

Editor's note: Reconsideration granted; decision reaffirmed -- See U.S. v. Pope (On Reconsideration), 27 IBLA 133 (Sept. 30, 1976)

UNITED STATES

v.

JOHN W. POPE

IBLA 72-174

Decided June 16, 1976

Appeal from Contest No. OR-05879 (Wash.) decision of Administrative Law Judge Graydon E. Holt, declaring Mountain Rock Placer mining claim, now known as Cliffstone Placer mining claim, null and void.

Reversed.

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

Whether a deposit of building stone is an uncommon variety locatable under the mining laws after section 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (1970), depends on whether the deposit has a property giving it a distinct and special value as compared with other deposits of stone used for similar purposes.

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

In determining whether a deposit of building stone is a common or uncommon variety under section 3 of the Surface Resources Act, 30 U.S.C. § 611, a special and distinct value of a building stone may be reflected by a higher market value in comparison with deposits of

common varieties, or by reduced costs or overhead so that the profit would be substantially more while the market price would remain competitive.

APPEARANCES: Carl B. Luckerath, Esq., Seattle, Washington, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GOSS

John W. Pope appeals from a decision of the Administrative Law Judge 1/in Contest No. OR-05879 (Wash.) declaring the Cliffstone (formerly Mountain Rock) Placer mining claim null and void because the stone found on the claim is a common variety of building stone and therefore not locatable after the Surface Resources Act of July 23, 1955, 30 U.S.C. §§ 601-615 (1970).

The Cliffstone Placer mining claim, consisting of 20 acres situated in the Snoqualmie National Forest, King County, Washington, was located on October 28, 1958, as the Mountain Rock Placer mining claim. The granodiorite n2 stone sells under the trade name of "Cliffstone" and has been used primarily for landscaped retaining walls, other landscaping and also for construction purposes.

Common varieties of stone have not been locatable under the mining laws since the enactment of the Surface Resources Act of July 23, 1955, supra, which provides in part in Section 3:

A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders * * * shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws * * *. "Common varieties" as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block

1/ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effected pursuant to order of the Civil Service Commission, 37 Fed. Reg. 16787 (August 19, 1972).
2/ See Tr. 107. All transcript references are to the hearing of November 13, 1970, the second hearing, unless otherwise indicated.

pumice" which occurs in nature in pieces having one dimension of two inches or more. 3/

Departmental regulation 43 CFR 3711.1(b) further defines common varieties:

(b) "Common varieties" includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. * * *

The complaint herein was filed on request of the Forest Service, Department of Agriculture, and alleges that the material found is not a valuable mineral under the above section. The complaint does not contain an allegation as to whether the land was chiefly valuable for building stone. Appellant alleges a valuable discovery of a unique stone highly desirable for architectural facing, decoration and special landscaping.

The enactment of the Surface Resources Act affected only common varieties. The Act of August 4, 1892, 30 U.S.C. § 161 (1970), remains effective as to building stone which has some property giving it a distinct and special value. United States v. Coleman, 390 U.S. 599 (1968). The pertinent part of that Act provides:

Any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims.

Following a hearing, the Administrative Law Judge herein rendered a decision on January 17, 1969, declaring the Cliffstone Placer claim null and void. Pope appealed, and on December 31, 1969, the Chief, Office of Appeals and Hearings, set the decision aside and remanded the case for further hearing. The reasons therefor were explained at 5:

Specifically, the evidence herein is too sketchy and too general with respect to the price received for the subject stone as compared with prices received for ordinary stone from other deposits which are also used in the area for landscaping purposes. Evidence should also be developed comparing production and overhead costs of marketing the subject stone with the costs of

3/ See 30 U.S.C. § 611 (1970).

producing and marketing all other stone used for landscaping purposes in the same market area. ^{4/} Furthermore, although the contestees' Offer of Proof averred that the rock on the claim is especially suitable and valuable for landscaping, building, facing and architectural designs, it appears from the record that it has been used only for landscaping purposes. Evidence should be introduced as to whether it has been used for building, facing and architectural designs.

^{4/} Cf. McClarty v. Secretary of the Interior et al., 408 F.2d 907 (9th Cir. 1969).

A further hearing was held on November 13, 1970, and on October 18, 1971, the Administrative Law Judge again declared the Cliffstone Placer mining claim null and void. The Judge reasoned as follows:

The evidence at the hearing and the previous McClarty hearing [^{4/}] established that a wide variety of stone is available for construction and landscaping in the Cascade Mountains and that all stone that is used has some quality which makes it sufficiently valuable to be profitably marketed. Cliffstone, like the Heatherstone in the McClarty case, is in this category. Although it has a unique quality in the manner in which it has been fractured, its value is within the same general price range as many other materials used for the same purposes. Since the unique quality of the Cliffstone does not give it a distinct and special value, it must be considered a common variety not subject to location since July 23, 1955. [Emphasis added.]

