CLARK COUNTY

v.

NEVADA PACIFIC COMPANY, INC.

172 IBLA 316 Decided September 27, 2007

United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

CLARK COUNTY

v.

NEVADA PACIFIC COMPANY, INC.

IBLA 2005-161 Decided September 27, 2007

Appeal from a decision issued by Administrative Law Judge Andrew S. Pearlstein in a private mining contest declaring the Community #3 unpatented placer mining claim in Clark County, Nevada, null and void. Private Mining Contest No. N-77632.

Affirmed.

1. Mining Claims: Discovery: Generally--Mining Claims: Generally

The contestant in a private mining contest has the burden of establishing its case by a preponderance of evidence without the burden shifting that takes place in a government contest. The standard for determining whether there has been a discovery of a valuable mineral deposit in a private mining contest is the same as that used in government contests, *i.e.*, the prudent man-marketability test.

2. Mining Claims: Discovery: Generally--Mining Claims: Determination of Validity--Mining Claims: Placer Claims--Mining Claims: Common Varieties of Minerals: Generally

To satisfy the requirement of discovery on a placer claim located for sand and gravel on or before July 23, 1955, it must be shown that the sand and gravel were exposed prior to that date and are of a quality acceptable for the work being done in the area, that the extent of the deposit is such that it would be profitable to extract it, and that there is a present demand for the sand and gravel.

3. Mining Claims: Discovery: Geologic Inference--Mining Claims: Determination of Validity--Mining Claims: Placer Claims--Mining Claims: Common Varieties of Minerals: Generally

Where expert testimony establishes that sand and gravel deposits in the region are highly variable, multiple exposures of sand and gravel are necessary to show that values on the claim are high and relatively consistent before geologic interference can be applied to determine the full extent of the deposit.

4. Mining Claims: Common Variety of Minerals: Generally--Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Discovery: Marketability--Rules of Practice: Evidence

Where the evidence demonstrates that the extent or quality of common variety sand and gravel within a mining claim was not established on or before July 23, 1955, the Administrative Law Judge did not err in finding it unnecessary to reach the issue of marketability, including the hypothetical market.

APPEARANCES: Gary L. Hayes, Esq., Henderson, Nevada, for the appellant-contestee, Nevada Pacific Company, Inc.; William R. Marsh, Esq., Sedalia, Colorado, Robert R. Marsh, Esq., Denver, Colorado, and Michael L. Foley, Esq., Las Vegas, Nevada, for appellee-contestant, Clark County, Nevada.

OPINION BY ADMINISTRATIVE JUDGE McDANIEL

Nevada Pacific Company, Inc. (Nevada Pacific), appeals from the decision issued on February 22, 2005, by Administrative Law Judge Andrew S. Pearlstein (2005 Decision) in a private mining contest initiated on September 15, 2003, by Clark County, Nevada, against Nevada Pacific's Community #3 sand and gravel placer claim located in the NE¼ sec. 2, T. 21 S., R. 62 E., Mount Diablo Meridian (M.D.M.), in the County. The County alleged, *inter alia*, that the owners of the claim had failed to perfect a discovery of a valuable mineral deposit on the claim on or prior to July 23, 1955, the date on which common varieties of sand and gravel were withdrawn from location under the mining laws. On February 22, 2005, after a 4-day hearing, Judge Pearlstein issued his decision, declaring the Community #3 claim null and void for lack of a discovery. 2005 Decision at 23. On appeal, Nevada Pacific urges that we reverse the 2005 Decision based on procedural and

substantive error. For the reasons discussed below, we affirm Judge Pearlstein's decision.

I. Background

A. Pre-Contest History of the Claim

The Community #3 mining claim is one of eight contiguous placer mining claims which were located on Federal lands in Clark County in 1946. 2005 Decision at 3. Jerome L. Block, also known as J. L. Block, acquired an undivided interest in the claim in 1962 and in 1971 transferred that interest to Nevada Pacific, which holds the sole interest in the claim today. *Id.* at 6. The only mineral resource within the Community #3 claim is sand and gravel, which the parties have stipulated is "common variety" for purposes of section 3 of the Multiple Use Mining Act of July 23, 1955, also known as the Common Varieties Act, 30 U.S.C. § 611 (2000). 2005 Decision at 3; Tr. at 386*; see also* Statement of Reasons (SOR) at 2. The quantity, quality, dates, and value of sand and gravel removed from the claim are in dispute. Order Denying Motion to Dismiss Complaint and Granting Motion to Dismiss Certain Allegations" (Pre-hearing Order), issued March 31, 2004, at 3.

