

In addition, there was an intervening or superseding development, viz., the heavy rainfall, which was the direct result of the damage. This is clearly an Act of God for which the Government was not responsible.⁶¹ The Government is not an insurer of contractors against acts of nature.⁶² Damage from that cause is a risk which contractors must bear.

We therefore limit appellant's recovery to \$26,136.52 plus a reasonable profit, as the parties have stipulated. The appellant urges that "10 percent per annum of the total cost represents a reasonable profit."⁶³ This is in the nature of a claim for interest, which cannot be recovered against the United States in the absence of an express provision therefor in the contract or relevant statute.⁶⁴ There is no such express provision in this contract and appellant has cited no statute authorizing payment of interest. However, we note no objection was made by the Government to the percentage requested and we regard it as reasonable under the circumstances.⁶⁵ Accordingly, we allow the appellant a profit of 10 percent of \$26,136.52, or \$2,613.65.

The claim is sustained and appellant is awarded a total of \$28,750.17.

Conclusion

Appellant's claim for the cost of encasement is denied.

Appellant's claim for extra work is sustained in the amount of \$28,750.17.

SHERMAN P. KIMBALL, *Member.*

I CONCUR:

DEAN F. RATZMAN, *Chairman.*

UNITED STATES

v.

FRANK AND WANITA MELLUZZO

A-30595

Decided July 31, 1969

Mining Claims: Common Varieties of Minerals

Whether a deposit of sand, gravel, or stone within a mining claim is a common variety no longer locatable under the mining laws since the act of July 23,

⁶¹ *Amino Brothers Co. v. United States*, 178 Ct. Cl. 515 (1967), *cert. den.* 389 U.S. 846 (1967).

⁶² *Banks Constr. Co. v. United States*, 176 Ct. Cl. 1302 (1966).

⁶³ Appellant's Post-Hearing Brief, p. 54.

⁶⁴ *Flora Construction Company*, note 14, *supra*, 66 I.D. at 320, 59-2 BCA at 10,440. *Accord: Eastern Service Management Company v. United States*, 363 F. 2d 729 (4th Cir. 1966). See, generally, Ackerman, "Payment of Interest by the Government on Amounts Owing Under Government Contracts," 19 *Business Lawyer* 527 (1964).

⁶⁵ *Cf. Norair Engineering Corporation*, ASBCA No. 10856 (September 29, 1967), 67-2 BCA par. 6619; *Consolidated Contractors*, ASBCA Nos. 9133 and 9165 (July 17, 1964), 1964 BCA par. 4327.

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1955, or is still locatable as an uncommon variety depends on whether it has a unique property and whether the unique property gives it a special and distinct value.

Mining Claims: Common Varieties of Minerals

The fact that a deposit of sand and gravel has a location closer to the market than others does not make it an "uncommon variety" as location is not a unique property inherent in the deposit but only an extrinsic factor.

Mining Claims: Common Varieties of Minerals

A deposit of sand and gravel which has physical characteristics that surpass those of some operating sand and gravel deposits in the marketing area but which is not shown to be significantly superior in physical properties to the predominant commercial sand and gravel deposits in the area is not an uncommon variety.

Mining Claims: Common Varieties of Minerals

A mining claim located for deposits of sand, stone and gravel prior to the act of July 23, 1955, which are common varieties of such materials, is invalid where it is not shown that the material could have been marketed at a profit prior to the date of the statute.

Administrative Practice—Administrative Procedure Act: Adjudication

The procedures followed by the Department of the Interior in the initiation, prosecution, hearing and administrative decision of mining contests are in full compliance with the Administrative Procedure Act and its requirements of separation of function in decision making and do not deny due process.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Frank and Wanita Melluzzo have appealed to the Secretary of the Interior from a decision dated February 11, 1966, of the Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision of a hearing examiner declaring the Rena Nos. 1 to 6 placer mining claims in secs. 3 and 4, T. 4 N., R. 3 E., G.S.R. Meridian, Maricopa County, Arizona, to be null and void.

The six claims are situated about 15 to 20 miles north of Phoenix on Cave Creek immediately south of the Cave Creek Dam (Tr. 10; Ex. 3, 9).¹ They were located for deposits of sand, gravel, water-washed rounded basaltic boulders, and field stones, which lie in a wash approximately 600 feet wide that traverses all of the contested claims (Tr. 445, 57-58). While there is some dispute as to the quality of the sand and gravel deposit, there was no question but that there is a sufficient quantity of it suitable for use as concrete aggregate for the construction of roads and highways (Tr. 59, 60). The boulders and field stones from the claims offer a variety of colors, shapes, sizes and surfaces and are

¹ These and similar references are to the pages of the transcript of the official report of proceedings before the hearing examiner and to the exhibits offered.

used as building stones in the construction of walls, patios, and fireplaces, and for decorative landscaping (Tr. 446, 448, 449, 452-456). The stone is gathered from the claims and transported to the Melluzzo stone yard where it is offered for sale along with stone gathered from other claims.

The hearing examiner related the history of the Melluzzo stone operation in some detail:

Briefly, the background for the Melluzzo stone operation began many years ago. Over an extended period of time Frank Melluzzo and his brother Dino hunted in the mountains throughout Maricopa County, and while doing so they often picked up from one to a jeep-load of rock containing various attractive colors. The rocks were taken home and kept in the yard in front of Dino Melluzzo's house. Occasionally, people passing by the yard would buy small quantities of the rock from Dino, his wife, the children, or whichever member of the Melluzzo family happened to be home. In 1953 or 1954 Frank Melluzzo recognized the possibilities in the stone business and started actively collecting stone. Thus, over a period of years a hobby became an avocation and then developed into a vocation.

During this early period and up to and including 1956, Frank Melluzzo was in the window cleaning business and had a house and store rental business in and near Phoenix. By 1956 he had become more and more occupied with stone and gradually turned the window cleaning business over to his brother. In 1954 and 1955 the Melluzzo brothers, a brother-in-law, and several employees of the window cleaning business worked on a part-time basis collecting stone. In the fall of 1955 two quarrymen were employed solely for the collection of stone.

Prior to July 23, 1955, Frank Melluzzo and the members of his family allegedly located 8 or 9 groups of placer claims comprising approximately 50 individual claims containing from 20 to 160 acres each in Maricopa County for field stone, slate, or other building material including sand and gravel. The claims for which location notices have been recorded in Maricopa County are the Rena Nos. 1 through 6, the Nita Jean Nos. 1 through 4, the Enterprise groups of 18 claims, the White Shale group with 8 claims, the P and M Enterprise group with 6 claims, the Sunburnt group with 6 claims, the Concetta, and the Dino S (Exh. 37). In addition Mr. Melluzzo stated that there are an unknown number of claims which have not yet been recorded. At the hearing he could not remember the number or the names of the unrecorded claims. This list does not include the claims purchased by him such as the Arizona Placer claim nor does it include claims outside of Maricopa County such as the claims in Northern Arizona which were located for flagstone. And it does not include 900 acres of lode claims known as the El Rame group, part of which embrace the Rena claims.

