

UNITED STATES

v.

CLARK COUNTY GRAVEL, ROCK AND CONCRETE COMPANY

A-31025

Decided MAR 27 1970**Mining Claims: Contests -- Rules of Practice: Government Contests**

A Government motion on an appeal to the Secretary by mining claimants to dismiss contest proceedings against two mining claims will be granted without prejudice and a Bureau order remanding those proceedings withdrawn where it appears that the evidence at a hearing did not specifically relate to the claims and there is no useful purpose at this time for such further proceedings.

Mining Claims: Common Varieties of Minerals: Generally

Sand and gravel useful only for purposes for which other common varieties of sand and gravel may be used and having no unique properties giving them special and distinct value for such purposes are common varieties no longer locatable under the act of July 23, 1955.

Mining Claims: Common Varieties of Minerals: Unique Property

The mere showing that volcanic rock on mining claims may be useful for filter rock in sewage treatment plants does not adequately establish that the rock is not a common variety of stone within the meaning of the act of July 23, 1955, where it appears that volcanic rock widely found in abundance may have desirable characteristics for filter rock and there is no detailed showing of any unique property in the rock within the claims giving it a special and distinct value for such purposes.

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

The marketability of common varieties of sand, gravel or stone must be shown as of the date of the act of July 23, 1955, in order to sustain mining claims located for such materials prior to that time. The test does not require a showing that materials have actually been sold at a profit as of that time, but that they could have been; however, in an area such as the Las Vegas Valley where there are vast quantities of sand and gravel, the lack of sales from mining claims raises a presumption that a prudent man could not market the materials from the claims and the presumption is not overcome by theoretical and hypothetical evidence as to there being a general market for such materials.

Mining Claims: Discovery: Marketability

The showing of some production and sales of sand and gravel from 1956 to 1960 on two adjoining claims no longer owned by the contestee is insufficient by itself to show that sand and gravel from large acreages of mining claims held by the contestee in an area of vast sand and gravel sources, some closer to the market areas than the contestee's claims, were marketable at a profit as of July 23, 1955, when such deposits were removed from location under the mining laws.



UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

A-31025

: Nevada Contest 3343, 061806,
: 061808, 064495

United States

: 39 placer mining claims
: declared null and void,
: case remanded as to 2 claims

v.

Clark County Gravel, Rock
and Concrete Company

: Affirmed as modified

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Clark County Gravel, Rock and Concrete Company has appealed to the Secretary of the Interior from a decision by the Chief, Office of Appeals and Hearings, Bureau of Land Management, dated June 20, 1968, which affirmed in part a hearing examiner's decision of October 3, 1966, holding 41 placer mining claims located in Las Vegas Valley, Clark County, Nevada, to be null and void on the ground that the sand and gravel for which the claims were located are common varieties within the meaning of section 3 of the act of July 23, 1955, 30 U.S.C. § 611 (1964), and there was no discovery of a valuable mineral deposit on the claims as shown by the lack of marketability of the materials as of the date of that act.

The decision of the Office of Appeals and Hearings also vacated the hearing examiner's decision as to Contest 061806, involving the Sands No. 129 claim, and Contest 061808, involving the Sands No. 131 claim, both of which are located in section 36, T. 23 S., R. 61 E., M.D.M., and remanded the case as to those two claims for further proceedings. The reason for this was that the contestant had submitted no evidence as to the invalidity of the claims.

The contestant has now filed a motion to dismiss Contests 061806 and 061808 on the ground that it was originally believed that the lands within the two claims, Sands Nos. 129 and 131, were included in lands which the Secretary of Interior was directed to convey to the City of Henderson, Nevada, by the act of July 22, 1963, 77 Stat. 88, but that they are not included therein, and that no useful purpose would be served at this time by further proceedings to contest the validity of these two claims.

We see no reason to question the motion and therefore grant it. The decision below is modified to the extent that the order of remand is set aside and these two contest proceedings are dismissed. This does not mean that future contest proceedings may not be instituted by the Bureau if desired.