The Common Varieties Act withdrew "common varieties" of minerals, including sand and gravel, from location under the mining laws as of that date. 30 U.S.C. § 611 (2000); *United States v. Coleman*, 390 U.S. 599, 604-05 (1968); *United States v. Thompson*, 168 IBLA 64, 68 n.4 (2006). For a claim to be valid under the Act, there must have been a discovery of a "common variety" mineral deposit on or prior to July 23, 1955, but if the discovery followed that date, the claim is invalid. A "discovery" for purposes of common variety minerals is determined by the prudent man test as refined by the marketability test. *See United States v. Aiken Builders Products*, 149 IBLA 267, 269 (1999). The "prudent man" element of the test asks whether a person of ordinary prudence would be justified in the further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine. *United States v. Aiken Builders Products*, 149 IBLA at 269, *citing Castle v. Womble*, 19 L.D. 455, 457 (1894). The marketability element of the test asks whether the mineral can be "extracted, removed and marketed at a profit." *U.S. v. Coleman*, 390 U.S. at 600 *quoting* and approving the marketability test articulated by the Secretary. The two elements of the test are not distinct standards, but complementary. *Id*. at 603. Only when both elements of the test have been satisfied is there a discovery. Thus, the ultimate issue in determining the validity of the Community #3 claim, and resolving this appeal, is whether there was a discovery meeting this test on the claim on or prior to July 23, 1955.

The Bureau of Land Management (BLM), initiated an earlier Government contest against the Community #3 claim in 1967, alleging no discovery on the claim

on or prior to July 23, 1955. In a decision issued on April 28, 1972, the hearing examiner determined that Block, the owner of the claim at the time, had not established that there was a local market for the sand and gravel on the claim on or prior to July 23, 1955, and declared the claim null and void. On appeal, we affirmed on the same grounds. *United States v. Block*, 12 IBLA 393, 400, 408-409 (1973). Block appealed to the Federal District Court for the District of Nevada, which granted summary judgment in favor of the Secretary for the same reason. *See* SOR, Ex. 4, J. L. *Block v. Andrus*, No. 75-2928 (9th Cir. Mar. 29, 1977) at 1. Block appealed to the Court of Appeals for the Ninth Circuit, which remanded the case to BLM for reconsideration in light of the "hypothetical market test" that it had recently announced in *Melluzzo v. Morton*, 534 F.2d 860 (9th Cir. 1976). *Id.* at 3. Upon remand, BLM did not pursue its contest, and Nevada Pacific retained possession of the claim.[1]

B. Clark County's Private Contest

Over the next 30 years, residential development in Clark County, which includes Las Vegas, grew around the Community #3 claim, and the claim is now adjacent to a residential subdivision and a school. 2005 Decision at 12. The County constructed a drainage channel near the Community #3 claim, including 2.86 acres along the western edge of the claim,[2] to mitigate flash floods that affect the Las Vegas valley. On July 12, 2002, Clark County served Nevada Pacific with a Notice of Intent to Condemn a total of 56.5 acres on the Community #3 claim, including the 2.86 acres. The County envisioned using the land to construct a detention basin for flood control. *Id.* Finally, Clark County filed an action in eminent domain against Nevada Pacific seeking an easement over the claim for flood control purposes. *Id.* at 13. On August 14, 2003, the Clark County District Court for the State of Nevada issued an Order of Possession that granted the County the right to use the drainage channel for flood control purposes pending the resolution of the eminent domain proceedings.[3] The condemnation action has not yet been resolved. *Id.*

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[1] Nevada Pacific filed a patent application for the claim in 1992. However, it withdrew its patent application in 1999 when BLM advised that it would contest the claim. 2005 Decision at 9-10.

[2] In 1995 BLM erroneously granted Clark County a right-of-way across the Community #3 claim to construct the drainage channel. Upon finding that the right-of-way crosses the Community #3 claim and is not subject to the multiple surface use limitations imposed by the Multiple Surface Use Act, 30 U.S.C. § 612 (2000), because it predates that Act, BLM rescinded the portion of the right-of-way that is located within and encumbers that claim. 2005 Decision at 12.

[3] In response to this order, BLM reissued the previously-issued right-of-way subject

(continued...)

Asserting an adverse interest in the claim based on its desire to use the land for flood control, pursuant to 43 C.F.R. § 4.450, on September 15, 2003, Clark County initiated this private contest to invalidate Nevada Pacific's interest and title in the mining claim.[4] The County contended, *inter alia*, that

> [n]o discovery of a valuable deposit of sand and gravel or of any other valuable mineral as required by 30 U.S.C. §§ 23, 35 was made on the Community #3 at any time before common varieties of sand and gravel were withdrawn from entry and appropriation under the mining laws through the enactment of 30 U.S.C. § 611 on July 23, 1955[.]

SOR, Ex. 1, Private Contest Complaint at ¶ 25(c). Clark County corroborated its complaint, pursuant to 43 C.F.R. § 4.450-4(c), with an affidavit provided by Dr. Richard V. Wyman, a professional geological engineer, and relied in part on the public record created by the Government contest BLM initiated against the Community #3 claim in 1967. Answer at 16.