Appellant herein argues that under United States v. Coleman, supra, United States v. U.S. Minerals Development Corporation, 75 I.D. 127 (1968), and McClarty v. Secretary of the Interior, supra, the deposit has a unique property giving it distinct and special value. Appellant further argues that the primary issue is the standard against which a unique and special value of a stone should be judged. He contends that using any criteria other than relation to the lowest grade common rock (common quarry rock

^{4/} McClarty involved Heathersone, which possesses some of the natural fracturing and flat surface cross-sectioning properties with which Cliffstone is endowed. The Board determined in United States v. McClarty, 17 IBLA 20, 81 I.D. 472 (1974), that Heatherstone is an uncommon variety.

then delivered in Seattle and vicinity for \$ 6.00 to \$ 7.00 per ton retail) is to apply an indefinable standard, which in effect makes the exception to the Common Varieties Act of 1955 meaningless; the value of Cliffstone should not be compared with that of other stone, which itself has a "distinct and special value." Appellant argues that a determination of unique property has already been made by both the Hearing Examiner and, in effect, by the Office of Appeals and Hearings in its remand of the case; therefore, the sole issue remaining is whether Cliffstone has a "special value."

In the Government's December 14, 1970, brief, it was contended that Pope had not shown there was a substantial market for the stone at prices over and above the price paid for common varieties of similar material; thus, appellee had not shown distinct and special value as required by U.S. Minerals Development Corp., supra.

[1] As stated by appellant, the threshold question is the yardstick by which "uniqueness" and "special and distinct value" is to be measured, *i.e.*, unique and with special value compared to what? Under the test in Coleman, supra, as applied in Brubaker v. Morton, 500 F.2d 200, 202-03 (9th Cir. 1974) and Boyle v. Morton, 519 F.2d 551, 552 (9th Cir. 1975), where a large quantity of similar stone is available from other deposits in the same general market area, the stone is not unique and therefore does not have a distinct and special value. Where there is some unique feature of the stone claimed to differentiate it from otherwise common varieties of stone, the Circuit Court in McClarty v. Secretary of the Interior, supra at 908, approved the following guidelines:

(1) [T]here must be a comparison of the mineral deposit in question with other deposits of such 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; and (5) the distinct and special value must be reflected by the higher price which the material commands in the market place. [Emphasis added.]

The Court further stated that special economic value may be reflected by reduced costs or overhead, as is discussed infra.

In applying the McClarty guidelines, Cliffstone should be compared with other materials used for similar masonry purposes. In view of our holding herein with respect to use of Cliffstone for masonry, we do not reach the issue of whether it has been shown there is a unique and special value of the stone for landscaping purposes.

According to the evidence summarized below, Cliffstone is deposited in a talus slide 5/ naturally fractured into relatively thin, flat, round-edged, lightweight pieces with a particular propensity for acquiring moss colorations.

Economical quarrying and preparation

Dwayne Richard Coffman, landscape architect and designer, testified that virtually all of the rocks on the site would lend themselves to conveyance to a job site without blasting or quarry work, depending on the size of the equipment (Tr. 4, 16). Quarry rock requires drilling and blasting (Tr. 16). Coffman testified that the thin slabs of Cliffstone can be easily broken with a sledge hammer. They will break almost like they have been cut with a saw (Tr. 14).

Appellant, who is engaged in selling and hauling building stone, testified that the rock is found in naturally loose formation (Tr. 32). It is very well weathered on the edges with rounded corners and smooth surfaces (Tr. 32). Because it is not blasted, it does not have sharp edges (Tr. 32-33). Appellant testified regarding the size, quality and character of the rock for delivery to the job as follows:

There's no preparation necessary; it's merely loaded on the truck and taken to the site, the landscape site or the building site, as it were, and used exactly as it comes from the quarry, no blasting, no barring loose is necessary [Tr. 33].

Appellant also testified that the larger pieces are used for landscaping; there is a great quantity of smaller pieces 3 to 4 inches thick, suitable for masonry work (Tr. 39). There is no trimming necessary with Cliffstone as there is with other stones (Tr. 42). Cliffstone naturally fractures in slab form which can be used for fireplaces. Most other rock available for facing stone for fireplaces does not have a natural fracture (Tr. 42). Those that do have a natural fracture require blasting or some processing (Tr. 43).

