeZan, *supra*; (6) location -- United States v. Stewart, 5 IBLA 39, 79 I.D. 27, 31 (1972); United States v. Bedrock Mining Co., Inc., 1 IBLA 21, 24 (1970); (7) size -- Heden testified that his larger "stepping stones" attracted \$10-15 more per ton than other stones on the claims. This suggested that the stones, based on unique size, may have had a distinct and special value in the market place. When asked what percentage of his sales were devoted to stepping stones, Heden responded, "Oh, I would say probably 5 percent is stepping stones. It's hard to say. It really is hard to say. That is really an arbitrary figure. I don't know" (Tr. 100). Heden's testimony did not support a finding that a mining operation could be maintained through the exclusive marketing of the rhyolite for use as stepping stones. Even assuming that the larger stones were locatable minerals, they must support a discovery without consideration of the economic value of nonlocatable minerals. United States v. Lease, 6 IBLA 22, 79 I.D. 339 (1972); United States v. Chas. Pfizer & Co., Inc., 76 I.D. 331, 348 (1969); United States v. Mt. Pinos Development Corp., 75 I.D. 320, 328 (1968). The sales of rhyolite for use as stepping stones were not sufficient to establish a unique use which satisfied the "distinct and special value" test.

Further, in United States v. Guzman, 18 IBLA 109, 124-25, 81 I.D. 685 (1974), the Board recently stated:

Common varieties of a particular mineral material do not have to be physically alike or equally desirable for a given purpose. For example, many kinds of common rock may be used to build a wall and, because their physical properties differ, certain kinds of common rock may be preferred for this purpose and, in fact, make a

better wall and command a better price. Nevertheless, they remain common varieties of rock because their physical properties are not unique or rare. United States v. Ligier, A-29011 (October 8, 1962); United States v. Shannon, 70 I.D. 136 (1963). This Board held similarly with reference to a deposit of cinders in United States v. Harenberg, 9 IBLA 77 (1973), stating:

A deposit of volcanic cinders which are suitable for use in the manufacture of cement blocks must be regarded as a common variety mineral material within the context of the Act of July 23, 1955, when the evidence shows that other such deposits occur commonly in the area and are similarly used, and the fact that the subject deposit has qualities which are particularly well-suited to this purpose does not alter its essential character as common cement block material.

Likewise, the Department has consistently held that deposits of sand and gravel suitable for all construction purposes, which may be superior to other deposits of sand and gravel found in the area because it is free of deleterious substances, and because of hardness, soundness, stability, favorable gradation, nonreactivity and nonhydrophilic qualities, but which is used only for the same purposes as other widely available, but less desirable deposits of sand and gravel are, nonetheless, a common variety of sand and gravel. United States v. Mt. Pinos Development Corp., [supra]; United States v. Ramstad, A-30351 (September 24, 1965); United States v. Basich, A-30017 (September 23, 1964); United States v. Hensler, A-29973 (May 14, 1964); United States v. Henderson [68 I.D. 26, 29 (1961)].

We hold that in comparison with the extremely large deposits of similar stone throughout the area, the stone herein concerned is not unique. United States v. Brubaker, 500 F.2d 200 (9th Cir. 1974); United States v. Stewart, supra, citing McClarty v. Secretary of the Interior, 408 F.2d 907 (9th Cir. 1969).

[4] Even assuming the rhyolite in question is unique, this alone would not be enough. Under the DeZan case, the second requirement " \* \* \* that the unique property give the deposit a distinct and special value," has not been established by the contestees.

If the rhyolite is to be used for the same purposes as minerals of common occurrence, then there must be a showing that the unique properties of the stone give it a special value for such use. Such value would normally be reflected by the fact that the rhyolite would command a higher price in the marketplace in comparison with the price for which other rhyolite and building stones without such unique properties are sold or yield substantially higher profits because the unique property permits reduced costs of operation. United States v. McClarty, 17 IBLA 20, 81 I.D. 472 (1974); United States v. Heldman, *supra* at 7; United States v. California Soylaid Products, Inc., *supra* at 184; United States v. United States Minerals Development Corp., *supra* at 134.

