

UNITED STATES *v.* U.S. MINERALS DEVELOPMENT CORPORATION

A-30407

Decided April 30, 1968

Mining Claims: Common Varieties of Minerals—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—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 material 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.

Mining Claims: Common Varieties of Minerals—Mining Claims: Hearings—Rules of Practice: Hearings

A stipulation between the Government's attorney and the mining claimant's attorney at a hearing to determine whether a building stone is of a common or uncommon variety under the act of July 23, 1955, that the stone is marketable, does not preclude a further hearing to consider whether the facts relating to the marketability demonstrate that the stone has some property giving it a distinct and special value over other stones used for the same purposes which are also marketable but are considered to be of a common variety.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The U.S. Minerals Development Corporation has appealed to the Secretary of the Interior from a decision by the Chief, Office of Appeals and Hearings, Bureau of Land Management, dated October 29, 1964, declaring its placer mining claim located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 21, T. 3 S., R. 21 E., S.B.M., Riverside County, Calif., to be null and void on the ground that the material within the claim is a common

variety of stone not locatable under the mining laws since the enactment of the act of July 23, 1955, 69 Stat. 367, 30 U.S.C. secs. 601-615 (1964). The decision reversed a decision by a hearing examiner dated July 22, 1963, dismissing a contest brought by the Government against the claim. The hearing examiner held that the stone within the claim has a distinct and special commercial value and thus is not to be considered as a common variety under the act of July 23, 1955.

Section 3 of that act provides as follows:

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. 69 Stat. 368, 30 U.S.C. § 611.¹

The appellant's mining claim was located in 1962 for a reddish quartzite stone which it contends has an attractive, shiny luster, and which has been sold under the trade name of "Rosado stone" for use as veneer on walls and for fireplaces, patio floors and other building purposes. At the hearing the parties orally stipulated that the stone had been used solely for building purposes, that it is found within each ten-acre subdivision of the claim, and that its marketability was not in issue, but that the sole issue to be determined was whether the stone is a common variety no longer locatable under section 3 of the act of July 23, 1955, quoted above.

The question considered by the hearing examiner and the Office of Appeals and Hearings, with opposite conclusions reached, was whether or not the stone came within that provision of section 3 of the act excluding the materials listed in that section from being common varieties where the deposits of material are valuable "because the deposit has some property giving it distinct and special value." The hearing examiner emphasized that the stone had an attractive color and appearance and sufficient schistosity, making it valuable as a building stone marketable at a higher price than ordinary desert stone

¹ An amendment by the act of September 28, 1962, 76 Stat. 652, 30 U.S.C. § 611 (1964), also added petrified wood to the materials listed in this section.

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in the area, and is located near transportation and accessible to a substantial market area. These qualities, he found, brought the stone within the definition of uncommon varieties set forth in a regulation defining them, 43 CFR 3511.1(b), formerly 43 CFR 185.121(b) (amended as published in 27 F.R. 9137, September 14, 1962).

In reversing the hearing examiner's decision, the decision below held that as the Rosado stone was used for building and construction purposes the same as other deposits of stone which are widely available, it can not be considered an uncommon variety. The decision stated that the hearing examiner's interpretation of the regulation was erroneous and that his decision did not comport with Departmental decisions rendered after its amendment in 1962, *United States v. D. G. Ligier*, A-29011 (October 8, 1962); *United States v. Kelly Shannon et al.*, 70 I.D. 136 (1963); *United States v. Frank Melluzzo et al.*, 70 I.D. 184 (1963); *United States v. Kenneth McClarty*, 71 I.D. 331 (1964) (rendered after the examiner's decision); as well as decisions prior to the amendment, e.g., *United States v. J. R. Henderson*, 68 I.D. 26 (1961).

The appellant has several objections to the decision of the Office of Appeals and Hearings and to the Departmental decisions relied on by it. Its major contention is that the Rosado stone has intrinsic characteristics which set it apart from other quartzite and building stones in the marketing areas, that it is not a stone of widespread occurrence, that it is marketable, and thus must be considered an uncommon variety still locatable under the mining laws.

