

UNITED STATES

v.

AMOS D. ROBINETTE ET AL.

A-31036

Decided

MAR 4 1970

Mining Claims: Common Varieties of Minerals: Generally --
Mining Claims: Discovery: Marketability

Mining claims located for decomposed granite and building stone are properly declared null and void where the evidence supports a finding that the deposits of such materials are common varieties subject to the act of July 23, 1955, and the prudent man test of a discovery of a valuable mineral deposit, as complemented by the marketability test, was not satisfied as of that time.

Mining Claims: Hearings -- Rules of Practice: Hearings

In a case where mining claims have been declared null and void for lack of a timely discovery of a valuable mineral deposit locatable under the mining laws prior to July 23, 1955, a further hearing to produce additional evidence relating to the validity of the claims will be denied where there appear to be no reasons warranting further proceedings and there is no indication that further evidence could be produced which would change the decision as no such further evidence was submitted in a later case involving the claimants and similar claims for the same materials in the same area.

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Basically, the hearing examiner's and the Bureau's decisions rested upon two findings and conclusions, namely, that the minerals involved are common varieties of materials within the meaning of section 3 of the act of July 23, 1955, 30 U.S.C. § 611 (1964), which removed common varieties of sand, stone, gravel, etc. from location under the mining laws, and that the requirements of discovery of a valuable mineral deposit, particularly that of marketability, were not satisfied before the date of the act of July 23, 1955. For these two reasons the claims were deemed invalid.

Appellants contend generally that the claims are valid under the prudent man test of discovery, that the deposits on the claims are valuable for building stone and decomposed granite, which has special values for making black top and for other uses. They request permission for oral argument "before final submission of this case." They have also requested the appointment of a "Field Commissioner" to take further testimony on three specified items.

Although appellants appear to concede that for the claims to be valid there must be evidence as to their marketability prior to the act of July 23, 1955, they contend that the act of July 23, 1955, is not controlling or applicable here because these claims were located prior to the effective date of the act, and that the claims should be judged as to their validity by the mining laws enacted in "1873". (This is an obvious error as their brief shows that they mean the act of May 10, 1872, Rev. Stat. § 2319 et seq., 30 U.S.C. § 22 et seq. (1964)). The significant point concerning the applicability of the act of July 23, 1955, in this case is that it removed "common varieties" of sand, gravel, stone, etc. from location under the mining laws. If a mineral deposit has some physical property giving it a "distinct and special value", it is an uncommon variety of sand, stone or gravel within the meaning of the act of July 23, 1955, and mining claims may be located for it after that date and a discovery may be had thereafter. However, if the deposit is of a common variety of sand, stone or gravel, the fact that the claims were located prior to the act renders the claims valid only if there was a valid discovery prior to the date of the act and this includes a requirement that the deposits could have been extracted, removed and marketed at a profit at that time. United States v. Coleman, 390 U.S. 599 (1968); Palmer v. Dredge Corp., 398 F.2d 791 (9th Cir. 1968), cert. denied 393 U.S. 1066.

Two other cases being decided today are similar to this case in that the claims in the three cases are all in four adjoining sections near the town of Wrightwood and all are alleged by the claimants to be valuable for their deposits of decomposed granite or stone. The appellants are parties in one of these other cases, United States v. Amos D. Robinette et al., A-31133, and Amos Robinette was a witness for the contestees in the remaining case, United States v. Evelyn T. Harding et al., A-31138. The same attorney has represented the contestees in the three cases. In the other two proceedings, references to the claims in this case have been made and it was requested that judicial notice be taken of certain evidence in this case. For these reasons and because similar issues are involved, these cases have been reviewed together and notice has been taken of all of the evidence in each case. Appellants' brief in this case has cited certain cases and made arguments similar to those made in the other Robinette case where they have been discussed and rejected. Therefore, those arguments will not be repeated here as they have no merit in this case also.

The decisions below have discussed the evidence presented at the hearing in this case in some detail, and we adopt the discussion and findings therein. Further discussion of the evidence in detail will be made only by way of emphasis and to answer specific contentions of appellants.

