

**Editor's note: Appealed – aff'd, Civ. No. 9995 (D. N.M.), reversed and remanded, No. 74-1011 (10th Cir. June 18, 1974) rehearing denied (Sept. 30, 1974), 501 F.2d 1389**

UNITED STATES

v.

W. G. NICKOL AND EVA ROSE NICKOL

IBLA 72-138

Decided January 23, 1973

Appeal from a decision of Administrative Law Judge Dent D. Dalby <sup>1/</sup> holding a mining claim null and void.

Affirmed.

Mining Claims: Common Varieties of Minerals: Generally—Mining Claims:

Special Acts

The Act of July 23, 1955, had the effect of excluding from the coverage of the mining laws "common varieties" of building stone, but left the Act of August 4, 1892, authorizing the location of building stone placer mining claims effective as to building stone that has "some property giving it distinct and special value."

Mining Claims: Common Varieties of Minerals: Generally—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 reflected by the fact that the mineral commands a higher price in the market place. If, however, the stone or other mineral has some property making it useful for some purpose for which other commonly available materials cannot be used, this may adequately demonstrate that it has a distinct and special value.

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<sup>1/</sup> The title "Administrative Law Judge" replaced that of "Hearing Examiner" pursuant to an order of the Civil Service Commission. 37 F.R. 16787 (August 19, 1972).

Mining Claims: Contests—Rules of Practice: Appeals: Burden of Proof—Rules

of Practice: Government Contests

In a mining contest when the Government has established a prima facie case that there has not been a discovery of a valuable mineral deposit within a mining claim, the claimant then has the burden of proof to show with a preponderance of the evidence that a discovery has been made.

Mining Claims: Common Varieties of Minerals: Generally—Mining Claims:

Discovery: Marketability

In order to satisfy the requirements for discovery of mining claim located for a common variety of limestone prior to July 23, 1955, it must be shown that the material could have been extracted, removed, and marketed at a profit prior to that date.

Mining Claim: Common Varieties of Minerals: Generally

A deposit of limestone cannot be characterized as a deposit of an uncommon variety when the claimant fails to show what particular quality or use makes it an uncommon variety.

Mining Claims: Common Varieties of Minerals: Generally

Even if a deposit of limestone meets all other requirements necessary to constitute it an uncommon variety of stone it is not a valuable mineral deposit within the mining laws if the claimant cannot show that it is marketable at a profit.

APPEARANCES: Harry O. Morris, Esq., Albuquerque, New Mexico, for Contestees; Richard L. Fowler, Esq., Office of the General Counsel, United States Department of Agriculture, Albuquerque, New Mexico, for the United States.

#### OPINION BY MR. RITVO

W. G. Nickol and Eva Nickol have appealed to the Secretary of the Interior from a decision by Judge Dent D. Dalby dated September 24, 1971, declaring the Mollie R. mining claim invalid on grounds that the mineral deposit, limestone, on the claim is a common variety of stone, and the evidence failed to show a market for the limestone on the claim at the time of the enactment of the Act of July 23, 1955, or since that time. The appellants' claim, the Mollie R., was located for building stone materials on February 13, 1954, within the Cibola

National Forest, about 15 miles east of Albuquerque, New Mexico. The claim covers the E 1/2 E 1/2 sec. 34, T. 10 N., R. 5 E., N.M.P.M..

The Bureau of Land Management initiated the mineral contest on behalf of the Forest Service, United States Department of Agriculture. The complaint charged that:

1. A valid discovery as required by the mining laws of the United States does not exist within the limits of the Mollie R. placer mining claim.
2. The land embraced within the limits of the claim is nonmineral in character within the meaning of the mining laws.
3. The material found within the claims is not a valuable mineral deposit under 30 U.S.C. § 611.

In their answer, the Nickols stipulated that they were the sole parties in interest, having accumulated all the other interests in the Mollie R. placer claim. They also denied the specific allegations of the complaint and affirmatively alleged a valid discovery.

A hearing was held on April 7, 1971, before Judge Dent Dalby. Contestant introduced Harve I. Ashby, a Forest Service mining engineer, as a witness while the Contestees offered the testimony of Vincent C. Kelly, Emeritus Professor from the University of New Mexico. The content of their testimonies is summarized in Judge Dalby's decision:

[I]n his [Ashby's] opinion, the limestone exposures on the claim were presently locatable, i.e., the deposits were an uncommon variety (Tr. 27). His opinion was based on the understanding of the geology of the area. He believed that the exposure of the claim was the lime kiln member of the Madera formation. This member is being mined and used in the manufacture of cement in the area by the Ideal Cement Company. Limestone suitable for use in the production of cement is not a common variety (43 CFR 3711.1(b)).

However, Ashby was mistaken in his belief. Dr. Vincent C. Kelly, Emeritus Professor from the University of New Mexico and a highly qualified geologist, testified that he had widespread experience with the Madera formation as a result of mapping it in many places in New Mexico (Tr. 80-82). He had been on the Mollie R. many times over the past 25 years (Tr. 83). According to Dr. Kelly, the

lime kiln member had been eroded off the highest peaks of the claim (Tr. 83-85). The limestone on the Mollie R. is the lower portion of the formation which contains deposits of chert, a hard silica-type of impurity, making it unsuitable for the manufacture of cement (Tr. 86). After hearing Dr. Kelly's testimony, Ashby changed his opinion and concluded the Mollie R. limestone was a common variety (Tr. 101, 102).

