

UNITED STATES v. SHERMAN C. SMITH; LARRY L. SMITH

IBLA 81-1109

Decided August 13, 1982

Appeal from decision of Administrative Law Judge E. Kendall Clarke, declaring placer mining claim null and void. AA-25640.

Affirmed.

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

Whether a deposit of stone is an uncommon variety under sec. 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (1976), and therefore locatable under the mining law depends on whether the deposit has a property which gives it a distinct and special value as compared with other deposits of similar materials. It must be shown that the material under consideration has some property which gives it 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 may be reflected by the fact that it commands a higher price in the market place or by reduced cost or overhead so that the profit to the claimant would be substantially more.

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

A deposit of slate and graywacke cannot be determined to be an uncommon variety of mineral solely on the basis of its accessibility or proximity to market (both factors of location), even though such factors may give the deposit a competitive advantage, as they are not unique properties inherent in the deposit but only extrinsic factors.

APPEARANCES: Sherman C. Smith, pro se, and for Larry L. Smith; Arno Reifenberg, Esq., Office of General Counsel, U.S. Department of Agriculture, Portland, Oregon, for appellee.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Sherman C. Smith and Larry L. Smith have appealed from a decision of Administrative Law Judge E. Kendall Clarke, dated August 24, 1981, declaring the RS&S placer mining claim null and void.

The claim is situated in sec. 11, T. 5 N., R. 2 W., Seward meridian, Alaska, within the Chugach National Forest. This land was the subject of an application for withdrawal filed by the Forest Service, U.S. Department of Agriculture, on November 28, 1978. Notice of the proposed withdrawal, published in the Federal Register (43 FR 57134 (Dec. 5, 1978)), provided that the land would be segregated from location and entry under the general mining laws for 2 years from the date of publication, "unless the application is rejected or the withdrawal is approved."

This case was initiated with the filing of a contest complaint on August 1, 1979, by the Bureau of Land Management (BLM) on behalf of the Forest Service, charging:

1. There are not presently disclosed within the boundaries of the mining claim minerals of a variety subject to the mining laws sufficient in quantities and/or qualities to constitute a valid discovery.
2. Material found within the limits of the claim is not a valuable deposit under Section 3 of the Act of July 23, 1955, (69 Stat. 367; 30 U.S.C. 601).
3. The land embraced within the claim is nonmineral in character.

The charges were duly denied and the matter came on for hearing on March 7, 1980, in Anchorage, Alaska, before Administrative Law Judge Clarke.

In his decision, the Administrative Law Judge concluded that the Government had presented a prima facie case of the lack of a discovery and that appellant had failed to overcome this case by a preponderance of the evidence. Specifically, the Judge held that appellant had failed to establish a "continuing demand" for the material from his claims and, further that the rock was a "common variety," not locatable under the mining laws (Decision at 7). He stated that based on its "intrinsic value," the rock was "similar" to "large quantities of slate and graywacke in nearby areas." 1/ *Id.*

We will first address the "common variety" issue since a finding on that issue could be dispositive of the case.

[1] Section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1976), withdrew from the operation of the mining laws, including the Building Stone Act of August 4, 1892, 30 U.S.C. § 161 (1976), any "deposit of common varieties of * * * stone." See United States v. Coleman, 390 U.S. 599, 604-05 (1968). The same section provides that a deposit having a property giving it distinct and special value is not a common variety. The standards by which to distinguish between common varieties and uncommon varieties of material were set forth in McClarty v. Secretary of the Interior, 408 F.2d 907, 908-09 (9th Cir. 1969). They are:

1. There must be a comparison of the mineral deposit in question with other deposits of minerals generally;
2. The mineral deposit in question must have a 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;
5. The distinct and special value must be reflected by the higher price which the material commands in the market place, or by reduced cost or overhead so that the profit to the claimant would be substantially more.

1/ The term graywacke is apparently used to refer to metasiltstone, which is generally grouped along with metasandstone under the heading metaclastic. In the transcript, the term graywacke and metaclastic were used interchangeably (Tr. 14). Such rock is described as "light to medium gray, rusty weathering and break[s] along joint surfaces into angular blocks" (Exh. B at 2). This is contrasted with slate which is described as "dark gray, rusty weathering, and usually [having] a well developed foliation causing it to break into thin sheets." *Id.*

In this case there was a comparison of appellants' material with other deposits in the area. Thus, initially we must determine whether appellants' material has a "unique property."

