

Conclusion

Accordingly, the appeal is sustained and the case is remanded to the contracting officer, for proceeding with the adjustments contemplated and provided by the contract escalation provisions pursuant to our two findings, *supra*.

THOMAS M. DURSTON, *Member*.

I concur:

ARTHUR O. ALLEN, *Alternate Member*.

PAUL H. GANTT, Chairman, disqualified himself from participation in the consideration of this appeal. (43 CFR 4.2)

UNITED STATES v. J. R. HENDERSON

A-28496

Decided January 13, 1961

Mining Claims: Common Varieties of Minerals

Sand and gravel suitable for all construction purposes, free from deleterious substances and having proportions of sand and gravel which meet construction specifications without expensive processing, but used only for the same purposes as other widely available, but less desirable deposits of sand and gravel, are common varieties of sand and gravel and not locatable under the mining laws since these facts do not give them a special, distinct value.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

J. R. Henderson has appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management dated April 18, 1960, that affirmed a decision of a hearing examiner dated December 29, 1959, declaring null and void his placer mining claims, the Dickie, Big Hall, Sandy and Teddie, all in Clark County, about 2 miles south southwest of Whitney, Nevada.

The claims were located on public land of the United States on April 4, 1957, and quitclaimed by the locators to the appellant on June 28, 1957. On May 6, 1959, the United States contested the validity of the claims by filing charges that minerals have not been found within the limits of the claims in sufficient quantity or quality to constitute a valid discovery and that the materials found within the limits of the claims are not valuable mineral deposits under section 3 of the act of July 23, 1955 (30 U.S.C., 1958 ed., sec. 611). The appellant denied the charges and a hearing was held on September 15, 1959.

At the hearing, the United States conceded that there are large quantities of sand and gravel suitable for construction purposes on

January 13, 1961

the claims and that the appellant has dug large pits exposing these materials to view and has removed considerable amounts of them. Its witness stated that the sand and gravel have been formed from volcanic rock so that they are harder than such materials formed from sedimentary rock and are of the same nature as other sand and gravel found in an area about 2½ miles wide by 7 miles long and that both are of good quality and not cemented or mixed with caliche. It contended, however, that the claims are invalid because common varieties of sand and gravel are not locatable minerals under the act of July 23, 1955 (*supra*), and that the appellant had not shown that the sand and gravel in question are valuable because they have any properties giving them special and distinct value which cause them to constitute an exception to the provisions of the statute. The contestant's evidence confirmed this view of the nature of the findings on the claims but the appellant contended that the claims are valid because of the exception recognized in the statute. The hearing examiner and the Acting Director held that no showing of a discovery of a locatable mineral had been made and declared the claims null and void for that reason.

On appeal to the Secretary of the Interior, the appellant makes the same contention so that the sole question to be determined is whether the minerals found on the claims under contest may be the subject of location under the mining law.

Section 3 of the act of July 3, 1955 (*supra*), amended the mining laws by removing certain materials from the category of valuable mineral deposits. It provides:

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 * * *

The appellant does not rely upon some other mineral in or in association with sand and gravel; his case rests upon an alleged discovery of sand and gravel on the claims which he contends have characteristics giving them distinct and special value.

His evidence shows that the deposits on the claims contain hard sand and gravel free from blow sand and caliche (Tr. 67, 69)¹ of the

¹ These and subsequent references are to the appropriate pages of the transcript of the hearing in this case.

proper size and gradation in size and mixed in proportions very close to the perfect percentage for construction use (Tr. 69, 70) so that it is possible to use or sell pit run material which meets construction specifications for concrete aggregate (Tr. 60) and, because of the sharpness of the grains, to sell the sand for mortar and plaster (Tr. 76). The area wherein such deposits are found is about $3\frac{1}{2}$ miles wide and 7 miles in length (Tr. 88) but the claims are adjacent or near to the appellant's patented land where the processing plant and the well which furnishes water for washing are located so that it is economically advantageous for him to work them from the existing plant (Tr. 88). There is a ready market for ready mix concrete and plaster and mortar sand in the vicinity (Tr. 25-53).

The appellant's evidence also showed that concrete made from aggregate produced on the claims can be ground and polished to produce an attractive stone of various muted shades of cream, coral, brown, purple, gray and black in irregular shapes and surrounded by the light gray of the concrete mix. The result is an acceptable substitute for terrazzo, the marble for which is normally shipped in from Italy or Georgia (Tr. 71-72). This so-called poor man's terrazzo has been used in the rotunda area and entrance walkways of the Clark County convention hall, in the hospital at Henderson and several of the Las Vegas schools (Tr. 73). The appellant submitted a sample as his exhibit A at the hearing which he explained was the polished product obtained by sawing a slice from a concrete test cylinder made from the aggregate (Tr. 71-72). Other aggregate not of volcanic origin used in this manner would present only a contrast between the light gray of the concrete and the darker gray of the cross sections of the aggregate (Tr. 90-91).