In the early part of the 1950's most, if not all, of the stone used in Arizona for construction purposes was flagstone. By 1957 the trend changed and the rough, irregular field stone became more popular. The contestee testified that walls, fireplaces, etc., are now being constructed with stone from many different locations or claims to give a variegated appearance. This testimony is amply supported by the colored photographs received in evidence at the hearing. These photographs show the uses of the field stone both before and after July 1955.

In the operation of his stone business Mr. Melluzzo sends employees out to different groups of claims with instructions to bring back a volume of stone. The stone is picked off the ground in most cases and is then delivered to the stone yard which is used both for storage and display. Customers go to the yard and select the colors they want and order the stone on a ton or yardage basis.

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Many contractors and stone masons who are familiar with the product place their orders by telephone. Some of the stone is delivered by the company to the construction site and some stone is sold at the yard. On the larger jobs the stone is delivered directly to the construction site from the various claims. Mr. Melluzzo testified that the product sold contains many colors and that each color comes from a different claim or area. He stated that the business is possible only because he has many claims with a wide variety of colors. Some claims contain more than one color of stone but no one color can be sold by itself.

Mr. Melluzzo does not keep records of production by individual claims and until quite recently he did not keep records of total production. He testified that there was never any apparent reason for keeping such records. At this time he can only guess how much stone came from each claim in any one year. This is also true of the income from the individual claims, particularly in the early years during the hobby and avocation period when every member of the family was selling the stone.

* * * * *

Over the past ten years in which Mr. Melluzzo has been mining stone he has had many contacts with the Bureau of Land Management through patent applications, previous contest hearings, a contest hearing held after this case was heard, and through the information counter at the Land Office. His patented claims include the Dino S., on which he built his attractive home.

The previous hearings involving Mr. Melluzzo which were referred to at the present hearing were Contest No. 9946, *Melluzzo v. Call* heard on February 14, 1956, which involved the Nita Jean group, and Contest No. 9866, *United States v. Melluzzo*, heard on April 4, 1958, which involved the Arizona Placer claim. The subsequent hearings, Contest 10549, *United States v. Melluzzo*, held on November 13, 1963, involved part of the El Rame lode group, and Contest Nos. 10591, 10592, 10593, and 10594 which were held as a combined hearing and started on May 5, 1964. These latter cases involved two Nita Jean claims, the Concetta and the Enterprise group. The information for this background summary has been liberally extracted from the transcripts in the various hearings, from the patent application for the Dino S., and from decisions of the Bureau and the Department resulting from hearings.

The validity of the claims was challenged in a contest complaint filed on March 26, 1963, on the grounds that:

1. The Rena Nos. 1, 2, 3, 4, 5, and 6, placer mining claims are for common varieties of minerals affected by Public Law 167 (act of July 23, 1955—84th Congress; 69 Stat. 367; 30 U.S.C., sec. 601).²
2. These claims were not located until after July 23, 1955, the effective date of Public Law 167, supra.
3. There was no validating discovery of mineral as required by the United States mining law within the limits of the Rena * * * placer mining claims.

* Section 3 of the act of July 23, 1955, as amended, provides:
 "No deposit of common varieties of sand, stone, gravel * * * shall 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 a distinct and special value * * *."

The hearing examiner held that the sand, gravel and stone were common varieties of sand, gravel and stone and were excluded from location by the act of July 23, 1955, *supra*. This being so, for the claims to be locatable, he stated, the claimant must establish the marketability of the materials before July 23, 1955. He then analyzed at length and in detail the evidence in this and the other proceedings involving these and other claims of the contestees and the sand, gravel and stone markets in the Phoenix area. He concluded that the evidence did not establish that "any particular 10-acre subdivision within the group of claims was valuable for its mineral content or that the materials on the claims could have been profitably sold in a market for which there were many other more readily available deposits prior to July 23, 1955." Finally he determined that the Rena placer claims were not located in December 1954 as the contestees claimed and, in fact, were not located prior to the effective date of the act of July 23, 1955.

On appeal, the Chief, Office of Appeals and Hearings, affirmed. He held that the mineral materials in the claims are common varieties, that the contestees had not established that the claims were located prior to July 23, 1955, that claims located for common varieties of sand, gravel and stone after that date are null and void, and that they had also failed to establish that the sand, gravel and building stone from the claims were marketable prior to July 23, 1955. He also rejected appellants' contention that the Department's hearing procedure was in violation of section 5 of the Administrative Procedure Act, 60 Stat. 239, now 5 U.S.C. sec. 554 (Supp. IV, 1969), because the hearing examiner was under the control of the administrative bureau that initiated the mining contest.³ Finally he found nothing in the hearing examiner's reference to other mining contests in which the Melluzzos were parties that amounted to a denial of due process.

On appeal, the Melluzzos contend that the claims were located prior to July 23, 1955, that a market existed prior to July 23, 1955, for the materials produced from the claims, that the materials on the claims are of special and distinct value, and that they have not been accorded due process.

The principles controlling the disposition of mining claims located for sand, gravel and building stone are well established. As we have seen, the act of July 23, 1955, *supra*, removed "common varieties" of such materials from location under the mining laws. Thus if the materials on the claims are common varieties, the appellants in order to

³ Former section 5 provided in part:

"The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended or initial decision * * *. * * * nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review * * * except as witness or counsel in public proceedings."

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satisfy the requirement of discovery must show that as of July 23, 1955, the deposits could have been extracted, removed, and marketed at a profit. Marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand for the material, that is, a demand that existed when the deposit was subject to mining location. *United States v. Coleman*, 390 U.S. 599 (1968); *Foster v. Seaton*, 271 F. 2d 836 (D.C. Cir. 1959); *United States v. Alfred N. Verrue*, 75 I.D. 300 (1968).

If any of the deposits is of an uncommon variety of sand, stone, or gravel, then it remains subject to mining location and the date of discovery can be after July 23, 1955. Whether a deposit is or is not a common variety, there must be a discovery at a time when the land in the claim is open to location and the claimant must be able to demonstrate as a present fact that the claim is valuable for mining purposes. *United States v. Warren E. Wurts and James E. Harmon*, 76 I.D. 6 (1969).

If there is a deposit of an uncommon variety of sand, gravel, or stone on the claims which meets the other requirements of the mining laws, then the claims are valid and the other issues in the case will be rendered moot. We will examine this aspect of the appeal first.

The appellants allege that the superior qualities of the sand and gravel are "gradation, absence of plastic fines, alkali reactivity, abrasion, soundness and asphalt mix design." They also contend that the gravel from the Rena claims alone of all the gravel north of Northern Avenue, the line beyond which they say hauling of gravel from the Salt River, the major source of supply in the Phoenix area, becomes uneconomical, is usable without costly additives.

