

Editor's Note: Appealed -- Civ.No. A91-066 (D. Alaska Feb. 28, 1991), aff'd, (date unknown), rev'd, No. 93-35084 (9th Cir. May 20, 1996)

UNITED STATES

v.

SHERMAN C. SMITH AND LYNDA K. SELLERS SMITH

IBLA 89-443

Decided August 22, 1990

Appeal from a decision by Chief Administrative Law Judge Parlen L. McKenna finding the REC #2 placer mining claim null and void.

Affirmed as modified.

1. Mining Claims: Hearings--Mining Claims: Location--Rules of Practice: Hearings

A stipulation by counsel for the Forest Service and a mineral claimant that there was some limestone "of sufficient carbonate content to be located under the 1872 Mining Law" does not prevent review of the record on appeal to determine if there was a valid location of a mineral on the claim under the mining laws.

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

If a deposit of limestone is to be subject to location as a valuable mineral deposit under the mining laws, it must be shown to have some property giving it distinct and special value. Suitability of the deposit for production of agricultural lime does not establish that the stone is subject to location, without proof that the limestone has distinct and special properties giving it special value for that purpose.

3. Mining Claims: Common Varieties of Minerals: Special Value--Mining Claims: Location

Marketability is not the sole test of the validity of a mining claim for limestone. Unless it is shown to have some special property that excludes it from the operation of the Common Varieties Act, limestone cannot be located as a valuable mineral under the mining laws.

4. Mining Claims: Common Varieties of Minerals: Special Value--Mining Claims: Location

If a deposit of limestone is to be subject to location under the mining laws as building stone, it must be

shown to have some distinct and special property giving it special value for that purpose. Although price is a factor in showing that stone has such a property, a showing that the stone can be marketed at a profit does not alone establish the existence of a special property in the stone.

5. Mining Claims: Hearings--Rules of Practice: Hearings

A prima facie case showing invalidity of a limestone mining claim located after July 23, 1955, for use as decorative stone is established by proof that the stone is a common variety lacking any property giving it distinct and special value.

6. Mining Claims: Hearings--Rules of Practice: Hearings

New evidence offered in support of an application for a rehearing must tend to show that the party seeking rehearing has some likelihood of success if the application is to be allowed. The applicant for a rehearing must also explain why the evidence offered on appeal was not presented at the original hearing, if the evidence could have been available then.

APPEARANCES: Sherman C. Smith, Cooper Landing, Alaska, pro se; Robert A. Maynard, Esq., Assistant Regional Attorney, Office of the General Counsel, U.S. Department of Agriculture, Juneau, Alaska, for the U.S. Forest Service.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On April 21, 1989, Chief Administrative Law Judge Parlen L. McKenna found null and void the REC #2 unpatented travertine placer mining claim located on April 2, 1986, in sec. 9, T. 4 N., R. 4 W., Seward Meridian, in the Chugach National Forest, Alaska. His finding issued after a contest hearing held on August 18, 1988, at Anchorage, Alaska, where evidence was taken concerning the right to locate a claim for travertine in the National Forest. The contest complaint placed two distinct issues for decision before the fact-finder: (1) whether the travertine was subject to location under the mining laws or was instead a common variety excluded from such location by the Act of July 23, 1955 (Common Varieties Act), 30 U.S.C. § 611 (1982), and (2) whether there had been a discovery of locatable mineral on the claim. On the record before us, the question whether there was a valid location is dispositive of the appeal.

Travertine is limestone. It is defined by A Dictionary of Mining Mineral and Related Terms, Bureau of Mines (1968), as

[a] calcium carbonate, CaCO<sub>3</sub>, deposited from solution in ground and surface waters. The cellular deposits are known as tufa, calcareous sinter, spring deposit, or cave deposit. When solid, banded and susceptible of a good polish, it is known as Mexican

onyx, or onyx marble. True onyx, however, is banded silica or agate. Travertine forms the stalactites and stalagmites of caves, and the filling of some veins and spring conduits.

Id. at 1162. Dolomite limestone is distinguished from travertine by the presence in dolomite of magnesium. Id. at 338. Travertine and dolomite are, in turn, distinguished from marble by the manner of their formation, marble being "limestone which has been crystalized by heat or pressure and is capable of taking a polish." Id. at 680.