The conclusions to be drawn from the appellant's evidence are that the sand and gravel found on the contested claims are of good quality and suitable in every way for concrete aggregate as extracted from the pit or with some blending of materials taken from deep and shallow pits (Tr. 70). The value of these materials to the appellant is derived from their good quality as building materials without expensive processing, their location close to his processing plant and the lack of caliche (Tr. 81). Their use in the terrazzo substitute is not a demonstration of special and distinct value since it is limited in amount and restricted to local use. The predominant use of the sand and gravel is for ordinary construction purposes. The appellant did not even suggest that he contemplates shipping aggregate out of the area for widespread use. The distinct and special value for which he contends consists only of the factors which make the materials suitable for his particular local business and cause his processing costs to be

January 13, 1961

low and thus give the materials more value to him than like materials in the area.

The Senate report on a companion bill (S. 1713) under consideration at the same time as the bill which became the act of July 23, 1955, declares that—

The proviso in this section reading—

* * * nothing herein contained shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit—

has been incorporated in the bill to make clear the committee intent to not preclude mining locations based on discovery of some mineral other than a common variety of sand, stone, etc., occurring in such materials, such as, for example, a mining location based on a discovery of gold in sand or gravel.

The last sentence of this section declares that—

“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 * * *.

This language is intended to exclude from disposal under the Materials Act materials that are commercially valuable because of “distinct and special” properties, such as, for example, limestone suitable for use in the production of cement, metallurgical or chemical-grade limestone, gypsum, and the like. (Sen. Rept. No. 554, 84th Cong., 1st Sess., pp. 7-8.)

The House report on the bill which became the act of July 23, 1955 (H.R. 589), also notes that the language of the bill excludes “material such as limestone, gypsum, etc., commercially valuable because of ‘distinct and special’ properties.” (House Rept. No. 730, 84th Cong., 1st Sess., p. 9.)

The pertinent regulation provides:

(b) “Common varieties” as defined by decision of the Department and of the courts include deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Section 3² of the law has no application where the mineral for which a location is made is carried in or borne by one of such common varieties.

These observations do not lend support to the appellant’s contention that he has a discovery of sand and gravel possessing special and distinct value. They indicate, rather, that there was no contemplation that sand and gravel suitable for construction purposes would be regarded as anything but common varieties of these materials.

The fact that these sand and gravel deposits may have characteristics superior to those of other sand and gravel deposits does not make them an uncommon variety of sand and gravel so long as they are

² “Thus, while marble would not be a common variety of stone, ordinary building stone or sand and gravel or pumice or limestone used in building would be.” (43 CFR, 1959 Supp., 185.121(b)).

used only for the same purposes as other deposits which are widely and readily available. See *United States v. Duvall & Russell*, 65 I.D. 458, 462 (1958).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director of the Bureau of Land Management is affirmed.

THEODORE F. STEVENS, *The Solicitor*.

BY: EDMUND T. FRITZ,
Deputy Solicitor.

APPEAL OF WICKES ENGINEERING AND CONSTRUCTION CO.

IBCA-191

Decided January 18, 1961

Contracts: Changes and Extras—Contracts: Modification

A price adjustment determined by the contracting officer through the procedures established by the contract, when duly accepted or otherwise agreed to by the contractor, constitutes a valid modification of or supplement to the contract terms that cannot thereafter be unilaterally altered by the contracting officer.

BOARD OF CONTRACT APPEALS

The Department Counsel has moved for reconsideration of that portion of the Board's original decision in this case, rendered on November 30, 1960, which sustained the appeal as to Claim A. The motion asserts that the Board's holding is inconsistent with those made in the case of *Salem Products Corporation* by the Armed Services Board of Contract Appeals¹ and the Comptroller General.²

In our original decision with respect to Claim A we ruled that appellant was entitled to be paid for unanticipated rock excavation the sum of \$41,487.58 provided in Change Order No. 3, without deduction of the credit of \$1,371.49 for the earth excavation displaced by such rock excavation that was subsequently attempted to be provided in Change Order No. 4.

This ruling was based on the view that the terms of Change Order No. 3 set forth a determination—made through the procedures established by the contract—of the amount to be paid for the unanticipated rock excavation which, having been duly agreed to in writings signed by both parties or their authorized representatives, constituted a valid modification of or supplement to the contract terms.

¹ ASBCA Nos. 4320 and 4698, 58-2 BCA par. 1944 (September 29, 1958), modified on reconsideration; 59-2 BCA par. 2864 (September 16, 1959).

² 39 Comp. Gen. 726 (April 26, 1960).