Appellants have quoted from the decision below at some length and they have also quoted certain testimony of witnesses at the hearing. However, they have failed to show clearly any specific errors in the decision. Instead, from the lengthy quotations they make only a few broad contentions which are not necessarily supported by their quotations, as will be seen.

Generally, as to whether the materials on the claims comprise a valuable mineral deposit within the meaning of the mining laws, appellants contend that the Forest Service did not show this. They base this in large part upon their assertion that the Forest Service's witness, a mineral examiner, made no statement at any point that at the time the Robinettes located the claims the sand, rocks and stone were not a valuable deposit, nor did he make any statement that the deposits on the land were not readily saleable, or that a reasonably prudent man would not be

justified in expending further time and effort in removing materials from the claims. They point out, on the other hand, that Mr. Robinette gave his opinion that a prudent man would be justified in expending time, money and effort upon the claims for the purpose of further development.

Although no question was directed to the Forest Service's witness as to his opinion as to whether the prudent man test was satisfied, this does not mean that the hearing examiner, as the trier of fact, or the Bureau, on appeal, could not, in the absence of such opinion testimony, reach a conclusion on the prudent man test based on the facts that were presented at the hearing.

As to whether or not the materials on the claims were common varieties, there is no evidence that the building stone on the claims had any special properties giving it a special value above and beyond that of ordinary, common building stone. Only 50 cubic yards of building stone were sold from the claims in 1954 at \$5 a cubic yard and this was the only sale of such material from the claims (Tr. 60-62).

Most of the evidence concerned the decomposed granite on the claims. As to the quality of the decomposed granite, appellants refer to testimony by Robinette and also by a general contractor, Joseph L. Meluso, who for two years prior to the hearing had removed material from the claims, paying him a lease rental of \$100 a month or \$1,200 a year, rather than an amount based on the measurement of material removed (Tr. 91-93). Meluso stated that it was of an excellent quality and the right type for his use. In answer to a question as to why it is superior to other decomposed granite, he replied that it is siliceous and has very little topsoil in it, that it is graded fine, but that there are areas where the materials differ slightly and each type of material can be used for different types of work (Tr. 93, 94). However, although Meluso had been familiar with the claims from the time of their location, he had purchased material from them only about 2 years prior to the hearing, i.e., in 1963-1964. Prior to that time he had obtained his decomposed granite from another source, apparently abandoning it only after the material changed in nature. (Tr. 99-100.)

Robinette's testimony showed that some decomposed granite from the claims had been sold prior to July 23, 1955, but it was used mostly for subbase for driveways and for concrete floors (Tr. 62). In answer to a question, he admitted that ordinary gravel is used

for subbase purposes also, but he asserted that it was not, under his definition of ordinary gravel, used for driveways where the suitability of gravel would depend upon its size (Tr. 62-63). The main difference alleged between his decomposed granite and other decomposed granite was its suitability for use in making "desert mix", i.e., black top for roads. Appellants refer to testimony by Robinette comparing the quality of the material used for making black top from his claims with that from another quarry in the area. He stated that the material in the other quarry, on State Highway property north of his property, was similar to his, but that there was too much dirt in it to make good black top and that consequently the State Highway Department was hauling in its own material for making the black top (Tr. 54). Meluso testified that the State's material probably came from San Bernardino (Tr. 95-96). Robinette indicated that the decomposed granite on his other claims (those in A-31133) is of a different type and is not suitable for black top (Tr. 83). 1/

To show the value and marketability of the materials from the claims, appellants submitted copies of State sales tax returns. They assert that the Director's summary of the record of sales is not correct. However, their summary of the sales of the materials agrees with that in the decision below, which is supported by the record. The sales are as follows:

Fourth quarter, 1953 -	\$	55.24
First quarter, 1954 -		none
Second quarter, 1954 -		668.00
Third quarter, 1954 -		163.54
Fourth quarter, 1954 -		214.70
First quarter, 1955 -		none
Second quarter, 1955 -		262.93
Third quarter, 1955 -		706.88
Fourth quarter, 1955 -		194.50

1/ However, his expert witnesses in the proceeding involving his other claims testified that the decomposed granite on those claims could be used for road mix. See the decision in the second Robinette case, A-31133.

