

UNITED STATES OF AMERICA
v.
CALIFORNIA SOYLAID PRODUCTS, INC.

IBLA 70-203

Decided March 15, 1972

Appeal from decision (Arizona 032965) by Graydon Holt, Departmental hearing examiner, holding mining claim null and void.

Affirmed.

Mining Claims: Common Varieties of Minerals--Mining Claims:
Determination of Validity

To determine whether a deposit of building stone or other substance listed in the Act of July 23, 1955, is of a common or uncommon variety, there must be a comparison of the deposit with other deposits of similar type minerals in order to ascertain whether the deposit has a property giving it a distinct and special value. If the deposit is to be used for the same purposes as minerals of common occurrence, then there must be a showing that some property of the deposit gives it a special value for such use and that this value is generally reflected by the fact that the material commands a higher unit price in the market place. However, a showing that the stone or other mineral has some property making it useful for some purpose for which other commonly available materials cannot be used may also adequately demonstrate that it has a distinct and special value.

Mining Claims: Discovery: Generally

To constitute a valid discovery upon a placer mining claim located for deposits of tuff, there must be a discovery on the claim of such tuffaceous deposit as would warrant a prudent man in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.

Mining Claims: Discovery: Marketability

In order to satisfy the requirements of a discovery on a placer mining claim located for a deposit of a tuffaceous mineral, it must be shown that the deposit can be extracted, removed and marketed at a profit.

Mining Claims: Common Varieties of Minerals--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

Where an applicant for a mineral patent filed to cover a claim for a tuffaceous building stone used for the same purposes as other building stone has not shown that the mineral located on the claim has a unique character such that when sold it commands a higher price on the open market than comparable materials the building stone does not have a special and distinct value and is a common variety of stone not locatable under the mining laws after July 23, 1955.

APPEARANCES: Harold E. White (White, Oberhansley, Fleming) for appellant. L. K. Luoma, Field Solicitor, Department of the Interior, for the United States.

OPINION BY MR. RITVO

California Soylaid Products, Inc., has appealed to the Secretary of the Interior from the decision of a hearing examiner dated January 17, 1966, wherein it was held that appellant's Bear Claw placer mining claim located for a building stone was null and void. The hearing examiner held that the building stone is a common variety of stone within the meaning of the Act of July 23, 1955, 30 U.S.C. § 611 (1970), and has not been locatable under the United States mining laws since that date. On appeal, the Bureau of Land Management, on September 20, 1968, remanded the case to the hearing examiner for further evidence in light of decisions since the original hearing. On April 7, 1970, the supplementary hearing was held and the case is now before this Board for a final determination.

The contestee located the Bear Claw placer mining claim on March 5, 1961, for land located in the NE 1/4 sec. 20 and NW 1/4 sec. 21, T. 2 N., R. 11 W., G.S.R., Arizona. At various times before locating the claim, Soylaid through S. D. Osborn and Ted Lotridge, had filed four mineral material sale applications ^{1/} and had entered

^{1/} Filed pursuant to the Act of July 31, 1947, as amended, 30 U.S.C. § 601 (1970), which so far as is pertinent here, authorizes the Secretary of the Interior to dispose of mineral materials on public lands which are not subject to disposition under other laws.

into contracts pursuant thereto for the removal of a green tuffaceous building stone from a quarry located within the NE 1/4 Sec. 20, T. 2 N., R. 11 W., G. & S.R.M., Yuma County, Arizona.

On March 28, 1961, Osborn and Lotridge filed their fifth application, Arizona 03505, pursuant to the 1947 Act for 100 tons of the building stone. In April 1961, a third party applied for 500 tons of stone in the same area.

Before the sales application could be acted upon, Lotridge notified the land office that on March 5, 1961, the Bear Claw placer mining claim had been located by the appellant, by S. D. Osborn, its president, for the stone found in the NE 1/4 sec. 20 and the NW 1/4 sec. 21, T. 2 N., R. 11 W., G & S.R.M., Arizona.

