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UNITED STATES v. KENNETH McCLARTY

A-29821

Decided August 27, 1964

Mining Claims: Common Varieties of Minerals

A deposit of building stone fractured to a large extent into regular rectangular shapes and sizes which are suitable for use in construction without further cutting or splitting and which exist in a greater proportion in the deposit than in other deposits of the same stone in the vicinity is not an uncommon variety of building stone which is locatable under the mining laws because

²³ Dec. Comp. Gen. B-149016, B-149083 (July 16, 1962).

it has a special and distinct value where it appears that the regularly shaped stone is usually, by customer preference, mixed with irregularly shaped stone from the claim in construction usage and that the regularly shaped stone is not shown to have any uses over and above those of deposits of ordinary building stone in the locality.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Forest Service, Department of Agriculture, has appealed to the Secretary of the Interior from a decision dated September 24, 1962, by the Director of the Bureau of Land Management vacating a decision of a hearing examiner holding null and void Kenneth McClarty's Snoqueen placer mining claim within the Snoqualmie National Forest, Washington, on the ground that the claim, located after July 23, 1955, is for a common variety of stone which is not locatable under the mining laws within the meaning of section 3 of the act of July 23, 1955, 69 Stat. 368 (1955), 30 U.S.C. § 611 (Supp. IV, 1963).

Section 3 of the act of July 23, 1955, amended the mining law by the provision that:

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. * * * "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 * * *.

Section 1 of the Materials Act of July 31, 1947, as amended, 69 Stat. 367 (1955), 30 U.S.C. § 601 (1958), authorizes the Secretary of Agriculture to dispose of mineral materials, including but not limited to common varieties of sand, stone, gravel, clay, etc., on public lands of the United States administered by him for national forest purposes under such rules and regulations as he may prescribe upon payment of adequate compensation therefor.

On June 23, 1960, a forest supervisor, acting as the delegate of the Secretary of Agriculture, issued a special use permit to John W. Pope entitling him to remove 50 tons of selected rock for building stone, common variety, for 50 cents per ton from a 2-acre site to be chosen by the permittee and the district ranger between White Pass Lake and Dog Lake within sec. 36, T. 14 N., R. 11 E., or sec. 1, T. 13 N., R. 11 E., Willamette Meridian, which site might include a portion of the pit site under permit to the State Department of Highways for the removal of highway surfacing materials, known as pit site E-137. On August 1, 1960, the ranger and Pope chose a 2-acre site within sec. 36, which was found later to be included in the placer mining claim which McClarty located on the same day.

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On April 1, 1961, the Bureau of Land Management, at the request of the Forest Service, initiated a contest against the mining claim by the filing of a complaint charging that:

1. The building stone for which the claim was located is a common variety not locatable under the mining law;
2. The land embraced within the claim is nonmineral in character;¹
3. A portion of the land embraced in the claim was on the date of its location appropriated to other uses through the issuance of a special use permit by the Forest Service so that this portion of the claim was not locatable at the time the claim was located regardless of the character of the mineral deposit therein.

McClarty controverted the charges, and a hearing was subsequently held at which the Forest Service presented evidence on behalf of the contestant and McClarty submitted his own testimony and that of other witnesses and pictures and samples of the building stone found on the claim.

The hearing examiner found that the claim was located on August 1, 1960, for building stone composed of andesite country rock common to much of the Cascade Range. He observed that in the immediate vicinity of the claim this stone extends along the highway for several miles on both sides and that it has been fractured both horizontally and vertically in such manner that it can be used in its native state with a minimum of processing as veneer on walls, for chimneys, patios, and general rubble construction. There was testimony at the hearing that there is an exposure extending four miles along the highway and two or three miles on each side of the highway (Tr. 13). Similar outcrops of lava have been found in the Mt. Hood area (Tr. 34-41), near Mt. Baker (Tr. 42), and in other parts of Oregon and Washington (Tr. 75-76). The examiner noted that the contestee predicated the validity of his claim upon a higher percentage of usable fractured stone in it than in any other known deposit. He held that, assuming a greater concentration of usable pieces of stone on the claim than elsewhere, the concentration does not distinguish the material from all other fractured andesite in the area and concluded that an economic advantage over other deposits does not give this deposit a special and distinct economic value or use over and above the general run of such material. On this basis, he declared the claim null and void.