The REC #2 was located 112 miles from Anchorage on a hillside having slopes of from 35 to 75 degrees. About 60 tons of travertine have been removed from the claim by appellants. There are two deposits of limestone on the claim. The upper deposit has a weighted grade of 89.6-percent calcium carbonate, while the lower deposit averages 81.1 percent. Norman F. Day, the Forest Service geologist who was the principal Forest Service witness at the 1988 hearing, estimated there to be 28,400 tons in the upper deposit and 19,736 tons in the lower. Day estimated that there were about 250 tons of banded travertine, the highest grade of stone, on the claim. John Gutierrez, a Forest Service geologist and mining engineer, prepared a cost estimate for removing limestone for building stone use from the REC #2. In his survey of the market for the purpose of determining marketability of the stone, Gutierrez discovered that his respondents would pay no more for REC #2 limestone than they would for any other commercially available stone imported into Alaska. Both Government witnesses testified that the REC #2 stone was a common variety of limestone of no distinct or special value either for lime or building stone. In addition to the limestone deposit claimed by appellants there are other larger known deposits of limestone in the area which have not been developed. 1/

To show the validity of their claim, appellants rely on a market survey and on a plan of operations that contemplate the development of a market for agricultural limestone in the Alaska market, generally in the Anchorage area. Appellants summarized their position in a statement made at hearing, explaining: "I have the only deposit of limestone suitable for agricultural purposes and decorative stone purposes that is economically

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1/ Limestone is a very common stone, found in abundance throughout the United States. This circumstance affected early decisionmaking in cases involving limestone, as First Secretary Vogelsang observed in Gray Company Trust (On Rehearing), 47 L.D. 18, 20 (1919), where he explained why a mining claim for limestone was invalid:

"As to the limestone deposits, the existence of which upon portions of the ground is testified to by claimant's witnesses, it is sufficient to say that they have not been demonstrated to be of such quality as to give them any substantial value over and above other limestone deposits of that region which are there shown to exist in immense quantities and more favor-ably situated with relation to transportation facilities, or otherwise to bring them within the category of mineral deposits subject to location under the mining laws."

feasible to develop for many, many years to come" (Testimony of Sherman C. Smith, Tr. 149). Later briefs filed by appellants are generally to the same effect.

While appellants challenge some of the items of cost appearing in the Day and Gutierrez estimates of value, they also rely on parts of those estimates, principally challenging projected road-building expenses and the need to include insurance and some items of machinery for the limestone crushing, sorting, and bagging operations that the Government witness testified would be required for supplying agricultural lime to both garden and farm use. Although appellants now contend on appeal that there is a greater quantity of limestone on the REC #2 than the Government estimated, they presented no evidence concerning the quantity of stone found on the claim at the 1988 hearing and accepted the Government estimate when estimating production from the claim. They offered proof that some of the limestone on their claim tested at 96.26-percent purity for calcium and magnesium carbonate (Tr. 152, 168). Their plan is to sell lime in competition with other producers already selling agricultural lime to farmers and gardeners in the Anchorage area, where appellants believe they can sell an equivalent product at the going rate to earn a profit because of the proximity of their claim to their market and because their situation as a going gravel and top-soil business helps to minimize production costs (Tr. 185-88). Accepting the Government's estimates of the quality and quantity of stone on the claim for purposes of argument, appellants presented testimony that

even with [the Government's estimated production costs] figure, even with their figure, there is such a profit potential left in marketing this [travertine] in this area that there's about two and half million in 44,000 tons or 48,000 tons. That's a fantastic profit potential in dirt work for the amount of effort that has to be put into it. Absolutely. Any dirt contractor will tell you that. Its -- it's just unbelievable that it has that potential profit. Of course, that's got to be drug out over a reasonable period of time. But there is a very, very large profit potential in any aspect of this, any way you run it as a prudent -- I know -- businessman and dirt man.

(Testimony of Sherman C. Smith, Tr. 183).