The rhyolite on the contested claims is marketed by the contestees for building stone purposes. <sup>10/</sup> Heden testified that any building stone that could be put on a wall commanded a wholesale price of \$45 per ton (Tr. 100). Heden was wholesaling his stone for that price (Tr. 71, 94-95). The evidence also indicates that the retail market price contestees receive for their stone is the same as the price commanded by other building stones in the market. The Administrative Law Judge's decision, in fact, states:

The contestees' counsel agrees in his brief that the retail market price at the stone yards for the Heden building stones does not indicate that they have a distinct and special value over competing stones. [<sup>11/</sup>]

Despite this finding, the Judge concluded that the subject rhyolite had a distinct and special value resulting from an \$11 favorable

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<sup>10/</sup> The claims at issue are for uncommon building stone (Tr. 3, 4). The Act of August 4, 1892, 30 U.S.C. § 161 (1970), the so-called Building Stone Act, provides for mineral entry of lands "chiefly valuable" for building stone. The record indicates that there is an enormous amount of rhyolite in the Cline Butte area, both on private and public land, which is not being exploited (*e.g.*, Tr. 29, 30, 82, 85, 96). Lack of development and sales raises a presumption that the market value of the minerals found in the area is not sufficient to justify the cost of extraction and may well suggest that the claimants seek the land for other, more valuable purposes. United States v. Coleman, 390 U.S. 599, 603 (1968). In light of our conclusion as to the invalidity of the contested claims, we need not rule on this question. Apart from the question of "chiefly valuable," mining claims located for building stone must satisfy all the requirements of the mining laws relating to discovery. United States v. Colonna & Co. of Colorado, Inc., 14 IBLA 220 (1974).

<sup>11/</sup> Judge's Decision at 5.

price differential received due to lower transportation costs in relation to Arizona sandstone, not other local building stone. <sup>12/</sup> There is, however, no testimony that the sandstone Mr. Ciesiel examined in Portland came from Arizona (Tr. 18, 19). Mr. Heden's remarks (Tr. 10), quoted supra, assumed that it did, but Mr. Ciesiel testified that there were deposits of sandstone in Oregon that were used as building stone, as a facing material (Tr. 54). If the sandstone is another local stone, the basis for the Judge's conclusion would disappear. However, even if it is not, his conclusion is still erroneous.

In support of his conclusion that the transportation cost saving gave the subject rhyolite a distinct and special value, Judge Ratzman cited McClarty v. Secretary of the Interior, 408 F.2d 907 (9th Cir. 1969). In McClarty, the court suggested that the special economic value of a stone "attributable to the unique property of the deposit" could be reflected by reduced costs or overhead so that the profit to the producer would be substantially more while the retail market price would remain competitive with other building stone. Id. at 909. The building stone in McClarty was naturally fractured in regular shapes ready for use by the stonemason, with little, if any, cutting or shaping required. Its unique property was inherent in the deposit. Factors extrinsic to a deposit, however, are not determinative. Advantageous location which results in reduced transportation costs is such an extrinsic factor. A deposit of rhyolite cannot be determined to be an uncommon variety of mineral solely on the basis of its location, even if it were proven that the location gives the deposit a competitive advantage due to its proximity to market. United States v. Guzman, supra; United States v. Stewart, supra; United States v. Bedrock Mining Co., Inc., supra.

The Board concludes that Ciesiel's testimony regarding his examination of the contested claims and investigation of the building stone market presented a sufficient showing to establish a prima facie case in support of the charge that the rhyolite found within the limits of the claims was not a valuable mineral deposit under Section 3 of the Act of July 23, 1955. The burden of proof then shifted to the contestees to rebut the issues raised by the Government by a preponderance of the evidence. United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975). The contestees did not meet their burden. Accordingly, the Board finds that the rhyolite deposits on contestees' claims are a common variety of stone not subject to location under the mining laws of the United States.

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<sup>12/</sup> Judge's Decision at 4, 8.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is reversed, and the Gerald D. Heden, Jr., Rock Hound, David, Stanley, Sharon, and Rock Hound #1 mining claims are declared void.

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Martin Ritvo  
Administrative Judge

I concur:

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Joseph W. Goss  
Administrative Judge

## ADMINISTRATIVE JUDGE HENRIQUES DISSENTING:

I would affirm the decision of the Administrative Law Judge dismissing the contest. It is my opinion that the contestees preponderated on the charges of the complaint.