The mining claims, as we have seen, lie north of Phoenix, and are now in an area in which there is a market for sand and gravel (Tr. 50, 344, 621, 650). The sand and gravel from the claims is used for the same purposes as other sand and gravel deposits, that is, for the construction of roads and other building purposes.

The hearing examiner held that the sand and gravel deposit is a common variety, citing *United States v. Basich*, A-30017 (September 23, 1964):

* * * The Department has consistently held that materials of a superior quality which can be produced advantageously but which are used only for the same purposes as other less desirable deposits of the same materials are common varieties of material and are not locatable under the mining laws since these advantages do not give them a distinct and special value.

The Bureau of Land Management affirmed on the same ground, stating:

The sand and gravel deposit is of suitable quality for use as concrete aggregate or mineral aggregate for the construction of roads. The evidence shows there are

other sources of the material closer to the metropolitan area. Sand and gravel suitable for construction purposes, free from deleterious substances, and having proportions of hardness, soundness, stability, favorable gradation, non-reactivity, hydrophilia, and non-plasticity to 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. See *United States v. J. R. Henderson*, 68 I.D. 26 (1961).

In a recent case the Department reviewed the cases it had decided which were concerned with the question whether building stone was a common or uncommon variety of stone and concluded:

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. Henster, Sr., et al.*, A-29973 (May 14, 1964); *United States v. L. N. Basich*, A-30017 (September 23, 1964). *United States v. U.S. Minerals Development Corporation*, 75 I.D. 127, 133 (1969).

It then went on to discuss the criteria pertinent to determining whether or not a material is a "common variety:"

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 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.

* * * * *

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

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the price at which it is sold in comparison with the price for which the material in other deposits without such property is sold. *Id.*, 134, 135.

These criteria were generally approved in the recent case of *McClarty v. Secretary of Interior*, 408 F. 2d 907 (9th Cir. 1969).⁴ Since they are broader than the standard relied on by the hearing examiner and by the Office of Appeals and Hearings, the evidence must be re-evaluated in terms of the *Minerals Development* criteria.

The first criterion is that the deposit of material must have a unique property. Only if it has a unique property is it necessary to consider the second criterion, that the unique property must give the deposit a distinct and special value. We consider first then whether the Rena claims contain deposits of materials which have a unique property.

As we have noted, appellants strongly urge that the sand and gravel on the claims is unique because it is superior in several requisite properties: gradation, absence of plastic fines (non-plasticity), alkali reactivity, resistance to abrasion, soundness, and suitability for asphalt mix. These, however, are properties which must be met and are met to certain minimum standards by all sand and gravel that is used commercially. It was therefore incumbent upon appellants to show that the Rena sand and gravel is so superior to other sand and gravel that it can be claimed to be unique. This essentially is a matter of comparison and the obvious question, of course, is what sand and gravel the Rena sand and gravel is to be compared with. The easy answer is that it is to be compared with common varieties of sand and gravel, but the difficulty is in determining what is a common variety.

The difficulty in making this determination is that it inevitably leads to the question as to what area is to be considered in determining what is a common variety. This is strikingly pointed up by contestees' exhibit R, which shows the occurrence of sand and gravel sources in the Phoenix metropolitan area. This map shows that by far the largest source is the bed of the Salt River, which runs parallel to and approximately 9 miles south of Northern Avenue, an east-west street. Two other main sources are the Agua Fria River and the New River, which run in a north-south direction across Northern Avenue in the western part of Phoenix. Roughly parallel to the Agua Fria River and the New River and 8 to 10 miles to the east is Cave Creek, the southern terminus of which for our purposes is about 3 miles above Northern Avenue. From that point Cave Creek runs approximately 10 miles in

⁴ The court did question the Department's conclusion that where a material claimed to be an uncommon variety is used only for the same purposes as a common variety the only reasonably practical criterion for determining whether the alleged uncommon variety has special and distinct value is whether it commands a higher price in the market place. The court suggested that this "cannot be the exclusive way of proving that a deposit has a distinct and special economic value attributable to the unique property of the deposit." 408 F.2d at 909. The *McClarty* case concerned a deposit of building stone which had the unique property of a high percentage of stone naturally fractured into regular shapes requiring little or no fabrication for laying up in walls, etc.

a north-northeast direction to the Cave Creek Dam where the Rena claims are situated. The Rena claims lie 12 miles north of Northern Avenue and approximately 20 miles due north of the principal sand and gravel operations in the Salt River. Near the southern terminus of Cave Creek, about 5 miles north of Northern Avenue, are three pits, on 19th Avenue, held by Union, Allstate, and the city of Phoenix.

Appellants at the hearing predominantly compared the Rena sand and gravel with the deposits lying north of Northern Avenue. This excluded the major deposits in the Salt River. The reason given for using Northern Avenue as a limit was that it is the general practice of Salt River producers to charge a bonus of 6 to 10 cents a ton mile for haulage beyond Northern Avenue (Tr. 338-339). The significance of this is not brought out by appellants. The implication seems to be that Salt River material is not competitive with Rena material in the market area north of Northern Avenue and therefore should not be compared with it, but there is no evidence to this effect. On the contrary the fact that Salt River producers do have a system of charges for deliveries north of Northern Avenue indicates that they sell material in that area and are competitive with the Rena material.

Implicit in appellants' attempt to limit the area in which the sand and gravel deposits are to be compared is the assumption that a deposit can be unique within the contemplation of the common varieties statute merely because of its location. In *United States v. Mt. Pinos Development Corp.*, 75 I.D. 320 (1968), the Department rejected location as a factor for determining whether or not a deposit of sand and gravel is an uncommon variety. The Department pointed out that location is a significant element in determining whether a deposit of sand and gravel is marketable at a profit and thus satisfies the requirement of a discovery but that the test of discovery is not the same as the test of an uncommon variety.

The act of July 23, 1955, *supra*, states that "common varieties" do not include deposits of sand, gravel, etc. which are valuable "because the *deposit has some property* giving it a distinct and special value" (italics added). This suggests that a special physical property must inhere in the deposit itself and that factors extrinsic to the deposit are not to be determinative. Location is such an extrinsic factor. We are not aware of any sound basis for gleanings a Congressional intent to make a deposit an uncommon or common variety depending on whether it is located within or outside of a market area or even whether it is located in a particular part of a market area.

For these reasons we conclude that the Rena sand and gravel is to be compared not only with the sand and gravel deposits north of Northern Avenue, but also with the large deposits in the Salt River, particularly since only about 15 percent of the concrete aggregate market lies north of Northern Avenue (Tr. 344). With this ground

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rule established, let us see whether the appellants have shown by a preponderance of the evidence (*Foster v. Seaton, supra*) that the Rena sand and gravel has the unique properties claimed by the appellants.