Concerning the value of the travertine on the claims said to be valuable for construction use as decorative building stone, appellant Sherman C. Smith further testified that:

I could get [building stone to Anchorage] for the same as any other thing in actual cost. I can load it out and transfer to Carlile and have them bring it up here, and I'll have approximately \$25 -- 22, \$25 a ton in it. But that's not a -- a saleable product; you've still got to process it.

(Tr. 197). There is no evidence before us that the stone has any greater value for building purposes than other building stone available in the

Alaska market, and in fact it is appellants' contention that it is the equivalent of other such stone (Tr. 195-96). As with the stone planned for processing into agricultural lime, appellants propose to sell limestone building material at a profit on the Alaska market in competition with imported materials by exploiting advantages derived from their location near the Anchorage market and economies of scale potential in their existing operation (Tr. 153-55).

[1] Judge McKenna concluded that the limestone on REC #2 was properly located under the 1872 Mining Law. He premised this finding on acceptance of a fact stipulation by the parties to the contest that some material on the claim was locatable, holding that

contestant does not dispute contestees' compliance with the applicable mining laws and regulations pertaining to staking, recording, and annual assessment work. \* \* \* At least some travertine mineral found on Rec [sic] #2 is locatable under the mining laws, for use as a soil amendment. [Citation omitted.]

(Decision at 3). This approach assumes too much and ignores obvious questions raised about the effect of the Common Varieties Act by the evidence produced at hearing. The stipulation on which Judge McKenna relied for his ruling was put into the record by counsel for the Forest Service as follows:

What we're going to stipulate to is there is at least some travertine that is of sufficient quality, sufficient carbonate content. I don't want to be stipulating that all of it is at a certain level of content. In fact, the evidence we'll present would show a variance [in carbonate.] So the stipulation would be that there is at least some travertine on this deposit that is of sufficient carbonate content to be located under the 1872 mining law.

(Tr. 7, 8).

While the effect of this agreement of fact is not entirely clear, if it is taken as a concession by the Government that the REC #2 stone was properly located under the 1872 Mining Law there is no foundation for the stipulation in the record before us. If, however, it is merely a concession that there is some high-grade carbonate content in the stone on the claim it is irrelevant. 2/ Whatever it is taken to mean, we find that the meaning

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2/ The phrase "of sufficient quality, sufficient carbonate content" may be a reference to United States v. Chas. Pfizer & Co., 76 I.D. 331 (1969), an assistant solicitor's opinion that found limestone used for manufacturing cement to be per se subject to location under the mining laws if it is "95 percent or more calcium and magnesium carbonates." Id. at 342. The Chas. Pfizer opinion relied primarily on analysis of tax cases to draw this bright line distinction at 95 percent of carbonate purity in defining locatable portland cement stone. Appellants do not propose to use any of the stone from REC #2 for cement manufacture.

of the statement is unclear; we are not bound by agreed statements that are ambiguous or contrary to law or established fact, and must look to the record before us to determine the issues before us, and therefore can give no such effect to this statement as did the fact finder. United States v. Clare Williamson, 45 IBLA 264, 87 I.D. 34 (1980); United States v. Henrietta Bunkowski, 5 IBLA 102, 79 I.D. 43 (1972). We find, therefore, that whatever effect was given to the stipulation by the parties at hearing, it cannot prevent our review of the record to determine whether the REC #2 stone was properly located under the mining laws. United States v. Bunkowski, 5 IBLA at 118, 79 I.D. at 50. Therefore, the effect of the Common Varieties Act on appellants' claim as it relates to location of limestone for production of agricultural lime will be first considered.

[2] Concerning whether there has been a "location" under the 1872 Mining Law, we observed in United States v. Bolinder, 28 IBLA 187, 83 I.D. 609 (1976) (a case where we found a special property in the manner of deposition of geodes), that:

Under the mining law, 'lands valuable for minerals' are reserved from sale, unless otherwise authorized by law. R.S. § 2318, 30 U.S.C. § 21 (1970). Lands in which 'valuable mineral deposits' are found may be occupied and purchased and such deposits are open to exploration and purchase. R.S. § 2319, 30 U.S.C. § 22 (1970). Interpretations of these two quoted phrases are the sources for determining the locatability of particular substances under the mining laws. Often, these interpretations have arisen in the context of a determination of the mineral character of the land. From such cases, the classic definitions of 'mineral' and 'locatability' have stemmed.