At the outset I would like to clarify the difference in the result which is reached when a Government contest of a mining claim is dismissed as opposed to the situation which obtains when a Government contest of a patent application is not sustained. The dismissal of a Government contest of a mining claim is not a finding by the Board that the claim is valid or necessarily that a discovery has occurred. See e.g., United States v. Harold Ladd Pierce, 75 I.D. 255, 267 (1968). On the contrary, dismissal simply means that on issues presented to the Board either (1) the Government has not presented a prima facie case or (2) the mineral claimant has preponderated on the questions raised in the complaint. That a dismissal of a complaint does not, even impliedly, validate a claim is obvious from the fact that a complaint could be processed on the question of improper location of a lode claim as a placer claim. A finding that the claim was properly located as a placer can by no stretch of the imagination be held to declare that the mineral claimed can be mined, removed and marketed at a profit. As a logical corollary, the presentation of a prima facie case by the Government on the issue of improper location shifts the burden of proof only as to that issue. It does not put into issue the mineral character of the land, the existence of a discovery, etc.

A government contest of a patent application, on the other hand, has a different result. When a dismissal of such a contest is mandated the claim may proceed to patent and the Government will be divested of its title to land. It is, in a practical and legal sense, a finding of the claim's validity. In such cases I believe the scope of review of this Board ought to be, and is, broader than that exercised in a simple contest proceeding. This is not to say that the nature of the proof required is different in the two cases. In both, the Government has the burden of presenting a prima facie case. Assuming that the Government has presented such a case, the burden devolves upon the mineral claimant to preponderate on the issues presented. The difference between the two occurs, I submit, on appeal to this Board. If the mineral claimant has preponderated on the issues raised in the contest of a mining claim, such contest is properly dismissed regardless of whatever doubts may be raised on questions which are not in issue. If the mineral claimant has preponderated on the issues presented in the contest of a patent application, however, such contest is properly dismissed only when there are no doubts on issues essential to a claim's

validity regardless of whether or not they have been joined. Should such doubts exist, the proper recourse is a remand of the case for a further hearing on these issues. This course of action is required by the Department's duty to examine each claim "to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." Cameron v. United States, 252 U.S. 450, 460 (1920). See United States v. Kosanke Sand Corp. (On Reconsideration), 12 IBLA 282, 80 I.D. 538 (1973). See generally United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975). 1/

The above perspective is, I believe, necessary in order to place the case at bar in its proper light. If a patent application were involved herein I would not hesitate to order a remand for another hearing on a variety of issues. I think it obvious that contestees have presented what is essentially a weak case. Judge Ratzman found, however, that the Government's presentation was even more deficient. I would affirm the Judge's decision.

The majority states that: "[t]he Administrative Law Judge's conclusion that contestees had preponderated on the common variety issue was based on his misapplication of the legal requirements for proving the existence of a valuable mineral deposit to the facts of this case." A close reading of the majority's decision, however, clearly indicates that the issue of credibility is determinative of the outcome reached, and not the erroneous application of legal principles. Thus, the majority notes that "[t]he Hedens' testimony regarding their knowledge of the amount and quantity of exploitable rhyolite deposits found in Eastern Oregon must be weighed in light of other revealing statements made by contestees." Supra at 331. Further on, the majority declares:

Heden's testimony was generally vague and uncertain, and demonstrated a total absence of any reliance on specific factual data. The Government's witness, on the other hand, based his testimony on an examination of the Cline Butte area plus extensive knowledge of the mineral inventory of Eastern Oregon (Tr. 39-40).

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1/ In order to avoid any misinterpretation let me reiterate my support for the Carlile doctrine which holds that upon a finding of no discovery of a valuable mineral deposit a claim must be considered invalid. United States v. Carlile, 67 I.D. 417 (1960); United States v. Bartels, 6 IBLA 124 (1972). This principle is, I believe, eminently sound. What my concern touches upon is not what results flow from a finding of no discovery, but rather how such a determination is reached. Thus, Carlile has no direct bearing on my position.