Pursuant to the field report dated August 10, 1961, submitted by a Bureau of Land Management mineral examiner, the land office issued a decision dated September 28, 1961, wherein it rejected appellant's application to purchase additional rock on the grounds that the deposit was a mineral locatable under the mining laws. It held that:

* * * [the] mineral material present on the claim is an uncommon variety of rock because of its color, texture, cleavability and suitability for cutting into blocks for building purposes. (Hearing Ex. A.) 2/

Thereafter, appellant, on October 2, 1963, filed mineral patent application Arizona 032965 for the Bear Claw placer mining claim. The application set forth the following information: The claim consisted of deposits of uncommon building stone; a discovery cut had been made along the strike of the vein; open pit mining was to be utilized; the nearest center of trade is located approximately 27 miles away, by good road, at Salome, Arizona; in excess of 1,000 tons of an uncommon building stone had been mined; and the value of the stone was approximated to be \$10 per ton.

As a result of the patent application, a second field examination was conducted by a Bureau of Land Management mineral evaluation

2/ This reference and similar ones are to the exhibits submitted at or to the pages of the transcript of the hearings held before Graydon Holt, pursuant to contest numbered Arizona 032965, United States of America v. California Soyland Products, Inc. The hearings took place at San Bernardino, California, on November 5, 1965, and at Los Angeles, California, on April 7, 1970.

engineer, Louis Zentner (Tr. 5). His report (Ex. K) dated December 18, 1963, concluded the material on the claim was not subject to mineral location, stating:

It is the opinion of the examining engineers after examining the deposit, reviewing the definition of common variety, and reviewing Secretarial decisions relating to deposits having like physical characteristics, that the stone on the subject claim is a common variety.

The state director, thereupon, on June 25, 1964, initiated this contest. The complaint contained the following allegations:

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

2. Valuable minerals have not been found within the limits of the claim so as to constitute a valid discovery within the meaning of the mining laws. A timely answer was filed by the appellants and a hearing on the case was held at San Bernardino, California, on November 5, 1965.

The facts are summarized in the decision of the Bureau of Land Management.

The claim is located in the Eagle Tail Mountains approximately 27 miles southeasterly from Salome, Arizona. At the hearing Louis Zentner, a valuation engineer testified that the mineral for which the claim was located is a tuff having a pleasant green color, naturally cleavable and easily mined, suitable for use on buildings as a decorative veneer, and that a market exists for the material. He stated the outcrop of the green tuff beds is visible in two other exposures within two miles northwest from the Bear Claw claim. The rock exposed in the Bear Claw pit amounts to more than 100,000 tons. Zentner described the tuff bed on the claim as being 35 feet wide, striking N. 55 degree W., and dipping 60 degree southwesterly, and consisting of several strata of tuffaceous rock being separated by feather edge shale or clay partings.

3/ The proper citation for section 3 of the Act of July 23, 1955, is 30 U.S.C. § 611 (1970).

Ted Lotridge, vice-president of the contestee corporation and a wholesale rock and stone dealer in the Los Angeles area, testified that he considered the green tuff to be uncommon and that he had continuing orders for this stone from other stone dealers and builders in the Los Angeles area, as well as in Santa Clara, California; Portland, Oregon; and St. Louis, Missouri. He named several buildings on which the green tuff had been used as external veneer, including Bullock's-Westwood in Los Angeles, the Canejo Hospital in Thousand Oaks, and the residence of Wilbur Clark in Las Vegas, Nevada. He indicated that he sold the green tuff for \$35 to \$50 a ton as rubble, and for not less than \$50 a ton as cut stone. He stated that no quarrying had been done at the Bear Claw mine since the time of location of the claim in 1961 because of litigation.

On January 17, 1966, the hearing examiner rendered his decision. He stated:

The evidence at the hearing was extensive and supported the allegations in the patent application that the green stone on the claim has an attractive color and texture, that it is cleavable and easy to mine and cut into blocks, that it has been found in quantity in an accessible location, and that it can be marketed at a profit for use in the building and construction industry. Also the evidence established that while there are many colored stones used for the same purposes throughout the southwest, there are no other known deposits with a comparable green stone except on the claim and in the immediate vicinity. The contestee contended that these superior qualities and the limited number of occurrences of this particular color and type of stone removed it from the common variety classification.

In support of his decision holding the claim null and void, he cited the prevailing law and quoted from the case of United States v. Basich, A-30017 (September 23, 1964), wherein it was held that:

The Department has consistently held that materials of superior quality which can be produced advantageously but which are used only for the same purposes as other varieties of material and are not locatable under the mining laws since these advantages do not give them a special, distinct value.