Appellant's case in this respect rests almost entirely upon the testimony of Michael D. Obele, a soils and material engineer formerly with the Arizona Testing Laboratories, a private organization. Obele was in charge of testing materials and said that the company had tested samples from almost every pit in the Salt River Valley at one time or another (Tr. 337). He described the properties for which sand and gravel is tested—gradation, soundness, etc. (Tr. 329-337). One of the company's lab technicians took one sample each from the Rena Nos. 3, 4, and 6 to a depth of 16 feet (Tr. 346-348). The company first ran only a sieve analysis to determine gradation of the material and the plasticity of the fines (Tr. 362; Ex. S). Obele testified that, with only a screening to exclude material larger than 1½ inches and with no washing, the material in its natural condition met the gradation requirements specified for concrete aggregate by the American Society for Testing Materials (ASTM). (Tr. 363-364; Ex. T). The sieve analysis also showed the material to be non-plastic (Ex. S, pp. 4-6).

Further tests were then run but only on the sample from the Rena No. 6 because the material appeared to be uniform. The sample was tested for reactivity, soundness, and resistance to abrasion. The test showed that the material easily met specifications for soundness and abrasion and was non-reactive, thus permitting its use with any type of Portland cement (Tr. 365-371; Ex. S, p. 10). The test report concluded that the Rena material was an excellent concrete aggregate "if crushed, graded and stockpiled properly" (Ex. S., p. 10).

Although Obele was generally asked by contestees to compare the Rena material with other material from sources north of Northern Avenue, he was asked by them and by the contestant to make some comparisons with the Salt River material. On gradation he said that Salt River had more large boulders than the Rena claims; consequently more crushing would be required "if you wanted to use them" (Tr. 375, 404). On reactivity he said that "sometimes" there is reactivity with the Salt River aggregate and stripping agents are required in making asphaltic concrete, which is not true of the Rena material (Tr. 376). The latter is superior to Salt River material because it has more of the dark basic rock which has a better affinity for asphalt (Tr. 397-398). However, Obele later stated that the Rena material is only "a bit less reactive" than that from Salt River and that "reactivity is not a problem in this area because we have an excellent low [sic] supply of low alkali cement." The Rena material

will have "another separate and distinct value" because of its lower reactivity only "should the occasion ever arise for cement from another area, specialized cement" (Tr. 404).

Obele also testified that the Rena material was superior to the Salt River material in that it did not require washing (Tr. 397). However, the test report had stated that washing of the sand "may become necessary, although from our test data it would seem unnecessary" (Ex. S., p. 11). Obele indicated that the statement was cautionary since "it is so unusual that you can produce concrete aggregate without washing." He believed no washing was necessary to the depth of the samples, 16 feet (Tr. 383-384). He said that washing was "generally" needed for the Salt River material, but that he supposed there were places where no washing was necessary. In fact, he was only sure that one operator was washing (Tr. 385). Again, though, when asked whether the Rena material was superior with respect to fines and plasticity over the Salt River material, he replied that it was, in general, because there is "a great deal of washing done at the Salt River" and also there is a lot of larger rock (Tr. 405).

As to soundness Obele testified that the Rena material was comparable to the Salt River aggregate (Tr. 369). As for resistance to abrasion the Rena aggregate "would be perhaps just a bit tougher than Salt River, a percent or two" (Tr. 370).

An evaluation of Obele's testimony indicates that he believed the Rena material to be superior to the Salt River material in three respects, gradation, cleanliness, and reactivity, but only *generally* so. Thus he did not say that *all* Salt River aggregate had to be washed but, at the most, only "a great deal." On reactivity he indicated that the Salt River material was only "a bit" more reactive but that reactivity was not a present problem anyway. On gradation he was concerned only with the presence of more Salt River boulders, presumably over 1½ inches in size, which would have to be crushed *if they were to be used*. The Rena claims also have boulders over 1½ inches in size which have to be screened out and crushed if they are to be used.

The degree of superiority of Rena materials in these respects is hardly indicated to be of such magnitude as to warrant the conclusion that the Rena deposits possess unique properties which would set them apart as uncommon varieties. Perhaps the proper view to be given to Obele's testimony is to be found in his statement that "no concrete aggregate is a common variety aggregate" and that "*all* the pits along the Salt River and the other stream beds that we have talked about [Agua Fria, New River, etc.] are *not* common varieties" (Tr. 402; italics added). Obele seemed to consider as a common variety in the area only the ordinary silt or alluvium to be found everywhere (Tr. 341, 373-375).

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The principal expert witness for the Government was Charles H. McDonald, a highway engineer specializing in materials employed by the city of Phoenix since August 1963 (Tr. 595). Prior to that time and from 1930 he was with the Bureau of Public Roads, principally as a materials specialist but also as a construction engineer. He worked over the entire State but principally in the Phoenix area where he was in charge of materials going into all Federal aid highway projects (Tr. 596, 622-623).

McDonald testified as to tests made of two samples from stockpiles of sand and gravel on the Rena No. 4 (Tr. 600-601). The tests showed plasticity indexes of 4 and 8, determined by the wet method (Tr. 617; Ex. 24). He criticized the non-plasticity result of Obele's test (Ex. S.) for the reason that it was made by the dry method (Tr. 617). McDonald stated that it was a characteristic of all pits in southern Arizona—he had seen most of them—that the upper material is non-plastic but that plasticity increases at depth. This was true of Salt River. He had examined some of the lower layer in the pit on the Rena claims and noticed the plasticity was increasing (Tr. 610-611, 647-648). The only difference from one deposit to another was the depth of the non-plastic material. The clean materials were much deeper in the Salt River than in Cave Creek because the Salt River was a considerably larger stream. Even in Salt River, however, clay impregnated material would be encountered at 50 feet (Tr. 614-616).

Questioned as to the processing required for the Rena material, McDonald criticized Obele's test report (Ex. S.). He said that for concrete sand the maximum limit on sand passing the No. 200 screen is 5 percent and that Obele's report showed only 3, 4, and 4 percent, respectively, of the three samples passing the No. 200 screen. However, McDonald said, this was based on a composite sample whereas if the material was split between coarse and fine sizes, as is done in the normal production of concrete aggregate, the percentage of fine sand passing the No. 200 screen would double, going to 6 and 8 percent. The only practical way of removing the excess No. 200 material is to wash it, which is practiced generally in the Salt River "which is normally a cleaner material than Cave Creek." McDonald also said that in actual production, because of islands of silt deposits in a stream wash, general experience showed that the material produced would show anywhere from 2 to 10 percent more passing the No. 200 screen than tests would show. For that reason, in his opinion, production on a large scale would have to be washed to meet specifications (Tr. 618-620).