Prior to the hearing, Nevada Pacific filed a Motion to Dismiss the contest on a variety of grounds, alleging that Clark County had failed to show an adverse interest in the Community #3 claim; that the factual allegations of the complaint are shown by BLM's records and thus could not be raised in a private mining contest; that the matter was not appropriate for an administrative forum due to pending litigation in Nevada District Court; and that the matter had previously been litigated in Federal court. Contestee's Motion to Dismiss Private Contest Complaint at 2. In ruling on the motion, Judge Pearlstein granted the motion as it related to the County's allegation that the mining claim was not properly recorded with BLM because it was shown by BLM's records, but denied the motion as to the remainder of Nevada Pacific's arguments. He ruled that "Clark County has met the requirements for bringing a private contest" and "[t]hus, the sole substantive issue remaining for hearing is whether Nevada Pacific has made a valid discovery of a valuable mineral on the claim under the applicable mining laws." Mar. 31, 2004, Pre-hearing Order at 1, 8-9.

At the hearing, Clark County called Brian L. Block and Loretta Block, who testified regarding operations at the Community #3 claim since the mid-1990s in their respective capacities as the corporate secretary of Nevada Pacific and the

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[3] (...continued)
to all valid and existing rights. 2005 Decision at 13.

[4] Under 43 C.F.R. § 4.450, any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land, or who seeks to acquire a preference right, may initiate a private contest to have the adverse claim of title or interest invalidated for any reason not shown by the records of BLM.

financial manager of the general contractor engaged by Nevada Pacific to run its operations. Tr. at 90, 207. The County next called its professional geological engineer, Wyman, who testified based on his six or seven field examinations at the site of the claim. *Id.* at 234. He explained the steps in discovering a mineral deposit that can be mined for a profit. *Id.* at 236-43. He stated that the quantity of the sand and gravel on a claim must be determined because it must be mined on a large scale due to its low unit value. *Id.* at 238. He further testified that the quantity depends in part on the thickness of the deposit, which cannot be determined visually by inspecting the surface because the thickness can vary "[f]rom a few inches to hundreds of feet" over a surface distance of one-half mile. "[T]he bedrock topography is irregular and it may be just below the surface or very deep." *Id.* at 239-43.[5] Thus, he concluded that, given the highly variable nature of sand and gravel deposits in the Las Vegas valley, "a systematic exploration that would cover all the dimensions of the particular property" would be required to determine the quality and quantity of the material present. *Id.* at 278; see also 239-40.

Focusing on the Community #3 claim, Wyman testified that an aerial photograph of the claim taken on October 27, 1955, showed that the only excavation work on the site was one small site covering about one-half of an acre in the southwest corner of the claim and totaling approximately 800 cubic yards.[6] Tr. at 282-85, 290-92 (testifying with regard to Clark County Hearing Ex. 15). Wyman testified that, given the variable nature of sand and gravel deposits within a claim this

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[5] Wyman explained that certain geologic occurrences, such as pediments and caliche, can significantly decrease the amount of sand and gravel available in a deposit and increase the cost of mining it. He further opined that pediments and caliche are impossible to predict without drilling or trenching. Tr. at 239-42, 276. Wyman described pediments as follows: "As the mountain face erodes, only the part that is above the surface will erode, the part below the surface doesn't. . . . so as you approach the mountain you find a terrace cut in it, a bench, which we call a pediment, bedrock surface close to the actual surface." *Id.* at 239. He described caliche as "a soil that has been cemented in place by ground water carrying soluble salts and cemented in place" that "can be very, very hard, sometimes harder than concrete." *Id.* at 275. "It makes it more difficult to mine because it's harder, or [takes] more physical effort to break it up," remove or crush it. *Id*. at 276-77. Wyman testified that the depth of bedrock underlying the Community #3 claim could impact the claim because it is located at the base of Frenchman Mountain. *Id.* at 239-40.

[6] This work was part of a larger excavation by the Clark County Road Department, which received the material free of charge. It crossed the boundary between the Community #3 claim and an adjacent claim, but by far the largest part of the excavation was on the adjacent claim. 2005 Decision at 7.

size, the isolated location of a one small excavation on one-half of an acre in the extreme southwest corner of the claim, and the lack of excavation or trenching on the remaining 159-1/2 acres, there was insufficient exploration data available to determine the quality and quantity of the mineral deposit. *Id.* at 282-84, 292-96. Clark County did not present evidence on marketability at the hearing and rested its case on the issue of lack of physical discovery, *i.e.*, the quality and quantity of the mineral deposit within the claim.

Next Nevada Pacific presented its defense, which included its witness Charles Bechler, a civil engineer, who testified that he had worked in Las Vegas since 1961 and had been involved in the creation of the aggregate mineral material standards currently in use in Clark County. Tr. at 398-99, 429. He gave his opinion that the Community #3 claim is accessible by a nearby road and that the material within the claim meets Clark County public works specifications. *Id.* at 409, 430. He also opined that a man working in sand and gravel operations in 1955 would have recognized the mineral value of the Community #3 area and made a claim. *Id.* at 444.

