

**Editor's note: appealed - aff'd, Civ.No. 81-1271 PHX EHC (D.Ariz. Feb. 27, 1984); aff'd, Civ.No. 84-1915 (9th Cir. Jan. 24, 1985), cert. denied, 472 US 1028 (June 24, 1985)**

UNITED STATES  
v.  
DUNBAR STONE CO.

IBLA 80-780

Decided July 10, 1981

Appeal from decision of Administrative Law Judge Michael L. Morehouse declaring the New Strike Nos. 1 through 7 placer mining claims, the New Strike Nos. 1 through 7 lode claims, the Evergreen Nos. 1 through 6 lode mining claims, and the Evergreen Nos. 1 through 6 placer mining claims invalid. AZ 10637.

Affirmed.

1. Mining Claims: Determination of Validity -- Mining Claims: Lands Subject to -- Mining Claims: Withdrawn Land -- Withdrawals and Reservations: Effect of

A mining claim located on land previously withdrawn from appropriation under the mining laws is null and void ab initio.

2. Mining Claims: Common Varieties of Minerals: Special Value -- Mining Claims: Common Varieties of Minerals: Unique Property

Where deposit of Yavapai schist has pleasant coloration and allegedly can be blasted out and broken in such a manner as to tend to maintain unfeathered edges, it is nevertheless a common variety of building stone and is, therefore, unlocatable, as these characteristics are not unique properties setting it apart from vast amounts of other common stone found throughout the area where the deposit is situated.

3. Mining Claims: Contests

When the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made and is present within the limits of the claim.

4. Mining Claims: Contests

Where a Government mineral examiner testifies that he has examined a mining claim and found the mineral values insufficient to support a finding of discovery, a prima facie case has been established, and if not rebutted, the mining claim is properly declared invalid.

5. Administrative Procedure: Administrative Law Judges --  
Administrative Procedure: Administrative Review -- Administrative  
Procedure: Substantial Evidence -- Appeals -- Evidence: Generally --  
Rules of Practice: Appeals: Generally

On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision. The powers of an agency reviewing an initial or recommended decision of an Administrative Law Judge are greater than those of an appellate court reviewing the decision of a trial judge.

APPEARANCES: William B. Fortner, Esq., Prescott, Arizona, for the appellant; T. Adrian Pedron, Esq., Office of the General Counsel, U.S. Department of Agriculture, Albuquerque, New Mexico, for the Forest Service.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On February 28, 1978, the Arizona State Director, Bureau of Land Management (BLM), acting on behalf of the Forest Service (FS), U.S. Department of Agriculture, initiated a complaint contesting the validity

of 26 mining claims: the New Strike Nos. 1 through 7 lode claims, New Strike Nos. 1 through 7 placer claims, Evergreen Nos. 1 through 6 lode claims, and Evergreen Nos. 1 through 6 placer claims. Dunbar Stone Company (Dunbar) and G. H. Seebold were named as owners of the claims and contestees in the proceeding. The complaint alleged that no valid discovery existed on these claims, and that the lands embraced within their limits are nonmineral in character. The complaint also specifically alleged that a deposit of stone found within the limits of the placer claims is not a valuable mineral deposit under section 3 of the Act of July 23, 1955, 69 Stat. 367, 30 U.S.C. § 611 (1976), the so-called "Common Varieties Act."

Dunbar filed a timely answer generally denying these allegations and advised BLM that it had purchased Seebold's interests in the claims. Subsequently, BLM referred the matter to the Hearings Division of the Office of Hearings and Appeals for appointment of an Administrative Law Judge for a hearing, which took place on June 6 and 7, 1979, in Phoenix, Arizona.

On June 24, 1980, Administrative Law Judge Michael L. Morehouse issued his decision declaring these claims invalid, from which decision Dunbar (appellant) has appealed.

[1] The New Strike and Evergreen placer claims were all located on September 28, 1976. On this date, a portion of the lands on which the New Strike Nos. 3, 6, and 7 claims are situated was withdrawn from mineral entry by Public Land Order (PLO) No. 2303 (Govt Exhs. 3 and 4; Tr. 8-14). Mining claims located on lands which are withdrawn from mineral entry at the time of location are null and void ab initio. Accordingly, those portions of these three claims lying within the E 1/2 NW 1/4 and the E 1/2 sec. 17, T. 13 N., R. 1 W., Gila and Salt River meridian, are null and void. 1/

[2] The only mineral deposit supporting the validity of the balance of the placer claims situated outside the withdrawn area is Yavapai schist, a stone which appellant has sold for building purposes for use as stone facing on buildings. Schist was first removed from these claims in 1967 or 1968 under a special use permit which expired in 1976, after which the claims in question were located.