Contest 3343 involves 4 mining claims, ABC Nos. 1-4, all located within section 17, T. 19 S., R. 60 E., M.D.M., and totalling 600 acres. 1/ Contest 064495 involves 35 mining claims, Sands Nos. 1-6, 51-66, 83-86, 111-117, and 120, located in sections 25, 35 and 36, T. 22 S., R. 61 E., M.D.M., and sections 19, 20, 21, 22, 23, 30 and 31, T. 22 S., R. 62 E., M.D.M., each for 160 acres and totalling 5600 acres in a solid block. All of the Sands claims involved in Contest 064495 are within the area to be sold to the City of Henderson under the act of July 22, 1963, supra, but the ABC group is not (Tr. 16, 17, 91). The ABC claims are situated about 12 miles northwest from the center of Las Vegas, Nevada, traversed by highway U.S. 95, as shown on Ex. G-11. The Sands claims lie about 12 miles south-easterly from Las Vegas, and from 1 to 8 miles west of Henderson, Nevada. See Ex. G-9. State Highway No. 41 traverses 8 of the claims, as shown by Ex. G-10.

1/ One of the Bureau's witnesses, Robert T. Webb, testified that the ABC claims cover the same land as other mining claims, the Kings Nos. 1, 2, 3 and 4 claims located on March 6, 1954, by different persons from those who located the ABC claims, and that separate contest proceedings were being instituted against those claims (Tr. 97, 98). A departmental decision, United States v. Harold H. Benson, A-31061 (September 4, 1969), has upheld a Bureau decision finding the King No. 1 and King No. 3 claims to be invalid for lack of a discovery of a valuable mineral deposit. The King No. 1 claim covered the NW $\frac{1}{4}$ and the King No. 3 the NE $\frac{1}{4}$ of section 17, corresponding, respectively, with the ABC No. 1 and ABC No. 2. A Bureau decision, United States v. Neil Stewart, et al., Nevada Contest 3341 (March 4, 1969), has affirmed a hearing examiner's decision declaring the King Nos. 2 and 4 placer mining claims to be null and void. An appeal to the Secretary from this decision is pending (A-31145). The King No. 2 claim embraces the SW $\frac{1}{4}$ and the King No. 4 embraces the NE $\frac{1}{4}$ SE $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$ of section 17, corresponding, respectively, with the ABC No. 3 and the ABC No. 4.

All of the claims were located during the month of June, 1955, 2/ prior to the act of July 23, 1955, which removed common varieties of sand, gravel, stone, pumice, pumicite and cinders from the category of valuable mineral deposits locatable under the mining laws. See United States v. Coleman, 390 U.S. 599 (1968). The decisions below found that the Government established a prima facie case that the materials within these claims are common varieties of sand and gravel occurring in wide abundance in the area and that there was not a valid discovery of a valuable mineral deposit prior to the 1955 act. They also found that the contestee had failed to overcome this showing by a preponderance of the evidence, either showing that the materials have some special or unique properties giving them a value beyond that of common varieties of such materials which would take them outside the operation of the 1955 act, or showing that the materials within the claims were marketable at a profit prior to the act, an essential for a valid discovery. The decisions below have discussed the evidence in detail and their findings as to the evidence are adopted. Further discussion of the evidence will be made only for emphasis and to answer appellant's contentions.

Appellant contends basically that the decision below is erroneous in finding that its evidence failed to overcome the prima facie case of the Government, in misinterpreting the prudent man test of Castle v. Womble, 19 L.D. 455 (1894), by requiring a showing that the material had in fact been removed and marketed "before sand and gravel became subject to the mineral leasing act", 3/ and in finding that the material on the claims is all "common variety" sand and gravel.

2/ The decisions below named the original locators of the claims. The appellant acquired the claims by quitclaim deed in 1956, and by agreement among the parties was substituted as the real party in interest and the contestee in this case, as the complaints had issued in the name of the original locators. References in this decision to the contestee or appellant may be understood as including also, where pertinent, the original locators.

3/ Appellant presumably means the act of July 23, 1955, supra, which removed common varieties of sand and gravel from location under the mining laws and authorized their sale; however, the Materials Act of 1947, 61 Stat. 681, had already authorized the sale of sand and gravel from public lands.

We shall consider first the issue as to whether any of the materials within the claims falls outside the category of common varieties of sand, gravel, stone, etc. within the meaning of the act of July 23, 1955. The evidence showed generally that there was sand and gravel on the claims which would be suitable for the normal uses of sand and gravel in the Las Vegas area, that is, for fill material, bituminous hot mix and concrete aggregate, although there was some disagreement as to its quality. Appellant does not contend that the sand and gravel within the claims have any unique properties giving them special value for such uses.