The evidence adduced at the hearing was summarized by the Administrative Law Judge as follows:

A report dated December, 1979, on the R S & S Building Stone Placer Claims was prepared by Jim Halloran and Bob Hoekzema. Examinations of the 20 acre claim were made on July 24, November 8, December 6, 1978 and November 7, 1979. (Ex. A). The claim is at varying elevations from 700 feet rising to 1200 feet. It slopes at a 5 degrees to 24 degrees angle and is on the south slope of Fairman Mountain. Uphill is vegetated while downhill is not. The northeastern section of the Kenai Peninsula consists of a thick sequence of interbedded slate, argillite, metasilstone and metasandstone. After they were consolidated into shales, siltstones and sandstones, they metamorphosed and became folded and faulted.

The slate is medium to dark gray. It is broken into thin sheets. The argillite is dark gray and very fine grained and commonly breaks in subconchoidal fractures into irregular fragments. The metasilstone and metasandstone units tend to be light to medium gray and break along joint surfaces into angular blocks. The geology of the claim is both slate and metaclastic. The contact between them almost split the claim diagonally. The slate outcrops on the lower east end and metaclastics surface on the rest of the claim.

The Alaska State Department of Transportation used the finer size slate on the east end of the claim as a borrow source during the reconstruction of the Sterling Highway. There are at least 73,000 tons of graywacke reserves on the R S & S claim. The Smiths have removed at least 460 cubic yards of material.

The report determined that rock on the R S & S claim has no intrinsic, distinct and special value over similar types of stone occurring in the area. The Hope Road quarry, Peterson Creek quarry, Silvertip quarry and American Pass deposits are nearby.

On the issue of discovery, in particular marketability, there have been only past sporadic sales of rock. The rock from the claim was used as fill in the construction of dock cribbing. It was also used to surface a parking area. None of the building stone outlets in Anchorage sell stone from the R S & S claim. A market for local sources of building stone has not been developed. The mineral examiner believed that local rock from the Chugach Forest area is not attractive enough and does not have the desirable

physical properties to compete with the higher quality stone from elsewhere. The blocky metaclastic rock on the west end of the R S & S claim is better building stone than that from the Silvertip Creek quarry. The slates on the R S & S are better suited for facing stone than those slates on Peterson Creek. Nonetheless the R S & S stone is not ideal because of its small size.

Mr. Jim Halloran, a mineral examiner with the United States Forest Service in the Chugach National Forest, testified on behalf of the Government. He stated the slate and graywacke rock on the R S & S claim can be found elsewhere on the Kenai Peninsula. (Tr. 14). Similar rock can be found in the Chugach State Park. (Tr. 15). Mr. Smith stated he was using the rock in rock panels which he sold at Cooper Landing. (Tr. 26). He is attempting to develop a market for these panels. The U.S. Forest Service is selling rock from the Hope Road, Silvertip and Peterson Creek quarries. (Tr. 29). The slate on the Peterson Creek quarry is attractive and of the right size but doesn't break nicely. The Silvertip quarry has graywacke that is coarser in size than graywacke found on the R S & S claim. (Tr. 30). The Hope Road quarry has good slate suitable for building fireplaces, but it must be removed by hand. (Tr. 31). The most numerous use of rock from the quarries is for the building of fireplaces and decorative walls. Rock from the R S & S claim has been used for fill material. Mr. Halloran is of the opinion that the rock has no intrinsic unique qualities. (Tr. 33). He based his opinion on the fact that it has no special value that commands a higher price in the marketplace. Since the rock on the R S & S claim breaks randomly, it does not have favorable splitting characteristics of a unique building stone. In addition, there is an abundant amount of similar slate on the Kenai Peninsula. (Tr. 35). There are other quarries in the area which have rock that is suitable for septic rock although, there is not a large market for such rock. (Tr. 261).

Mr. Robert B. Hoekzema, a Physical Scientist for the Bureau of Mines and formerly a mineral examiner for the U.S. Forest Service, was called as a witness for the Government. (Tr. 70). He inspected the R S & S claim in July of 1978. He made comparisons with rock in other quarries nearby and found little distinction in the rock types. (Tr. 73). In his opinion rock masons would not want R S & S rock since it has poor splitting qualities. (Tr. 74). Mr. Hoekzema believed the R S & S rock is not unique since there is so much other rock exposed in the Kenai Peninsula that is similar. (Tr. 77).