Lawrence P. Korsmo, landscape designer, also testified concerning the special qualities of Cliffstone that make it economical to quarry:

5/ A talus slide occurs when rocks at the top of a hill break off according to the fracturing of the rocks, begin to slide and eventually reach the bottom of the slope (Tr. 104).

It does make a very excellent material for masonry work, the reason for this being that it has a natural structure that would lend itself to this work. And by selection in the area where the rock is lying, you can pick out material, then, that is already four or five inches thick and does not require sawing such as is required in the Wilkinson sandstone that has to be sawed into the correct dimensions and all. So this is readily available on the ground in a shape that is already useable for masonry work [Tr. 82-83].

Donald KirVan, building stone supplier, verified the fact that the rock was readily available in a useable state on the claim, and that no prying or blasting was necessary (Tr. 65-70).

Appearance

Albert W. Nelson, architect, testified concerning his use of the rock in fireplaces. When he needed a lintel, which is a rock that goes across the top of the opening in front of the fireplace about eight feet long, Pope's quarry was the only rock source of which he knew (Tr. 58-59). Nelson designed the fireplaces and chimneys pictured in the exhibits. Nelson stated that he would use this rock in designing houses where people wanted a similar effect (Tr. 60).

KirVan testified that he has sold the stone to architects. He said that it was a fairly good seller from the standpoint that it had good architectural character and did lend itself extremely well to fireplace and wall construction (Tr. 65). He said he would use this rock any time over common quarry rock (Tr. 68).

Korsmo also testified concerning the use of the stone in masonry work:

* * * It also appeals to architects, because some of them have a pure attitude and rather than use an angle iron to support across the lintel of the fireplace opening, they feel that it's a little more beautiful and structurally correct to just use one lintel that spans this opening out of the material that the rest of the fireplace is built out of [Tr. 82, 83].

* * * * *

And I think this type of a shape and surface is more beautiful inherently than a rock that's been blasted from fifty feet down under the surface and coming in squares and even triangular blocky shapes. So

the landscape gardener, contractor, or architect would be more pleased with the use of this rock [Tr. 89].

Ease of placement

Alton C. Everson, brick contractor and layer who did the masonry work on fireplaces and chimneys pictured in the exhibits, testified that Cliffstone is a good rock for building because it lays well with very little work to be done to it (Tr. 118). He says that it can be laid up without ever hitting it with a hammer, so the rock does not get a hammer mark on it (Tr. 121). A stone like Travertine requires cutting, but Cliffstone does not (Tr. 121).

Korsmo also testified the stone requires only a minimum of chipping by the mason (Tr. 84).

Maintenance

Everson testified that Cliffstone is easy to clean because it is a hard rock (Tr. 119-20). It can be cleaned with straight acid without damage. Everson compared Cliffstone to other rocks for cleaning purposes:

* * * You take something like Travertine and end any of that stuff, you've got to be real, real, real careful. In fact, stuff like Texas shell, you don't dare touch it. It will turn yellow. It's too soft. And once it gets dirty, it's ruined. It's a mess, and it will stay that way forever. After a while they're always second rate. This you can go back over, a home owner can do it. He can go over it with straight acid or four-to-one and you can't hurt the rock. You'll always have a goodlooking job [Tr. 120].

Scarcity

Coffman testified that Pope's claim is the only deposit of the Cliffstone granitic type which he knows of in Western Washington (Tr. 9).

Pope testified that he does not know of any granitic rock in Western Washington similar to Cliffstone in the extent of its shape and peculiar features (Tr. 33). He further testified that "there's nothing else like it available anywhere" (Tr. 47).

KirVan testified that he did not know of any commercial deposits of this rock in the northwest area of Washington (Tr. 66). He did not know of any other rock close at hand which exists in 4- and 5-inch thick slabs (Tr. 66-67). He did know of a rock that

comes that way, which does not require trimming or preparation, but it is a thousand miles away from Seattle (Tr. 67). Rock having the peculiar characteristics of Cliffstone's cornering and fracturing ability is not available, other than on Pope's site, without going a long way for it, thereby making the cost prohibitive (Tr. 70). The rock on Pope's site exists in a great mass and he has not seen that amount of such rock in any one place (Tr. 70).

Korsmo testified that he does not know of any deposits of rock comparable to Pope's in the Northwest (Tr. 86). He particularly commented that he does not know of any place where he can find the type of lintel rock pictured in the exhibits (Tr. 97).

Everson said that he does not think there is enough rock like Cliffstone in the area (Tr. 118).