Nevada Pacific then called Gayle Aldred who testified that from 1952-1972 he worked at Ideal Asphalt & Paving Company, Inc. (Ideal Asphalt), a sand and gravel operation visible to the west of the Community #3 claim in the October 1955 aerial photograph.[7] *Id.* at 522-23, 545-46. Aldred stated that there had been a ready market for material from Ideal Asphalt's operations during the years he worked there, with the exception of a sharp slowdown that lasted about a year in the early 1960s. *Id.* at 526-33, 541. Next, Brian Block was called as a witness concerning operations on the Community #3 claim since the mid-1990s.

Finally, Dr. Alan Schlottmann, an economist, testified on behalf of Nevada Pacific regarding a market analysis he had performed to determine whether the sand and gravel market in Clark County on or before July 23, 1955, would have supported the entrance of an operator marketing mineral material from the Community #3 claim. Tr. at 661. He used three methods to analyze the market conditions. First, he examined the "basic facts that underlie this product," such as demand, as reflected by sales figures, which showed a "healthy market" for sand and gravel in Clark County, particularly in the years of 1953-54. *Id.* at 673, 680-82. Schlottmann stated that the 1953-54 sales figures were especially noteworthy because they showed growth in the Clark County sand and gravel market when the national economy was in "sharp recession." *Id.* at 681-82. Second, he looked at the recorded success rate for sand

[7] The transcript is unclear how far west, but a comparison of the one-half-mile-long side of the Community #3 claim in the aerial photograph indicates that it was approximately 1-1/2 miles away from Ideal Asphalt. Tr. at 545-46; *see also* Clark County Hearing Ex. 15.

and gravel companies that did enter the market during that time period. He found that two companies successfully entered the market and that no companies left the market for reasons that would indicate a softening of the market, although one was purchased in what he assumed to be a strategic acquisition by a competitor. *Id.* at 686-88. Finally, he used financial assumptions from various industry publications to create a hypothetical balance sheet for a sand and gravel operation on the Community #3 claim in 1955. *Id.* at 689-94. Although he cautioned that this method of hypothetical calculation is imprecise, he stated that by his calculations, including his conservative assumptions, such an enterprise would have been a profitable one. *Id.* Schlottmann concluded that the sand and gravel market in Clark County on or prior to July 23, 1955, was sufficiently strong to make a sand and gravel operation on the Community #3 claim "a viable operation," assuming "that a sufficient quantity of material was there to justify a mining operation [and that] . . . it was sufficient quality to meet the market test of minimum acceptable standards." *Id.* at 674, 754-58; *see also id.* at 694.

Judge Pearlstein determined that there had been no discovery on the Community #3 claim on or prior to July 23, 1955, because, regardless of potential marketability, the "evidence shows that nobody knew at that time whether common variety sand and gravel existed on the claim in sufficient quality and quantity for a prudent man to further expend his energies with a reasonable prospect of success in developing a valuable mine." 2005 Decision at 23. Because Judge Pearlstein found that Clark County had preponderated in showing that there was no established quality and quantity of the deposit in 1955, he reasoned that it was unnecessary to reach the issue of marketability, including hypothetical marketability, and made no determination on the issue. *Id.* at 22.

II. Arguments

On appeal, Nevada Pacific raises several arguments. First, it argues that the contest complaint, as corroborated, was deficient because it provided only "conclusory" statements with no supporting facts showing that there was no discovery on the claim on or prior to July 23, 1955. SOR at 6-14. Next, it argues that the County should be precluded from raising the issue of whether there was a discovery on July 23, 1955, because, according to Nevada Pacific, the prior Government contest of the same claim and the litigation it engendered conclusively determined that there was a discovery of sufficient quality and quantity of sand and gravel on the Community #3 claim prior to July 23, 1955, at least sufficient to satisfy the prudent man test. *Id.* at 15-17, 22-27. Nevada Pacific also argues that Judge Pearlstein erred by rejecting its argument that a pre-1955 discovery on the Community #3 claim can be established through geologic inference. *Id.* at 29-32. Finally, it argues that the 2005 Decision is in error because it fails to follow the instructions issued by the Ninth

Circuit when it remanded the Government contest against the Community #3 claim to consider the hypothetical market test. *Id.* at 17-19, 27-29.

III. Analysis

A. Sufficiency of the Complaint

Nevada Pacific argues that the complaint allegations, as corroborated, were conclusory and lacked supporting facts, and that, pursuant to 43 C.F.R. § 4.450-4(a)(4), (b) and (c), "Dr. Wyman should have been limited to testifying regarding the allegations raised in his Affidavit . . . ." SOR at 10. It contends that the conclusory nature of the allegations, as corroborated, failed to provide adequate notice for Nevada Pacific to prepare its defense. In his order denying Nevada Pacific's pre-hearing motion to dismiss, Judge Pearlstein ruled that the complaint was adequate to bring this private contest and ordered that "the sole substantive issue remaining for hearing is whether Nevada Pacific has made a valid discovery of a valuable mineral on the claim under the applicable mining laws." Pre-hearing Order at 8-9. Then, at the hearing the Judge allowed Wyman, Clark County's expert witness, along with Nevada Pacific's witnesses, including its two experts, to fully testify on the issue of whether a discovery was made on the claim.[8]

A party bringing a private contest must make a clear and concise statement of the facts underlying the contest. 43 C.F.R. § 450-4(a)(4). The complaint here alleges, *inter alia,* as follows:

> 17. The only known mineral material within the Community #3 that has a commercial use is sand and gravel . . . .
>
> 18. The sand and gravel within the Community #3 is a common variety of sand and gravel . . . .
>
> 19. No sand or gravel within the Community #3 was mined for commercial purposes at any time on or before July 23, 1955 . . . .

