

UNITED STATES DEPARTMENT OF THE INTERIOR

Stewart L. Udall, Secretary

Frank J. Barry, Solicitor

**DECISIONS
OF THE
UNITED STATES
DEPARTMENT OF THE INTERIOR**

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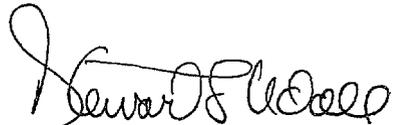
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PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1964, to December 31, 1964. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable Stewart L. Udall served as Secretary of the Interior during the period covered by this volume; Mr. James K. Carr served as Under Secretary; Messrs. Frank P. Briggs, John A. Carver, Kenneth Holum, and John M. Kelly served as Assistant Secretaries of the Interior; Mr. D. Otis Beasley served as Administrative Assistant Secretary; Mr. Frank J. Barry served as Solicitor of the Department of the Interior. Mr. Edward Weinberg served as Deputy Solicitor.

This volume will be cited within the Department of the Interior as "71 I.D."



Secretary of the Interior.

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ERRATA

Page 2—Line 9, delete the word *for* and add *was*.

Page 2—Paragraph 4, line 5—*existance* should read *existence*.

Page 10—Footnote 3, line 2—*Jack Carmen v. United States*, 143 Ct. Cl. 747 (1958) should read *Jack Carman*.

Page 147—United States *v. G. C. (Tom) Mulkern*, A-27746 (*January 19, 1962*), should read (*January 19, 1959*).

Page 289—Paragraph 5—8 point, line 18—43 *CFR, 1964 Supp. 3123.d(1)* should read 43 *CFR, 1964 Supp. 3123.2(d)(1)*.

Page 346—Footnote 14, line 5—32 Stat. 744 (1903) should read 32 Stat. 744 (1902).

Page 367—Footnote 3, line 3—*Anthony P. Miller, Inc. v. U.S. 111 St. Cl. 252, 330 (1948)* should read 111 *Ct. Cl. 252, 330 (1948)*.

Page 396—Footnote 3, line 6—*Robison, Transferee*, 48 L.D. 384, should read *Robinson, Transferee*, 48 L.D. 384.

Page 443—Paragraph 2, line 2—Irrigation District filed a Contest *Na 5740*, should read Contest *No. 5740*.

Page 447—Odd Page Nos. 449, 451, 453, 455 and 457, *U.S. v. E. V. Presentin and Devises of the H. A. Martin Estate*, should read *H. S. Martin Estate*.

Page 536—Line 13—Columbia Basin Project Act of Mar. 10, 1943 (47 *Stat. 14, 16*) should read (57 *Stat. 14, 16*).

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- Barlow, S. L. M. (5 L.D. 695); *contra*, 6 L.D. 648.
- Barnhurst v. State of Utah (30 L.D. 314); modified, 47 L.D. 359.
- Bartch v. Kennedy (3 L.D. 437); overruled, 6 L.D. 217.
- Beery v. Northern Pacific Ry. Co. et al. (41 L.D. 121); overruled, 43 L.D. 536.
- Bennet, Peter W. (6 L.D. 672); overruled, 29 L.D. 565.

¹ For abbreviations used in this title, see Editor's note at foot of page.

- Bernardini, Eugene J., *et al.* (62 I.D. 231); distinguished, 63 I.D. 102.
- Big Lark (48 L.D. 479); distinguished, 58 I.D. 680, 682.
- Bill Fufts, 61 I.D. 437 (1954); overruled, 69 I.D. 181.
- Birkholz, John (27 L.D. 59); overruled so far as in conflict, 43 L.D., 221.
- Birkland, Bertha M. (45 L.D. 104); overruled, 46 L.D. 110.
- Bivins *v.* Shelly (2 L.D. 282); modified 4 L.D. 583.
- *Black, L. C. (3 L.D. 101); overruled, 34 L.D. 606. (See 36 L.D. 14.)
- Blenkner *v.* Sloggy (2 L.D. 267); overruled, 6 L.D. 217.
- Boesch, Conrad William (41 L.D. 309); vacated, 42 L.D. 244.
- Bosch, Gottlieb (8 L.D. 45); overruled, 13 L.D. 42.
- Box *v.* Ulstein (3 L.D. 143); overruled, 6 L.D. 217.
- Boyle, William (38 L.D. 603); overruled so far as in conflict, 44 L.D. 331.
- Braasch, William C., and Christ C. Prange (48 L.D. 448); overruled so far as in conflict, 60 I.D. 417, 419.
- Bradford, J. L. (31 L.D. 132); overruled, 35 L.D. 399.
- Bradstreet *et al.* *v.* Rehm (21 L.D. 30); reversed, 21 L.D. 544.
- Brady *v.* Southern Pacific R.R. Co. (5 L.D. 407 and 658); overruled, 20 L.D. 259.
- Brandt, William W. (31 L.D. 277); overruled, 50 L.D. 161.
- Braucht *et al.* *v.* Northern Pacific Ry. Co. *et al.* (43 L.D. 536); modified, 44 L.D. 225.
- Brayton, Homer E. (31 L.D. 364); overruled so far as in conflict, 51 L.D. 305.
- Brick Pomeroy Mill Site (34 L.D. 320); overruled, 37 L.D. 674.
- *Brown, Joseph T. (21 L.D. 47); overruled so far as in conflict, 31 L.D. 222. (See 35 L.D. 399.)
- Brown *v.* Cagle (30 L.D. 8); vacated, 30 L.D. 148. (See 47 L.D. 406.)
- Browning, John W. (42 L.D. 1); overruled so far as in conflict, 43 L.D. 342.
- Bruns, Henry A. (15 L.D. 170); overruled so far as in conflict, 51 L.D. 454.
- Bundy *v.* Livingston (1 L.D. 152); overruled, 6 L.D. 284.
- Burdick, Charles W. (34 L.D. 345); modified, 42 L.D. 472.
- Burgess, Allen L. (24 L.D. 11); overruled so far as in conflict, 42 L.D. 321.
- Burkholder *v.* Skagen (4 L.D. 166); overruled; 9 L.D. 153.
- Burnham Chemical Co. *v.* United States Borax Co. *et al.* (54 I.D. 183); overruled in substance, 58 I.D. 426, 429.
- Burns, Frank (10 L.D. 365); overruled so far as in conflict, 51 L.D. 454.
- Burns *v.* Vergh's Heirs (37 L.D. 161); vacated, 51 L.D. 268.
- Buttery *v.* Sprout (2 L.D. 293); overruled, 5 L.D. 591.
- Cagle *v.* Mendenhall (20 L.D. 447); overruled, 23 L.D. 533.
- Cain *et al.* *v.* Addenda Mining Co. (24 L.D. 18); vacated, 29 L.D. 62.
- California and Oregon Land Co. (21 L.D. 344); overruled, 26 L.D. 453.
- California, State of (14 L.D. 253); vacated, 23 L.D. 230.
- California, State of (15 L.D. 10); overruled, 23 L.D. 423.
- California, State of (19 L.D. 585); vacated, 28 L.D. 57.
- California, State of (22 L.D. 428); overruled, 32 L.D. 34.
- California, State of (32 L.D. 346); vacated, 50 L.D. 628. (See 37 L.D. 499 and 46 L.D. 396.)
- California, State of (44 L.D. 118); overruled, 48 L.D. 98.
- California, State of (44 L.D. 468); overruled, 48 L.D. 98.
- California, State of *v.* Moccettini (19 L.D. 359); overruled, 31 L.D. 335.
- California, State of *v.* Pierce (9 C.L.O. 118); modified, 2 L.D. 854.
- California, State of *v.* Smith (5 L.D. 543); overruled, 18 L.D. 343.