28 IBLA at 196, 83 I.D. at 613. 3/

To determine whether limestone is locatable, we must consider the effect of the Common Varieties Act, which provides pertinently that:

No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders \* \* \* shall be deemed a valuable deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located \* \* \*. "Common varieties" \* \* \* does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value.

30 U.S.C. § 611 (1982). 4/

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3/ For a discussion of the requirements of state and Federal law for a valid location, see Scott Burnham, 100 IBLA 94, 94 I.D. 429 (1987), aff'd, American Colloid Co. v. Hodel, No. C 88-224-K (D. Wyo. Dec. 22, 1988).

4/ The history of the evolution of the law leading to the Common Varieties Act is described at 1 Am. Law of Mining § 8.01[4][b][i] (2d ed. 1989), where

Limestone is stone and unless it possesses some property giving it distinct and special value for some purpose, it comes within the provisions of the Common Varieties Act and is not subject to location under the mining law. United States v. Foresyth, 100 IBLA 185, 94 I.D. 453 (1987); United States v. Foresyth, 15 IBLA 43 (1974); United States v. Lease, 6 IBLA 11 (1972). In McClarty v. Secretary of the Interior, 408 F.2d 907 (9th Cir. 1969), a standard was announced for

distinguishing between common varieties and uncommon varieties of building stone. These guidelines \* \* \* are (1) there 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.

Id. at 908. We have adopted this approach to decisionmaking in limestone cases arising under the 1955 Act. United States v. Foresyth, 100 IBLA at 246, 248, 94 I.D. at 485-87. 5/

So far as concerned the stone on REC #2 intended to be used to manufacture lime, it was agreed by the parties that there were two distinct deposits on the claim having an average carbonate content of 89.6 and 81.1-percent. There was testimony that this material would be obliged to compete with higher quality lime already available on the Anchorage market having 90-percent calcium carbonate content or more. Only about 250 tons of the REC #2 material could approach this quality.

Responding to this testimony, appellant Sherman C. Smith testified that he understood the law to be that "it's incumbent on me to preponderate on the evidence that I can produce an equivalent product and a saleable product from that material" (Tr. 166). Prior to introducing a sample of limestone said to be "96.26 including the magnesium carbonate" (Tr. 168), appellant Sherman C. Smith explained, quoting from a report in evidence, that "a lower purity of lime may be as cost-effective as a higher-purity source shipped from a distant point" (Tr. 154). He expanded on this point, stating that "a percentage of lime is important \* \* \*. However, in a local market, you can market a product of much different quality qualifications

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fn. 4 (continued)

it is observed that there were many years of vacillation about whether stone such as limestone should be considered subject to location. see also, Zimmerman v. Bruenson, 39 L.D. 310 (1910), overruled, Layman v. Ellis, 52 L.D. 714 (1929) (gravel and sand). 5/ But see United States v. Melluzzo, 76 I.D. 160, 167 (1969) and Chas. Pfizer, supra at 346.

because of the high cost of the distant source." *Id.* Consistent with this theory of their case, appellants plan to sell a coarser and lower grade of lime than is currently marketed, expecting to compensate for any deficiency in quality of stone by taking advantage of lower manufacturing and transportation costs that they expect to derive from the location of their existing business (Tr. 155-57). It is therefore their contention that the stone's value derives from its geographic location and appellants' ability to meet local needs.

The legislative history of the bill that became the Common Varieties Act deals directly with limestone. The House Report observes that the statutory definition of "common varieties" "would exclude materials such as limestone, gypsum, etc., commercially valuable because of 'distinct and special' properties." H.R. Rep. No. 730, 84th Cong., 1st Sess. 9 (1955). The Senate Report expanded on this reference, stating that the definition of "common varieties \* \* \* is intended to exclude from disposal under the Materials Act materials that are commercially valuable because of 'distinct and special' properties, such as, for example, limestone suitable for use in the production of cement, metallurgical or chemical-grade limestone, gypsum, and the like." S. Rep. No. 554, 84th Cong. 1st Sess. 8 (1955). This language became the foundation for the Departmental regulation implementing the Act, 43 CFR 3511.1(b) (1965). <sup>6/</sup>