There is little doubt that the mineral deposit satisfies the marketability test, which is the sine qua non to the validity of any

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1/ As we have concluded that there was no discovery of "a valuable mineral deposit" on these placer claims, it is unnecessary to consider either whether the irregularity of their configuration or acreage (see 43 CFR 3842.1-5(d), or whether the effect of the failure to conform the New Strike Nos. 1 through 7 placer claims to the rectangular survey system as required by 43 CFR 3842.1-2(b) affect their validity.

mining claim, as appellant has presented documentation showing considerable sales of schist from these claims. However, maintaining a profitable mining operation does not by itself establish a valid claim where the material being mined was not locatable when claimed because it is a "common variety."

Until July 23, 1955, valid mining claims could be located and maintained for lands chiefly valuable for building stone, under the terms of the Mining Law of 1872 and the Act of August 4, 1892. However, in the Act of July 23, 1955, Congress excluded, inter alia, "common varieties" of stone from location. The Supreme Court, in United States v. Coleman, 390 U.S. 599 (1968), held that this last Act also excluded common varieties of building stone from location.

The Act of July 23, 1955, provides that a deposit having a property giving it distinct and special value is not a common variety. Thus, in order to be valid, any mining claim for building stone located after July 23, 1955, must contain a deposit of building stone which has a property giving it distinct and special value, i.e., a deposit of an "uncommon variety." This requirement is in addition to the requirement that the deposit be "valuable" under the marketability test. 43 CFR 3842.2(b).

In McClarty v. Secretary of Interior, 408 F.2d 907 (9th Cir. 1969), the Ninth Circuit considered the standards [by] which [to] distinguish [between] common varieties from [and] uncommon varieties of building stone, as follows:

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

Id. at 908.

Thus, the first step in determining whether the Yavapai schist is an uncommon variety (and therefore locatable) is to determine whether it has a "unique property." Appellant's witnesses stressed the pleasant earth tone coloration of the schist, and its ability to be blasted out and broken in such a manner as to tend to maintain sharp unfeathered edges. Both of these traits, they testified, were unusual and set the material apart from other types of schist from the area. Testimony by

Gerhardt Seebold, who located the subject stone placers and operated the quarries for 15 years, set the volume of this stone within the claims at 60,000 tons (Tr. 160, 241).

Appellant's witnesses testified that Apache Stone and Supply, Inc. (Apache), sells schist, and that this schist is available in earth tones but that its product was not as beautifully colored as that found on appellant's claims. Attractive coloration, even if unusual, does not distinguish a deposit of stone from other deposits of the same stone so as to justify the conclusion that the deposit has a distinct and special property, where comparable stone is abundant and is found with varied coloration. United States v. Mansfield, 35 IBLA 95 (1978); United States v. Brubaker, 9 IBLA 281, 80 I.D. 261 (1973), aff'd Brubaker v. Morton, 500 F.2d 200 (9th Cir. 1974); United States v. Shannon, 70 I.D. 136 (1963); United States v. Ligier, A-29011 (Oct. 8, 1962). This is because beauty of coloration is inherently subjective. One type of coloration from among the infinite variety of nature may appeal to some persons, and this coloration may in fact be unusual. However, the fact that one deposit of a material may bear this coloration does not make it unique, as there are often deposits which will do the same job to the full satisfaction of the other persons. Appellant makes no price distinction based on the various colors (Tr. 314).

The record shows that there is a vast amount of Yavapai schist of varying coloration throughout the area where appellant's claims are situated, and that Apache is selling comparable material, even though its coloration may be different from that found on appellant's claims. Accordingly, we find that the color of appellant's schist is not a distinct and special property having special economic value.

Appellant makes a great point of the fact that most schist rock from other sources has a high percentage of tapered or "feathered" edges, which make it difficult or unsuitable for laying up in a wall, whereas the Dunbar schist yields a low percentage of feather-edged stone, and thus is much more desirable. But simply because this may be uncommonly good schist does not necessarily make it uncommonly good stone. There are many other types of common stone which are suitable for wall facing. Were we to hold that a deposit of a particular kind of country rock is uncommon merely because, unlike much rock of the same kind, it rises to a standard of acceptance for masonry work, we would be obliged to hold that vast quantities of other common stones suitable for such purpose are locatable under the mining law, notwithstanding the prohibitions of the Act of July 23, 1955, in that regard. We are not obliged to consider how a particular deposit of a common stone type ranks when compared only with other deposits of the same generic type (i.e., limestone, sandstone, shale, granite, basalt, slate, etc.), and hold that a superior or unusual occurrence of that particular

type is an uncommon variety, when its special characteristics only make it suitable to be used in the same manner as common varieties of other types. Appellant's argument and evidence centers on the desirability of this deposit of schist, "compared to other schist that you get," (contestee's appeal brief, p. 6), but in considering common building stone we are not limited to comparing schist only with other schist, limestone only with other limestone, granite only with other granite.

