

UNITED STATES
v.
JOHN W. POPE (ON RECONSIDERATION)

IBLA 72-174

Decided September 30, 1976

Petition for reconsideration of United States v. Pope, 25 IBLA 199 (1976), which reversed the decision of Administrative Law Judge Graydon E. Holt in Contest No. OR-05879 (Wash.) declaring the Cliffstone Placer Mining Claim null and void.

Petition granted; prior decision reaffirmed.

1. 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 the Surface Resources Act, 30 U.S.C. § 611 (1970), 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: Arno Reifenberg, Esq., Office of the General Counsel, U.S. Department of Agriculture, Portland, Oregon, for petitioner-appellee;
Carl B. Luckerath, Esq., Seattle, Washington, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GOSS

The U.S. Forest Service, appellee herein, has petitioned the Board for reconsideration of United States v. John W. Pope, 25 IBLA 199 (1976),

in which the Board reversed a decision of Administrative Law Judge Graydon E. Holt declaring the Cliffstone placer mining claim null and void. The Board determined that the material "Cliffstone" has a unique property giving it a distinct and special value and is thus not a common variety within the meaning of the Surface Resources Act of 1955, 30 U.S.C. § 611 (1970).

Appellee initially contends that contestee's original appeal ought to be dismissed for failure to serve the adverse party under 43 CFR 4.402. However, such dismissal is discretionary, 1/ and it is concluded that the decision below requires review by the Board.

Appellee's other arguments are mainly directed against the holding that Cliffstone has a distinct and special value.

[1] To support a finding of distinct and special value, the evidence generally must show that the unique property would command a market price higher than that for common materials used for the same purpose or that the unique property would reduce overhead production costs and provide for greater profits. United States v. McCormick, 27 IBLA 65 (1976); United States v. McClarty, 17 IBLA 20 (1974). Masonry Cliffstone has been sold in the Seattle-Kirkland areas for the premium price of \$ 64 per ton. 2/ Petitioner argues that the value of Cliffstone is reduced because the pieces have to be selected, picked up at the quarry, and hauled to the building site. These expenses are inherent in the cost of any rock, however, and the record shows that such cost is of course less than the expense of blasting, selecting, picking up, hauling and shaping other rock. The evidence supports the findings summarized in the Board's prior decision:

Like Heatherstone [the material considered in McClarty, supra], 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.

1/ Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969).

2/ This was at some period prior to the 1970 hearing, for the stone had by then been incorporated into established homes. See e.g., Exhibit G-2, a picture of the home of Seattle architect Albert W. Nelson, Jr. (Tr. 41, 65).

Therefore pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is granted and the decision in United States v. Pope, supra, is reaffirmed.

Joseph W. Goss
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON DISSENTING

I would grant the petition for reconsideration and vacate our previous decision in this case. I noted in my special concurrence in this case, United States v. Pope, 25 IBLA 199, 210 (1976), and my dissent in United States v. McClarty, 17 IBLA 20, 55, 81 I.D. 472, 487 (1974), difficulties and problems in the "reduced overhead" test of McClarty v. Secretary of the Interior, 408 F.2d 907 (9th Cir. 1969). That test does not seem consonant with the intent of the drafters of section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1970). I am very reluctant to see a test not in harmony with such intent and purpose extended much further by this Board beyond the particular facts of the McClarty case.

The Forest Service in this request for reconsideration has pointed to portions of our opinions in United States v. Pope, *supra*, which tend to show that the result was influenced by the failure of the Government to respond to allegations made by the appellant. I believe the only satisfactory resolution of this very weak case should be a remand for a further hearing. This would afford both parties the opportunity to present additional evidence on the factual issues involved and would also enable both parties to present their legal arguments in a more informative factual framework than we have before us now. Therefore, I must dissent from the reaffirmance of this Board's prior decision in this case.

Joan B. Thompson
Administrative Judge