Appellant contends that the decision by the Office of Appeals and Hearings constitutes a ruling that no building stone claim can be upheld as containing uncommon varieties and that building stone deposits are not locatable as a matter of law under the mining laws. It charges, in effect, that the Department has interpreted the act of July 23, 1955, as repealing section 1 of the act of August 4, 1892, 27 Stat. 348, 30 U.S.C. sec. 161 (1964), which authorized the location of placer mining claims for lands "that are chiefly valuable for building stone." The basis of the charge is that the Department's decisions have emphasized the use of the material as the criterion for determining whether it is common or uncommon and have held that where material is used for the same purposes as common varieties of the material it is considered a common variety despite its having distinctive and special qualities. Since, appellant asserts, ordinary stone can be and is used for

building purposes, no stone used for building purposes can, under the Department's rulings, be an uncommon variety; hence, the Department has in effect held that the 1892 act has been repealed by the 1955 act.

Appellant states that the "special and distinct value" prescribed in the 1955 act must mean an "economic value," and that the emphasis by the Department on the use of the material rather than on its economic value or intrinsic characteristics has destroyed all standards. It contends that the decision below and other Departmental rulings are unreasonable, out of harmony with the statute, and, hence, are invalid.

It is clear from a recent ruling by the Supreme Court involving the effect of the 1955 act upon the mining laws as to building stone, that the act removed from the coverage of the mining laws "common varieties" of building stone, leaving the provisions of the mining laws, including the 1892 act relating to building stone, effective as to building stone that has "some property giving it a distinct and special value." *United States v. Coleman*, No. 630, April 22, 1968, — U.S. —. This has been the position of the Department since the enactment of the 1955 act. The question presented since that enactment as to mining claims located thereafter has been to determine whether a building stone was a common or uncommon variety of stone within the meaning of the act. Contrary to appellant's contentions, the 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. To read such a ruling in any Departmental decision issued after enactment of the 1955 act is to read something which is not there. An analysis of the 5 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 are to be used in determining what constitutes having a "property giving it distinct and special value."

In *United States v. D. G. Ligier*, *supra*, the stone was a tuff having colors ranging from white through cream, pink, lavender and brown, with high compressive strength and light weight. The locators hoped to develop a market for the stone as an ornamental building stone, but only one carload had been removed from the claims, and there was a vast deposit not only on the claims but in a 20-mile area surrounding the claims. It was found that the claims had no special economic value over and above the general run of deposits of building stone. It

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was also held that as marketability of the stone had not been proved, in any event, there was not a discovery of a valuable deposit even if the claims were locatable.

In *United States v. Kelly Shannon, supra*, the building stone had pleasing colors and split readily—both qualities asserted for the Rosado stone here. However, in the *Shannon* case only a few sales had been made, primarily to an interested party, and the Government witness had taken the stone to 15 rock dealers who were not interested in it. It was held that this limited use did not indicate that the stone was of an uncommon variety.

In *United States v. Frank Melluzzo, supra*, a pink quartz had been sold and used for some ornamental building purposes, and a small amount of stone had been sold as gem stone for lapidary purposes. This latter stone was disseminated throughout the lower grade building stone. There were other large deposits of the building stone in the area, and similar deposits elsewhere in the State and two other States. The decision held that the lower grade stone was sold for the ordinary uses to which any colored building stone is put and that it was a common variety. The claimants contended that because the stone sold for \$20 to \$40 per ton, whereas ordinary stone is sand, rock, or other material selling for from \$0.25 to \$10 per ton, their stone should be considered to be an uncommon variety. The Department said that price alone was not the pertinent criterion but only a factor that might be of relevance.

As for the stone suitable for lapidary purposes, assuming that it could be considered to be an uncommon variety, the Department found it could not be segregated as a separate deposit from the mass of ordinary stone and that, even if it could be, the two sales of 520 pounds of the stone for \$260 in two years fell short of demonstrating that the lapidary stone constituted a valuable mineral deposit.