[8] Counsel for Nevada Pacific raised concerns at the start of the hearing about limiting the testimony to the issues alleged in the complaint as corroborated. He claims to have orally made a second motion to dismiss at the close of the government's case-in-chief. However, the transcript indicates that though he mentioned he might make a motion to dismiss, he did not state the grounds and, after a brief discussion with the Judge, chose not to make a motion. Tr. at 393-94.

> 20. The public land within the Community #3 is nonmineral in character.
>
> . . . .
>
> 25. (c) No discovery of a valuable deposit of sand and gravel or of any other valuable mineral as required by 30 U.S.C. §§ 23, 35 was made on the Community #3 at any time before common varieties of sand and gravel were withdrawn from entry and appropriation under the mining laws through the enactment of 30 U.S.C. § 611 on July 23, 1955[.]

SOR, Ex. 1, Private Contest Complaint at 2-3.

Nevada Pacific argues only that the issues raised in the complaint were not described in sufficient detail. We do not agree. Our cases have established that all that is required in a Government contest is a complaint that is sufficient to put the contestee on notice of the issues to be adjudicated. *See, e.g.*, *United States v. Mills*, 91 IBLA 370, 374 (1986); *United States v. Bolinder*, 28 IBLA 187, 200-201 (1976). The requirement that the contest complaint must contain a clear and concise statement of the facts underlying the contest is applicable to both Government and private mining contests. 43 C.F.R. § 450-4(a)(4); 43 C.F.R. § 451-2. The charges quoted above from Clark County's complaint are adequate to put Nevada Pacific on notice of the issues. Nevada Pacific was or should have been fully aware of Clark County's position as a result of the allegations in the complaint, as corroborated and as augmented by the public record created by the Government contest BLM initiated against the Community #3 claim in 1967. Thus, we see no reason to alter Judge Pearlstein's ruling on the sufficiency of the complaint or his allowance of testimony.

B. Issue Preclusion

The Government's 1967 contest provides an unusually rich procedural history for this private contest, but it does not, as Nevada Pacific suggests, preclude the issues raised in this contest. Nevada Pacific argues, based on the doctrines of "the law of the case" and collateral estoppel, that the administrative and judicial history of the 1967 Government contest "litigated and necessarily decided" the issue of whether a sufficient quality and quantity of material was found within the Community #3 claim as of July 23, 1955. SOR at 26-27. Thus, it argues that all that remained in question was the marketability of the claim.

We do not agree with Nevada Pacific that the prior Government contest has such a preclusive effect in the present contest. First, we must reject Nevada Pacific's argument that the prior administrative and judicial history of this claim has

established as the "law of the case" that as of July 23, 1955, material of sufficient quantity and quality were known to exist on the claim. No such determination was made. Nor is this private contest part of the same "case" as the Government contest, a necessary requirement for the application of the law of the case doctrine. *See Ellis v. United States*, 313 F.3d 636, 646 (1st Cir. 2002) (stating the "same case" requirement); *Delta Savings Bank v. United States*, 265 F.3d 1017, 1027 (9th Cir. 2001) (stating that the doctrine does not apply when the original case is voluntarily dismissed and then re-filed, because it is not the same case, even if the parties are only "technically" different). The Government abandoned the earlier contest following remand and Clark County filed a new contest.

Next, Nevada Pacific argues that Judge Pearlstein erred by considering more than the issue of hypothetical market. Nevada Pacific reasons that when the Ninth Circuit remanded the government contest to BLM with instructions to consider whether there was a "hypothetical market" for the sand and gravel on the Community #3 claim, the Court must have made a determination, which was binding on all future Government and private contests, that the physical elements of discovery—physical exposure and a demonstration of the quantity and quality of mineral material within the claim—had been met. Therefore, Nevada Pacific argues, if any new contest were to go forward against the Community #3 claim, the contestant would be collaterally estopped from litigating any issue other than the hypothetical market. SOR at 27.