Judge Dalby concluded that the limestone was a common variety, and therefore the claim is valid only if there was a market for the limestone on July 23, 1955, and thereafter. The evidence introduced by Contestees of the deposit's marketability showed one sale in 1959 to Longenbaugh and Coe, Inc. This company used in the construction of a highway 40,000 tons of rocks from the Mollie R. For which contestees were paid four cents per cubic yard or a total of approximately \$1,220. There was no evidence of any other sales from 1954 to 1971. Judge Dalby held that the evidence failed to show that the limestone was marketable as of July 23, 1955, or that a market existed thereafter. Thus, he concluded that a discovery of a valuable mineral deposit within the mining law does not exist on the Mollie R. and declared the claim invalid. The Nickols filed notice of appeal on October 22, 1971.

The appeal is based on the following arguments:

- 1) Location was prior to the effective date of the Act of July 23, 1955;
- 2) There is a valuable mineral deposit exposed on the claim;
- 3) The mineral was and can be extracted;
- 4) The mineral is an uncommon variety because it is unique in content and location; and
- 5) The mineral possesses distinct and special value.

The principles controlling the disposition of mining claims located for building stone are well established. The Act of August 4, 1892, 30 U.S.C. § 161 (1970) authorizes a location of building stone claims on "lands that are chiefly valuable for building stone." The Act of July 23, 1955, provides in § 3 as amended, 30 U.S.C. § 611 (1970) 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" \* \* \* does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value.

The Act of July 23, 1955, supra, removed common varieties of building stone from location under the mining laws. Thus, if the stone is a common variety, the appellants, in order to satisfy the requirements of discovery, must show that as of July 23, 1955, the deposits in each claim could have been extracted, removed and marketed at a profit. Marketability can be demonstrated by 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 for the material, that is, a demand that existed when the deposit was subject to location. United States v. Coleman, 390 U.S. 599 (1968); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Frank and Wanita Melluzzo, 76 I.D. 181 (1969), set aside and remanded in part on other grounds, 77 I.D. 172 (1970). If the stone is an uncommon variety, it remains subject to location and the date of discovery can be after July 23, 1955. In order to determine whether a deposit of stone or other material has a unique property which material under consideration with other deposits of similar materials. It must then be shown that the material under consideration has some property which gives it a value for purposes for which other materials are not suited or, if the material is to be used for the same purposes as other materials of common occurrence, that it possesses some property which gives it a special value for such uses, which value is generally reflected by the fact that it commands a higher price in the marketplace. United States v. Paul M. Thomas, et al., 78 I.D. 5 (1971).

Even if the Nickols can establish that their limestone claim contains an uncommon variety, they still must show that there is a valid discovery on the claim. United States v. Harold Ladd Pierce, 75 I.D. 255 (1968).

At the close of the Government case the Nickols made a motion for dismissal contending that the United States had not made a prima facie case. The Nickols' claim that Judge Dalby erred in refusing to grant their dismissal motion.

After a thorough review of the evidence, this Board finds that the Government adequately established a prima facie case for lack of discovery. United States v. Howard S. McKenzie, 4 IBLA 97 (1971); United States v. Independent Quick Silver Co., 72 I.D. 367 (1965).

Appellants also insist in their appeal that location prior to the effective date of the Act of July 23, 1955, eliminates the Mollie R. from the Act's requirements. This argument is without merit. The Courts have ruled to the contrary. A mining claim located for a common variety of stone must be perfected by discovery, including marketability, prior to July 23, 1955, United States v. Barrows, 404 F.2d 749 (9th Cir. 1968), cert. denied, 394 U.S. 974 (1969). Palmer v. Dredge Corporation, 398 F.2d 719 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969), affirming Clear Gravel Enterprises, Inc., A-27967, A-27970 (December 29, 1959) where the issue is fully discussed.

To satisfy the Act's requirements that a valid discovery exists on a common variety claim, the contestee must show that the materials could have been extracted, removed, and marketed at a profit prior to July 23, 1955. The fact that similar materials are being sold in the vicinity is not sufficient evidence to validate another claim. United States v. Loyd Ramstad and Edith Ramstad, A-30351 (September 24, 1955). Furthermore, evidence of total production is limited to the one sale in 1959 to Langenbaugh & Co., Inc., for local highway construction for which appellants received about 1250. Therefore, the Judge's conclusions that there was no market for the limestone prior to July 23, 1955, and since, and that a valid discovery had not been made are affirmed.

Likewise, the record demonstrates that the Judge properly held the limestone on the Mollie R. to be a common variety. Appellants contend that the limestone in the claim is "unique in content for this area and also the location of the claim is unique." Neither of these assertions is persuasive. Location, by itself, does remove a deposit of stone from the common variety category. United States v. Neil Stewart, 5 IBLA 39, 79 I.D. 27 (1972). The content of the stone, i.e., its physical characteristics, were not shown either to make it usable for purposes for which other materials are not suited or to command a higher price for uses to which other material are put. Finally, the Judge found, and the appellants, do not disagree, that the limestone is not suitable for use in the manufacture of cement. Therefore, under the criteria set out above, the limestone is a common variety of stone.

Therefore, pursuant to the authority vested in the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is affirmed.

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Martin Ritvo, Member

We concur.

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Douglas E. Henriques, Member

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Anne Poindexter Lewis, Member