In *United States v. Kenneth McClarty, supra*, the stone was used as veneer on walls, for chimneys, patios, and general rubble construction. There were other deposits of the stone in the area and in other parts of the State and another State, but the unique feature claimed for the deposit in question was that a high percentage of the stone was fractured naturally into regular shapes which could be used for construction with a minimum of cutting or splitting. The hearing examiner found that the naturally fractured stone was not distinguishable from the other stone in the area and that the economic advantage enjoyed by the deposit over other deposits because of its higher concentration

of naturally fractured regularly shaped stone did not give the deposit a special and distinct economic value. The Director overturned this decision, finding that there were commercial quantities of the material. In reversing the Director's decision on appeal to the Secretary, it was found that although most of the stone was regular in size and shape no special value had been recognized in actual usage because of these characteristics, and that the regularly shaped stone on the claim was used for the same purposes as the irregularly shaped stone in the same deposit, and as stone found in other deposits in the locality. It was stated that the fact the stone did not require as much cutting or shaping did not endow the stone with the character of an uncommon variety. It was also stated that there was no evidence that the colors of the stone were more varied or more desirable for construction purposes, giving it a special and distinct value, over other colored stone in the vicinity.

In *United States v. E. M. Johnson et al.*, A-30191 (April 2, 1965), limited sales of limestone were made for ordinary construction purposes. A Government witness testified that it was useful only as rubble, that it had wide occurrence and no special characteristics, and that nine stone dealers were not interested in buying it. The Department held that merely because a material may have commercial value, this does not establish that it is an uncommon variety.

These decisions fall far short of a ruling of law that building stone, as a category of materials, may never be found in a deposit which can be considered an uncommon variety. No such arbitrary ruling has been made, nor has any other arbitrary formula or standard been set forth for determining whether a claim contains a common variety or uncommon variety under the 1955 act. Each case presented has been determined on its own merits in order to ascertain whether the statutory definition was satisfied.

This does not mean that there may not be any guidelines or factors developed to help in determining whether a deposit is an uncommon variety. The most important factor inherent from the language of the statute is that there must be a comparison of the mineral deposit in question with other deposits of such minerals generally. Certainly, there can be no evaluation of whether the properties allegedly giving a deposit a "distinct and special value" really do so without such a comparison. Although, appellant suggests that this Department has over-emphasized the factor of how the mineral is to be used in determining whether or not it is a common variety there is apparently

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some misunderstanding of the rationale behind the Department's decisions. The use of the mineral is not the sole criterion in determining whether the mineral is of a common or uncommon variety, but it is an important factor to be considered as a basis of comparison of one deposit with other deposits to ascertain whether the given deposit has properties giving it a special and distinct value.

This real significance of the use factor is reflected in the *McClarty* case where it was claimed that the naturally occurring regular shapes of the stone gave it a special and distinct value. However, there was no evidence that in the use of the stone in the building trade any significant value was attributed to the stone because of that quality. It was found, on the contrary, that it was used in the same manner as other, irregularly shaped stone found on the same claim. The claim did have a greater concentration of the naturally fractured regularly shaped stone which might give the claimants some economic advantage in that it would reduce the cost of cutting and shaping the stone, but this fact was considered insufficient to warrant the stone being considered an uncommon variety because this unique characteristic of the deposit of stone did not give it any distinct or special value. That is, a purchaser who wanted regularly shaped stone would not pay any more for a naturally shaped stone than he would for a stone that had to be cut to shape. It would make no difference to him how the shape of the stone was achieved, whether by natural fracturing or by fabrication.

It must be conceded that the language used in some of the Department's decisions on common varieties could lead to the conclusion that the Department would hold to be a common variety any mineral deposit that was used for the same purposes as deposits of admittedly common varieties of the same mineral. See the *Ligier*, *Melluzzo*, and *McClarty* cases, also *United States v. J. R. Henderson, supra*; *United States v. J. R. Cardwell and Frances H. Smart*, A-29819 (March 11, 1964); *United States v. R. R. Hensler, Sr., et al.*, A-29973 (May 14, 1964); *United States v. L. N. Basich*, A-30017 (September 23, 1964). However, the statements in all these cases must be evaluated in light of the fact that in none of the cases was there any evidence that the unique characteristics claimed for the minerals involved gave them a distinct and special value. For example, as in the *McClarty* case, the sand and gravel in the *Basich*, *Hensler*, and *Henderson* cases, which were used for the same purposes as ordinary sand and gravel, were

not shown to command a higher price for the unique characteristics claimed to make them more suitable for such purposes.

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 be 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. For example, suppose a deposit of gravel is found which has magnetic properties. If the gravel can be used for some purpose in which its magnetic properties are utilized, it would be classed as an uncommon variety. But if the gravel has no special use because of its magnetic properties and the gravel has no uses other than those to which ordinary nonmagnetic gravel is put, for example, in manufacturing concrete, then it is not an uncommon variety because its unique property gives it no special and distinct value for those uses.