He then concluded as follows:

The material in the present case is a green stone of a superior quality which can be produced advantageously, but which is used only for the same purposes as other less desirable deposits of similar material. Thus, I find that the green stone is a common variety within the purview of the Act of July 23, 1955, and has not been locatable since that date.

As noted above, the appellant took an appeal from the hearing examiner's decision to the Bureau of Land Management. On September 20, 1968, the BLM remanded the case to the hearing examiner.

The Bureau decision reviewed more recent departmental decisions in which guidelines for determining whether a deposit of building stone is or is not a locatable mineral under the Act of July 23, 1955, were set forth. ^{4/} These guidelines, it concluded, established that a determination as to whether a mineral was a common variety and therefore non-locatable under the Act of July 23, 1955, or is locatable as an uncommon variety having a "distinct and special value" could only be made --

* * * by ascertaining whether the deposit has some property making it useful for some purpose for which other commonly available materials can not be used which gives it such value, or, if the deposit is used for the same purpose as minerals of common occurrence, by determining if it has some property which gives it special value for such use as reflected by the fact that the material commands a significantly higher price in the market place than the other material.

The case was remanded to the hearing examiner with instructions to acquire --

* * * evidence * * * as to the extent of other building stone in the marketing area which is used for the same purposes as the green tuff, and as to the price commanded by the other stone in comparison

^{4/} United States v. U.S. Minerals Development Corporation, 75 I.D. 127 (1968); United States v. Gene DeZan et al., A-30515 (July 1, 1968); United States v. R. W. Brubaker et al., A-30636 (July 24, 1968).

with the price of the green tuff. * * * Evidence also is needed on the cost of mining, removing and transporting the green tuff from the claim to the market place where the sale prices are established.

The supplemental hearing took place in Los Angeles, California, on April 7, 1970.

The contestant's first witness was Charles W. MacQueen (Tr. 111), a mining engineer for the Bureau of Land Management's Phoenix district office. MacQueen had been assigned to conduct an investigation into the stone market in the Phoenix and Los Angeles areas. The results of that examination were compiled into a report and introduced into evidence as Ex. 11 (Tr. 117). MacQueen's testimony on direct rerevealed the highlights of his investigation.

MacQueen noted that, basically, the stone was utilized as a veneer. He emphasized that the green tuff (commonly referred to by the parties as the "mint stone") was by no means the only stone used as a veneer in Phoenix and Los Angeles. In the Phoenix area, schists, marbles and dolomites were used as veneering material, while in Los Angeles, Mexican, California and Blythe driftwood were used, as well as many other stones. Tr. 116-118.

During the course of his investigation, MacQueen interviewed several stone dealers in both Phoenix and Los Angeles. The gist of their collective opinions as to the marketability of the "mint stone" was that there was little or no demand for the stone. Some attributed the lack of marketability to the stone's "artificial" or "manufactured" appearance, others to the fact that green simply was an undesirable color for building stone. Most, if not all, of the dealers were of the opinion that the stone was an excellent building stone, very easy to work with, and that at one time, it represented a potentially saleable commodity.

Asked to compare the price of the "mint stone" with that of the aforementioned other varieties, MacQueen responded: "In my opinion, the mint stone, in either the Los Angeles or Phoenix area . . . would sell for substantially the same price per ton as competitive stones" (Tr. 148-149). Although he recognized that a few sales had been made at a higher price, he stated that such sales were not indicative of the true value of the stone. Tr. 148, 203-204.

He therefore concluded that, based upon the standards set forth by the Department in recent decisions, in his opinion "the mint stone (was) in fact a common variety." Tr. 148-149.

On cross-examination, MacQueen stated that he knew of no deposit with the same characteristics as the "mint stone" outside of the Eagle Tail area. Tr. 150. He also agreed that when the stone had been used in the past its price had in some instances been above average. Tr. 81. In fact, a Phoenix stone dealer who had purchased the "mint stone" from appellant in 1967, had sold it for between \$55 and \$75 per ton, depending on the amount of finishing work (Tr. 183). However this sale was to a customer who "had to have it," so the price was raised. Tr. 182-183. That dealer also told MacQueen that if the stone could be produced, it would make more money (Tr. 186), but he also said that the market for the green stone was gone. Tr. 187.

Another Los Angeles dealer told MacQueen that he had sold the green stone at \$40 a ton and Palos Verdes stone at the same price, \$40 a ton. Tr. 193.