He further performed a thorough investigation of the building stone market and presented evidence indicating the comparable price per ton of competing building stone. Supra at 332.

These statements contrast sharply with Judge Ratzman's evaluation of the same testimony.

"[the Government's witness] did not carefully assess the nature and value of the deposit being quarried by the Hedens. Therefore, the contestees were provided with virtually a clear field for specific and detailed evidence relating to the assertions. \* \* \*" (Dec. at 8). (Emphasis added)

Judge Ratzman had stated earlier in his decision that "[t]he Hedens gave detailed information concerning the deposit of rhyolite on which the contested claims are located. Mr. Ciesel has not obtained any rock from those claims, and seems to have given only perfunctory consideration to the allegations in the contestees' answer." (Dec. at 6). Inasmuch as the applicable regulations limit our review to the transcript of the hearing, together with the documentary submissions, 43 CFR 4.24, the majority's conclusions can only be based on the same facts which the Administrative Law Judge had before him, but without the advantage of the Judge's personal observation of the witnesses. It is clear that Judge Ratzman found the contestees' testimony credible, a finding with which a majority of this Board apparently disagrees.

It is true that this Board has de novo review of cases before it. Nevertheless, this Board has held that "where, as here, the resolution of a case depends primarily upon [a Judge's] findings of credibility, which in turn are based upon his reaction to the demeanor of witnesses, his findings will not be lightly set aside. \* \* \*". United States v. Chartrand, 11 IBLA 194, 212, 80 I.D. 408, 418 (1973). This salutary rule should be followed here.

The majority recounts at length what it conceives to be the deficiencies of the contestees' testimony. I believe it informative to quote from Judge Ratzman's review of the evidence. The Judge noted that:

Mr. Ciesel [the Government's sole witness] estimated that rhyolite probably occurs over five per cent of the surface of Eastern Oregon. He conceded that an extremely small portion of the five per cent could be used as a source of building stone; nonetheless, he does not consider good pits or claims to be rare. Tr. 38. In addition to

the Cline Butte deposit, he named the Dooley Mountain deposit (in Eastern Oregon, approximately fifteen miles south of Baker) and a third source of rhyolite building stone, in the Sucker Creek Area south of Vale (also in Eastern Oregon). Tr. 39, 50-51.

Mr. Ciesel did not specifically inquire of the stone dealers about the stone varieties supplied by Mr. Heden. Tr. 41. He did not dig a pit on any of the contested claims, or look closely at a building stone from one of those claims. He reached his conclusion on the basis of observations of outcroppings. Tr. 45. He had observed large areas of rhyolite stone on private lands on Cline Butte, but did not know at the time of the hearing whether the stone from private lands was available for sale. Tr. 49.

Mr. Ciesel acknowledged (i) that Mr. Heden's stone quarrying and marketing activities are profitable (Tr. 51), (ii) that he had not looked into the question of whether architects specify types of rhyolite facing stone by name, e.g. Ochoco Fawn or Purple Sage (Tr. 57), and (iii) that the stone in question has special economic values because of closeness to market, ease of removal, extensive quantity and extensive or uniform quality (Tr. 58-59). He insisted, however, that "there is nothing unique about that stone." Tr. 59. (Emphasis added)

(Dec. at 3-4)

The majority distinguishes the decision in United States v. McClarty, 408 F.2d 907 (9th Cir. 1969), from the case at bar on the issue of common variety by stating that "[f]actors extrinsic to a deposit, however, are not determinative [of a deposits uniqueness]. Advantageous location which results in reduced transportation costs is such an extrinsic factor." But the Government's own witness testified that in addition to easy access to the market the stone had special economic values because of its uniform quality. The majority, however, does not address this point. I would point out that the quality of a stone is certainly an intrinsic factor in any deposit and surely a stone of superior quality is by definition unique.

The majority places great emphasis on Ciesel's discussion of rhyolite deposits in Eastern Oregon, the area in which the claims are located. "Eastern Oregon," however, is not a compact area. Everything east of the Willamette Valley is considered to be

Eastern Oregon. As regards the specific allusions to Baker and Vale it should be noted that contestees' mining claims are over 175 air miles from Baker and 200 air miles from Vale. To point to the testimony of the contestee that he has not examined the deposits at Baker and Vale and indicate that this failure somehow vitiates the effect of his testimony is, I submit, unwarranted. The majority's simple statement that "[w]e hold that in comparison with the extremely large deposits of similar stone throughout the area, the stone herein concerned is not unique . . ." is nothing more than a conclusion based on the same evidence which the Judge heard and which he weighed in a different scale. It is a finding on credibility, not on law, and I would affirm the Judge's findings on this point.