On appeal, the Director reviewed the evidence and concluded that

¹ This charge was withdrawn during the course of the hearing as shown in the transcript at page 98 (Tr. 98).

it does not warrant a finding that the building stone on the claim is in the common variety category and that the charges against the claim had not been sustained. The Director did not disagree with the facts found by the examiner but seemed to base his decision on the ground that the deposit of stone on the claim is not a common variety because the stone having the unique fracturing property exists on the claim "*in commercial quantities*" (italics in Director's decision).

In its appeal to the Secretary, the Forest Service contends that the fact that commercial quantities of building stone of a particular type are found on the contestee's claim and not in other deposits in the area cannot make this deposit one of uncommon stone. The contestee reiterates his previous contentions that the unusual jointing or fracturing in nature of the stone into shapes ideally suited for masonry, the varied coloration, and the concentration in merchantable quantity on his claim are the characteristics or properties which give the stone on his claim distinct and special value so that it is not a common variety of stone within the meaning of the act of July 23, 1955.

A review of the testimony reveals that extensive deposits of stone of the same composition as the stone on the claim are exposed in the vicinity and that there are other similar deposits in other areas in the same State. The deposits are the result of lava flows which, in the process of cooling and because of the pressures exerted upon them, were fractured into small pieces. On the Snoqueen claim, there is a higher percentage of rectangular pieces than in the other exposed deposits in the vicinity. The contestee introduced into evidence as Exhibits B and C two pieces of stone which the hearing examiner described as having flat parallel sides. Exhibit B, he said, is approximately two feet long, five inches wide, and two inches thick. Exhibit C is also approximately two feet long, three and one-half inches wide, and three inches thick. The contestee testified that these exhibits are truly representative of 70 percent of the stone that is observable on his claim (Tr. 113). He based his case for an uncommon variety of stone upon the suitability of the elongated rectangular pieces of stone for construction work.

However, his Exhibit A shows 30 pictures of buildings and portions of buildings constructed in whole or in part of stone, which, he said, came "every inch of it from the Snoqueen claim" (Tr. 100). These pictures show a hodge-podge of all shapes: elongated rectangles, long, slender wedges, irregular flagstones, and small polygonal interstitial pieces mortared together into a nonuniform mass of masonry. There is only a general parallel pattern of pieces of stone, no attempt to

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maintain a uniform mortar thickness and no striving for any uniform or repetitive symmetry in the finished design such as exists in an ordinary brick wall. In the walls, a single stone that is wider than others is often allowed to protrude outward several inches and the same is true of longer pieces of stone used in fireplaces and chimneys which are allowed to extend several inches beyond the finish line. The result is the creation of a rustic effect which is clearly apparent in all of the pictures.

The contestee testified that the trade does not demand or want all of one conformation as in the samples C and B but some, not the average demand by any means, want a monotonous type like B and C (Tr. 197-198). One witness testified that 30 to 40 percent of the stone in one picture seems to be wedge-shaped instead of rectangular; in another, 15 or 20 percent (Tr. 193). Another witness said about half of the stone in another picture is like B and C (Tr. 181). Of another picture, he said the percentage of stone similar to B and C appears to be "fifty per cent or more, fifty to seventy per cent" (Tr. 182). Another witness observed that, for the flagstone type of masonry built of rubble stone as shown in the pictures comprising Exhibit A, in which the beauty of the finished product is based on irregular shapes and a clear intent to avoid any suggestion of sequence or symmetry, stone of uniform width and dimension like Exhibits B and C are of no value (Tr. 184-186).