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 it 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.

This may appear to be inconsistent with the statement in the *Meluzzo* case, *supra*, that "price is [not] the pertinent criterion for determining whether a mineral is a common variety. It is only a factor that may be of relevance." 70 I.D. at 187. This statement must be read in the context of the mining claimants' argument in that case that a common variety of stone consists of sand, rock, and other material generally sold for 25 cents a yard or ton to \$4, \$5 or \$10 per ton whereas the pink quartz involved in that case sold for \$25 to \$35 per ton. The Department considered that the price difference meant nothing unless the same classes of material were being compared. For example, the

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claimants lumped together as common varieties rock selling at \$4 per ton or \$10 per ton, despite the fact that the \$10 price was $2\frac{1}{2}$ times the \$4 price. Yet they claimed that the \$25 price for their stone made it an uncommon variety although that price was only $2\frac{1}{2}$ times the price for a common variety of rock. The Department pointed out that there was a far greater price spread between the 50 cents per pound at which some pink quartz was sold for lapidary purposes and the .0175 cent per pound at which most of the pink quartz was sold than there was between the price of \$10 per ton and \$25 per ton which the claimants said would separate a common from an uncommon variety of stone. The Department's statement that price is not *the* pertinent criterion must be read in this context.

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.

With these principles in mind we turn to a consideration of the facts in this case. The special properties claimed for the Rosado stone are its reddish color and luster and its easy cleavability. The stone is a quartzite, i.e., a metamorphosed sandstone (Tr. 57). The evidence indicates that the nearest similar deposit of quartzite is 14 or 15 miles away (Tr. 20, 23), although one of appellant's officers testified that it was not of the same quality (Tr. 88). As noted earlier, the stone has been sold and used in a variety of building construction, as veneer in walls, in fireplaces and hearths, and in patio floors. Two stonemasons testified for the appellant that people like the color of the Rosado stone and that it was good to work with (Tr. 119, 133). However, it was not used for any purpose that other decorative building stone is not used for (Tr. 141).

Since no unique use is claimed for the stone and it is used only for the same purposes as any decorative building stone, the question is whether the special properties of the stone, color and cleavability, give it a special and distinct value for such uses. That is, does it command a higher price than other decorative building stone in the area?

On this point the record is not satisfactory. The evidence is limited, apparently because of the stipulation by the parties that the market-

ability of the stone was conceded. There is evidence indicating that there are several other varieties of building stone in the market area of the Rosado stone, for example, Palos Verde stone, Silver Mist sandstone from Utah, Arizona pink flagstone (Tr. 61, 113-115, 119, 127, 142). However, although there were statements that the Rosado stone sold for \$50 and around \$42.50 per ton (Tr. 15, 85), appellant's counsel objected to a question directed to appellant's officer as to the price at which the stone had been sold, the objection being on the ground that marketability was not an issue (Tr. 113). Counsel also objected to a statement of a Government witness that the Rosado stone should not be judged only against other quartzites but against other building stones (Tr. 141).

It seems evident that the stipulation as to marketability precluded the full development of evidence necessary to determine whether all the criteria for an uncommon variety of mineral have been satisfied so far as the Rosado stone is concerned. A proper determination of the question cannot be made on the basis of the present record. Further evidence is needed as to the extent of other building stone in the marketing area which is used for the same purposes as the Rosado stone—and it is immaterial whether such other stone is a quartzite—and evidence is needed as to the price commanded by the other stone in comparison with the price of the Rosado stone. Only with this comparative evidence can a proper determination be made as to whether the Rosado stone is an uncommon variety.²

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 decisions below are set aside and the case is remanded for a further hearing to develop further evidence in accordance with the views set forth in this decision.

EDWARD WEINBERG,
Acting Solicitor.

² The fact that the parties entered into a stipulation regarding the issue of marketability does not preclude this Department from considering further the facts relating to the value of the building stone on this claim in relation to other building stone. It has long been the position of the Department that a stipulation entered into by a Government agent and a mining claimant does not bind this Department or preclude consideration of any questions vital to the determination, even if they were covered by the stipulation. *Stanislaus Electric Power Co.*, 41 L.D. 655 (1912).