/ This leaves the issue of common varieties dependent upon whether the sand and gravel on the claims have some property giving them "special and distinct value" for some other use or whether there is any other material on the claims which can be said to be other than a common variety of sand, gravel, stone, etc. Appellant contends that its evidence shows that the "materials underlying many of the claims" have a special economic value for use as filter rock in sewage treatment plants. It contends further that the testimony of its witness, Simon Perliter, was uncontradicted that "filter rock materials had been moved for very long distances for plants in the Las Vegas area because the general run of material from gravel sources in the vicinity did not satisfy filter rock specifications."

It is not clear whether appellant is contending that the gravel on the claims which is suitable for bituminous mix and concrete aggregate is also suitable for use as filter rock. As indicated later, a principal requisite of filter rock is porosity, a factor which would appear to lessen the strength of a rock. The strength of concrete is dependent upon the strength of the rock that is put in it (Dep. 14); consequently it would seem that a rock which is desirable for making concrete would not be suitable as a filter rock and that the general run of gravel on appellant's claims which is suitable for concrete aggregate would not be suitable for filter rock. It would appear then that appellant is talking about another form of rock on the claims when it is referring to filter rock. However, it is not necessary to resolve this uncertainty in appellant's position in order to reach a proper decision in this case.

Let us analyze Perliter's testimony more carefully with respect to filter rock, noting first that it was a very minor portion of his testimony. Perliter's testimony was taken in a deposition

subsequent to the hearing in this case. He is a civil and sanitary consulting engineer having his base of operations in California, with a branch office in Las Vegas between 1953 and 1955 (Dep. 21, 22). He indicated that he looked over the Las Vegas area during that period of time and in designing a sewage treatment plant he was concerned about obtaining what is called "filter rock" used in the second stage of the treatment (Dep. 19). At first he thought the rock would have to be transported from Southern California at a price of \$14 a ton, but he found a cheaper source a half mile north of the Sands claims (Dep. 20-21, 38, 40). He stated that "certain of the materials available on the Sands claim" would be acceptable as filter rock (Dep. 20). As for other sources of filter rock in the Las Vegas area, the only source he saw other than the Sands group and the area a half mile north of Sands No. 1 was on the ABC claims, especially No. 3, which he stated has suitable rock although he would prefer a more angular rock for filter rock (Dep. 41). In some sewage plants the filter rock has to be replaced in about 20 years, and there had not been any replacements for the 3 plants in the Las Vegas Valley constructed in 1953-1955 (Dep. 42). He estimated that a plant for Clark County used 34,000 tons of the filter rock, and he could not guess as to the amount used in the two other plants (Dep. 42, 43). He did not know of any other substance that could be used in lieu of the filter rock (Dep. 39). He stated that filter rock "carries a very high specification and that is why it is not available in all areas" (Dep. 40). Perliter, however, did not say what the specifications for the filter rock are. He simply indicated that there are "special requirements, particularly in relation to abrasion and sulphate resistance" (Dep. 20), and it is important that there be "voids" (Dep. 39).

Testimony from another of contestee's witnesses, Ronald Hollberg, a consulting geologist, throws a little more light on the use of rock in sewage treatment plants. In reference to the basaltic rock which he saw on the Sands claims he stated:

"It is not easily destroyed or broken down and as you know a lava rock is porous somewhat like a sponge and it has been used successfully as a leaching rock in sewer treatment plants where the bacteria comes against the pores and accumulates in there and they are held there and that is a tremendous asset in these treatment plants.

It makes sense to a layman that the rock, the aggregate would stick together much easier if the cement or the material that is cementing one to the other could get a-hold inside these pores, more so than a well-rounded limestone or a dolomitic rock which is smooth.

So, I favor this area [the Sands claims] in that respect even over the ABC Claims which are somewhat better separated as to size." Tr. 173-174.

Hollberg's testimony suggests two main qualities for leaching or filter rock in sewage treatment plants - hardness and porosity - and perhaps indicates that the basaltic rock on the claims has these two qualities. He did not in fact say that the rock on the claims could be used as filter rock; this is no more than a possible implication from his testimony the whole of which (on filter rock) is quoted above. Hollberg did not suggest that only limited deposits of volcanic rock would have the two qualities mentioned or could be used for such purposes; instead, his testimony indicates that any volcanic rock which is hard and porous would be suitable. Nothing in Perliter's testimony suggests otherwise except his implication as to the high requirements and the suggestion that he thought he might have to get such rock from California.