The witness acknowledged that if 600 tons of the stone had been sold at a substantially higher price than other stone, it would " * * * go far * * * toward leading me to the conclusion that it was an uncommon variety * * *" Tr. 207. However he stated that he was "unable to find any evidence that the mint stone was bringing a higher price per ton in comparison with competitive stones." Tr. 197.

The Government's next witness was Hall F. Susie (Tr. 213), the Chief, Branch of Minerals, Bureau of Land Management, Arizona state office. He stated that an employee of a stone company near Phoenix said that in his opinion the stone would probably sell for 10 to 15 percent higher in the market than similar type stone. Tr. 217. However, on cross-examination he agreed that his informant was not a good witness. Tr. 227. He concluded that under the criterion of the United States Minerals Development Corporation case the conclusion that the stone was a common variety was correct. Tr. 219.

On cross-examination, Susie offered his interpretation of the U.S. Minerals Development Corporation case, supra. He stated that if a material commands a substantially higher price in the market place, it is an uncommon variety. In his opinion, if common stone sold for \$50 a ton and another stone at \$60 a tone, the \$10 difference sustained over a period of time would be substantial. Tr. 222. He noted that stone comparable to the "mint stone" in the Phoenix area was selling for from \$30 to \$40 per ton.

The appellant recalled as its only witness Ted W. Lotridge, an officer of the appellant corporation and the man in charge of its stone operations.

He said he operated a material yard at Redondo Beach for the sale of stone products and masonry materials where he stocked 100 types of

stone. Tr. 229-231. He sells 3000 - 4000 tons per year for a gross of \$100,000. Tr. 232.

As for price differential between the "mint stone" and its competitors Lotridge said that the former sold for \$75 a ton wholesale, and \$80 a ton retail (Tr. 234-235) while Arizona sandstone sold for \$55 a ton and a local stone "Palos Verdes sandstone" sells for \$50 a ton wholesale and between \$60 and \$62 retail. Tr. 35. He further noted that the "mint stone" rubble sold for \$37 per ton while the Palos Verdes rubble brought only \$22. Tr. 249-250. However, he testified that the last sale of stone to Western States was four months prior to the hearing. It was a sale of "cut wall", 10 tons first then two tons as a follow up, at \$54 per ton wholesale. Tr. 253-254.

The witness then described a special use made of the stone, one he claimed was unmatched by any other building stone in this country and only capable of duplication by travertine and cipellino, both found in Italy. He described the procedure as one in which the "mint stone" was cut into strips, guillotined and cemented into "plaques" twelve inches long and six inches wide. He stated that these plaques sold for \$1.65 per square foot wholesale and \$2.05 retail. Tr. 241. Its use would be similar to a plywood veneer or wallpaper. Because of its reduced weight and cost, the "plaque" could be used more extensively than actual stone in order to give a wall a stone-like effect. He said other building stone cannot be used for this purpose as it will not cut that thin. However there has been no production of plaques. Tr. 274.

He also testified that at one time he had been selling 100 tons a week and had 30 tons at hand. Tr. 255. The major operation of the quarry was prior to 1960 (Tr. 273), when 50% of the production was rubble which wholesaled at \$15 a ton. Tr. 277. 5/

At the first hearing held on November 5, 1965, the contestee's attorney stipulated that there had been no quarrying performed or sales made since the claim had been located on March 5, 1961. Tr. 89.

On cross-examination Lotridge agreed that there had been a sale in March 1967 to Western States of 62 tons at a wholesale price of

5/ In the patent application the contestee stated that it had extracted more than 1000 tons of stone valued at \$10 a ton. See Hearing Examiner's decision at 2.

\$45 per ton for 42 tons of wall rock and the rest at \$65 or \$75 per ton for coping and other special cuts. Tr. 270-272.

He reiterated his earlier claim that sales had been spasmodic due only to the fact that litigation had, on several occasions, caused him to cease operating. Lotridge concluded that thousands of tons of the stone remained to be quarried and that if he won the contest he had no qualms concerning his ability to carry on a profitable business.

The basic principles of law applicable to this case are now well-established and need no extensive elaboration. For a mining claim to be valid there must be discovered on the claim a valuable mineral deposit. 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); United States v. Coleman, 390 U.S. 599 (1968).

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, supra. This present marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand.

Section 3 of the Act of July 23, 1955, supra, removed certain minerals from disposition under the mining laws. It provided:

A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: Provided, however, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common varieties" as used in this Act does not include deposits of such materials which are valuable because

the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more.