Collateral estoppel, also known as issue preclusion, may apply in an administrative review context. *Muskingum Mining Co. v. Office of Surface Mining Reclamation and Enforcement*, 113 IBLA 352, 356-57 (1990). "Under collateral estoppel principles, once an *issue* is actually litigated and necessarily determined, that determination is conclusive in subsequent suits based on a different cause of action but involving a party or privy to the prior litigation." *Id.* at 357 *quoting* United States v. *ITT Rayonier, Inc.*, 627 F.2d 996, 1000 (9th Cir. 1980). Nevertheless, collateral estoppel does not apply in the case at hand. In order for an issue of fact litigated in a prior proceeding to have a collateral estoppel effect in a later proceeding, all of the following five elements must be present:

(1) there must be identity of the parties or their privies;
(2) there must be identity of issues;
(3) the parties must have had an adequate opportunity to litigate the issues in the previous proceeding;
(4) the issues to be estopped must have been actually litigated and determined in the prior proceeding; and
(5) the findings on the issues to be estopped must have been necessary to the administrative decision.

Id. quoting Pantex Towing Corp. v. Glidewell, 763 F.2d 1241, 1245 (11th Cir. 1985).

In its SOR Nevada Pacific addressed only the fourth element required for application of collateral estoppel, *i.e.*, that the prior contest "litigated and necessarily decided" that a sufficient quantity and quality of sand and gravel was known to exist on the claim on or before July 23, 1955. SOR at 26-27. We do not agree that the Ninth Circuit determined the merits of this issue. Rather, the Court expressly deferred ruling and remanded the case to allow the parties to more fully develop the record in accordance with a newly clarified legal standard.[9] Therefore, without addressing the other elements of the doctrine, in absence of this required fourth element, collateral estoppel does not apply.

C. Geologic Inference

[1] As the contestant in a private mining contest, Clark County has the burden of establishing its case by a preponderance of evidence without the burden shifting that takes place in a Government contest. *Wesley Laverne Edwards v. Paul Unruh*, 33 IBLA 277, 284E (1978)*; see California v. Doria Mining & Engineering Corp.*, 17 IBLA 380, 389 (1974); *Marvel Mining Co. v. Sinclair Oil & Gas Co.*, 75 I.D. 407, 423 (1968). But the standard for discovery in a private mining contest is the same as that in Government contests, *i.e.*, the prudent man-marketability test, defined above. *United States v. Edeline*, 39 IBLA 236, 239 (1979), *overruled in part on other grounds by United States v. Feezor (Feezor I)*, 74 IBLA 56, 90 I.D. 262 (1983).

At the hearing, Clark County's only claim was that there was not a discovery on the Community #3 claim on or prior to July 23, 1955. To support its allegation, the County focused solely on the information that was or could have been known about the extent and quality of the sand and gravel deposit on the Community #3 claim on or prior to July 23, 1955. Judge Pearlstein held that Clark County had preponderated on this issue by establishing that the "evidence shows that nobody knew at the time whether common variety sand and gravel existed on the claim in sufficient quality and quantity for a prudent man to further expend his energies with a reasonable prospect of success in developing a valuable mine." 2005 Decision at 23.

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[9] The Court stated:

> More importantly, the parties may have been laboring under the false impression that the determination would turn entirely on the issue of whether any material had actually been marketed. Thus, virtually all of the evidence goes to that issue. Fairness dictates that the case be remanded for further hearings and proceedings consistent with the views of this court in *Melluzo v. Morton*, *supra*.

SOR, Ex. 4, *J. L. Block v. Andrus*, No. 75-2928 (9th Cir. Mar. 29, 1977) at 3.

On appeal, Nevada Pacific argues that the prior Government contest established that the claim contained sufficient sand and gravel to be marketable [10] and that Judge Pearlstein erred in finding that there was no evidence of the physical exposures necessary to infer geologically that there was a marketable quantity and quality of sand and gravel on the claim in 1955.

It is well established that physical exposure of a valuable mineral is a necessary element of discovery. *Feezor I*, 74 IBLA at 85*; see Vanderbilt Gold Corp.*, 126 IBLA 72, 83 (1993). It is also well-established that discovery cannot be predicated on "(1) the exposure of . . . isolated bits of mineral on the surface of the claim, not connected with or[] leading to substantial values, (2) the finding of mere surface indications of mineral within the limits of the claim, (3) the discovery of valuable mineral deposits outside [the] claim, or (4) inferences from established geological facts relating to the claim." *United States v. E.K. Lehmann & Assocs. of Montana, Inc.,* 161 IBLA 40, 95 (2004) *quoting* 2 American Law of Mining 35-40 to 35-41*; see also United States v. Martinek*, 166 IBLA 347, 409 (2005).

Nevada Pacific correctly states that our cases have allowed the use of geologic inference to establish the extent of the deposit once there has been an exposure and a showing that the values are high and consistent. *See, e.g., United States v. Feezor (Feezor II)*, 130 IBLA 146, 190 (1994) ("Once an exposure of a mineral deposit within the limits of a mining claim has been shown to exist, and demonstrated values have been high and relatively consistent, geologic inference may be used to show continuity of values beyond the area of the physical exposure and establish that the exposed mineral deposit is 'valuable' within the meaning of the mining laws."); *see also Feezor I*, 74 IBLA at 78 (clarifying that under our case law "geologic inference, standing alone, is insufficient to establish the existence of a valuable mineral deposit where it is necessary to infer continuity of values at depth where such values have not yet been disclosed. In other words, while geologic inference is, in fact, applicable, isolated and erratic high values are simply incapable of giving rise to an inference that better values exist someplace on the claim.").