- Call *v.* Swain (3 L.D. 46); overruled, 18 L.D. 373.
- Cameron Lode (13 L.D. 369); overruled so far as in conflict, 25 L.D. 518.
- Camplan *v.* Northern Pacific R.R. Co. (28 L.D. 118); overruled so far as in conflict, 29 L.D. 550.
- Case *v.* Church (17 L.D. 578); overruled, 26 L.D. 453.
- Case *v.* Kupferschmidt (30 L.D. 9); overruled so far as in conflict, 47 L.D. 406.
- Castello *v.* Bonnie (20 L.D. 311); overruled, 22 L.D. 174.
- Cate *v.* Northern Pacific Ry. Co. (41 L.D. 316); overruled so far as in conflict, 43 L.D. 60.
- Cawood *v.* Dumas (22 L.D. 585); vacated, 25 L.D. 526.
- Centerville Mining and Milling Co. (39 L.D. 80); no longer controlling, 48 L.D. 17.
- Central Pacific R.R. Co. (29 L.D. 589); modified, 48 L.D. 58.
- Central Pacific R.R. Co. *v.* Orr (2 L.D. 525); overruled, 11 L.D. 445.
- Chapman *v.* Willamette Valley and Cascade Mountain Wagon Road Co. (13 L.D. 61); overruled, 20 L.D. 259.
- Chappell *v.* Clark (27 L.D. 334); modified, 27 L.D. 532.
- Chicago Placer Mining Claim (34 L.D. 9); overruled, 42 L.D. 453.
- Childress *et al.* *v.* Smith (15 L.D. 89); overruled, 26 L.D. 453.
- Chittenden, Frank O., and Interstate Oil Corp. (50 L.D. 262); overruled so far as in conflict, 53 L.D. 228.
- Christofferson, Peter (3 L.D. 329); modified, 6 L.D. 284, 624.
- Clafin *v.* Thompson (28 L.D. 279); overruled, 29 L.D. 693.
- Claney *v.* Ragland (38 L.D. 550). (See 43 L.D. 485.)
- Clark, Yulu S. *et al.* (A-22852) February 20, 1941, unreported; overruled so far as in conflict, 59 I.D. 258, 260.
- Clarke, C. W. (32 L.D. 233); overruled so far as in conflict, 51 L.D. 51.
- Clayton, Phebus (48 L.D. 128) (1921); overruled to extent inconsistent, 70 I.D. 159.
- Cline *v.* Urban (29 L.D. 96); overruled, 46 L.D. 492.
- Clipper Mining Co. (22 L.D. 527); no longer followed in part, 67 I.D. 417.
- Cochran *v.* Dwyer (9 L.D. 478). (See 39 L.D. 162, 225.)
- Coffin, Edgar A. (33 L.D. 245); overruled so far as in conflict, 52 L.D. 153.
- Coffin, Mary E. (34 L.D. 564); overruled so far as in conflict, 51 L.D. 51.
- Colorado, State of (7 L.D. 490); overruled, 9 L.D. 408.
- Condict, W. C. *et al.* (A-23366) June 24, 1942, unreported; overruled so far as in conflict, 59 I.D. 258-260.
- Cook, Thomas C. (10 L.D. 324). (See 39 L.D. 162, 225.)
- Cooke *v.* Villa (17 L.D. 210); vacated, 19 L.D. 442.
- Cooper, John W. (15 L.D. 285); overruled, 25 L.D. 113.
- Copper Bullion and Morning Star Lode Mining Claims (35 L.D. 27). (See 39 L.D. 574.)
- Copper Gance Lode (29 L.D. 542); overruled so far as in conflict, 55 I.D. 348.
- Corlis *v.* Northern Pacific R.R. Co. (23 L.D. 265); vacated, 26 L.D. 652.
- Cornell *v.* Chilton (1 L.D. 153); overruled, 6 L.D. 483.
- Cowles *v.* Huff (24 L.D. 81); modified 28 L.D. 515.
- Cox, Allen H. (30 L.D. 90, 468); vacated, 31 L.D. 114.
- Crowston *v.* Seal (5 L.D. 213); overruled, 18 L.D. 586.
- Culligan *v.* State of Minnesota (34 L.D. 22); modified, 34 L.D. 151.
- Cunningham, John (32 L.D. 207); modified, 32 L.D. 456.
- Dailey Clay Products Co., The (48 L.D. 429, 431); overruled so far as in conflict, 50 L.D. 656.
- Dakota Central R.R. Co. *v.* Downey (8 L.D. 115); modified, 20 L.D. 131.
- Davis, Heirs of (40 L.D. 573); overruled, 46 L.D. 110.
- DeLong *v.* Clarke (41 L.D. 278); modified so far as in conflict, 45 L.D. 54.

- Dempsey, Charles H. (42 L.D. 215); modified, 43 L.D. 300.
- Denison and Willits. (11 C.L.O. 261); overruled so far as in conflict, 26 L.D. 122.
- Deseret Irrigation Co. *et al.* v. Sevier River Land and Water Co. (40 L.D. 463); overruled, 51 L.D. 27.
- Devoe, Lizzie A. (5 L.D. 4); modified, 5 L.D. 429.
- Dickey, Ella I. (22 L.D. 351); overruled, 32 L.D. 331.
- Dierks, Herbert (36 L.D. 367); overruled by the unreported case of Thomas J. Guigham, March 11, 1909.
- Dixon v. Dry Gulch Irrigation Co. (45 L.D. 4); overruled, 51 L.D. 27.
- Douglas and Other Lodes (34 L.D. 556); modified, 43 L.D. 128.
- Dowman v. Moss (19 L.D. 526); overruled, 25 L.D. 82.
- Dudymott v. Kansas Pacific R.R. Co. (5 C.L.O. 69); overruled so far as in conflict, 1 L.D. 345.
- Dunphy, Elijah M. (8 L.D. 102); overruled so far as in conflict, 36 L.D. 561.
- Dyche v. Beleele (24 L.D. 494); modified, 43 L.D. 56.
- Dysart, Francis J. (23 L.D. 282); modified, 25 L.D. 188.
- Easton, Francis E. (27 L.D. 600); overruled, 30 L.D. 355.
- East Tintic Consolidated Mining Co. (41 L.D. 255); vacated, 43 L.D. 80.
- *Elliot v. Ryan (7 L.D. 322); overruled, 8 L.D. 110. (See 9 L.D. 360.)
- El Paso Brick Co. (37 L.D. 155); overruled so far as in conflict, 40 L.D. 199.
- Elson, William C. (6 L.D. 797); overruled, 37 L.D. 330.
- Emblem v. Weed (16 L.D. 28); modified, 17 L.D. 220.
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- Erhardt, Finsans (36 L.D. 154); overruled, 38 L.D. 406.
- Esping v. Johnson (37 L.D. 709); overruled, 41 L.D. 289.
- Ewing v. Rickard (1 L.D. 146); overruled, 6 L.D. 483.
- Falconer v. Price (19 L.D. 167); overruled, 24 L.D. 264.
- Fargo No. 2 Lode Claims (37 L.D. 404); modified, 43 L.D. 128; overruled so far as in conflict, 55 L.D. 348.
- Farrill, John W. (13 L.D. 713); overruled so far as in conflict, 52 L.D. 473.
- Febes, James H. (37 L.D. 210); overruled, 43 L.D. 183.
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- Ferrell *et al.* v. Hoge *et al.* (18 L.D. 81); overruled, 25 L.D. 351.
- Fette v. Christiansen (29 L.D. 710); overruled, 34 L.D. 167.
- Field, William C. (1 L.D. 68); overruled so far as in conflict, 52 L.D. 473.
- Filtrol Company v. Brittan and Echert (51 L.D. 649); distinguished, 55 L.D. 605.
- Fish, Mary (10 L.D. 606); modified, 13 L.D. 511.
- Fisher v. Heirs of Rule (42 L.D. 62, 64); vacated, 43 L.D. 217.
- Fitch v. Sioux City and Pacific R.R. Co. (216 L. and R. 184); overruled, 17 L.D. 43.
- Fleming v. Bowe (13 L.D. 78); overruled, 23 L.D. 175.
- Florida, State of (17 L.D. 355); reversed, 19 L.D. 76.
- Florida, State of (47 L.D. 92, 93); overruled so far as in conflict, 51 L.D. 291.
- Florida Mesa Ditch Co. (14 L.D. 265); overruled, 27 L.D. 421.
- Florida Railway and Navigation Co. v. Miller (3 L.D. 324); modified, 6 L.D. 716; overruled, 9 L.D. 237.
- Forgeot, Margaret (7 L.D. 280); overruled, 10 L.D. 629.
- Fort Boise Hay Reservation (6 L.D. 16); overruled, 27 L.D. 505.
- Freeman, Flossie (40 L.D. 106); overruled, 41 L.D. 63.
- Freeman v. Texas and Pacific Ry. Co. (2 L.D. 550); overruled, 7 L.D. 18.
- Fry, Silas A. (45 L.D. 20); modified, 51 L.D. 581.