Contrary to appellant's statement quoted previously, Perliter did not testify that "filter rock materials had been moved for very long distances for plants in the Las Vegas area because the general run of material from gravel sources in the vicinity did not satisfy filter rock specifications". Instead, he testified that he first thought the rock would have to be transported from Southern California at \$14 a ton but that he then found a cheaper source in the Las Vegas Valley. He did not state the price for this rock so the \$14 a ton price mentioned has no significance except as probably reflecting transportation costs from California. Perliter's testimony that he had not observed other material suitable for filter rock except on the Sands and ABC claims and an area north of Sands No. 1 must be weighed with his overall testimony which does not indicate that he made any thorough examination of the valley for such sources but examined the Sands and ABC claims for this purpose at the request of the contestee. It also must be weighed with Hollberg's testimony quoted above which seems to suggest that any of the basaltic lava rock could be used for filter rock, and with general testimony concerning the geological dissemination of volcanic rock in the area, e.g., one of the Bureau's witnesses testified that the southern fringes of the Las Vegas Valley are almost entirely intermediate volcanic materials (Tr. 116). The probable widespread dissemination of such materials can

be adduced from the fact that the materials are found on the Sands group of claims which lie approximately 12 miles southeasterly from the city of Las Vegas whereas the ABC claims are situated about 12 miles northwest from the city center and from testimony by contestee's witnesses and those of the Bureau to the effect that materials on the claims are similar in many respects to claims throughout the Las Vegas area. It appears that the volcanic rock is a common rock of great abundance in the Las Vegas area as well as in many other areas.

✓ To determine whether a material is an uncommon variety within the meaning of the 1955 act, it must be shown that there is some specific property of the material on the claims which is unique and gives it a special and distinct value above ordinary varieties of material. United States v. Frank and Wanita Melluzzo, 76 I.D. 160 (1969). Perliter did not testify as to the special requirements for filter rock except to say that there are high requirements, particularly as to abrasion and sulphate resistance, and that this is why it is not available in all areas. He did not discuss any unique property of the rocks within these claims which is not found in other rocks found in wide abundance. The evidence certainly does not establish that the volcanic rock within these claims has any unique property distinguishing it from other commonly available volcanic rock. The fact is that the 35 Sands claims cover 5600 acres in a solid block running over 6 miles in an east-west direction. Although Perliter did not examine 5 of the claims (Dep. 10) and did not testify as to what he found on each claim, the fact that filter rock may be found on 4800 acres (30 claims) in just one area in the Las Vegas Valley indicates that it is not of limited occurrence. The fact too is that the filter rock that was actually used in 1954 came not from the Sands claims but from an area one-half mile away from the claims, thus showing even more widespread occurrence.

✓ We must conclude that appellant failed to show by a preponderance of evidence that the materials on the claim are anything other than common varieties of sand, gravel or stone. In any event, even if we were to assume that rock suitable for use as filter rock is an uncommon variety of gravel or stone, the appellant has failed to show that it exists on each of the claims in issue. As we have already noted, Perliter did not examine 5 of the Sands claims at all and did not testify as to what he found on each of the remaining claims. He said only that "certain of the materials available on the Sands claim" would meet the requirements for filter rock (Dep. 20).

As for the ABC claims he indicated that only No. 3 had material suitable for filter rock (Dep. 41). Hollberg, the only other witness mentioning filter rock, spent only 6 hours examining both the Sands claims and the ABC claims. He examined only the Sands claims within a quarter of a mile from the highway, a maximum of 19 claims. (Tr. 181-184.) He too did not testify as to what he found on each claim. There was therefore a complete failure of evidence as to the existence of filter rock on any specific claim, except the ABC No. 3.

This leaves the issue of the validity of the claims dependent upon whether there was an adequate showing of marketability of the materials on the claims as of the date of the act. The marketability of materials demonstrates whether or not there has been a discovery of a valuable mineral deposit. That this is a proper and essential test which must be shown as of the date of the July 23, 1955, act has been confirmed in United States v. Coleman, supra; Palmer v. Dredge Corp., 398 F.2d 791 (9th Cir. 1968), cert. denied 393 U.S. 1066.