McDonald testified that it is quite rare to find a deposit which requires no crushing or screening and which would meet specifications just as extracted. He knew one at Mesquite Creek but Salt River and Cave Creek could not be used in that fashion (Tr. 657). He said

that the upper layers of the Rena deposit would be easier to work than the Salt River material and that the deposit would certainly be valuable "if it were as deep as the Salt River" (Tr. 657-658). He also said that if he had no outside knowledge of materials and had only the Obele test report before him, and a wet test showed nonplasticity, he would say that the material was good but not special (Tr. 661-662).

Obele testified on rebuttal that he ran a wet plasticity test on a stockpile sample and that it showed nonplasticity (Tr. 684).

McDonald's testimony and his test report, we believe, substantially controverts Obele's testimony and test report in critical respects, namely, whether the Rena sand and gravel is unique because it requires no washing and because it is nonplastic. The McDonald testimony, in our opinion, is entitled to as much weight as the Obele testimony, if not more, because it is based upon experience and wide observation of sand and gravel deposits all over southern Arizona and particularly in the Phoenix area. Obele's testimony was much more confined to laboratory tests. Even so, Obele's testimony showed no more than that there were minor variances in properties between the Rena sand and gravel and the Salt River deposits, and Obele testified that the 5 largest producers of sand and gravel in the Phoenix area had pits in the Salt River which presumably supplied most of the 85 percent of the market area existing below Northern Avenue (Tr. 344, 386-387).

We conclude therefore that the appellants have fallen far short of showing by a preponderance of evidence that the sand and gravel deposits in the Rena claims have unique properties which would set them apart from the common varieties of sand and gravel in the Phoenix area as exemplified by the extensive deposits in the Salt River. The first criterion necessary for establishing an uncommon variety of sand and gravel not having been established, the question of satisfying the second criterion, whether the unique property gives a special and distinct value to the deposit, is not reached.

We turn now to a consideration of whether the building stone or decorative field stone on the Rena claims is an uncommon variety. The stone is of two general types, one a rounded basalt ("nigger head") and the other a greenstone. As we have seen, the stone is used for decorative purposes in walls, fireplaces, and other structures and in landscaping.

As for the rounded basalt, appellants simply state in their present appeal that it does not commonly occur in the Phoenix area because it is rounded by tumbling downstream for long distances and there are few streams of such length. However, this is contradicted by testimony of McDonald that the rounded basalt is "very common" in the

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Phoenix area and "extremely common" in the Salt River (Tr. 675-679) and is plentiful in New River (Tr. 680).

As for the greenstone appellants assert only that the "area of these claims" is the only source of greenstone shown on the geological map of Maricopa County and is the only source close to the Phoenix metropolitan area. The geologic map (Ex. 19) shows that the claims are situated in a greenstone area approximately 6 miles long by $1\frac{1}{2}$ to 2 miles wide. The map also shows a smaller greenstone area, approximately 3 miles long and $\frac{1}{3}$ to 1 mile wide, about $1\frac{1}{2}$ miles north of the first area. The map shows 3 smaller areas of greenstone south of the claims area, that is, closer to Phoenix by as much as $2\frac{1}{2}$ miles. According to the map, then, there are over 7000 acres designated as greenstone.⁵

There is nothing in the record to show that the greenstone is rarer than the other decorative field stone which is used in the Phoenix area. It is apparently not used by itself but is mixed with a variety of other colored stone from other claims held by the appellants.

We find little to distinguish this case from the *Coleman* case, *supra*, decided by the Supreme Court. Coleman had 18 placer claims, comprising 720 acres, which contained decorative building stone. He said, like the appellants here, that he needed all the claims to provide a complete range of colors for ornamental use. The Department held that the stone was a common variety in view of the fact that similar stone occurred in the area of 28,000 acres of which the claims were a part. *United States v. Alfred Coleman*, A-28557 (March 27, 1962).

Before the Supreme Court Coleman argued that his stone was an uncommon variety. He stressed that even the Government witnesses admitted that the stone "ranged in colors from gray, buff, reds, pinks and rusty colored which grade into black * * * and that it, for many years, had been used for fireplaces, rock walls, and, to a limited extent, for veneer-type construction" (Coleman brief, p. 27). Coleman submitted as part of the record three color photographs (Exhibits P, Q, and R) showing the use of his vari-colored stone in the walls and columns of a commercial building. The court, however, agreed with the Department that the stone was a common variety.

Appellants' stone is not different from Coleman's stone. Both are used for the same purposes and Coleman's color photographs could have been photographs used in this case. Appellant's photographic exhibits show construction uses identical to Coleman's. There is no contention that decorative building stone is rare in the Phoenix area.

⁵ The map also shows far more extensive areas in the county which are designated as "schist." The legend on the map states that "schist" "locally includes diorite, rhyolite, and greenstone." A witness for the contestees indicated that that greenstone might not have the same color variations but his testimony was not at all clear on what the distinction might be (Tr. 269-271).

Melluzzo himself has located 56 placer claims (Ex. 37) and has 8 or 9 quarries (Tr. 476, 551). There are several other stone suppliers in the area (Tr. 427) who presumably have their own sources of supply.

Since none of the materials on the Rena claims is an uncommon variety, a location based on any of them is valid only if the material was marketable at a profit prior to July 23, 1955. *United States v. Coleman, supra; Foster v. Seaton, supra.*

The evidence is overwhelming that there was no market for the sand and gravel from the claims prior to July 23, 1955. McDonald testified that there were closer sources which supplied what demand there was in the area, that it would have been economic folly to open a pit at the Rena locations except for some local road building in the immediate area, and that a market did not develop until the 1960's (Tr. 620-621). Another Government witness placed the current main market at about an equal distance from the Rena claims and the Salt River deposits and said the New River deposits are closest to the northern market (Tr. 63-64). These other deposits have almost all been in operation for over 20 years and there has never been a shortage (Tr. 64). Obele testified to Union's operating pit on 19th Avenue, 4 miles north of Northern Avenue and 6 miles south of the Rena claims (Tr. 343-344). He also referred to at least 8 plants on the Agua Fria and 2 on New River (Tr. 389). All of these pits produce materials which, with varying degrees of processing, can be used as concrete aggregate (Tr. 383, 390). Obele said the market north and east of Phoenix (toward the Rena claims) developed significantly in the last 4 years; he had no knowledge of the situation prior to 1959 (Tr. 390).

The Rena material was first developed on a large scale between March and December 1962 by the Allstate Materials Company (Tr. 27, 31, 79), 7 years after the critical date. 20,000 to 30,000 tons were removed from the pit which was on the Rena No. 4 (Tr. 88). The only evidence as to any development prior to July 23, 1955, was Melluzzo's uncertain testimony that 600 tons of sand and gravel, mostly sand, were sold commencing in December 1954 (Tr. 467-468, 699). He used about 100 tons for houses he was building and Shorty Rutter took 500 tons for which he paid \$.25 per yard, he thought (Tr. 700, 721-724). This very limited disposal of sand and gravel, apparently for limited local use,⁶ falls short of establishing that the Rena sand and gravel could have been extracted and sold at a profit as of July 23, 1955.⁷ On the contrary, the market was adequately supplied by much closer regularly operated commercial pits.