Mr. Wesley Moten [Moulton], Regional Mining Engineer for the U.S. Forest Service, testified he has had experience in examining building stone placer claims in California and Alaska. (Tr. 85). He has been on the R S & S claim. In his opinion there are no unique characteristics in any of the stone located on the claim. There is an abundance of similar stone in the Kenai Mountains and down the coast to Juneau. (Tr. 86).

Mr. Victor Baer, Resource Management Assistant for the U.S. Forest Service in the Chugach National Forest, stated he is responsible for the issuance of special permits for the sale of rock in the Kenai Peninsula. Since July, 1975, he has issued several permits to Mr. Vandiver, a rock mason, at the price of \$1.00 per cubic yard. Eight permits were issued for the Hope quarry, and six for the Silvertip, between April 1976 and February 1979. Hope quarry rock fractures naturally in thin veneers and is used for fireplaces. Silvertip rock is in larger blocks and is used for retaining walls. Two other permits for two pick-up loads of rock have also been issued. (Tr. 108-112). Mr. Kerry T. Martin, who is also a Resource Management Assistant in the Chugach National Forest, has issued only one permit since 1976. It was for a single pick-up load at five dollars. (Tr. 174).

Sherman Smith, the mining claimant, has a geology degree from the University of California. He has resided in the Chugach National Forest for thirty-one years. He has other mining claims in addition to the one which is the subject of this proceeding. In Mr. Smith's opinion, the R S & S rock is unique. First, the deposit is located next to the Sterling Highway. (Tr. 182). Next, the claim has a combination of rock types. There is no problem with water drainage from the claim into anadromous streams nearby. The claim is centrally located in the Kenai Peninsula. These are extrinsic factors he believes that add value to his claim. The intrinsic features are that there are two types of material that are well suited for problems in the area. (Tr. 186). The graywacke can be broken down with hand tools and is ideal for stone work in fireplaces. There is no need to drill for the graywacke since there is a large volume already broken down. In his opinion the rock could be used as septic rock. Mr. Smith stated other rock deposits do not have rock in small uniform size. He believes R S & S rock has an economic advantage over other deposits for use as septic rock because it is already broken into useable size. (Tr. 222).

Mr. Smith has sold only 50 tons or less of stone since he has located the claim. A sale of 500 cubic yards of pit run rock was sold and it was used to stabilize a

piling dock. He received \$5,000 for this rock. He also sold four tons of building stone in Anchorage, from \$60 to \$125 a ton. Stone delivered and sold in Anchorage at \$60 a ton would just cover his expenses. (Tr. 195).

[2] As noted by the Administrative Law Judge, appellants have raised a number of extrinsic factors which they assert contribute to the uniqueness of their deposit. These factors include a central location on the Kenai Peninsula and direct access to a highway. Such factors, however, are not determinative of a "unique" property of the mineral deposit itself. While such factors may give appellants a competitive advantage with respect to marketing their material, the Board has concluded that unique properties which give a deposit a distinct and special value must be inherent in the deposit and not extrinsic factors. United States v. Heden, 19 IBLA 326 (1975). Therein, the Board stated:

Factors extrinsic to a deposit, however, are not determinative. Advantageous location which results in reduced transportation costs is such an extrinsic factor. A deposit of rhyolite cannot be determined to be an uncommon variety of mineral solely on the basis of its location, even if it were proven that the location gives the deposit a competitive advantage due to its proximity to market. United States v. Guzman, [18 IBLA 109, 81 I.D. 685 (1974)] * * *; United States v. Stewart, [5 IBLA 39, 79 I.D. 27 (1972)] * * *; United States v. Bedrock Mining Co., Inc., [1 IBLA 21 (1970)] * * *. [Emphasis in original.]

Id. at 341.

In their statement of reasons for appeal, appellants quote from one of the Forest Service's mineral examination reports which contained the statement that: "The rock on the R.S. & S. is the only detrital rock deposit with close to ideal size rock on the Kenai Peninsula that can be accessed without new road construction or overburden removal" (Exh. A at 14). However, the mineral examiner properly recognized that accessibility is an extrinsic factor, which like proximity (both factors of location) does not enter into the question of distinct and special value, and he concluded that in his opinion "this claim fails because it has no intrinsic or inherent properties making it distinct or special" (Exh. A at 14).