- Fuils, Bill; 61 I.D. 437 (1954); overruled, 69 I.D. 181.
- Gallihier, Maria (8 C.L.O. 137); overruled, 1 L.D. 57.
- Gallup *v.* Northern Pacific Ry. Co. (unpublished); overruled so far as in conflict, 47 L.D. 304.
- Gariss *v.* Borin (21 L.D. 542). (See 39 L.D. 162, 225.)
- Garrett, Joshua (7 C.L.O. 55); overruled, 5 L.D. 158.
- Garvey *v.* Tuiska (41 L.D. 510); modified, 43 L.D. 229.
- Gates *v.* California and Oregon R.R. Co. (5 C.L.O. 150); overruled, 1 L.D. 336.
- Gauger, Henry (10 L.D. 221); overruled, 24 L.D. 81.
- Gleason *v.* Pent (14 L.D. 375; 15 L.D. 286); vacated, 53 I.D. 447; overruled so far as in conflict, 59 I.D. 416, 422.
- Glassford, A. W. *et al.* 56 I.D. 88 (1937); overruled to extent inconsistent, 70 I.D. 159.
- Gohrman *v.* Ford (8 C.L.O. 6); overruled so far as in conflict, 4 L.D. 580.
- Golden Chief. "A" Placer Claim (35 L.D. 557); modified, 37 L.D. 250.
- Goldstein *v.* Juneau Townsite (23 L.D. 417); vacated, 31 L.D. 88.
- Goodale *v.* Olney (12 L.D. 324); distinguished, 55 I.D. 580.
- Gotebo Townsite *v.* Jones (35 L.D. 18); modified, 37 L.D. 560.
- Gowdy *v.* Connell (27 L.D. 56); vacated, 28 L.D. 240.
- Gowdy *v.* Gilbert (19 L.D. 17); overruled, 26 L.D. 453.
- Gowdy *et al. v.* Kismet Gold Mining Co. (22 L.D. 624); modified, 24 L.D. 191.
- Grampian Lode (1 L.D. 544); overruled, 25 L.D. 495.
- Gregg *et al. v.* State of Colorado (15 L.D. 151); modified, 30 L.D. 310.
- Grinnell *v.* Southern Pacific R.R. Co. (22 L.D. 438); vacated, 23 L.D. 489.
- *Ground Hog Lode *v.* Parole and Morning Star Lodes (8 L.D. 430); overruled, 34 L.D. 568. (See R.R. Rouseau, 47 L.D. 590.)
- Guidney, Alcide (8 C.L.O. 157); overruled, 40 L.D. 399.
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- Gwyn, James R. (A-26806) December 17, 1953, unreported; distinguished, 66 I.D. 275.
- Halvorson, Halvor K. (39 L.D. 456); overruled, 41 L.D. 505.
- Hansbrough, Henry C. (5 L.D. 155); overruled, 29 L.D. 59.
- Hardee, D. C. (7 L.D. 1); overruled so far as in conflict, 29 L.D. 698.
- Hardee *v.* United States (8 L.D. 391; 16 L.D. 499); overruled so far as in conflict, 29 L.D. 689.
- Hardin, James A. (10 L.D. 313); revoked, 14 L.D. 233.
- Harris, James G. (28 L.D. 90); overruled, 39 L.D. 93.
- Harrison, Luther (4 L.D. 179); overruled, 17 L.D. 216.
- Harrison, W. R. (19 L.D. 299); overruled, 33 L.D. 539.
- Hart *v.* Cox (42 L.D. 592); vacated, 260 U.S. 427. (See 49 L.D. 413.)
- Hastings and Dakota Ry. Co. *v.* Christenson *et al.* (22 L.D. 257); overruled, 28 L.D. 572.
- Hausman, Peter A. C. (37 L.D. 352); modified, 48 L.D. 629.
- Hayden *v.* Jamison (24 L.D. 403); vacated, 26 L.D. 373.
- Haynes *v.* Smith (50 L.D. 208); overruled so far as in conflict, 54 I.D. 150.
- Hellman *v.* Syverson (15 L.D. 184); overruled, 23 L.D. 119.
- Heinzman *et al. v.* Letrodec's Heirs *et al.* (28 L.D. 497); overruled, 38 L.D. 253.
- Heirs of Davis (40 L.D. 573); overruled, 46 L.D. 110.
- Heirs of Philip Mulnix (33 L.D. 331); overruled, 43 L.D. 532.
- *Heirs of Stevenson *v.* Cunningham (32 L.D. 650); overruled so far as in conflict, 41 L.D. 119. (See 43 L.D. 196.)

- Heirs of Talkington *v.* Hempfing (2 L.D. 46); overruled, 14 L.D. 200.
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- Helmer, Inkerman (34 L.D. 341); modified, 42 L.D. 472.
- Helphrey *v.* Coil (49 L.D. 624); overruled, Dennis *v.* Jean (A-20899), July 24, 1937, unreported.
- Henderson, John W. (40 L.D. 518); vacated, 43 L.D. 106. (See 44 L.D. 112 and 49 L.D. 484.)
- Hennig, Nellie J. (38 L.D. 443, 445); recalled and vacated, 39 L.D. 211.
- Hensel, Ohmer V. (45 L.D. 557); distinguished, 66 L.D. 275.
- Henry D. Mikesell, A-24112 (Mar. 11, 1946); *rehearing denied* (June 20, 1946), overruled to extent inconsistent, 70 L.D. 149.
- Herman *v.* Chase *et al.* (37 L.D. 590); overruled, 43 L.D. 246.
- Herrick, Wallace H. (24 L.D. 23); overruled, 25 L.D. 113.
- Hess, Hoy, Assignee (46 L.D. 421); overruled, 51 L.D. 287.
- Hickey, M. A., *et al.* (3 L.D. 83); modified, 5 L.D. 256.
- Hildreth, Henry (45 L.D. 464); vacated, 46 L.D. 17.
- Hindman, Ada I. (42 L.D. 327); vacated in part, 43 L.D. 191.
- Hoglund, Svan (42 L.D. 405); vacated, 43 L.D. 538.
- Holden, Thomas A. (16 L.D. 493); overruled, 29 L.D. 166.
- Holland, G. W. (6 L.D. 20); overruled, 6 L.D. 639; 12 L.D. 436.
- Holland, William C. (M-27696), decided April 26, 1934; overruled in part, 55 L.D. 221.
- Hollensteiner, Walter (38 L.D. 319); overruled, 47 L.D. 260.
- Holman *v.* Central Montana Mines Co. (34 L.D. 568); overruled so far as in conflict, 47 L.D. 590.
- Hon *v.* Martinas (41 L.D. 119); modified, 43 L.D. 197.
- Hooper, Henry (6 L.D. 624); modified, 9 L.D. 86, 284.
- Howard, Thomas (3 L.D. 409). (See 39 L.D. 162, 225.)
- Howard *v.* Northern Pacific R.R. Co. (23 L.D. 6); overruled, 28 L.D. 126.
- Howell, John H. (24 L.D. 35); overruled, 28 L.D. 204.
- Howell, L. C. (39 L.D. 92). (See 39 L.D. 411.)
- Hoy, Assignee of Hess (46 L.D. 421); overruled, 51 L.D. 287.
- Hughes *v.* Greathead (43 L.D. 497); overruled, 49 L.D. 413. (See 260 U.S. 427.)
- Hull *et al. v.* Ingle (24 L.D. 214); overruled, 30 L.D. 258.
- Huls, Clara (9 L.D. 401); modified, 21 L.D. 377.
- Humble Oil & Refining Co. (64 L.D. 5); distinguished, 65 L.D. 316.
- Hunter, Charles H. (60 L.D. 395); distinguished, 63 L.D. 65.
- Hurley, Bertha C. (TA-66 (Ir.)), March 21, 1952, unreported; overruled, 62 L.D. 12.
- Hyde, F. A. (27 L.D. 472); vacated, 28 L.D. 284.
- Hyde, F. A. *et al.* (40 L.D. 284); overruled, 43 L.D. 381.
- Hyde *et al. v.* Warren *et al.* (14 L.D. 576; 15 L.D. 415). (See 19 L.D. 64.)
- Ingram, John D. (37 L.D. 475). (See 43 L.D. 544.)
- Inman, *v.* Northern Pacific R.R. Co. (24 L.D. 318); overruled, 28 L.D. 95.
- Interstate Oil Corp. and Frank O. Chittenden (50 L.D. 262); overruled so far as in conflict, 53 L.D. 228.
- Instructions (32 L.D. 604); overruled so far as in conflict, 50 L.D. 628; 53 L.D. 365; Lillian M. Peterson *et al.* (A-20411), August 5, 1937, unreported. (See 59 L.D. 282, 286.)
- Instructions (51 L.D. 51); overruled so far as in conflict, 54 L.D. 36.
- Iowa Railroad Land Co. (23 L.D. 79; 24 L.D. 125); vacated, 29 L.D. 79.
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- Jackson Oil Co. *v.* Southern Pacific Ry. Co. (40 L.D. 528); overruled, 42 L.D. 317.

- Johnson *v.* South Dakota (17 L.D. 411); overruled so far as in conflict, 41 L.D. 22.
- Jones, James A. (3 L.D. 176); overruled, 8 L.D. 448.
- Jones *v.* Kennett (6 L.D. 688); overruled, 14 L.D. 429.
- Kackmann, Peter (1 L.D. 86); overruled, 16 L.D. 464.
- Kanawha Oil and Gas Co., Assignee (50 L.D. 639); overruled so far as in conflict, 54 I.D. 371.
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- Kinney, E. C. (44 L.D. 580); overruled so far as in conflict, 53 I.D. 228.
- Kinsinger *v.* Peck (11 L.D. 202). (See 39 L.D. 162, 225.)
- Kiser *v.* Keech (7 L.D. 25); overruled, 23 L.D. 119.
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- Knight *v.* Heirs of Knight (39 L.D. 362, 491; 40 L.D. 461); overruled, 43 L.D. 242.
- Kniskern *v.* Hastings and Dakota R.R. Co. (6 C.L.O. 50); overruled, 1 L.D. 362.
- Kolberg, Peter F. (37 L.D. 453); overruled, 43 L.D. 181.
- Krigbaum, James T. (12 L.D. 617); overruled, 26 L.D. 448.
- Krushnic, Emil L. (52 L.D. 282, 295); vacated, 53 I.D. 42, 45. (See 280 U.S. 306.)
- Lackawanna Placer Claim (36 L.D. 36); overruled, 37 L.D. 715.
- La Follette, Harvey M. (26 L.D. 453); overruled so far as in conflict, 59 I.D. 416, 422.
- Lamb *v.* Ullery (10 L.D. 528); overruled, 32 L.D. 331.
- Largent, Edward B., *et al.* (13 L.D. 397); overruled so far as in conflict, 42 L.D. 321.
- Larson, Syvert (40 L.D. 69); overruled, 43 L.D. 242.
- Lasselle *v.* Missouri, Kansas and Texas Ry. Co. (3 C.L.O. 10); overruled, 14 L.D. 278.
- Las Vegas Grant (13 L.D. 646; 15 L.D. 58); revoked, 27 L.D. 683.
- Laughlin, Allen (31 L.D. 256); overruled, 41 L.D. 361.
- Laughlin *v.* Martin (18 L.D. 112); modified, 21 L.D. 40.
- Law *v.* State of Utah (29 L.D. 623); overruled, 47 L.D. 359.
- Lemmons, Lawson H. (19 L.D. 37); overruled, 26 L.D. 398.
- Leonard, Sarah (1 L.D. 41); overruled, 16 L.D. 464.
- Lindberg, Anna C. (3 L.D. 95); modified, 4 L.D. 299.
- Linderman *v.* Wait (6 L.D. 689); overruled, 13 L.D. 459.
- *Linhart *v.* Santa Fe Pacific R.R. Co. (36 L.D. 41); overruled, 41 L.D. 284. (See 43 L.D. 536.)
- Little Pet Lode (4 L.D. 17); overruled, 25 L.D. 550.
- Lock Lode (6 L.D. 105); overruled so far as in conflict, 26 L.D. 123.
- Lockwood, Francis A. (20 L.D. 361); modified, 21 L.D. 200.
- Lonergran *v.* Shockley (33 L.D. 238); overruled so far as in conflict, 34 L.D. 314; 36 L.D. 199.
- Louisiana, State of (8 L.D. 126); modified, 9 L.D. 157.
- Louisiana, State of (24 L.D. 231); vacated, 26 L.D. 5.
- Louisiana, State of (47 L.D. 366); overruled so far as in conflict, 51 L.D. 291.
- Louisiana, State of (48 L.D. 201); overruled so far as in conflict, 51 L.D. 291.
- Lucy B. Hussey Lode (5 L.D. 93); overruled, 25 L.D. 495.
- Luse, Jeanette L., *et al.* (61 I.D. 103) distinguished by Richfield Oil Corp. 71 I.D. 243.