Appellant contends that its evidence established that the deposits were of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means "in a mining venture with a reasonable prospect of success." It states that the record shows that contestee deferred mining materials from the contested claims only because the contestee was able to supply its customers from adjoining claims. It then states that "the fact that a locator mines successfully from one of two adjoining claims is hardly evidence that he could [not(?)] have mined successfully from the other." Appellant contends that the Director has taken the position that the only way a locator of a sand and gravel claim can demonstrate discovery of a valuable mineral on his claim is to show that he in fact removed and marketed material before the 1955 act, and that this is a misinterpretation of the rule of Castle v. Womble, supra.

Support for the Bureau's apparent position that a showing of actual sales at a profit is necessary to sustain the contestee's burden of proof might be adduced from a decision by the United States District Court for the District of Nevada in Osborne v. Hammit, Civil No. 414, August 20, 1964. The court in that case made note of the fact that there are unlimited deposits of sand and gravel in Las Vegas Valley, encompassing 100,000 or more acres where the Bradford claims in that case were located. The court stated:

"the record discloses a situation where, if the Bradford Claims could be sustained on the hypothetical and speculative opinion evidence relied upon by the plaintiffs, each of the claims in the valley comprising over 100,000 acres might be separately validated on the same sort of theoretical evidence. The end

result would be that 100,000 acres of public lands would have been patented as valuable for mining, where it is evident and shown by the record that not more than one percent of the material might have been marketable in the reasonably foreseeable future.

* * * there is no reason why plaintiffs should not have commenced the removal and processing of the material in 1952 and continued the profitable enterprise through 1954, when the hearing was held. If they had done so, their claims would, perforce of law, have been sustained. Their failure to do so beclouds the reliability and evidentiary weight of the case presented by them.

We do not discount the value of opinion evidence from qualified witnesses in cases dealing with fairly unique deposits of locatable minerals. This case is different. Sand and gravel of the same general quality found in the Bradford Claims is readily available in thousands of adjoining acres. The burden of the proponent, plaintiffs here, is not simply to preponderate in the evidence produced, its burden is to produce a preponderance of credible evidence, and the trier of fact is not required to believe or to give weight to testimony which is inherently incredible. It is apparent from the evidence that if, in June 1962, owners of other claims near Las Vegas had commenced to produce and market sand and gravel from their properties, such action would have filled the theoretical void in the supply of the material to the Las Vegas market, rendering the Bradford Claims valueless. The plaintiffs failed to enter the race to supply the theoretical insufficiency of production of sand and gravel. If they had done so successfully, they would have satisfied the requirements of *Foster v. Seaton* (supra)[271 F.2d 836 (D.C. Cir. 1959)] by proving bona fides of development and present demand. Their failure so to act contradicts the speculative, hypothetical and theoretical testimony on which they rely." Osborne v. Hammit, slip copy, pages 15, 16.

This court decision makes it clear that the testimony of experts of a possible and theoretical market is not sufficient to sustain the burden of proof of discovery where there is an overwhelming source of supply as compared with the demand for the material as exists in Las Vegas Valley. However, the Department has not gone so far as to hold that it is absolutely essential to show actual profitable sales of materials to meet the test of marketability.

United States v. E. A. Barrows and Esther Barrows, 76 I.D. 299, 305 (1969). We have recognized the difficulty of proving marketability without showing any sales from claims and have held that such lack of sales or development of the claims may raise a presumption that the market value of the minerals on the claims is not sufficient to justify the expenditure required to extract and market them. United States v. Alfred N. Verrue, 75 I.D. 300 (1968); United States v. E. A. Barrows and Esther Barrows, *supra*. The fact here is that there have been no production and sales from the Sands claims either prior to July 23, 1955, or since. There was also no commercial development on the ABC claims prior to November 1963. For the most part the only evidence adduced by the contestee of marketability as of July 23, 1955, was the type of hypothetical and theoretical testimony of a general market found to be insufficient in Osborne v. Hammit.