⁶ The use of at least some of the sand and gravel is indicated by the testimony of Carlo Incardone, a Melluzzo employee from November 1954 to sometime in 1955, that in loading sand and gravel "we used to shovel everything that came along, grass, weeds and all" (Tr. 420). This type of material, without processing, could hardly have been sold in the concrete aggregate market.

⁷ As is shortly indicated in the extract from the hearing examiner's decision, the sale to Rutter might have been for as little as \$92.55.

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As to the marketability of the building stone prior to July 23, 1955, the hearing examiner carefully and thoroughly reviewed the testimony in this and other hearings in which Melluzzo presented evidence about his building stone operation. The hearing examiner stated:

Marketability

On the subject of marketability there were a number of witnesses who testified on behalf of the contestant. Lewis S. Zentner, a mining engineer employed by the Bureau of Land Management, stated that he made an investigation in the latter part of 1962 to determine the potential market for sand, gravel, and stone from the claims prior to July 1955. He interviewed several people in the stone business, apparently competitors of Mr. Melluzzo, and was informed that there was no market for the sand and gravel from the Rena claims in 1955.

Luther S. Clemmer, another mining engineer employed by the Bureau of Land Management, was in the area of the claims on 8 separate occasions in 1959 to determine the mineral character of the land in connection with small tract applications. At that time he saw no gravel operation and he was not aware that there were placer claims in the area.

Robert Krug, a weekend prospector, testified that in 1953 he was living in a house owned by Mr. Melluzzo's father and that Mr. Melluzzo was in the window cleaning business but was doing some mining. Mr. Melluzzo appeared to him to be fascinated and enthusiastic about mining. In the latter part of 1953 Mr. Krug moved to California but returned to Phoenix several years later. In 1956, 1957 and 1958 he prospected the area both above and below the Cave Creek Dam. While prospecting he looked for mining claim monuments in part to determine the land description but never found any in the area.

Jack Clarke, another weekend prospector, was in the Cave Creek dam area several times in 1956 or 1957 prospecting for placer gold. During this period there were no fresh diggings below the dam and nothing to suggest to him that there were placer claims in the area.

Charles H. McDonald, a highway engineer, testified that he was a material specialist employed by the Bureau of Public Roads in Arizona with headquarters in Phoenix during the period from 1930 to 1963. He expressed the opinion that there was no market for the sand and gravel in the Rena area prior to 1956 because there were sources of supply much closer to the potential demand. He stated that a person would be committing "an economic folly" (Tr. 621) to open a pit in the area prior to 1956, except for some local road building in the immediate area. He concluded that a market did develop for the material on the claims in the 1960's.

There were also a number of witnesses who testified for the contestees on this subject. Edward H. Barlow, a quarryman employed by the Melluzzo Stone Co., testified that he was first on the claims in January 1955, and that he gathered stone up and down the wash on both sides of the dam. He estimated that he removed several truck loads of stone and several loads of gravel from the claims during the period between January and July 1955.

Ross Palmer testified that he saw Mr. Melluzzo in the area during the first part of July 1955, and saw him haul a truck load of rock from the claims. Mr. Palmer remembered the date because he was first employed as a constable on July 1, 1955, and he went to the area immediately after being employed to practice pistol shooting.

Carlo Incardone, a plumber, testified that he moved from Chicago to Phoenix in 1953, and was first employed in the Phoenix area by Mr. Melluzzo. He was

with Mr. Melluzzo for approximately a year starting in November 1954. Originally he was employed in connection with the window business but later he collected stone from various Melluzzo claims. He recalled being on the Rena group in December 1954, and January 1955. During these two months he picked up a number of truck loads of material. One week in January he picked up four loads. Some gravel was secured and delivered to one of the Melluzzo houses.

Frank Melluzzo testified in his own behalf and stated that he located the Rena group in December 1954, and that during this month he removed 60 tons of sand and gravel for use in the foundation of two of his own houses he was building at 755 and 1515 East Hatcher Road (Tr. 700). On direct examination he estimated that between 100 to 150 tons of stone at \$9.00 a ton had been sold, and that 600 tons of sand and gravel had been removed from the claims in 1955 prior to July 23, 1955 (Tr. 466). Later, on cross examination, he stated that he had no record of production or sales (Tr. 689) and could not even guess how much material was removed from any one of his numerous claims (Tr. 541). Still later he went back to the figures of 100-500 tons of stone and 600 tons of sand and gravel and stated that an equal tonnage came from each claim (Tr. 698).

Of this sand and gravel Mr. Melluzzo stated that 100 tons were used by members of the family and 500 tons were sold to Shorty Rutter at 25 cents a yard, which amounted to \$250 or \$300 (Tr. 723). (Architrectural Graphic Standards by Ramsey and Sleeper, 5th Ed., gives the average weight of sand and gravel as 2700 lbs. per cubic yard. Thus, if 500 tons were sold to Mr. Rutter at 25 cents a yard it would amount to 370 yards or \$92.55. If the sale was for 25 cents a ton rather than a yard the sale price would be \$125.) In 1962 at a time when there was a much greater demand Mr. Melluzzo was selling the sand and gravel for 10 cents a ton (Tr. 482).

Numerous photographs were received in evidence at the hearing to show the uses of the stone from the Melluzzo claims both before and after July 23, 1955. Mr. Melluzzo stated that the "W" series 1 through 5 were pictures of walls and a culvert built with his stones, some of which came from the Rena group prior to July 23, 1955. Exhibits W-3, W-4, and W-5 are photographs of walls all built in the same neighborhood. He stated that the house shown on Exhibit W-4 is owned by Robert Wurzburger and that contestant's Exhibit 26 is a copy of a receipted bill for the stone sold to Mr. Wurzburger. This bill is dated August 1, 1954.

Another wall in the neighborhood which Mr. Melluzzo stated was built with his stone, part of which came from the Rena group, is owned by W. J. Caruthers. He testified that the Skyriders Hotel (Exh. X-4) was started prior to July 1955, and that the walls of the hotel were built with some of his stone. In each case numerous colors were used and each color came from a different area or group of claims. He could not estimate how much stone in any one of the exhibits came from any particular claim. Exhibit W-2 is a picture of a culvert in front of a house owned by Frank Melluzzo's father and was built in the spring of 1955 with Rena material. The county agreed to build the culvert if the Melluzzos would furnish the material. His father paid him \$40 or \$50 for delivering the material to the house. The culvert contains rounded boulders, and the only claims he owns with such boulders are the Rena claims. Also Mr. Melluzzo stated that he delivered stone from the Rena claims to the house at 118 West Hatcher Road and at Dr. Fusco's Clinic across the street before July 1955 (Tr. 464).