Appellants have offered three factors, however, which arguably are unique properties of the mineral deposit. They pointed out that the claim contains a combination of various rock types and that the graywacke is continually being broken down by frost wedging so that the material is replenished naturally thereby eliminating the normal quarrying costs, and that some of the graywacke covered by lichens which lend a desirable quality for facing stone (Tr. 187-88). Appellants have presented no evidence that the combination of rock types on their claim imparts a distinct and special value to the deposit, by way of a higher market price for material sold in combination from the

claim. In addition, the record indicates that the principal uses for the slate and graywacke from appellants' claim is in decorative rock panels or veneering stone for fireplaces and walls and as septic rock. ^{2/} The abundance of evidence indicates that, with minor variations, other rock material available locally is equally well suited for the same uses (Tr. 29-32, 74, 248). Indeed, similar rock is being quarried and used as decorative stone. With respect to septic rock, a Forest Service mining engineer indicated that any hard rock in the Kenai Peninsula could be used for such a purpose (Tr. 257-58).

Therefore, we must conclude that appellants' rock does not have a unique property. With the exception of accessibility, which is an extrinsic factor, it does not appear to differ substantially from other deposits of similar materials in the area.

Assuming, arguendo, that the varieties of rock on the claim could be considered as exhibiting unique properties, appellants have failed to establish that the deposit has a distinct and special value. The inherent properties of the graywacke and slate on this claim serve only to make those materials suitable for common purposes, such as for facing stone and septic rock, without imparting any noticeable, special economic advantage over the broad range of other such materials in the area. See United States v. Dunbar Stone Co., 56 IBLA 61, 64 (1981).

Appellants have presented no evidence that the graywacke and slate commands a higher price in the market place. Sherman Smith testified that approximately 4 tons of rock from the claim were sold in Anchorage for building stone for \$60 to \$125 per ton (Tr. 193-94). However, the Government provided evidence that "[n]atural building stone mined in Alaska or the lower states sells in Anchorage for around \$300 to \$500 per ton" (Exh. A at 15). While it is true that in addition to establishing a special value by reason of a higher market price, a claimant may establish such value by reason of "reduced costs or overhead," McClarty v. Secretary of the Interior, supra at 909, there is no evidence that the inherent properties of appellants' rock result in reduced costs or overhead from that material appearing generally in the immediate region in active quarries and exposed outcrops. See Exh. B.

The Government presented a prima facie case that the rock on the R S & S claim is a common variety. Appellants failed to rebut. Appellants' claim was properly declared null and void.

Even assuming appellants had established that their material was an uncommon variety, they failed to establish the discovery of a valuable mineral deposit. A "valuable mineral deposit" has been discovered where minerals have been found in such quantity and quality as to justify a person of ordinary prudence in the further expenditure of his labor and means with a reasonable prospect of success in developing a

^{2/} When asked to explain the use of the material as septic rock, Sherman Smith stated: "I don't know. I haven't researched it enough yet to know, but I think there could be some ideal types, as far as composition, that would have some chemical values" (Tr. 220).

valuable mine. Chrisman v. Miller, 197 U.S. 313 (1905). This so-called "prudent man" test has been augmented by the "marketability test," which requires a showing that the mineral may be extracted, removed, and marketed at a profit. United States v. Coleman, 390 U.S. 599 (1968). The mere fact that a deposit is an uncommon variety of stone does not make it per se marketable. United States v. Foresyth, 15 IBLA 43, 60 (1974).

In addition, where land is closed to location and entry under the mining laws subsequent to the location of a mining claim, the claimant must establish the discovery of a valuable mineral deposit at the time of the withdrawal. Cameron v. United States, 252 U.S. 450 (1920); Clear Gravel Enterprises v. Keil, 505 F.2d 180 (9th Cir. 1974).

While the record reveals that appellants could have a competitive advantage because of the location and accessibility of their claim, they have failed to establish that there is a present market for the material from their claim. 3/

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.

Bruce R. Harris
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

3/ Sherman Smith testified that in 1979 they sold \$5,000 worth of pit run rock from the claim to A.R.C. Construction, and it was used to stabilize a piling dock at the Sea Catch Cannery in Kenai (Tr. 219; see also Exh. A at 15). Rock that is suitable only for fill purposes is not locatable under the mining law, and even if the material is useful for other purposes, its sale for fill cannot be considered in determining its marketability. United States v. Bienick, 14 IBLA 290 (1974); see also United States v. Nikol, 47 IBLA 183 (1980); United States v. Osborne (On Judicial Remand), 28 IBLA 13, 23 (1976), aff'd sub nom., Bradford Mining Corp. v. Andrus, Civ. No. LV 77-218 (D. Nev., Mar. 15, 1979); United States v. Barrows, 76 I.D. 299 (1969); aff'd, Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971).