Thus, it is necessary to conclude that, although the contestee asserted that the slabs of stone exposed on his claim are unique because of the regularity of the size and shape of 70 percent of them which makes them ideally suited for construction use, his own evidence of the actual use made of the stone removed and sold from the claim shows that no substantial value has been recognized in actual usage because of regularity of size and shape. The stone taken from his claim and used in the construction of houses is of heterogeneous sizes and shapes incorporated in walls and floors in a manner intended to emphasize their heterogeneity so that the fact that there are proportionately more slabs of regular size and shape on his claim than in other deposits of the same stone in the vicinity is not of real significance. The fact is that the regularly shaped stone on the claim is used for the same purpose as the irregularly shaped stone on the claim and for no other purpose. The fact, too, is that the stone from the claim is used for the same purpose as stone found in other deposits in the locality. Although the regularly shaped pieces do not require

as much cutting or shaping,² this factor does not endow the stone with the character of an uncommon variety. *United States v. Duwall & Russell*, 65 I.D. 458, 462 (1958); *United States v. J. R. Henderson*, 68 I.D. 26, 28-29 (1961); *United States v. D. G. Ligier et al.*, A-29011 (October 8, 1962).

The contestee also testified that the stone from his claim avoids the monotonous grays because it has browns, reds, and pinks—a soft blending of various colors in it (Tr: 198). This may well be true. But there is a complete absence of any evidence as to the colors of other stone suitable for construction purposes found in the vicinity of, but not on, this claim. Hence, it is not established that the stone from the Snoqueen claim is more varied in color or that its colors are more desirable for construction purposes and that the stone in this respect has an attribute which gives it special and distinct value. *United States v. J. R. Henderson, supra*; *United States v. D. G. Ligier et al., supra*; *United States v. Kelly Shannon et al.*, 70 I.D. 136, 141 (1963); *United States v. Frank Melluzzo et al.*, 70 I.D. 184, 186 (1963).

As in these other cases in which special and distinct properties were claimed, the stone in this case has been used only for the same purposes for which other deposits in the vicinity which are widely and readily available are also suitable.

It follows that the fact that the regularly shaped stone exists in commercial quantities on the Snoqueen claim does not have the effect of making it an uncommon variety of stone. The Director's decision was consequently in error as it was based on that premise.

Since the mining claim is invalid because the mineral deposit for which a location was attempted is not a locatable mineral, it is very clear that McClarty never had any rights which he could advance as superior to those of Pope who has had at all times since the issuance of his permit a legal right to remove common building stone under the terms of his permit. Evidently Pope did not regard the stone as an uncommon variety because he applied for and obtained his permit under section 1 of the Materials Act, *supra*, which authorizes the disposal under that act only of—

* * * mineral materials (including but not limited to common varieties of the following: sand, stone * * * if the disposal of such mineral * * * materials (1) is not otherwise expressly authorized by law, including * * * the United States mining laws. * * *

Only minerals not subject to location under the mining laws can be disposed of under the Materials Act.

²It would appear that much of the advantage gained in laying up the regularly shaped pieces of stone disappears when the stone is mixed with irregularly shaped pieces.

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Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a); 24 F.R. 1348), the decision appealed from is reversed and the case is remanded for reinstatement of the decision of the hearing examiner.

EDWARD WEINBERG,
Deputy Solicitor.

CHARGEABILITY OF ACREAGE EMBRACED IN OIL AND GAS LEASE OFFERS

Oil and Gas Leases: Acreage Limitations

Acreage embraced in a lease offer which is subject to drawing to determine priority will not be charged against the offeror until the offer has been successfully drawn.

M-36670

September 17, 1964

To: Regional Solicitor, Anchorage

Subject: Chargeability of Acreage Embraced in Oil and Gas Lease
Offers

This is in reply to your memorandum of July 29, 1964, enclosing a memorandum of July 24, 1964, from the Acting Manager of the Fairbanks Land Office concerning the Umiat lease sale. As we understand the situation, during the Umiat simultaneous filing period three companies, Atlantic Refining Company, Sun Oil Company, and Pan American Petroleum Corporation, filed 264 joint offers covering 659,923 acres. The three companies were successful in the case of 42 offers which total less than 300,000 acres. A protest has been filed against the issuance of leases to these three companies on the grounds that their filing on 659,923 acres was a violation of the acreage limitations and that thus all their offers were void and not eligible to be drawn.

Many questions on different aspects of this problem, involving the interpretation of various provisions of the statute and the regulations, have been raised by interested parties. However, the central question is whether the acreage limitations which are imposed by statute and regulation apply to all acreage embraced in offers for oil and gas leases. Section 27 (d) (1) of the Mineral Leasing Act (30 U.S.C., sec. 184 (d) (1)) states that "No person, association, or corporation * * *