The legislative history of the Common Varieties Act was analyzed in United States v. Kaycee Bentonite Corp., 64 IBLA 183, 89 I.D. 262 (1982) (a decision holding that a clay having special blending properties for industrial use possessed a property giving it distinct and special value within the meaning of the Act). There we observed that "Congress and this Department identified common variety minerals as those used primarily for building purposes and deriving their value from proximity to market." *Id.* 64 IBLA at 209, 89 I.D. at 276. We then quoted from the House Report on an early version of the legislation, for the proposition that

[t]he value of such materials is difficult to ascertain, moreover, since it depends so much on incidental factors like the proximity of the deposits to prospective consumers, local needs, and the like, rather than on any generally recognized value of the materials such as may be ascribed to valuable deposits of gold, coal, or similar materials.

*Id.* Concluding our review of the legislative history, we quoted Congressman Engle's explanation of how the bill would prevent future location of common varieties:

The reasons we have done that is because sand, stone, gravel, pumice, and pumicite are really building materials, and are not the type of material contemplated to be handled under the mining

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<sup>6/</sup> That regulation provided, pertinently, that "[l]imestone suitable for use in the production of cement, metallurgical or chemical-grade limestone, gypsum and the like are not "common varieties."

laws, and that is precisely where we have had so much abuse of the mining laws, because people can go out and file mining claims on sand, stone, gravel, pumice, and pumicite taking in recreational sites and even taking in valuable stands of commercial timber in the national forests and on the public domain.

Id. This legislative history is instructive in this case, for it describes the situation postulated by appellants, who argue that their proximity to market is of first importance to a showing that their stone is marketable at a profit. Their argument is therefore self-defeating, for, if correct, it tends to establish that their claim is invalid because the stone on it is a common variety.

[3] Appellants assume that ultimate profit is the test of the value of their claim. The Department, however, has never recognized marketability as the sole test of the validity of a mining claim of this nature. United States v. Matthey, 67 I.D. 63, 65 (1960). Whether the material on the REC #2 claim may be profitably removed and sold by appellants is not the issue they must confront. They must show that the material claimed can be located as a valuable mineral. To do so, because limestone is generally recognized to be a common variety of stone under the Common Varieties Act, they must show that it has unusual properties that take it out of the operation of the 1955 Act. That the stone can be located under the mining laws is not established by the fact that some high-grade stone is known to exist on the claim. There must be a showing that there is a property in the stone on the REC #2 that gives it distinct and special value for, in this instance, manufacturing lime. McClarty v. Secretary of the Interior, supra at 908. Appellants have not made such a showing. Their evidence tends to show that the claim is valuable because it is near Anchorage and because they are positioned in business to take advantage of that market. Consequently, we find that the stone located for the purpose of manufacturing lime was not properly located under the mining law.

[4] Concerning appellants' building stone claim, Judge McKenna found correctly that "common variety stone is not locatable as a valuable mineral deposit under the mining law" (Decision at 6). He stated that

contestees were unable to overcome the Government's prima facie showing that the travertine ore on the claim is not valuable for use as a decorative building stone. The Government made a prima facie case that the travertine is not locatable because it is common variety stone. Mr. Smith was the only witness to testify on contestees' behalf concerning the decorative stone issue. He presented no evidence of any unique property inherent in travertine as a raw mineral. His testimony focussed on the fact that his was the only travertine limestone in Southcentral Alaska, but he presented no rebuttal evidence concerning the lack of local demand for decorative stone. Mr. Smith admitted that he could not compete with or command a higher price than that paid for imported stone (Tr. 132). Although he had the opportunity to establish

that he could harness a greater profit by reducing costs, he presented no evidence on this point.

(Decision at 10). Judge McKenna then concluded that: "Even assuming arguendo that the travertine is locatable building stone, contestees have not preponderated on the prudent person/marketability tests. Therefore, I must conclude that contestees have failed to demonstrate that the travertine has an uncommon variety use as decorative building stone." Id.