Schist is a common variety of stone, widespread and vastly abundant. Like many other types of common stone, it is frequently used as a building stone. It is a widely-accepted truism that nature does not duplicate exactly, i.e., that there are no two identical snowflakes, fingerprints, trees, mountains, etc. Each product of nature may be expected to have some distinct feature or unique characteristic which will distinguish it from others of its kind, and perhaps either enhance its value or render it worthless. But where these qualities only serve to make a common stone suitable or desirable for a common purpose, such as construction, without imparting any marked, special, economic advantage over the broad range of other common building stones, that stone cannot be considered an exception to the statutory bar against the location of "common varieties" of stone imposed by 30 U.S.C. § 611 (1976).

As we observed in United States v. Guzman, 18 IBLA 109, 124, 81 I.D. 685, 692 (1974), a case in which we held that the natural sharp angularity of particles of sand did not make a deposit of the sand unique:

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.

So it is here; the angularity of this schist, even if naturally occurring, is inadequate to make it uniquely valuable in an economic sense. As Judge Morehouse found, the commonness of the schist found on appellant's claims is also reflected by the abundance of similar stone found near these claims, on lands outside their boundaries.

Much of the testimony for contestee at the hearing came from stone masons and masonry contractors who recited the advantages realized in laying schist from appellant's claims as opposed to schist from other sources because of the relatively squared (as opposed to feathered)

edges. However, contestee failed to establish that this characteristic was reflected in either a higher market price when compared with similar materials or in a unique advantage in cost of production (quarrying) of the stone. McClarty v. Secretary of the Interior, *supra*. Comparison of price lists of contestee and Apache Stone, a competitor in the market for schist for building stone, shows the prices to be very similar (Exhibits G-29 and G-30).

This schist is readily distinguishable from "cliffstone" and "heatherstone," other types of building stone which we have recognized as unique in, respectively, United States v. Pope, 25 IBLA 199 (1976), and United States v. McClarty, 17 IBLA 20, 81 I.D. 472 (1974). These stones were unique in that they could be removed for sale and use with practically no expense, simply by prying them out of formation with a bar, a distinct and special economic advantage. Appellant admits that the schist on his claim must be drilled and blasted out of the formation, and then split with a maul, or with a hammer and chisel, a time-consuming and expensive process associated with removal of common stone (Tr. 268).

Accordingly, we affirm Judge Morehouse's finding that the schist building stone found on the New Strike Nos. 1 through 7 and Evergreen Nos. 1 through 6 placer mining claims is not unique and is, therefore, a common variety of mineral. As such, it is not locatable under the mining laws, and these claims are therefore null and void.

[3, 4] Turning to the New Strike Nos. 1 through 7 and Evergreen Nos. 1 through 6 lode mining claims, we have thoroughly reviewed the record of this case and have concluded that Judge Morehouse's findings are correct. Accordingly, we adopt his decision that these claims are invalid as our own.

The affidavit of William B. Fortner, filed with appellant's statement of reasons, concerning samples taken from the claims is not cognizable, as it is evidence which should have been presented at the hearing in this matter. We decline to grant it any weight, as it has not been subject to cross-examination. While such a submission bears on whether to reopen the record for further presentation of evidence, we will not do so here in view of the strong indications in the record that these claims have been largely mined out and that the expense of processing ore from them is high.

[5] Finally, although we here affirm the findings of fact made below, we note that FS, in its answer, asserts that "[t]he question of whether Judge Morehouse's fact finding should be reversed is determined by reference to the substantial evidence rule." This is incorrect. The Board of Land Appeals, as the delegate of the Secretary of the Interior, 43 CFR 4.1, has the authority to make decisions concerning the public lands as fully and finally as might the Secretary himself.

This authority includes the power to make a de novo review of the entire administrative record and to make findings of fact based thereon. While we recognize the propriety of deferring to the Administrative Law Judge's findings where a witness' demeanor affects his credibility, our authority to make findings of fact which may differ from the former's is not limited by the substantial evidence rule in the manner stated. "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision \* \* \*" 5 U.S.C. § 557 (1976). "The powers of an agency reviewing an initial or recommended decision of an examiner [now Administrative Law Judge] are greater than those of an appellate court reviewing the decision of a trial judge." N.L.R.B. v. A.P.W. Products Co., 316 F.2d 899 (2nd Cir. 1963).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Edward W. Stuebing  
Administrative Judge

We concur:

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Douglas E. Henriques  
Administrative Judge

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C. Randall Grant, Jr.  
Administrative Judge