Raymond F. Shirley, mining engineer for the Forest Service, testified that, in addition to the several volcanic and granitic talus slides in Washington, he has seen a number of talus slides in Oregon (Tr. 103). In the vicinity of Pope's deposit there are two talus slides of granodiorite material -- one at Lenox Creek and one at Cougar Creek (Tr. 105, 107-08). Besides the Pope deposit, Shirley could not think of a talus slide that is presently being operated as a quarry or on which an operator has a proprietary interest so that he can sell the rock (Tr. 106). There was no testimony comparing in detail the material from the other talus slides with that from the Pope claim.

John W. Sargenson, a Government witness who is employed in connection with lands and minerals in the Snoqualmie National Forest, said that he did not believe the road to the Lenox and Cougar talus slides is readily accessible (Tr. 111).

On rebuttal, Pope stressed that he is familiar with the Lenox Creek area and finds no rock which is comparable to Cliffstone, except for the fact that it is granite. As far as the features of Cliffstone are concerned, there is no comparison with any other rock any place else that Pope knows in the Northwest (Tr. 113). He says the rock on Lenox Creek is cubicle or in massive pieces rather than long or flat like Cliffstone (Tr. 133).

We hold that the deposit of Cliffstone has unique and special properties.

[2] The final issue is whether the unique qualities of the Cliffstone deposit impart to it a distinct and special value. In comparing the price of Cliffstone with that of other stone used for similar purposes, the Judge summarized the testimony from the second hearing:

* * * Common basaltic rock used for landscaping is blasted off the side of a mountain and sold for \$ 6 a ton in the Seattle area (Tr. 38). [Footnote omitted.] The Cliffstone is merely picked out of the talus slide and sold in the Seattle area for from \$ 15.00 to \$ 17.50 a ton for landscaping purposes (Tr. 35). Selected pieces 6 to 8 inches thick used for steps in landscaping sell for \$ 25 a ton (Tr. 39). When used as a building stone the Cliffstone sells for \$ 60 a ton (Tr. 39). Selected pieces such as a lintel stone in a fireplace sell for more. A market for use as a building stone has not been developed because of the title conflict but the stone is attractive (see the many photographs received in evidence) and there is every reason to believe that a market can be developed in the building industry. A red volcanic rock from Oregon is used in Seattle for landscaping and it sells for from \$ 30 to \$ 40 a ton. Because of its light weight there is a greater volume in a ton of this material. [Emphasis added.]

Granite boulders are sold for landscaping in Seattle at \$ 15 to \$ 22 per ton (Tr. 18, 22-23).

The Government has not appealed the above findings that Cliffstone used for building construction sells for \$ 60 per ton, and that there is every reason to believe a market can be developed.

In McClarty, supra, the Court of Appeals explained "value" by stating that price is not the exclusive way of proving a distinct and special economic value attributable to the unique property of the deposit. The Court discussed other possibilities at 909:

* * * [I]n the McClarty case, where the unique properties of the stone are the natural fracturing into regular shapes and forms suitable for laying without further fabrication, the distinct and special economic value of the stone may or may not be measurable by the retail market price in comparison with the price of other building stone. It is quite possible that the special economic value of the stone would be reflected by reduced costs or overhead so that the profit to the producer would be substantially more while the retail market price would remain competitive with other building stone. * * *

The Court remanded the case to the Department for further evidence on the issue of value, whereupon the Board made the following findings:

From the facts presented we find that while the price per ton of Heatherstone is not significantly higher than other stone used for the same purposes, its unique qualities do impart definite economic advantages over other competitive types of stone. Heatherstone is cheaper by half to quarry and prepare for market, resulting in significantly higher profits to the quarry operator (Tr. 108.)

* * * * *

There is an established special value to the producer, reflected by reduced costs of overhead so that the producer's profit is substantially increased, and this is attributable to the uncommon physical properties of the stone. This, of itself, is sufficient to meet the Court's criterion for determining whether the stone has a special economic value. [Emphasis added.]

United States v. McClarty, *supra* n. 4, 45-46.

Like Heatherstone, Cliffstone's unique qualities give it a decided economic advantage over other competitive types of stone. There is a minimum of preparation expense with Cliffstone because it is used as it comes from the quarry with no blasting or barring loose necessary (Tr. 33). Appellant testified that Cliffstone is less costly to extract than Heatherstone, because Heatherstone must be barred out (Tr. 52). None of these Cliffstone advantages have been rebutted by the Government. On that basis, we conclude that the deposit of Cliffstone is an uncommon variety locatable under the mining laws.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is reversed and the contest dismissed.