The only evidence concerning the nature of the travertine said to be valuable for building material was supplied by the Government mineral examiner, who compared travertine from the claim to travertine sold on the market around Anchorage. He testified that the market for such material "is nil" (Tr. 121). He defined the Alaska market for building stone as a captive market, stating that "it's already been captured" and concluded that "there will be a decreased demand for travertine limestone" because of declining construction, and because travertine from the REC #2 "offers nothing--nothing new" (Tr. 122). It was his opinion, finally, that the REC #2 travertine "does not have any unique property. The Claimant has alleged coloration as being unique. The coloration isn't a unique property" (Tr. 123). Appellants made no challenge against this testimony at hearing.

As was true in the case of the stone to be used to make lime, therefore, the building stone on REC #2 cannot be said to have a property that gives it a distinct and special value for building. Although appellants argue that the building material found on the claim is valuable, and could ultimately be sold at a profit, these arguments are beside the point unless it be shown that the limestone has some property giving it distinct and special value that exempts it from the operation of 30 U.S.C. § 611 (1982). Although price may be a factor in a showing that stone has a special property that takes it out of the Common Varieties Act, a showing that the stone can be marketed at a profit does not, by itself, establish that such a property exists. Appellants have not offered evidence tending to show that REC #2 stone commands a special price in any market. We find therefore that the REC #2 claim did not contain travertine limestone having a distinct and special value for building so as to except it from the provisions of 30 U.S.C. § 611 (1982), and that the limestone was not subject to location under the mining laws. Because the claim was not properly located under the mining laws, the question of marketability decided by Judge McKenna is not reached.

[5] At the close of the Government case, appellants moved to dismiss the contest complaint on the ground that the Forest Service had failed to present a prima facie case of invalidity. Although appellants proceeded to put on their own case-in-chief when the motion to dismiss was denied, they urge on appeal that denial of their motion was error because it "was, and is, a good one" (Brief entitled "Marketability Test" filed July 26, 1989, at 4). 7/ Appellants argue that their travertine is comparable to

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7/ By presenting evidence in support of one's own position, a party moving to dismiss waives his motion to the extent that proof later introduced

"decorative stone in the Botanic Gardens right there in D.C." Id. at 2. It is appellants' contention that "[a]ll 'Evidence' of probative value submitted by the Contestant (USFS) and the Contestees clearly prove there is a profit potential for the numerous products available from REC #2" (Statement of Reasons (SOR), filed June 22, 1989, at 1). It is appellants' position that:

The "Proof" of the validity of REC #2 is simple. The public is paying a minimum of \$120 per ton for ag-lime in Alaska. A couple of the largest volume buyers are importing it wholesale and manage to get it here for about 100 per ton. The retail value is clearly shown by the copies of the receipts for recent purchases which we include.

Id. Appellants quote from Judge McKenna's decision for the proposition that "[t]he Mining Law of 1872 was passed to allow citizens of the United States to enter, explore, develop and eventually purchase public lands containing 'valuable mineral deposits'" (Brief, filed June 23, 1989, at 1). This quotation repeats the assertion at page 1 of their SOR that "[o]ur mining claim, REC #2, is a valid claim under the 1872 Mining Law, the 'Prudent Man Test,' and the 'Marketability' test." Finally, their assertions repeat and amplify the position they took at hearing, that the Common Varieties Act does not apply to their claim because they can show that a profit can be made from the deposit by sales on the Anchorage market.

To make a prima facie case of invalidity against the REC #2, the Forest Service was required, because limestone is a common variety, to show only that the limestone on the claim did not possess any intrinsic unique property. 30 U.S.C. § 611 (1982). The threshold issue here is whether REC #2 stone could be excepted from the Common Varieties Act, because the plain meaning of that statute is that common materials such as limestone are not locatable. The Act provides, pertinently, that "[n]o deposit of common varieties of \* \* \* stone \* \* \* shall be deemed a valuable mineral deposit within the meaning of the mining laws." Unless a claimant can bring his claim within the exception to the 1955 Act by showing that it possesses some "property giving it distinct and special value" he cannot locate a mining claim. 30 U.S.C. § 611 (1982).