- Luton, James W. (34 L.D. 468); overruled so far as in conflict, 35 L.D. 102.
- Lyman, Mary O. (24 L.D. 493); overruled so far as in conflict, 43 L.D. 221.
- Lynch, Patrick (7 L.D. 33); overruled so far as in conflict, 13 L.D. 713.
- Madigan, Thomas (8 L.D. 188); overruled, 27 L.D. 448.
- Maginnis, Charles P. (31 L.D. 222); overruled, 35 L.D. 399.
- Maginnis, John S. (32 L.D. 14); modified, 42 L.D. 472.
- Maher, John M. (34 L.D. 342); modified, 42 L.D. 472.
- Mahoney, Timothy (41 L.D. 129); overruled, 42 L.D. 313.
- Makela, Charles (46 L.D. 509); extended, 49 L.D. 244.
- Makemson v. Snider's Heirs (22 L.D. 511); overruled, 32 L.D. 650.
- Malone Land and Water Co. (41 L.D. 138); overruled in part, 43 L.D. 110.
- Maney, John J. (35 L.D. 250); modified, 48 L.D. 153.
- Maple, Frank (37 L.D. 107); overruled, 43 L.D. 181.
- Martin v. Patrick (41 L.D. 284); overruled, 43 L.D. 536.
- Mason v. Cromwell (24 L.D. 248); vacated, 26 L.D. 369.
- Masten, E. C. (22 L.D. 337); overruled, 25 L.D. 111.
- Mather *et al.* v. Hackley's Heirs (15 L.D. 487); vacated, 19 L.D. 48.
- Maughan, George W. (1 L.D. 25); overruled, 7 L.D. 94.
- Maxwell and Sangre de Cristo Land Grants (46 L.D. 301); modified, 48 L.D. 88.
- McBride v. Secretary of the Interior (8 C.L.O. 10); modified, 52 L.D. 33.
- McCalla v. Acker (29 L.D. 203); vacated, 30 L.D. 277.
- McCord, W. E. (23 L.D. 137); overruled to extent of any possible inconsistency, 56 I.D. 73.
- McCornick, William S. (41 L.D. 661, 666); vacated, 43 L.D. 429.
- *McCraney v. Heirs of Hayes (33 L.D. 21); overruled so far as in conflict 41 L.D. 119. (See 43 L.D. 196.)
- McDonald, Roy (34 L.D. 21); overruled, 37 L.D. 285.
- *McDonogh School Fund (11 L.D. 378); overruled, 30 L.D. 616. (See 35 L.D. 399.)
- McFadden *et al.* v. Mountain View Mining and Milling Co. (26 L.D. 530); vacated, 27 L.D. 358.
- McGee, Edward D. (17 L.D. 285); overruled, 29 L.D. 166.
- McGrann, Owen (5 L.D. 10); overruled, 24 L.D. 502.
- McGregor, Carl (37 L.D. 693); overruled, 38 L.D. 148.
- McHarry v. Stewart (9 L.D. 344); criticized and distinguished, 56 I.D. 340.
- McKernan v. Bailey (16 L.D. 368); overruled, 17 L.D. 494.
- *McKittrick Oil Co. v. Southern Pacific R.R. Co. (37 L.D. 243); overruled so far as in conflict, 40 L.D. 528. (See 42 L.D. 317.)
- McMicken, Herbert, *et al.* (10 L.D. 97; 11 L.D. 96); distinguished, 58 I.D. 257, 260.
- McNamara *et al.* v. State of California (17 L.D. 296); overruled, 22 L.D. 666.
- McPeck v. Sullivan *et al.* (25 L.D. 281); overruled, 36 L.D. 26.
- *Mee v. Hughart *et al.* (23 L.D. 455); vacated, 28 L.D. 209. In effect reinstated, 44 L.D. 414, 487; 46 L.D. 434; 48 L.D. 195, 346, 348; 49 L.D. 660.
- *Meeboer v. Heirs of Schut (35 L.D. 335); overruled so far as in conflict, 41 L.D. 119. (See 43 L.D. 196.)
- Mercer v. Buford Townsite (35 L.D. 119); overruled, 35 L.D. 649.
- Meyer, Peter (6 L.D. 639); modified, 12 L.D. 436.
- Meyer v. Brown (15 L.D. 307). (See 39 L.D. 162, 225.)
- Midland Oilfields Co. (50 L.D. 620); overruled so far as in conflict, 54 I.D. 371.
- Mikesell, Henry D. A-24112 (Mar. 11, 1946); *rehearing denied* (June 20, 1946), overruled to extent inconsistent, 70 I.D. 149.
- Miller, D. (60 I.D. 161); overruled in part, 62 I.D. 210.

- Miller, Edwin J. (35 L.D. 411); overruled, 43 L.D. 181.
- Miller *v.* Sebastian (19 L.D. 288); overruled, 26 L.D. 448.
- Milner and North Side R.R. Co. (36 L.D. 488); overruled, 40 L.D. 187.
- Milton *et al.* *v.* Lamb (22 L.D. 339); overruled, 25 L.D. 550.
- Milwaukee, Lake Shore and Western Ry. Co. (12 L.D. 79); overruled, 29 L.D. 112.
- Miner *v.* Mariott *et al.* (2 L.D. 709); modified, 28 L.D. 224.
- Minnesota and Ontario Bridge Company (30 L.D. 77); no longer followed, 50 L.D. 359.
- * Mitchell *v.* Brown (3 L.D. 65); overruled, 41 L.D. 396. (See 43 L.D. 520.)
- Monitor Lode (18 L.D. 358); overruled, 25 L.D. 495.
- Monster Lode (35 L.D. 493); overruled so far as in conflict, 55 L.D. 348.
- Moore, Charles H. (16 L.D. 204); overruled, 27 L.D. 482.
- Morgan, Henry S. *et al.* (65 L.D. 369); overruled to extent inconsistent, 71 L.D. 22.
- Morgan *v.* Craig (10 C.L.O. 234); overruled, 5 L.D. 308.
- Morgan *v.* Rowland (37 L.D. 90); overruled, 37 L.D. 618.
- Moritz *v.* Hinz (36 L.D. 450); vacated, 37 L.D. 382.
- Morrison, Charles S. (36 L.D. 126); modified, 36 L.D. 319.
- Morrow *et al.* *v.* State of Oregon *et al.* (32 L.D. 54); modified, 33 L.D. 101.
- Moses, Zelmer R. (36 L.D. 473); overruled, 44 L.D. 570.
- Mountain Chief Nos. 8 and 9 Lode Claims (36 L.D. 100); overruled in part, 36 L.D. 551.
- Mt. Whitney Military Reservation (40 L.D. 315). (See 43 L.D. 33.)
- Muller, Ernest (46 L.D. 243); overruled, 48 L.D. 163.
- Muller, Esberne K. (39 L.D. 72); modified, 39 L.D. 360.
- Mulnix, Phillip, Heirs of (33 L.D. 331); overruled, 43 L.D. 532.
- Nebraska, State of (18 L.D. 124); overruled, 28 L.D. 358.
- Nebraska, State of *v.* Dorrington (2 C.L.L. 647); overruled, 26 L.D. 123.
- Neilsen *v.* Central Pacific R.R. Co. *et al.* (26 L.D. 252); modified, 30 L.D. 216.
- Newbanks *v.* Thompson (22 L.D. 490); overruled, 29 L.D. 108.
- Newlon, Robert C. (41 L.D. 421); overruled so far as in conflict, 43 L.D. 364.
- New Mexico, State of (46 L.D. 217); overruled, 48 L.D. 98.
- New Mexico, State of (49 L.D. 314); overruled, 54 L.D. 159.
- Newton, Walter (22 L.D. 322); modified, 25 L.D. 188.
- New York Lode and Mill Site (5 L.D. 513); overruled, 27 L.D. 373.
- * Nickel, John R. (9 L.D. 388); overruled, 41 L.D. 129. (See 42 L.D. 313.)
- Northern Pacific R.R. Co. (20 L.D. 191); modified, 22 L.D. 224; overruled so far as in conflict, 29 L.D. 550.
- Northern Pacific R.R. Co. (21 L.D. 412; 23 L.D. 204; 25 L.D. 501); overruled, 53 L.D. 242. (See 26 L.D. 265; 33 L.D. 426; 44 L.D. 218; 177 U.S. 435.)
- Northern Pacific Ry. Co. (48 L.D. 573); overruled so far as in conflict, 51 L.D. 196. (See 52 L.D. 58.)
- Northern Pacific R.R. Co. *v.* Bowman (7 L.D. 238); modified, 18 L.D. 224.
- Northern Pacific R.R. Co. *v.* Burns (6 L.D. 21); overruled, 20 L.D. 191.
- Northern Pacific R.R. Co. *v.* Loomis (21 L.D. 395); overruled, 27 L.D. 464.
- Northern Pacific R.R. Co. *v.* Marshall *et al.* (17 L.D. 545); overruled, 28 L.D. 174.
- Northern Pacific R.R. Co. *v.* Miller (7 L.D. 100); overruled so far as in conflict, 16 L.D. 229.
- Northern Pacific R.R. Co. *v.* Sherwood (28 L.D. 126); overruled so far as in conflict, 29 L.D. 550.
- Northern Pacific R.R. Co. *v.* Symons (22 L.D. 686); overruled, 28 L.D. 95.
- Northern Pacific R.R. Co. *v.* Urquhart (8 L.D. 365); overruled, 28 L.D. 126.