In this case, Nevada Pacific argues that the exposure in the southwest corner of the claim, in combination with Ideal Asphalt's nearby sand and gravel operations, should be sufficient, using geologic inference, to establish a valid discovery on the claim on or before July 23, 1955. However, Judge Pearlstein did not apply geologic inference in determining that the claim lacked a discovery. He pointed out that "[on] the Community #3, the only physical exposure of minerals prior to July 23, 1955 was the small excavation of approximately 800 cubic yards from about ½ acre in the southwest corner of the claim." 2005 Decision at 20. He relied upon Wyman's testimony (as corroborated by the other experts) that

[10] As noted, this matter is not precluded from adjudication by the prior contest.

> the character of sand and gravel deposits can vary significantly over short distances. Hence one could not infer the existence of marketable deposits of sand and gravel on the Community #[3] claim by reference to other claims in the vicinity. In addition, it would be necessary to conduct some systematic exploration and sampling of a claim of this size in order to determine the depth of sand and gravel deposits, the quality of the sand and gravel, its suitability for its projected uses, and the existence and depth of cemented caliche layers that could prevent mining or greatly increase the cost of mining. (Tr. 278, 292-296).

Id. at 18. He concluded that in the absence of any other physical exposure on the claim before 1955, geologic inference alone cannot suffice to extend the possible determination of mineral character from one isolated excavation to the remainder of the site, let alone any proof of discovery. *Id.* at 18-20.

[2] Our review of the Department's case law involving sand and gravel deposits supports Judge Pearlstein's reasoning. Sand and gravel deposits have long been considered a special case under the mining laws by the Department. In 1929 the Department first articulated the test for discovery of a sand and gravel deposit that we continue to use today. In *Layman v. Ellis*, 52 L.D. 714, 721 (1929), the Assistant Secretary held that sand and gravel deposits were locatable under the mining laws in effect at that time. In doing so, the Assistant Secretary held that sand and gravel deposits that can be "extracted, removed and marketed at a profit" are locatable. *Id.* This standard has been consistently applied and adopted by the Department. *See* Sol. Op., "Taking of Sand and Gravel from Public Lands for Federal Aid Highways," 54 I.D. 294, 296 (1933) (adopting the reasoning in *Layman v. Ellis* as the policy of the Department); Sol. Op., "Use of special criteria to determine the mineral character of mining claims located for sand and gravel," M-36295 (Aug. 1, 1955) (rejecting proposed special criteria for sand and gravel claims and reaffirming the *Layman v. Ellis* criteria).

In 1958, the Deputy Solicitor, deciding for the Secretary, had the opportunity to reconsider the *Layman v. Ellis* standard and again confirmed its application in *United States v. Foster (Foster)*, 65 I.D. 1 (1958), *aff'd sub nom. Foster v. Seaton*, 271 F.2d 836, 838 (D.C. Cir. 1959), a case which also arose in southern Nevada and involved facts closely analogous to those before us. That case involved a Government mining contest brought against two adjacent sand and gravel claims. The only exploration work established at the hearing was a 300-foot circular pit at a point common to the two claims, with no test holes drilled or samples taken elsewhere on the claims. *Id.* at 8-9. The Deputy Solicitor found that "[t]he evidence is conflicting whether the depth exposed [in the pit] is 4 feet or 6 feet and there is no evidence that the depth, whatever it may be, extends throughout the claims." *Id.* at 9. He

concluded that "there is no credible evidence of a discovery of gravel in commercial quantities." *Id.*

The Deputy Solicitor made this determination despite the presence of the 300-foot-wide pit on the claims and an acknowledgment that "sand and gravel exist in the Las Vegas area in unlimited quantities." *Id.* at 6. Although he did not specifically use the term "geologic inference," it is apparent that he considered the concept inappropriate in evaluating the sand and gravel deposit when there is lack of sufficient physical exposure, particularly when not all of the sand and gravel in the Las Vegas area is "fit for commercial use" because "most of it is of poor quality." *Id.* The Deputy Solicitor then clarified that the

> appellants appear to be under the impression that all that is necessary to validate sand and gravel claims is to see the sand and gravel on the public domain and to file a claim thereon. Such is not the case. Before such a claim has any validity it must be shown that the sand and gravel are of a quality acceptable for the type of work being done in the market area, that the extent of the deposit is such that it would be profitable to extract it and process it if that is necessary, and that there is a present demand for the sand and gravel.

Id. at 5. The Deputy Solicitor's opinion makes it clear that sand and gravel deposits are held to a standard in which multiple exposures are required to establish that the values are high and relatively consistent. He, like Judge Pearlstein, based his decision on expert testimony establishing the variable nature of sand and gravel deposits in the region.