W. J. Caruthers testified on rebuttal (Tr. 871-891) that he moved into his house on December 8, 1954, and that he built the rock wall on the side of his yard with rock which he had secured from Melluzzo's 7th Avenue claims, not from the Rena group. Also, he stated that Wurzburger was his next door neighbor and that he had helped Wurzburger build his wall with stone from the 7th Avenue

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claims. He added that the other walls shown on Exhibit 43 (the same as Exhibits W-3, 4, and 5) were up at the time he moved into the area on December 8, 1954.

Harold Fox testified (Tr. 881-891) that he has lived at 118 West Hatcher Road since September 1952, and that none of the rock at his house came from the Melluzzo claims. He gathered the stone himself at numerous locations throughout the county. Also he stated that Dr. Fusco's Clinic across the street from his house was constructed in 1956 or afterwards.

In discussing the employees who worked for him on a part-time basis prior to July 23, 1955, in connection with his mining operation, Mr. Melluzzo named his brother Dino, Edward H. Barlow, Carlo Incardone, Keith E. Terrill, and a son of Harry Nichols (Tr. 754-761). Previously, on February 15, 1956, in the hearing of *Melluzzo v. Call*, Contest 9946 Mr. Melluzzo stated at page 272 of the transcript of that hearing (Exh. 34 A) :

"Q. Now, in your mining business how many employees do you have?

"A. I have two quarrymen.

"Q. Are they employed full time?

"A. What the demands and needs are. I have them now full time. I haven't had to use them up to this last year.

"Q. I see. Were they employed full time all during 1955?

"A. No.

"Q. How long a period did you employ them?

"A. I have been doing the quarrying myself, and I have employed these two men. They are paid by the tonnage, not as employees. They get \$3.00 a ton for quarrying the stone, and it has been approximately three months now. They have been working for me.

"Q. Employed for three months?

"A. Yes."

Mr. Melluzzo did not give the total income from the Rena group between the location in December 1954 and July 23, 1955, but he did mention \$40 to \$50 received from his father, \$250 to \$300 from Shorty Rutter and the sale of from 100 to 150 tons of rock at \$9.00 a ton making a total of from \$1190 to \$2700. At the previous *Call* hearing on February 14, 1956, which involved the Concetta, Nita Jean No. 1, and Nita Jean No. 2 claims, Mr. Melluzzo stated at page 97 of the transcript of that case (Exh. 34 B) :

"Q. What is your gross in 1955?

"A. 1955, I sold in the neighborhood of 202—some tons of stone and grossed 2800 and some dollars, plus I sold \$2200 of field [stone] from the Nita Jean to the Safeway. That brought my total for the year up to \$5000 some."

and page 99 he stated :

"Q. In 1955, you reported approximately only \$5000 of income from your mining claims?

"A. Yes.

"Q. Percentagewise, can you tell us how much came from the three claims—Nita Jean, Nita Jean 2 and the Concetta?

"A. Approximately 85 percent.

"Q. Came from these three claims?

"A. Yes."

In *United States v. Frank Melluzzo, Successor in Interest to the Estate of Victor E. Hanny*, Arizona No. 9866, the Arizona Placer mining claim, a 160 acre stone and slate claim, was involved. The Department had previously considered the validity of the claim in decisions dated March 5, 1952 (A-26280), November 9, 1956 (reported in 63 I.D. 369), and September 24, 1957 (A-27362). In the latter

decision the Department concluded that no discovery had been made on the claim prior to October 1, 1953 but allowed a rehearing to determine whether a discovery had been made between that date and July 23, 1955. Also the decision held that if discovery were established the claim would be valid to the extent of 20 acres.

The rehearing was held on April 4, 1958, and the Hearing Examiner in his decision of August 15, 1958, on page 5 summarized the testimony of Frank Melluzzo in part as follows:

"He said that the percentage of his stone shipments which come from the Arizona Placer depends on the job on which they are to be used. Stone from this claim sometimes comprises up to 90% of his shipments but generally in order to get the proper color variations 15 to 20% of the shipments come from this claim."

On the basis of the testimony at the rehearing, the Hearing Examiner found that 160 tons of stone were sold from the Arizona Placer claim in 1955 by Mr. Melluzzo and that some had been mined, removed, and disposed of at a profit during the years 1954, 1955, 1956, and 1957. These findings resulted in a conclusion that the claim was valid. The appellate decision by the Director dated April 10, 1959, affirmed the Hearing Examiner and authorized the issuance of a patent for 20 acres of this claim.

An excerpt from the transcript of the rehearing was read into the present record. On cross-examination by a Field Solicitor, Mr. Melluzzo (Exh. 35 page 120) responded as follows:

"Q. You had, I believe, or held 1, 2, 3, 4, 5, claims?"

"A. Yes.

"Q. Five claims adjoining the Arizona placer claims?"

"A. Yes.

"Q. You were removing material from those claims in 1957 and selling it?"

"A. That's right.

"Q. And that's also from the Arizona placer claims?"

"A. That's right.

"Q. That's six claims?"

"A. That would be more than that.

"Q. Now, were you also obtaining material from ground other than these six claims in 1957 and selling it?"

"A. Yes.

"Q. Now, where were those sources?"

"A. They were within a mile of there.

"Q. And they were also mining claims?"

"A. Right.

"Q. Patented or unpatented?"

"A. Some were patented and some of them were unpatented.

"Q. How many claims were there in that group?"

"A. Do you mean the acreage?"

"Q. Give us the number of claims first, and then the approximate acreages.

"A. I couldn't tell you how many I have got.

"Q. Can you give us an estimate? Three or four or five?"

"A. In twenty-acre claims, is that what you want? Do you mean—You see, I have a copper mine, 900 acres, and there is 42 claims up there.

"Q. In 1957 were you removing building material from those claims?"

"A. No. There was no building material there."

In 1958 at the time of this testimony there were 42 recorded El Rame lode claims (Exh. 37) including the El Rame Nos. 29, 30, 33, 34, and 46 which embrace the six Rena placer claims. Also the Rena claims are 9 miles due north of the Arizona placer claim (Exh. R).

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At the hearing of *United States v. Frank Melluzzo, et al.*, Contest Nos. 10591 through 10596 in Phoenix on May 5, 1964, Mr. Melluzzo testified regarding his production of stone from the Enterprise group of claims. Beginning on page 1110 of the transcript of that proceeding he testified:

"Q. Now, in 1955, can you give us an estimate of the amount of stone you removed and sold from the subject Enterprise claims?

"A. Well, we go back to these years and I don't know. I know I removed the stone and I know I sold it. It is like this man testifying—

"Q. Can you, to the best of your ability, make an estimation?

"A. I don't know how I could actually come up with a figure. I can give you a wild guess, say, approximately 300, 400 ton.