- Northern Pacific R. R. Co. v. Walters *et al.* (13 L.D. 230); overruled so far as in conflict, 49 L.D. 391.
- Northern Pacific R.R. Co. v. Yantis (8 L.D. 58); overruled, 12 L.D. 127.
- Nunez, Roman C. and Serapio (56 I.D. 363); overruled so far as in conflict, 57 I.D. 213.
- Nyman v. St. Paul, Minneapolis, and Manitoba Ry. Co. (5 L.D. 396); overruled, 6 L.D. 750.
- O'Donnell, Thomas J. (28 L.D. 214); overruled, 35 L.D. 411.
- Olson v. Traver *et al.* (26 L.D. 350, 628); overruled so far as in conflict, 29 L.D. 480; 30 L.D. 382.
- Opinion A.A.G. (35 L.D. 277); vacated, 36 L.D. 342.
- Opinion of Chief Counsel, July 1, 1914 (43 L.D. 339); explained, 68 I.D. 372.
- Opinions of Solicitor, September 15, 1914, and February 2, 1915; overruled, September 9, 1919 (D-43035, May Caramony). (See 58 I.D. 149, 154-156.)
- Opinion of Solicitor, October 31, 1917 (D-40462); overruled so far as inconsistent, 58 I.D. 85, 92, 96.
- Opinion of Solicitor, February 7, 1919 (D-44083); overruled, November 4, 1921 (M-6397). (See 58 I.D. 158, 160.)
- Opinion of Solicitor, August 8, 1933 (M-27499); overruled so far as in conflict, 54 I.D. 402.
- Opinion of Solicitor, June 15, 1934 (54 I.D. 517); overruled in part, February 11, 1957 (M-36410).
- Opinion of Solicitor, May 8, 1940 (57 I.D. 124); overruled in part, 58 I.D. 562, 567.
- Opinion of Acting Solicitor, June 6, 1941; overruled so far as inconsistent, 60 I.D. 333.
- Opinion of Acting Solicitor, July 30, 1942; overruled so far as in conflict, 58 I.D. 331. (See 59 I.D. 346, 350.)
- Opinion of Solicitor, August 31, 1943 (M-33183); distinguished 58 I.D. 726, 729.
- Opinion of Solicitor, May 2, 1944 (58 I.D. 680); distinguished, 64 I.D. 141.
- Opinion of Solicitor, Oct. 22, 1947 (M-34999); distinguished, 68 I.D. 433.
- Opinion of Solicitor, March 28, 1949 (M-35093); overruled in part, 64 I.D. 70.
- Opinion of Solicitor, Jan. 19, 1956 (M-36378); overruled to extent inconsistent, 64 I.D. 58.
- Opinion of Solicitor, June 4, 1957 (M-36443); overruled in part, 65 I.D. 316.
- Opinion of Solicitor, July 9, 1957 (M-36442); withdrawn and superseded, 65 I.D. 386, 388.
- Opinion of Solicitor, 64 I.D. 393 (1957); no longer followed, 67 I.D. 366.
- Opinion of Solicitor, Oct. 27, 1958 (M-36531); overruled, 69 I.D. 110.
- Opinion of Solicitor, July 20, 1959 (M-36531, Supp.); overruled, 69 I.D. 110.
- Oregon and California R.R. Co. v. Puckett (39 L.D. 169); modified, 53 I.D. 264.
- Oregon Central Military Wagon Road Co. v. Hart (17 L.D. 480); overruled, 18 L.D. 543.
- Owens *et al.* v. State of California (22 L.D. 369); overruled, 38 L.D. 253.
- Pace v. Carstarphen *et al.* (50 L.D. 369); distinguished, 61 I.D. 459.
- Pacific Slope Lode (12 L.D. 686); overruled so far as in conflict, 25 L.D. 518.
- Papina v. Alderson (1 B.L.P. 91); modified, 5 L.D. 256.
- Patterson, Charles E. (3 L.D. 260); modified, 6 L.D. 284, 624.
- Paul Jones Lode (28 L.D. 120); modified, 31 L.D. 359.
- Paul v. Wiseman (21 L.D. 12); overruled, 27 L.D. 522.
- Pecos Irrigation and Improvement Co. (15 L.D. 470); overruled, 18 L.D. 168, 268.
- Pennock, Belle L. (42 L.D. 315); vacated 43 L.D. 66.
- Perry v. Central Pacific R.R. Co. (39 L.D. 5); overruled so far as in conflict, 47 L.D. 304.
- Phebus, Clayton (48 L.D. 128); overruled so far as in conflict, 50 L.D. 281; overruled to extent inconsistent, 70 I.D. 159.

- Phelps, W. L. (8 C.L.O. 139); overruled, 2 L.D. 854.
- Phillips, Alonzo (2 L.D. 321); overruled, 15 L.D. 424.
- Phillips *v.* Breazeale's Heirs (19 L.D. 573); overruled, 39 L.D. 93.
- Pieper, Agnes C. (35 L.D. 459); overruled, 43 L.D. 374.
- Pierce, Lewis W. (18 L.D. 328); vacated, 53 L.D. 447; overruled so far as in conflict, 59 L.D. 416, 422.
- Pietkiewicz *et al.* *v.* Richmond (29 L.D. 195); overruled, 37 L.D. 145.
- Pike's Peak Lode (10 L.D. 200); overruled in part, 20 L.D. 204.
- Pike's Peak Lode (14 L.D. 47); overruled, 20 L.D. 204.
- Popple, James (12 L.D. 433); overruled, 13 L.D. 588.
- Powell, D. C. (6 L.D. 302); modified, 15 L.D. 477.
- Prange, Christ C. and William C. Braasch (48 L.D. 448); overruled so far as in conflict, 60 L.D. 417, 419.
- Premo, George (9 L.D. 70). (See 39 L.D. 162, 225.)
- Prescott, Henrietta P. (46 L.D. 486); overruled, 51 L.D. 287.
- Pringle, Wesley (13 L.D. 519); overruled, 29 L.D. 599.
- Provensal, Victor H. (30 L.D. 616); overruled, 35 L.D. 399.
- Prue, Widow of Emmanuel (6 L.D. 436); vacated, 33 L.D. 409.
- Pugh, F. M., *et al.* (14 L.D. 274); in effect vacated, 232 U.S. 452.
- Puyallup Allotments (20 L.D. 157); modified, 29 L.D. 628.
- Ramsey, George L., Heirs of Edwin C. Philbrick (A-16060), August 6, 1931, unreported; recalled and vacated, 58 L.D. 272, 275, 290.
- Rancho Alisal (1 L.D. 173); overruled, 5 L.D. 320.
- Rankin, James D., *et al.* (7 L.D. 411); overruled, 35 L.D. 32.
- Rankin, John M. (20 L.D. 272); reversed, 21 L.D. 404.
- Rebel Lode (12 L.D. 683); overruled, 20 L.D. 204; 48 L.D. 523.
- *Reed *v.* Buffington (7 L.D. 154); overruled, 8 L.D. 110. (See 9 L.D. 360.)
- Regione *v.* Rosseler (40 L.D. 93); vacated, 40 L.D., 420.
- Reid, Bettie H., Lucille H. Pipkin (61 L.D. 1); overruled, 61 L.D. 355.
- Rialto No. 2 Placer Mining Claim (34 L.D. 44); overruled, 37 L.D. 250.
- Rico Town Site (1 L.D. 556); modified, 5 L.D. 256.
- Rio Verde Canal Co. (26 L.D. 381); vacated, 27 L.D. 421.
- Roberts *v.* Oregon Central Military Road Co. (19 L.D. 591); overruled, 31 L.D. 174.
- Robinson, Stella G. (12 L.D. 443); overruled, 13 L.D. 1.
- Rogers, Fred B. (47 L.D. 325); vacated, 53 L.D. 649.
- Rogers, Horace B. (10 L.D. 29); overruled, 14 L.D. 321.
- Rogers *v.* Atlantic & Pacific R.R. Co. (6 L.D. 565); overruled so far as in conflict, 8 L.D. 165.
- *Rogers *v.* Lukens (6 L.D. 111); overruled, 8 L.D. 110. (See 9 L.D. 360.)
- Romero *v.* Widow of Knox (48 L.D. 32); overruled so far as in conflict, 49 L.D. 244.
- Roth, Gottlieb (50 L.D. 196); modified, 50 L.D. 197.
- Rough Rider and Other Lode Claims (41 L.D. 242, 255); vacated, 42 L.D. 584.
- St. Clair, Frank (52 L.D. 597); modified, 53 L.D. 194.
- *St. Paul, Minneapolis and Manitoba Ry. Co. (8 L.D. 255); modified, 13 L.D. 354. (See 32 L.D. 21.)
- St. Paul, Minneapolis and Manitoba Ry. Co. *v.* Hagen (20 L.D. 249); overruled, 25 L.D. 86.
- St. Paul, Minneapolis and Manitoba Ry. Co. *v.* Fogelberg (29 L.D. 291); vacated, 30 L.D. 191.
- Salsberry, Carroll (17 L.D. 170); overruled, 39 L.D. 93.
- Sangre de Cristo and Maxwell Land Grants (46 L.D. 301); modified, 48 L.D. 88.
- Santè Fè Pacific R.R. Co. *v.* Peterson (39 L.D. 442); overruled, 41 L.D. 383.
- Satisfaction Extension Mill Site (14 L.D. 173). (See 32 L.D. 128.)