Joseph W. Goss

Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON CONCURRING IN THE RESULT:

I concur in the dismissal of the Government's contest complaint in this case. The sole charge in the complaint related to whether the stone deposit was a valuable mineral deposit within the meaning of section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1970). That provision, in effect, made common varieties of stone and certain other materials no longer locatable under the mining laws, but indicated that "deposits of such materials which are valuable because the deposit has some property giving it distinct and special value" are not "common varieties" within the meaning of that Act.

To determine whether a deposit of stone meets this statutory standard, we must look to the nature of the deposit itself. McClarty v. Secretary of the Interior, 408 F.2d 907 (9th Cir. 1969). Thus, the deposit of stone must have some unique property. If, because of the unique property, the deposit of stone is useful for purposes that ordinary varieties of stone are not used, this may establish the distinct and special value. *Id.* However, if the material from the deposit is used only for uses to which ordinary varieties of the material are put, the deposit must meet one of two tests approved by the Court in McClarty. The first of these tests was prescribed in United States v. U.S. Minerals Development Corp., 75 I.D. 127 (1968). Under this test there would have to be a showing that the material from the deposit commands a higher price in the market place than ordinary varieties used for the same purpose. The Court in McClarty recognized this "higher price" test, but concluded it need not be the only test. It offered a "reduced overhead" test, namely, if the special economic value of the stone would be reflected by reduced costs of overhead which would substantially increase the producer's profit because of some uncommon physical properties of the stone deposit, this may be sufficient even though the retail market price is not higher in comparison with the price of other building stones.

After reviewing the evidence, it is evident the stone is used only for purposes for which ordinary varieties may be used. Also, I cannot find that the "higher price" test for similar uses has been met in this case. In the retail market, it is apparent that the few sales of this stone for building purposes were at lower prices than all but the most common types of stone on the market. For example, Pope testified that Arizona stone sold "in the neighborhood of \$ 70.00 to \$ 100.00 at times," and "Heatherstone," the stone from the claim in the McClarty case, sold for approximately \$ 70.00 a ton, which is some \$ 10 higher than the stone from Pope's claim (Tr. 51). The price of the stone from Pope's claim sold for landscaping purposes was even substantially less. However, there is some confusion in the record concerning prices due to

a failure of the witnesses to differentiate in their testimony between retail prices, prices at the quarry, and whether the prices included hauling and loading, or other incidental costs, rather than a simple in-place price for the stone itself at the quarry.

The only basis for any finding that this deposit of stone is an "uncommon variety" is applying the McClarty "reduced overhead" test. In my dissent in this Board's decision following the remand by the Court in United States v. McClarty, 17 IBLA 20, 55, 81 I.D. 472, 487 (1974); I pointed out some of the difficulties in the test, particularly in the proof when applying it. I indicated that to resolve this test satisfactorily it would be essential to compare the economics of the claimant's quarrying operation with that of other stone producers' operations to ascertain whether the claimant is, in fact, making a greater profit for his stone than other stone producers for reasons attributable to the unique property of the deposit. This economic advantage should be a substantial one.

The only evidence presented by the Government on this issue was evidence indicating there were additional talus slope types of deposits in the area (Tr. 104-07). However, there was no indication that stone from those deposits was being removed and sold, or could be, nor was there any evidence by the Government concerning a comparison of operating costs by the producer of the materials from this claim with other operations where stone was being sold. Mr. Pope and some of his witnesses did testify that because of the unique nature of the deposit, with the stone already fractured in shapes and sizes ready to use in the market place, the material could be removed from the claim at much less cost to the producer than other deposits where blasting and other work would be required (e.g., Tr. 47, 70, 97). Indeed, Pope testified that it costs less to remove this stone than the "Heatherstone" in McClarty because more manual labor was required for that stone (Tr. 52). The nature of the deposit of this stone would seem to bear out that testimony.

While I find the evidence very unsatisfactory and vague in meeting the McClarty "reduced overhead" test, it is evident on the basis of the present record that there is insufficient evidence to support the charge in the contest complaint because there was some evidence, albeit inconclusive and unsatisfactory, that the claim might meet the "reduced overhead" test and no evidence that it would not. For this reason, unless we order an additional hearing in this case for still further clarification of the record on a comparison of the economics of claimant's operations with that of

other stone producers, I agree the Government's complaint must be dismissed. Cf. United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975). 1/

Joan B. Thompson
Administrative Judge

1/ If there was some indication more detailed evidence would be produced to show whether or not the deposit has the value required under the McClarty "reduced overhead" test, I would favor ordering an additional hearing here. In the absence of such an indication and since there is not a patent application involved, dismissal of the contest complaint is necessary. This result is not a finding that the claim is valid. United States v. Taylor, supra.