The Deputy Solicitor's opinion in *Foster* was followed in *United States v. Henrickson*, 70 I.D. 212 (1963), a case in which claimants attempted, unsuccessfully, to establish discovery of a sand and gravel deposit based only on a discovery on an adjacent claim and the "casual observation" that there was sand and gravel on the contested claim. 70 I.D. at 216-17. In reversing the hearing examiner's decision declaring the claim valid, the Deputy Solicitor asserted the importance of the physical elements of discovery to establish that the deposit is of adequate quality and quantity, under the prudent man-marketability test: "Marketability alone will not suffice."
Id. at 217.

[3] Our review of almost a century of case law shows that the Department has required an extensive exposure standard to establish a sufficient quality and quantity of sand and gravel to constitute a discovery on a mining claim because expert testimony in the cases has consistently established that the nature of sand and gravel deposits is highly variable. In such circumstances multiple exposures of sand and gravel are required to establish that values on the claim are high and relatively

consistent before applying geologic inference to determine the full extent of the deposit.[11] Thus, Judge Pearlstein did not err in determining that the Community #3 claim was not supported by a discovery of a valuable sand and gravel deposit on or before July 23, 1955. Because expert testimony established the variable nature of sand and gravel deposits over relatively short distances in the Las Vegas valley, it would have been necessary to conduct more exploration than was shown in the October 1955 aerial photograph to establish that the sand and gravel on the Community #3 claim "are of a quality acceptable for the type of work being done in the market area," and "that the extent of the deposit is such that it would be profitable to extract it and process it if that is necessary." *See Foster*, 65 I.D. at 5. The record clearly demonstrates that the small excavation on one-half of an acre in one corner of the claim was insufficient to establish that there was a discovery of a valuable mineral deposit on the Community #3 claim, as of July 23, 1955.

D. Hypothetical Market Test

[4] Nevada Pacific also argues that the 2005 Decision is in error because it fails to follow the instructions issued by the Ninth Circuit when it remanded the Government contest against the Community #3 claim to consider the "hypothetical market test." SOR at 19-20, 27. Clark County did not present evidence on marketability at the private contest hearing and rested its case on the issue of lack of a physical discovery. Nevada Pacific offered the hypothetical market analysis of its economist, Schlottmann, who opined that the sand and gravel market in Clark County on or before July 23, 1955, was sufficiently strong to make a sand and gravel operation on the Community #3 claim "a viable operation," assuming "that a sufficient quantity of material was there to justify a mining operation" and that "it was sufficient quality to meet the market test of minimum acceptable standards." *Id.* at 674, 754-55. Judge Pearlstein stated that Schlottmann's testimony, "directed at trying to meet the elements of the *Melluzzo* hypothetical market test," was "a valiant and interesting endeavor." 2005 Decision at 22. Nevertheless, Judge Pearlstein found that

> Dr. Schlottmann's analysis was futile . . . [because] there is simply no factual basis for such an assumption, in the absence of any knowledge

[11] We note that in those cases where the exposure was limited, geologic inference was not applied, and in those cases where geologic inference was applied, the depth of the deposit was known. *Compare United States v. O'Callaghan*, 29 IBLA 333, 343 (1977), *United States v. Taylor*, 19 IBLA 9, 30 (1975), *United States v. Gibbs*, 13 IBLA 382, 385 (1973), *United States v. O'Callaghan*, 8 IBLA 324, 327 (1972), and *United States v. The Dredge Corp.*, 7 IBLA 136, 141 (1972) *with United States v. Isabell Construction Co.*, 4 IBLA 205, 208-209 (1971), and *United States v. Clear Gravel Enterprises, Inc.*, 2 IBLA 285, 291 (1971).

> at that time of the quantity and quality of aggregate material on the claim. While other aspects of Dr. Schlottmann's analysis could also be challenged, it is not necessary to do so since the fallacy of this assumption renders his entire analysis and all his conclusions circular and ineffective.

2005 Decision at 22. We agree with Judge Pearlstein that, lacking sufficient knowledge or evidence of the quality and quantity of the mineral deposit, there is no need to consider hypothetical markets. After a thorough examination of the record and pleadings in this case, we have determined that Judge Pearlstein's "findings and conclusions are supported by the record as a whole and are legally sound." *U.S. v. Knipe,* 170 IBLA 161, 168 (2006) *quoting U.S. v. Thompson*, 168 IBLA 63, 78 (2006). Because Clark County preponderated in showing that as of July 23, 1955, the extent or quality of common variety sand and gravel existing on the claim was not established and, therefore, that there was no discovery of a valuable mineral deposit on the Community #3 unpatented placer mining claim, Nevada Pacific has not shown error in Judge Pearlstein's decision.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

/s/
R. Bryan McDaniel
Administrative Judge

I concur:

/s/
Christina S. Kalavritinos
Administrative Judge