Similarly, appellants' summation of the evidence of sales for years subsequent to 1956 generally agrees with the Office of Appeals and Hearings' decision, except that for 1958 the decision stated that approximately 900 cubic yards of material were used for making 1050 yards of blacktop, whereas appellants indicate that approximately 1,000 cubic yards of material were used for making 1000 yards of blacktop. The record supports the decision below; it was explained that 10% would be subtracted to account for the expansion of the oil used with the sand and gravel (Tr. 51). Appellants otherwise agree as to the amount received for the material. They disagree for the year 1963 as to the value of the decomposed granite. The Office of Appeals and Hearings' figure of \$568.50 is supported by the record (Tr. 52); the appellants' figure of \$468.50 must be a typographical mistake. We see no basis for appellants' conclusion that the Bureau's decision is incorrect. Instead, the decision is more accurate than appellants' summary of the sales information. 2/

Appellants also contend that certain testimony by Robinette was not considered by the Director, apparently because no direct reference was made to it. The fact that every detail of testimony is not specifically referred to in the decision does not mean that it was not considered, as only the more important facts revealed by the testimony were discussed. Nevertheless, appellants' summary of this particular testimony by Robinette is as follows:

"* * * he further testified that, on his income tax return for the year 1953, he showed gross sales of \$23,582.94, less the cost of goods sold; that he paid \$7,803.17 for the materials he bought and that the difference applied to the materials mined and removed prior to July 23, 1955, and that he did a large job on a subdivision for the Wrightwood Company in May of 1955, at which time he made his first blacktop."

2/ Of course the evidence as to sales after July 23, 1955, particularly as to such late years as 1963, does not establish the marketability of the materials as of July 23, 1955.

This is from Robinette's testimony set forth in the transcript on pages 78-80. Robinette stated that these gross sales would cover "what I bought and what I mined", and that he didn't know what percentage would pertain to these claims (see Tr. 78). His business included more than the removal of material from these claims as he is a dealer in the sand and gravel business and purchased sand and gravel from other sources in the years 1953-1955 as well as since then (see Tr. 47, 74, 89). Appellants' implication that the difference between the amount bought and the gross sales would represent the materials mined and removed is not valid as his testimony indicates that the gross sales represent also the sale of the sand and gravel which he purchased and he did not state how much he sold it for. Thus, this uncorroborated testimony of the gross sales cannot be accepted as reflecting the amount received from sales of materials from the claims in 1953. Moreover, only 2 of the claims had been located in 1953.

Robinette, although he was at first uncertain, testified that he made his first blacktop in May 1955 (Tr. 80). He indicated that in some areas the desert mix for making the blacktop could be made from material found where the road is being placed, but not in the Wrightwood area because the soil is not suitable (Tr. 80-81).

All of the evidence in this record and the records in the other two cases referred to previously falls short of establishing that the materials within these claims have physical properties giving them a "distinct and special value" thus making them uncommon varieties of stone ^{3/} under the act of July 23, 1955. The fact that the material could be and was used in a mix for making blacktop is not sufficient to show that it is not a common variety of stone within the meaning of the act. It is apparent that the State Highway Department has transported its own materials from a distance rather than use material from appellants' claims and from other immediate areas which have similar deposits of decomposed granite, as testified to by the Forest Service's witness who indicated that the Forest Service sells decomposed granite in the area for 10¢ a cubic yard

^{3/} See the discussion in the second Robinette case, A-31133, pointing out that as to the decomposed granite the issue is whether it is a common variety of stone, not whether it is a common variety of sand or gravel.

in place (Tr. 29, 31). Robinette testified that for the years 1953-1955, he received for the decomposed granite \$1.50 a cubic yard delivered (Tr. 61). However, instead of reflecting the inherent value of the material, the delivered price undoubtedly reflects more the value of extracting it and transportation costs. Appellants' contentions regarding value of the deposit must be considered with this in mind, and an appraisal of the sales discussed before must weigh this factor.

Although the material on these claims may have an economic advantage due to its proximity to the town of Wrightwood, this alone is not sufficient to vest it with the attribute of an uncommon variety. United States v. Frank and Wanita Melluzzo, 76 I.D. 160 (1969). Moreover, there are similar sources of this material on other Forest Service lands in the area. (Tr. 29.) It is apparent from the evidence in this case and in the other two cases mentioned previously involving decomposed granite and building stone in adjoining sections that these materials are materials which are in abundance in California. It must be concluded, if we assume that the materials were locatable under the mining laws prior to that time, that they are common varieties of stone within the meaning of the July 23, 1955, act.