- *Sayles, Henry P. (2 L.D. 88); modified, 6 L.D. 797. (See 37 L.D. 330.)
- Schweitzer v. Hilliard *et al.* (19 L.D. 294); overruled so far as in conflict, 26 L.D. 639.
- Serrano v. Southern Pacific R.R. Co. (6 C.L.O. 93); overruled, 1 L.D. 380.
- Serry, John J. (27 L.D. 330); overruled so far as in conflict, 59 L.D. 416, 422.
- Shale Oil Company. (See 55 L.D. 287.)
- Shanley v. Moran (1 L.D. 162); overruled, 15 L.D. 424.
- Shineberger, Joseph (8 L.D. 231); overruled, 9 L.D. 202.
- Silver Queen Lode (16 L.D. 186); overruled, 57 L.D. 63.
- Simpson, Lawrence W. (35 L.D. 399, 609); modified, 36 L.D. 205.
- Sipchen v. Ross (1 L.D. 634); modified, 4 L.D. 152.
- Smead v. Southern Pacific R.R. Co. (21 L.D. 432); vacated, 29 L.D. 135.
- Snook, Noah A., et al. (41 L.D. 428); overruled so far as in conflict, 43 L.D. 364.
- Sorli v. Berg (40 L.D. 259); overruled 42 L.D. 557.
- Southern Pacific R.R. Co. (15 L.D. 460); reversed, 18 L.D. 275.
- Southern Pacific R.R. Co. (28 L.D. 281); recalled, 32 L.D. 51.
- Southern Pacific R.R. Co. (33 L.D. 89); recalled, 33 L.D. 528.
- Southern Pacific R.R. Co. v. Bruns (31 L.D. 272); vacated, 37 L.D. 243.
- South Star Lode (17 L.D. 280); overruled, 20 L.D. 204; 48 L.D. 523.
- Spaulding v. Northern Pacific R.R. Co. (21 L.D. 57); overruled, 31 L.D. 151.
- Spencer, James (6 L.D. 217); modified, 6 L.D. 772; 8 L.D. 467.
- Spruill, Lelia May (50 L.D. 549); overruled, 52 L.D. 339.
- Standard Shales Products Co. (52 L.D. 522); overruled so far as in conflict, 53 L.D. 42.
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- State of California (14 L.D. 253); vacated, 23 L.D. 230.
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- State of California (32 L.D. 346); vacated, 50 L.D. 628. (See 37 L.D. 499 and 46 L.D. 396.)
- State of California (44 L.D. 118); overruled, 48 L.D. 98.
- State of California (44 L.D. 468); overruled, 48 L.D. 98.
- State of California v. Moccettini (19 L.D. 359); overruled, 31 L.D. 335.
- State of California v. Pierce (3 C.L.O. 118); modified, 2 L.D. 854.
- State of California v. Smith (5 L.D. 543); overruled so far as in conflict, 18 L.D. 343.
- State of Colorado (7 L.D. 490); overruled, 9 L.D. 408.
- State of Florida (17 L.D. 355); reversed, 19 L.D. 76.
- State of Florida (47 L.D. 92, 93); overruled so far as in conflict, 51 L.D. 291.
- State of Louisiana (8 L.D. 126); modified, 9 L.D. 157.
- State of Louisiana (24 L.D. 231); vacated, 26 L.D. 5.
- State of Louisiana (47 L.D. 366); overruled so far as in conflict, 51 L.D. 291.
- State of Louisiana (48 L.D. 201); overruled so far as in conflict, 51 L.D. 291.
- State of Nebraska (18 L.D. 124); overruled, 28 L.D. 358.
- State of Nebraska v. Dorrington (2 C.L.L. 467); overruled so far as in conflict, 26 L.D. 123.
- State of New Mexico (46 L.D. 217); overruled, 48 L.D. 98.
- State of New Mexico (49 L.D. 314); overruled, 54 L.D. 159.
- State of Utah (45 L.D. 551); overruled, 48 L.D. 98.
- *Stevenson, Heirs of v. Cunningham (32 L.D. 650); overruled so far as in conflict, 41 L.D. 119. (See 43 L.D. 196.)
- Stewart *et al.* v. Rees *et al.* (21 L.D. 446); overruled so far as in conflict, 29 L.D. 401.

- Stirling, Lille E. (39 L.D. 346); overruled, 46 L.D. 110.
- Stockley, Thomas J. (44 L.D. 178, 180); vacated, 260 U.S. 532. (See 49 L.D. 460, 461, 492.)
- Strain, A. G. (40 L.D. 108); overruled so far as in conflict, 51 L.D. 51.
- Streit, Arnold (T-476 (Ir.)), August 26, 1952, unreported; overruled, 62 L.D. 12.
- Stricker, Lizzie (15 L.D. 74); overruled so far as in conflict, 18 L.D. 283.
- Stump, Alfred M. *et al.* (39 L.D. 437); vacated, 42 L.D. 566.
- Sumner *v.* Roberts (23 L.D. 201); overruled so far as in conflict, 41 L.D. 173.
- Sweeney *v.* Northern Pacific R.R. Co. (20 L.D. 394); overruled, 28 L.D. 174.
- *Sweet, Eri P. (2 C.L.O. 18); overruled, 41 L.D. 129. (See 42 L.D. 313.)
- Sweeten *v.* Stevenson (2 B.L.P. 42); overruled so far as in conflict, 3 L.D. 248.
- Taft *v.* Chapin (14 L.D. 593); overruled, 17 L.D. 414.
- Taggart, William M. (41 L.D. 282); overruled, 47 L.D. 370.
- Talkington's Heirs *v.* Hempfling (2 L.D. 46); overruled, 14 L.D. 200.
- Tate, Sarah J. (10 L.D. 469); overruled, 21 L.D. 211.
- Taylor, Josephine, *et al.* (A-21994), June 27, 1939, unreported; overruled so far as in conflict, 59 I.D. 258, 260.
- Taylor *v.* Yates *et al.* (8 L.D. 279); reversed, 10 L.D. 242.
- *Teller, John C. (26 L.D. 484); overruled, 36 L.D. 36. (See 37 L.D. 715.)
- The Clipper Mining Co. *v.* The Eli Mining and Land Co. *et al.*, 33 L.D. 660 (1905); no longer followed in part, 67 I.D. 417.
- The Departmental supplemental decision in Franco-Western Oil Company *et al.*, 65 I.D. 427, is adhered to, 66 I.D. 362.
- Thorstenson, Even (45 L.D. 96); overruled so far as in conflict, 47 L.D. 258.
- Tieck *v.* McNeil (48 L.D. 158); modified, 49 L.D. 260.
- Toles *v.* Northern Pacific Ry. Co. *et al.* (39 L.D. 371); overruled so far as in conflict, 45 L.D. 96.
- Tonkins, H. H. (41 L.D. 516); overruled, 51 L.D. 27.
- Traganza, Mertie C. (40 L.D. 300); overruled, 42 L.D. 612.
- Traugh *v.* Ernst (2 L.D. 212); overruled, 3 L.D. 98.
- Tripp *v.* Dumphy (28 L.D. 14); modified, 40 L.D. 128.
- Tripp *v.* Stewart (7 C.L.O. 39); modified, 6 L.D. 795.
- Tucker *v.* Florida Ry. & Nav. Co. (19 L.D. 414); overruled, 25 L.D. 233.
- Tupper *v.* Schwarz (2 L.D. 623); overruled, 6 L.D. 624.
- Turner *v.* Cartwright (17 L.D. 414); modified, 21 L.D. 40.
- Turner *v.* Lang (1 C.L.O. 51); modified, 5 L.D. 256.
- Tyler, Charles (26 L.D. 699); overruled, 35 L.D. 411.
- Ulin *v.* Colby (24 L.D. 311); overruled, 35 L.D. 549.
- Union Pacific R.R. Co. (33 L.D. 89); recalled, 33 L.D. 528.
- United States *v.* Bush (13 L.D. 529); overruled, 18 L.D. 441.
- United States *v.* Central Pacific Ry. Co. (52 L.D. 81); modified, 52 L.D. 235.
- United States *v.* Dana (18 L.D. 161); modified, 28 L.D. 45.
- United States *v.* Keith V. O'Leary *et al.* (63 I.D. 341); distinguished, 64 I.D. 210, 369.
- United States *v.* M. W. Mouat *et al.* (60 I.D. 473); modified, 61 I.D. 289.
- Utah, State of (45 L.D. 551); overruled, 48 L.D. 98.
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NOTE.—The abbreviations used in this title refer to the following publications : "B.L.P." to Brainard's Legal Precedents in Land and Mining Cases, vols. 1 and 2 ; "C.L.L." to Copp's Public Land Laws edition of 1875, 1 volume ; edition of 1882, 2 volumes ; edition of 1890, 2 volumes ; "C.L.O." to Copp's Land Owner, vols. 1-18 ; "L. and R." to records of the former Division of Lands and Railroads ; "L.D." to the Land Decisions of the Department of the Interior, vols. 1-52 ; "I.D." to Decisions of the Department of the Interior, beginning with vol. 53.—EDITOR.