In the U.S. Minerals Development Corp. case, supra, the Department reviewed its decisions and stated the criteria pertinent to determining whether or not material is a "common variety."

* * * [T]he Department has not ruled that simply because the stone is used for building purposes it must be considered to be a common variety and therefore not locatable under the mining laws. * * * An analysis of the * * * Departmental decisions concerned with this question as to whether the building stone on a claim located after the date of the act was a common or uncommon variety of stone shows that they do not stand for the proposition asserted by appellant and also reveals the criteria that ought to be used in determining what constitutes having a "property giving it distinct and special value" (U.S. Minerals Development Corp., supra, at 130).

* * * * *

In short, the Department interprets the 1955 Act as requiring an uncommon variety of sand, stone, etc. to meet two criteria: (1) that the deposit 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. It must give the deposit a distinct and special value. The value may be for some use to which ordinary varieties of the mineral cannot be put, or it may for uses to which ordinary varieties of the mineral can be or are put; however, in the latter case, the deposit must have some distinct and special value for such use. * * *

The question is presented as to what is meant by special and distinct value. If a deposit of gravel is claimed to be an uncommon variety but it is used only for the same purposes as ordinary gravel, how is to be determined whether the deposit in question has a distinct and special value? The only reasonably practical criterion would appear to be whether the

material from the deposit commands a higher price in the market place. If the gravel has a unique characteristic but is used only in making concrete and no one is willing to pay more for it than for ordinary gravel, it would be difficult to say that the material has a special and distinct value.

When the same classes of minerals used for the same purposes are being compared, about the only practical factor for determining whether one deposit of material has a special and distinct value because of some property is to ascertain the price at which it is sold in comparison with the price for which the material in other deposits without such property is sold (U.S. Mineral Development Corp., supra, at 134 and 135).

We believe the facts in the case now before us warrant the finding that the mineral present on the appellant's claim is a common variety. Even assuming that the stone in question here is unique in its physical characteristics, that alone is not enough. ^{6/} While it would satisfy the first step of the U.S. Minerals Development Corp., supra, two step test, namely that "the deposit have a unique property", the second step, "* * * that the unique property give the deposit a distinct and special value," has not been met. At no time during the course of either hearing was the appellant either able or inclined to demonstrate through concrete evidence its ability to procure a higher price for the "mint stone" than the market would bear for comparable but somewhat different stone. All we have is the word of one of appellant's officers. No business records of any kind were produced to substantiate his claims. We are of the opinion that had such transactions as those testified to by Lotridge existed, he surely would have offered into evidence tangible proof of their occurrence. In any case, we feel that appellant was obliged to do such, particularly where there is conflicting evidence on the point.

A review of the evidence relating to price may be helpful. First MacQueen, a Government witness, testified that his survey of the market led him to the conclusion that the "mint stone" commanded no higher price than other building stone used for the same purposes. Susie, the other Government witness, agreed.

^{6/} The characteristics of the green stone, except for its color, are practically identical with the Rosada stone in United States v. U.S. Minerals Development Corp., supra, and the driftwood rock in United States v. Gene DeZan et al., supra.

The contestee's sole witness offered testimony to the contrary. We find his testimony unconvincing. According to him, the contestee had quarried and sold some 2000 - 3000 tons of stone from the claim under the Materials Act prior to the time it located its mining claim. The contestee did not sell the stone to its ultimate consumer, but dealt with wholesalers, like Lotridge and Osborne, or others. Tr. 277. In its patent application Soyloid stated that the stone was valued at \$10 a ton at the quarry. Lotridge, however, testified that the price was \$15 a ton. There was no explanation of the discrepancy. Although the decision remanding the case for further hearing stressed the importance of the price received at the first sale, the contestee offered no evidence as to the quarry price of other stones.

At the first hearing Lotridge stated that he had records of the production from the claim, which he had not brought to the hearing. Tr. 84-85. Despite requests and promises to MacQueen, (Ex. 11 at 57-63), the contestee did not provide any evidence of sales at the second hearing.

Lotridge did testify that at one time their contract operator was producing 100 tons a week at the quarry, that 2000 tons had been taken out (Tr. 263) and that almost all of what had been quarried had been sold. Tr. 268-269. Yet the contestee offered no evidence in the form of statements or invoices or other business records to substantiate its claim that the stone sold at a higher price than other building stone.