The only more specific testimony submitted by the contestee with respect to the Sands claims pertained to development of the Sands Nos. 9 and 10 which lie directly east of the Sands No. 6, the easternmost of the claims in issue. These two claims are not involved in this proceeding and have been sold to the City of Henderson under a negotiated arrangement with the contestee (Tr. 227). The evidence concerning the mining operation from those two claims is not completely clear. However, taking the most favorable testimony for the contestee it appears that a sand and gravel plant was installed on those claims in February 1956 and operated for 4 years, producing approximately 500,000 yards of material used for concrete aggregate and in paving streets in Henderson (Tr. 234, 235). This was simply "really a rough estimate" by a witness and was not corroborated by any sales or production records. The record is not completely clear as to whether the plant was owned by contestee company or someone else (see Tr. 227 and 234) and who carried out the operation (Tr. 220). The only testimony concerning profit was a statement by the same witness that they made "quite a bit of money" (Tr. 238); however, there was no corroborating evidence showing costs and receipts so as to show how much, if any, profit was actually made.

Aside from the fact that the development on the Sands Nos. 9 and 10 claims did not commence until 7 months or more after the critical date of July 23, 1955, and therefore is of dubious value in showing marketability as of that date, the subsequent history of that development lessens even that value. Contestee's testimony was that after the 4 years of presumably profitable operations, the plant was moved to the northeastern part of the Las Vegas Valley where the operators had other claims from which they needed production. It was not until 1963

when it was planned to move the plant back to the Sands No. 6 to begin operations. This was never done. (Tr. 227-229, 235-236.) The fact that the plant was moved from the southern to the north-eastern part of the Las Vegas Valley instead of next door to the Sands No. 6 speaks volumes as to the lack of marketability of the materials from that claim in 1960 and as to lack of marketability 5 years earlier when the market was presumably smaller. A fortiori this would be true as to the other 34 Sands claims which lie farther west of Henderson than the Sands No. 6. There is simply no credible evidence that the material from all the Sands claims could have been marketed at a profit prior to July 23, 1955.

The real expectation of a market for the Sands claims is probably to be found in the testimony of a witness for the contestee that the claims were located because State Highway 41 was to be built traversing some of the claims and it was expected that the highway construction would furnish a market, as would the city of Henderson (Tr. 229-230, 237). However, prior to the location of these claims the State had located a materials site on two of the northernmost Sands claims which adjoined the highway location and all the highway material was obtained from that site (Tr. 237-238). Since the State could obtain its materials from this site free of charge, there was no reason why the contestee could expect to sell materials to the State for the highway and its failure to do so even from adjoining claims to the highway demonstrates this. The improved accessibility of the claims to Henderson apparently was a factor in the later sale of material from the Sands Nos. 9 and 10 claims; however, since the highway was not constructed until after July 23, 1955, this factor did not enhance the marketability of the materials from the claims until after the critical date.

As to the ABC claims, the record shows that some material was taken in 1950 from the ABC No. 2 by Clark County for an adjoining county road (Tr. 106-107, 119, 126) and that a larger amount was taken in 1952 from a materials site in the ABC No. 4 for use by the State in constructing U.S. 95 (Tr. 106, 121, 150-151). However, this fact does not indicate that the material on the claims was marketable at the time the claims were located on June 1, 1955, since the removals were prior to the time they were located and the free use of such materials by the county and State is not to be considered as manifesting their marketability. The first commercial production from the ABC claims after 1955 was from the No. 4 claim in November 1963 (Tr. 105). It clearly does not evidence marketability prior to July 23, 1955.

As for the filter rock, even if it be assumed that it is an uncommon variety subject to location after July 23, 1955, there is no credible evidence that it is marketable today. Contestee submitted no evidence that any more than the 3 sewage plants constructed in 1953-1955 had been built and Perliter stated that there had been no replacement of the filter rock in those plants since their construction. As to when replacement is necessary he said that he had seen "some" plants where replacement was necessary in 20 years. He agreed that "as time goes on" a necessity would arise for the construction of additional plants in Las Vegas. (Dep. 42, 44.) This is no more than evidence of a highly conjectural uncertain future market for some filter rock in the Las Vegas area and hardly establishes present marketability of any filter rock from any one or more of the claims in issue.

Thus, in considering the situation both as to the filter rock and sand and gravel in the Las Vegas valley area, we find that contestee's case for showing marketability rests only upon hypothetical and theoretical opinions as to the possibility of marketing these materials. It is clear that contestee failed to show any specific demand for these materials prior to July 23, 1955, or, in the case of filter rock, even today.

We conclude that contestee has failed to meet the burden of proof upon it to show by a preponderance of credible evidence that a valid discovery has been made on each or any of its claims.

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 as modified and Nevada contests 061806 and 061808 are dismissed without prejudice.



Ernest F. Hom
Assistant Solicitor
Land Appeals