Looking at the second part of the common variety test, i.e., do the unique qualities give the mineral deposit a distinct and special value, the Judge noted that:

Because it was not established where Exhibits 4 and 5 (tan and gray platy banded rhyolite stones) came from, there is no substantial evidence that rhyolite from another quarry is competing with the Heden stone on the Portland market. Thus, for that important market, it has been proven only that one competing product, a sandstone facing stone from Arizona, can be purchased for \$73 per ton, the same retail price which is received for the Heden stone. Mr. Heden explained that in the wholesale market place he realized \$11 more per ton for his Cline Butte stone than the Arizona quarry operator obtains for the sandstone.

(Dec. at 6).

The majority places great emphasis on a colloquy between Heden and the Government counsel concerning the relative hauling costs of stone from the Cline Butte deposit vis-a-vis stone from Arizona. A close examination of the exchange, however, shows that it does not support the conclusions drawn by the majority. First of all, the initial question was "are you telling us that you sell your stone for more and you expect to get more for your stone than, say the people that market their stone from Moon Mesa?" To which the contestee replied "Yes." (Tr. 100). The contestee then explained the difference in haulage cost alluded to above. But the entire discussion is limited to transportation costs. There is nothing in the exchange which refers to the profit returned to the contestee. When the contestee stated that "I am getting \$35" he was referring not to net profit but to gross income after subtracting transportation costs.

The Government mineral examiner had already testified that the deposit of rhyolite was possessed of "extensive quantity, extensive quality and ease of removal." (Tr. 59). In United States v. McClarty, 17 IBLA 20, 81 I.D. 472, (1974), a deposit of building stone was found to be unique because of natural fracturing and flat surface cross sectioning, which qualities simultaneously lowered the cost of production. While the extensive quantity of a deposit will not, of itself, make it unique, see United States v. McClarty, supra at 43, 81 I.D. at 482, the Government mineral examiner conceded extensive quality as well as ease of removal in addition to extensive quantity. Granted the paucity of the evidence before us as to the precise components of contestee's favorable market advantage, the simple question remains whether contestees preponderated over the Government's evidence. This question is essentially determined by the weight assigned to the testimony of the various witnesses. I think there was more than a sufficient basis upon which the Judge could find that the contestee had preponderated on the issue of common variety.

The Judge's conclusions are worthy of special note. He declared that:

The Bureau made a minimal prima facie case in support of the first charge in the complaint, but did not make a prima facie case in support of the second charge (it is recognized that the second charge could be interpreted as a broad reiteration of the first). The emphasis by the Bureau's witness was on the general question of whether rhyolite can be an uncommon variety of stone. He did not carefully assess the nature and value of the deposit being quarried by the Hedens. Therefore, the contestees were provided with virtually a clear field for specific and detailed evidence relating to the assertions which are fully set forth in the answers filed in these contests. Their evidence as to the unique properties of the deposit on the contested claims, and Mr. Heden's testimony concerning the eleven dollar favorable price differential on the Portland wholesale market, stand alone. Thus the Heden's proof preponderates. There is a possibility that contestees' presentation does not give the complete picture. A reasonably thorough analysis of the overall building stone market in Central Oregon and Western Oregon apparently has not been made by either party. On the basis of the record in this proceeding, I conclude that the contestees have shown that the rhyolite stone found within the limits of the contested claims is a valuable mineral deposit under Sec. 3 of the Act of July 23, 1955, 30 U.S.C. 611. (Emphasis supplied.)

(Dec. at 8).

This case represents merely another attempt by the Government to make its case on appeal after having failed below. I find nothing in the hearing record sufficient to overcome the great weight which we normally attach to a Judge's findings when they involve credibility. I, therefore, respectfully dissent from the opinion of the majority.

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Douglas E. Henriques  
Administrative Judge