The only evidence of this nature was presented by the contestant. Using an invoice of a sale made in March 1967, the Government's attorney questioned Lotridge about a sale he (as a wholesaler) had made. Tr. 269. He agreed that he had sold 42 tons at \$45 a ton wholesale. Tr. 271. This was \$5 less than price at which Lotridge stated he sold Palos Verde limestone (Tr. 235, 261), a product he had said (at the first hearing) was a common variety (Tr. 92), and classed with Colorado River stone as "hamburger", "the cheapest one on the market." Tr. 258. He offered no explanation to account for the discrepancy between the \$45 price and his earlier claim of \$75. Tr. 234.

There was some confusion in the testimony as to whether prices quoted were at the quarry or at the wholesaler-retailer's lot. Tr. 277-279. Since the contestee operated the quarry and sold to anyone at \$15 a ton (Tr. 277), the price at the quarry is the important

one. If the qualities of the mint stone commanded a higher price, the premium should have been evident at the first sale. The evidence as to prices of other stone at the quarry was limited. Lotridge testified that the quarry price of Texas limestone, another stone capable of being cut, was \$24 a ton. Tr. 260. It is not clear whether this price was for the cut or uncut stone.

The price at which the stone was sold to the retailer or builder, that is the second sale price, is only indirectly related to the quarry price because, as Lotridge testified, a great deal of the difference in price between the quarry and the stone yard was due to added processing. Tr. 246, 248, 261, 270-271, 281-282. In fact he stated that the \$23 a ton difference in price for Palos Verdes stone as rubble or cut stone was due to cutting. Id. It is also noteworthy that Lotridge testified that at least 50% of the sales were as rubble. Tr. 277.

The evidence as to "second sale" price does not establish that Lotridge was able to obtain a premium price for the mint stone. Transportation costs are also a factor influencing price at second and subsequent sales.

In summary, the Government established a prima facie case that the mint stone sold for no more than comparable building stone. The burden of proof then shifted to the contestant to establish by the preponderance of evidence that it did command a premium price. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). The contestant failed to overcome the Government's prima facie case. Cf. United States v. Carrie H. Boyle, 76 I.D. 61, 318 (Supp.) (1969).

Although this conclusion is sufficient to support our finding that the claim is invalid, we also note that there was no convincing evidence that there was a market for the mint stone.

Lotridge said the contestee had no market for the stone in Phoenix (Tr. 261), and that its sales were in the Los Angeles area. Tr. 262. MacQueen testified that he had been given the same information. Phoenix is closer to the claim than Los Angeles and was a substantial stone market. Tr. 123, 131, 134. The contestant stipulated at the first hearing on November in 1965 that it had not quarried or sold any green stone since March of 1961. Tr. 89. At the second hearing it offered testimony of only a few isolated sales of small amounts. There was testimony only about the sale, since the first hearing, of a total of 100 tons, in lots of 72 tons (Tr. 269),

12 tons (Tr. 253), and 1 ton (Tr. 233). An official of one of the large Los Angeles stone dealers told MacQueen that the general market for stone was declining. Tr. 142, Ex. 11, p. 64. He said that his firm had at one time been buying 300 - 400 tons of Arizona stone a week but was handling less than that a year then (May 27, 1969). He and another stone dealer said that the market for green stone may have disappeared. Tr. 134, 137.

The most this evidence shows is that there have been only a few small sales since 1961. Such evidence of isolated sales is not sufficient to demonstrate the existence of a market for the stone on the claim. United States v. E. A. and Esther Barrows, 76 I.D. 299 (1969), aff'd Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971); United States v. Frank and Wanita Melluzzo et al., 76 I.D. 181 (1969).

As noted above, appellant also claimed a distinct use for the "mint stone", *i.e.*, the specially cut plaques. While under certain circumstances a unique use could satisfy the "distinct and special value" test, that use must be coupled with the present ability to profitably market the item. In the present case, appellant made no presentation of any sales. Even where a unique use for the mineral involved is claimed, the locator must show that a market exists for the mineral for such a use. As far as can be gleaned from the record, there is no evidence that even a single plaque had been sold.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision holding the claim null and void is affirmed and the mineral patent application is rejected.

Martin Ritvo, Member

We concur:

Edward W. Stuebing, Member

Joan B. Thompson, Member