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DECISIONS OF THE DEPARTMENT OF THE INTERIOR

STANDARD OIL COMPANY OF CALIFORNIA

A-29263

Decided January 27, 1964

Oil and Gas Leases: Cancellation—Alaska: Land Grants and Selections— Alaska: University of Alaska Grant

Where an oil and gas lease offer was filed prior to enactment of the Alaska Statehood Act on July 7, 1958, a selection for the land was filed thereafter by the Territory of Alaska pursuant to the grant for the University of Alaska, and a lease was subsequently issued in response to the offer and prior to the admission of the State of Alaska on January 3, 1959, it is error to cancel the lease because of the filing of the selection and it is immaterial that subsequent to the admission of the State the land was patented to the State pursuant to the selection.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Standard Oil Company of California has appealed to the Secretary of the Interior from a decision dated September 18, 1961, of the Division of Appeals of the Bureau of Land Management which affirmed a decision of the land office at Anchorage, Alaska, canceling its non-competitive oil and gas lease because the land had been selected by the State of Alaska.

The oil and gas lease offer in question was filed by Jack V. Walker in the Anchorage land office on May 8, 1957,¹ when the Territory of Alaska was authorized to file selections on behalf of the University of Alaska for nonmineral land. On July 7, 1958, subsections 6(i) and 6(k) of the Alaska Statehood Act (72 Stat. 339, 342, 343) made provision for confirmation and transfer to the State of Alaska of the grant of 100,000 acres of nonmineral land to the University of Alaska made on January 21, 1929 (48 U.S.C., 1958 ed., sec. 354a), and, to the

¹The offer superseded an earlier offer including the same land which was filed by Walker on August 15, 1955. Walker elected to file a new offer rather than to have the lease issued on the earlier offer amended to include the land in question.

extent that the full acreage had not been selected on behalf of the University, made mineral land available for selection. These provisions became effective on January 3, 1959, when Alaska became a State. Associate Solicitor's opinion M-36567 (June 10, 1959). Meanwhile, the Territory of Alaska had filed an application, Anchorage 046163, on October 15, 1958, to select all of the land then covered by Walker's offer. Following the filing of the selection, a lease was issued to Walker, effective December 1, 1958. Thereafter the selected land for patented to the State on April 27, 1961, and later the land office on May 5, 1961, canceled the Walker lease, which had since been assigned to Standard.

The land office noted that the selection application filed by the Territory of Alaska on behalf of the University was confirmed and transferred to the State of Alaska pursuant to the Statehood Act and that the original grant was enlarged to include mineral land effective as of the date when statehood was achieved on January 3, 1959. It then concluded that oil and gas lease offers pending when the Statehood Act was adopted and conflicting with State or Territorial selections should be rejected to the extent of conflicts and that its failure to reject the Walker offer should be corrected by cancellation of the lease.

The Division of Appeals affirmed for the same reason.

The Bureau decisions were based on the assumption that if no action had been taken on the offer prior to January 3, 1959, when the State selection was broadened to include mineral lands, the offer would have had to be rejected. Associate Solicitor's opinion M-36567, *supra*. The Bureau therefore concluded that the lease was invalid and subject to cancellation.

This reasoning is faulty because it does not consider whether there was any bar to issuing the lease at the time when it was actually issued. The Walker offer was converted into a lease at a time when the selection application of the Territory was unacceptable because it included mineral land. The existence of an unacceptable selection application could not invalidate the offer. Therefore, at the time when the lease was issued, there was no bar to leasing the land.² Accordingly, it was erroneous to cancel the lease on the ground that it was issued when a selection for the land was pending. It follows that when a patent

² On June 3, 1959, revised regulations governing grants to Alaska were issued which in effect provided that offers for oil and gas leases filed prior to a State selection for the University of Alaska would be rejected upon approval of the selection. 43 CFR 76.12(b); *J. L. McCarrey, Jr., et al.*, A-28436 (November 14, 1960). The regulations were adopted well after the issuance of appellant's lease, and, in any event, no opinion is expressed as to whether a lease issued in violation of the regulation would be invalid for that reason alone.

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was subsequently issued to the State of Alaska for the land which had already been leased, the patent was necessarily subject to the lease. It could not destroy the rights represented by the lease. Accordingly, issuance of the patent furnishes no ground for canceling the lease.

Because the five-year term of the lease has now expired, the Bureau should determine the current status of the lease and take whatever action may be necessary in this case in view of this decision.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision appealed from is reversed and the case remanded for such further action as may be necessary in light of this decision.

ERNEST F. HOM,
Assistant Solicitor.

**UNITED STATES DEPARTMENT OF AGRICULTURE
UTAH CONSTRUCTION AND MINING CO.**

A-29722

Decided January 28, 1964

Mining Claims: Special Acts—Surface Resources Act: Verified Statement

The purchaser under a contract of sale of an undivided two-thirds interest in a mining claim may file the verified statement required of a mining claimant by section 5(a) of the act of July 23, 1955.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Forest Service, United States Department of Agriculture, has appealed to the Secretary of the Interior from a decision of the Division of Appeals, Bureau of Land Management, dated July 13, 1962, which reversed a decision of the Anchorage land office, dated February 13, 1962. The land office decision rejected a verified statement submitted by the Prince of Wales Mining Company, now the Utah Construction and Mining Co., in connection with the Iron King No. 3 lode mining claim, situated on the Kasaan Peninsula, Alaska.

The land office decision held that the verified statement, which was executed and filed in the name of the mining company, was not acceptable because the company was only a lessee of the claim. The decision held that a verified statement must be filed by the locator or purchaser of the claim in accordance with the requirements of section 5(a) of the act of July 23, 1955 (30 U.S.C., 1958 ed., sec. 613(a)), and regulation 43 CFR 185.126. The decision allowed a 30-day

period for the filing of a verified statement executed by one of the purchasers of the claim. The Forest Service appealed this decision on the ground that more than 150 days had elapsed since the date of the first publication of the notice to mining claimants published pursuant to section 5(a) of the 1955 act and that "the law does not permit an extension of time in which to file a verified statement."

The Bureau's decision of July 13, 1962, held that the language of section 5(a), which provides for the filing of a verified statement by

* * * any person claiming or asserting under, or by virtue of, any unpatented mining claim heretofore located, rights as to such lands or any part thereof. * * *

is sufficiently broad to include filing by the mining company, which then asserted that it was the lessee of a one-third working interest and purchaser of the remaining two-thirds working interest in the claim, and reversed the land office decision. Thus, no further verified statement was required to be filed and the Bureau remanded the case to the land office for reinstatement of the original verified statement. The Bureau did not clearly indicate whether its decision was based upon an acceptance of the contention of the appellee that it was qualified to file the verified statement as a purchaser of a two-thirds working interest in the claim or whether it thought that a lessee was qualified to file the statement, or both.

The Forest Service has taken this appeal from the Bureau decision, contending that the verified statement filed by the mining company showed that the company was the lessee of the claim. The verified statement, filed on August 21, 1959, provided in part that—

E. the present owners of record are Erick Lindemen, Albert L. Howard, of Seattle, Washington, and the State of Alaska, Commission of Minerals, Juneau, Alaska;

* * * * *

G. the above described unpatented lode mining claim is now held under valid existing agreement from the above lessors to the Prince of Wales Mining Company, 100 Bush Street, San Francisco 4, California;

The appellant contends that a proper construction of the 1955 act indicates that a lessee may not file a verified statement. It also takes exception to a letter from the appellee to the Bureau, received March 12, 1962, in which the appellee stated,

* * * in addition to being the lessee of a one-third working interest from the State of Alaska, [the company] is the purchaser of the remaining two-thirds working interest from the respective owners under agreement dated October 14, 1958, thereby, in our opinion, placing the Utah Construction & Mining Co. in the position of being the purchaser of a two-thirds working interest and lessee only as to a one-third interest. * * *

The appellant asserts that—

January 28, 1964

* * * This statement is completely unsupported by any evidence and is in complete contradiction to the information provided in the verified statement filed by them * * * on August 18, 1959. Inasmuch as the verified statement asserts that * * * [the company] is the lessee it is urged in the absence of additional evidence that they be considered only as lessees.