Since the materials are common varieties, the prudent man test of discovery as complemented by the marketability test must have been satisfied prior to the date of the act as well as since then in order to sustain the claims. United States v. Coleman, *supra*; Dredge Corp. v. Penny, *supra*. As mentioned earlier, there was only one sale of building stone prior to the date of the act and no evidence that there was really a market for the stone at that time so that a prudent man could expect to develop a profitable mine at that time. Likewise, although appellants showed that there were sales of the decomposed granite prior to the act, in the amounts quoted previously as shown by the sales tax records available to Mr. Robinette, these were not substantial sales.

The sales tax returns show gross sales of \$1364.41 for the 7 quarters from October 1, 1953, to June 30, 1955. The return for the third quarter of 1955 (July 1 to September 30) showed sales of \$706.88. Robinette could not apportion this amount as to sales prior to July 23, 1955 (Tr. 64), but if one-third of the amount, \$235.63, is added to the \$1364.41, we have total sales of \$1600.04 from October 1, 1953, to July 23, 1955. Of this total, \$250 represented the single sale of building stone, leaving \$1350.04 for the sales of decomposed granite.

Some of this amount represented sales from two patented claims, how much was not stated (Tr. 60). But if no deduction is made for the latter sales, the entire \$1350.04, apportioned equally among the 5 claims in issue, comes to \$270.00 per claim. This represents gross sales of decomposed granite from each claim for a period of 22 months or \$12.27 per month per claim.

There was no evidence as to the costs of appellants' operations; therefore, it is not possible to establish whether or not they even made any profit in their sale of the products. In any event any profit from gross sales of \$12.27 per month per claim would have been miniscule. Cf. United States v. Frank and Wanita Melluzzo et al., 76 I.D. 181 (1969); United States v. E. A. and Esther Barrows, 76 I.D. 299 (1969).

We must conclude that appellants have not shown by a preponderance of the evidence that there was such a market for the materials on each claim on July 23, 1955, that a prudent man could have reasonably expected at that time to develop a profitable mining venture on each claim and that, therefore, the claims were properly declared invalid.

This leads to appellants' request, in effect, for a new hearing. They specifically requested an opportunity for further testimony to be taken on these three items:

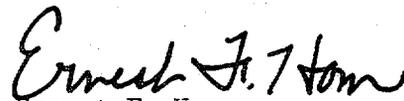
- "1. The existence or lack of existence of other and similar materials in the trading area of Wrightwood.
2. The special value of the deposits found on Contestee's claims as against other so called common materials in the area.
3. To obtain and produce before the Field Commissioner original sales tax returns on file with the State Board of Equalization of the State of California."

A further hearing in a case of this type would be ordered before a Bureau hearing examiner if there is some justifiable reason for doing so, such as allowing appellants to present evidence not available to them at the first hearing, or if the record evidence is so ambiguous or unsatisfactory that a proper determination cannot be made from it. No such reasons have been shown here. Furthermore, appellants have had the opportunity in the companion case decided today (A-31133)

(where the hearings were held a year after the hearing in this case) involving their other claims in this area for similar types of materials to present evidence relating to the three items appellants have specified here. Although some differences in the nature of the decomposed granite on these claims as compared with the other claims have been shown, they have not been of great significance and there is no indication that a further hearing would produce additional evidence to establish special values for the materials on these claims. Also, in the companion case (A-31133), there was reference to the sales tax returns and Robinette there testified that the records submitted in this case were all he had and copies of them were submitted in that case. Obviously then he has no other sales tax returns to submit. Since there is no indication that further evidence could be produced which would change the decision reached below, and there appear to be no reasons warranting further proceedings, the request for the appointment of a Field Commissioner and a new hearing is denied.

The request for oral argument, which is granted only as a matter of discretion, is also denied since appellants have had an opportunity to submit and have submitted in writing all the arguments which they desire to make and oral argument is not necessary for a fuller understanding of the issues in the case.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.



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