"Q. Between 3 and 4 hundred ton in the year what?

"A. 1955.

"Q. Year of 1955 the Enterprise claims. Now, what part of the year of 1955 would most of that have been removed?

"A. It is in the early part of the year, what you have here.

"Q. Do you do most of your quarrying in the winter or summer months?

"A. Well, your business slackens off and you do most of your quarrying in the early part of the year. Come summertime everyone in those years used to take off and left Phoenix."

Also Mr. Melluzzo produced stone from the Dino S claim in 1955. This claim was located on June 17, 1955, and the patent application was filed on September 1, 1956. In the patent application Mr. Melluzzo alleged that he produced 234 tons (\$2816.00) of stone from the Dino S between June 1955, and September 1956 (Exh. 42).

Then there are those building stone claims which have not yet been recorded. At the hearing Mr. Melluzzo could not remember their names or state where they were. There may have been some production from these claims, but when or how much remains unknown.

The evidence relating to marketability on behalf of the contestant established that there were numerous sources of supply for sand, stone, and gravel much closer to the Phoenix metropolitan area than the Rena group in 1955; that all of the deposits were usable for the same purposes; and that one of the major elements in determining the value of a deposit of such materials is its proximity to the demand.

The testimony on behalf of the contestees established that Mr. Melluzzo now has a prosperous stone business which is based on the ownership or control of numerous building stone deposits on many claims. But the question is not whether many deposits over a vast area are sufficiently valuable to support a business. The question is whether a mineral deposit on any one claim or on each of six claims is sufficiently valuable to be marketable.

At previous hearings when the subject was much fresher in his memory, Mr. Melluzzo gave his 1955 income from mining and the approximate percentages of production on the claims from which this income was derived. Although he accounted for 100% of his production, he made no mention of the Rena claims.

At the present hearing Mr. Melluzzo estimated the value of production from the Rena group but in the absence of some supporting record this testimony must be considered as nothing more than conjecture. He testified that members of the family used 100 tons and that a sale was made to Shorty Rutter but the testimony on this sale is not clear. In addition there was testimony by two employees that they each removed several truck loads of material from the Rena group prior to the critical date in 1955, and that the material was delivered either to

one of the Melluzzo houses or to the stone yard. Presumably, the material delivered to the stone yard was sold at some later date.

If this testimony is assumed to be correct, the only justifiable findings of fact are that the materials on the claims were usable by the Melluzzo family as long as they were free, and that occasional sales of minor quantities were possible in 1955. This evidence does not establish that any particular 10-acre subdivision within the group of claims was valuable for its mineral content or that the materials on any one of the six claims could have been profitably sold in a market for which there were many other more readily available deposits prior to July 23, 1955.

Accordingly, I find that the materials on the six Rena claims were not marketable as of that date.

We agree with the hearing examiner's conclusion that the contestees have not established that building stone or sand and gravel from *each* of the Rena claims was marketable prior to July 23, 1955.

Since we have concluded that the materials on the claims are common varieties of sand, gravel and stone, which were not marketable prior to July 23, 1955, it follows that the claims are invalid. Therefore we need not review extensively the dispute over the date on which the claims were located, for even if they were located prior to July 23, 1955, they are nonetheless invalid. However, if our view is material we agree with the decisions below that the claims were not located prior to July 23, 1955.

Finally, the contestees allege that they have been denied due process of law for several reasons. Their contentions that the fact that they were required to pay for cost of a reporter and again for a copy of the proceedings deprived a person of moderate means of an opportunity to defend himself properly is without merit, if for no other reason than that they have not shown that they could not afford the cost of a transcript. See *United States v. Gordon Marshall et al.*, A-30843 (Jan. 11, 1968).

Secondly, their assertion that the only expert testimony presented as to invalidity of the claims was that of Government employees who were presumably biased is clearly not accurate, but is without merit if it were.

They also contend that there was inadequate separation of judicial and administrative functions because the hearing examiner is under the direct control of the administrative office whose job it is to investigate mining claims and because the hearing examiner, the prosecutor and the investigative staff are too strongly influenced by each other and by the fact that they have a common superior.

This is a familiar argument which has been made time and again by counsel for the appellants and by others. In *United States v. Keith V. O'Leary et al.*, 66 I.D. 17 (1959), and in *United States v. Thomas R. Shuck et al.*, A-27965 (February 2, 1960), it was concluded that the procedure followed by this Department in the initiation, prosecution and deciding of contests in mining cases is in compliance with the Ad-

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ministrative Procedure Act, particularly with the requirements of section 5, 60 Stat. 239, now 5 U.S.C. sec. 554 (Supp. IV, 1969), relating to the separation of such functions in decision making. It was especially noted that Bureau of Land Management hearing examiners are appointed in accordance with the requirements made by the Civil Service Commission and with section 11 of the Administrative Procedure Act, 60 Stat. 244 (1946), now 5 U.S.C. sec. 3105 (Supp. IV, 1969). See also *United States v. E. M. Johnson et al.*, A-30191 (April 2, 1965); *United States v. R. B. Johnson*, A-30405 (October 28, 1965); *United States v. Ernest Evon Moseley*, A-30791 (December 13, 1967); *United States v. Ralph Fairchild*, A-30803 (January 19, 1968); *United States v. Jesse W. Crawford*, A-30820 (January 29, 1968).

The *Shuck* case was sustained in *Shuck v. Helmandollar*, Civil No. 682 Pct. (D. Ariz., December 7, 1961), and the *R. B. Johnson* case in *Johnson v. Udall*, Civil No. 1071 Pct. (D. Ariz., November 21, 1967). Very recently the efforts of appellants' counsel in the *Moseley*, *Fairchild*, and *Crawford* cases to raise an issue of lack of due process did not persuade the courts. *Moseley v. Udall*, Civil No. 6939 Phx., *Minerals Trust Corp. v. Udall*, Civil No. 6960 Phx., and *Crawford v. Udall*, Civil No. 6969 Phx. (all D.C. Ariz., May 20, 1969), which affirmed the respective Departmental decisions.

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 of the Bureau of Land Management is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

UNITED STATES

v.

FRANK AND WANITA MELLUZZO ET AL.

A-31042

Decided July 31, 1969

Mining Claims: Common Varieties of Minerals

Deposits of building stone which are of widespread occurrence and which are used for decorative construction and landscaping only because of the variety of colors in which the stone characteristically occurs are common varieties of stone not subject to mining location after July 23, 1955.

Mining Claims: Common Varieties of Minerals

Mining claims located prior to July 23, 1955, for common varieties of building stone are valid only if they meet all the requirements of the mining laws, including discovery, as of that date.

Rules of Practice: Evidence—Mining Claims: Hearings

In determining whether land on which a building stone claim is located is chiefly valuable for building stone, evidence submitted by the locator on