The Forest Service put into evidence proof of the character of the REC #2 stone, compared it to other similar stone, and showed that it was without any special property to distinguish it from other travertine because, among other things, it was not worth more on the market for either purpose proposed by appellants. Evidence concerning value was not offered

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fn. 7 (continued)

may be used to determine validity. United States v. Clare Williamson, 45 IBLA 264, 87 I.D. 34 (1980); United States v. Pool, 78 IBLA 215 (1984). The additional evidence offered by appellants shows that the stone on REC #2 derives its value chiefly from local needs and proximity to market, tending to prove that it is a common variety stone not subject to location as a valuable mineral.

by the Forest Service to show that the REC #2 material was not marketable. It was offered to show that it was not of special quality, a condition that could be reflected in the price obtainable for the material. See United States v. Kaycee Bentonite Corp., *supra*; McClarty v. Secretary of the Interior, *supra*. Price is a factor in showing that a special quality is present in a material, although it is not the only means of proving special value. Evidence that the REC #2 stone had no special property or value was all that was required to establish, *prima facie*, a showing that the deposit could not be located under the mining law. United States v. Lease, *supra*. Consequently, the Forest Service proved, *prima facie*, that the REC #2 stone was not subject to location because it was a common variety.

[6] Appellants were allowed time after hearing to supplement the record by submitting exhibits not ready at the completion of the hearing on August 18, 1988 (Tr. 257-58). These exhibits were submitted. Nonetheless, after Judge McKenna issued his decision and appeal was taken therefrom, appellants continued to file exhibits with the Board, submitting altogether 26 additional exhibits not offered at hearing, including a videotape dated July 16 and 18, 1989. Counsel for the Forest Service has objected to this manner of proceeding, and has moved to exclude these documents from consideration, or to consider them only as argument, and not as proof of the matters contained in them.

Appellants seek oral argument before the Board, and also request a rehearing to permit them to present the evidence outlined in the exhibits now submitted. They contend that it was proper for them to continue to supplement the record as they have done, stating that:

Now that the Forest Service has its whole show on the record is the logical time for us to present our case. Why should Mr. Maynard be so afraid of another hearing in D.C. We've had time to locate some of the information reasonably necessary to go forward with an investment program and it does not agree with what had been put into the record by the Government. Is Mr. Maynard afraid to face the facts? So far we haven't even been able to get them to admit that screening once gives a finished, saleable product. They'd like to have you believe that we have to screen two or three times. Our movie was intended to show you how easily the screened product can be made. We took the screens and the raw product to Judge McKenna's hearing but he declined the opportunity to watch and understand. We trust you'll do better.

(Concluding Statement, filed Sept. 18, 1989, at 3).

The additional proofs submitted by appellants supplement the evidence they provided during and immediately after the 1988 hearing. While it is true that they have now provided a clearer cost analysis of their proposed operation and a more complete mining plan, they continue to assume that the limestone on REC #2 is subject to location under the 1872 Mining Law without showing that a property giving it distinct and special value entitles it to such treatment. Although appellants have now outlined in greater detail how

they plan to process and handle this material, they have not explained how or if the presence of some condition gives this travertine a unique property. The suggestion made on appeal that some of it is similar to land-scape stone used at the U.S. Botanic Gardens tends only to indicate that some of the material is a common limestone useful for landscaping.

Counsel for the Forest Service correctly contends that we may only consider the additional evidence now offered to bolster appellants' case as argument to determine whether another hearing should be held. United States v. Fisher, 115 IBLA 277 (1990); United States v. Gray, 50 IBLA 209 (1980). To support a rehearing, the newly offered evidence should tend to show that appellants have some likelihood of success, assuming that the offered evidence can be produced as promised. Id. There should also be some explanation for the reason why the late-offered evidence was not offered at the first hearing, since the exhibits offered on appeal generally pertain to market conditions and are similar to documents previously offered at hearing. Id. Except for the explanation quoted above, indicating that appellants consider all proceedings in this contest up to the present to be a sort of discovery proceeding to enable them to perfect their claim, there is nothing in the record or in the documents submitted with appellants' briefs to show that this evidence could not have been ready in time for the 1988 hearing in Anchorage. Accordingly, the requests for oral argument and rehearing are denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified by this decision, and the REC #2 claim is found to be null and void.

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Franklin D. Arness  
Administrative Judge

I concur:

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Gail M. Frazier  
Administrative Judge