At the request of this office the appellee has submitted a copy of the October 14, 1958, "Agreement of Purchase and Sale." This agreement provides for the purchase by the appellee of a two-thirds interest in the claim held by Albert Leighton Howard, Marguerite C. Howard, Erick Lindeman, and Sally Ann Lindeman. The agreement provides that the mining company shall complete payment of the purchase price of \$1,000,000 by September 15, 1972, and that it may from the commencement of the agreement explore, mine, and remove all minerals in accordance with a royalty schedule set forth in the agreement. The execution of the agreement resulted in the passage of equitable title to a two-thirds interest in the claim to the appellee, and this equitable ownership of the appellee was fully in effect at the time of the filing of the verified statement, August 21, 1959.

Section 5(a) of the 1955 act provides for the filing of a verified statement by—

any person claiming or asserting under, or by virtue of, any unpatented mining claim heretofore located, rights as to such lands or any part thereof * * *.

The statute provides no indication whether the interest of an equitable owner is such as to permit the filing of a verified statement by it. Nor does the legislative history of the 1955 act provide any indication of the Congressional intent. I can, however, see no reason why the owner of equitable title to an interest in the claim would not hold a sufficient interest so as to qualify it to file a verified statement. Indeed, section 5(a) of the 1955 act provides that the verified notice to be filed by a mining claimant shall set forth "whether such claimant is a locator or purchaser under such location." Since the appellee here does hold equitable title to a two-thirds interest in the claim under a purchase agreement, the filing by it of the statement fulfills the requirement of the 1955 act.

Since the appellee has qualified to file as an equitable owner, the question of whether a lessee may properly file a verified statement need not be decided. To the extent that the Bureau decision may be inconsistent with this holding, it is hereby modified.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental

Manual; 24 F.R. 1348), the decision appealed from is affirmed as modified.

ERNEST F. HOM,
Assistant Solicitor.

APPEAL OF CHARLES T. PARKER CONSTRUCTION CO.

IBCA-335

Decided January 29, 1964

**Contracts: Acts of Government—Contracts: Additional Compensation—
Contracts: Interpretation—Contracts: Performance**

Under a contract for the construction of a transmission line containing the "Permits and Responsibility for Work, etc.," Clause of Standard Form 23A (March 1953), as implemented by a provision that "final acceptance is to be in writing at the time all work is completed to the satisfaction of the contracting officer," the contractor is responsible for repairing at his own expense a tower erected under the contract that before final acceptance of the line is damaged, without the fault of either party, by logs and debris thrown against the tower by forces of nature.

**Contracts: Acts of Government—Contracts: Additional Compensation—
Contracts: Interpretation—Contracts: Performance**

The allegation that the logs and debris may have belonged to the Government is not sufficient to shift liability for the tower repairs to it. Final acceptance may be deferred until after the contracting officer has had a reasonable opportunity to satisfy himself that the work fully conforms to all requirements of the contract. Assumption by the Government of responsibility for removal of the logs and debris is not an assumption of liability for repairs to the tower which are made by the contractor with knowledge that the Government disclaims responsibility for such repairs.

BOARD OF CONTRACT APPEALS

This is a timely appeal from the contracting officer's denial of contractor-appellant's claim in the amount of \$2,540.13 representing the cost of repairing a steel tower,¹ damaged by an extensive mud flow, containing logs and debris, which was precipitated from a glacier following a rainstorm.

The principal issue involved herein is whether the Government accepted the work prior to the mud flow and resulting damage to the tower.

¹ Although appellant erected 75 other steel towers during construction of 15 miles of power transmission line, only this one tower designated as AA 156 (36/2) was damaged. The concomitant mud flow caused considerable damage to other Government property which is under the jurisdiction of the United States Forest Service.

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The claim is premised on the theory (1) that actual construction work had been completed and verbally accepted by the Government two weeks prior to the loss; (2) that the Government accepted responsibility for removal of the logs and debris which the mud flow had deposited about the damaged tower, and should therefore be responsible for the cost of repairing that tower; and (3) that the logs and debris belonged to the Government, not a third party, and by reason thereof the costs of repair should be borne by the Government.

The appeal arises from the above-identified contract which was awarded appellant on June 28, 1960, by the Bonneville Power Administration. It called for the construction of a power transmission line, 15.4 miles in length, including installation of footings, erection of steel towers and stringing of ACSR "Chuker" conductors, located in Hood River and Clackamas Counties, Oregon.

Under a schedule of unit prices for diverse phases of work, the contract price of \$408,272.50 was increased to \$421,490.23 as the result of the issuance of three change orders.

The contract was executed on Standard Form 23 (Revised March 1953) and incorporated the General Provisions of Standard Form 23A (March 1953), which included a pertinent clause relating to appellant's responsibility for the work. It is quoted as follows:

11. PERMITS AND RESPONSIBILITY FOR WORK, ETC.

The Contractor shall, without additional expense to the Government, obtain all licenses and permits required for the prosecution of the work. He shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work. He shall also be responsible for all materials delivered and work performed *until completion and final acceptance*, except for any completed unit thereof which theretofore may have been finally accepted. (Italics supplied.)

Part II of the contract, entitled "Supplementary General Provisions," contained two clauses germane to the issues involved herein, which are quoted as follows:

2-108. *Liabilities of the Contractor.*

* * * * *

C. The contractor shall have sole responsibility for all work *until it is accepted in writing by the contracting officer*. Materials or work damaged, lost, stolen, or destroyed prior to said acceptance by reason of any cause whatsoever, whether within or beyond the control of the contractor, shall be repaired or replaced in their entirety, as required by the contracting officer, by the contractor solely at his own expense. (Italics supplied.)

* * * * *

2-122. *Final Acceptance.* Final acceptance by the contracting officer will be in writing at the time all work is completed to the satisfaction of the contracting officer; *provided, however*, that the contracting officer may at his discretion and in the interest of the Government accept individual completed divisions of work.

The contract was completed within the time required. Final acceptance thereof by the Government in writing was made on October 18, 1961.

The matter was submitted by the parties on the record without an oral hearing.

The evidence discloses that a huge mud flow from a glacier on Mount Hood occurred sometime between the afternoon of August 31 and noon the next day, September 1, 1961. The deluge of mud and water flowed through forest land and in its descent picked up logs, large rocks and other debris and piled them to a height of 9 feet against the steel tower erected by appellant, causing damage thereto to a substantial extent. Appellant was directed by the contracting officer to make the necessary repairs and replacements, and claims the sum of \$2,540.13 as compensation for doing this work. The cost of removing the logs and debris deposited about the tower by the mud flow was, however, borne by the Government and paid for by the issuance of a change order in the amount of \$1,371.06. This latter work was ordered for the purpose of preventing further damage to the tower.

Appellant's contention that the cost of repairing the damaged tower should be borne by the Government is predicated on the theory that for all practical purposes all construction work had been completed and verbally accepted by Government inspectors two weeks prior to the mud flow, that is, on August 18, 1961. Appellant, however, has failed to adduce any proof in substantiation of such allegations, which are unequivocally denied by the Government.

The contracting officer found, and appellant does not deny, that while all construction work specified in the contract was completed on August 18, 1961, cleanup was not completed until August 31, 1961. Clause 1-107 of the contract required cleanup to be completed within 30 days after completion of construction. Clause 3-106 specified in detail what was to be done in the way of cleanup, and then went on to provide that if appellant failed to perform any of the required cleanup, the Government would perform it at the expense of appellant or its sureties. It is clear from these provisions that cleanup was a material part of the work to be done by appellant, and that until it had been performed a finding that "all work is completed," within the meaning of Clause 2-122, could not properly be made. Hence,

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completion did not occur until August 31, 1961, the very day on which the mud flow began.

Appellant's allegation that there was a verbal acceptance by Government inspectors is unsupported by any showing of who the inspectors were, what they said, and whether they had any authority to give the final acceptance provided for in Clauses 2-108 and 2-122. Even if there were such a showing, a mere verbal acceptance would not suffice, since the clauses just cited provide that final acceptance is to be "in writing." The record contains no intimation of any circumstances, such as waiver or ratification, that conceivably might validate a verbal acceptance. Moreover, the assertion that the work had been accepted by August 18, 1961, is inconsistent with the fact that it was not completed until August 31, 1961.

The statement in Clause 2-122 that final acceptance is to be made at the time all work is completed "to the satisfaction" of the contracting officer clearly imports that the contracting officer is to have a reasonable opportunity to satisfy himself that the work fully conforms to all requirements of the contract. Obviously, the brief interval that elapsed between the completion of cleanup on August 31, 1961, and the discovery the next day that the tower had been damaged did not afford such an opportunity. The record, moreover, contains evidence to the effect that it is a standard practice of the Bonneville Power Administration not to accept a newly-constructed transmission line until an energization test has been made for the purpose of ascertaining whether the line is free from potential grounds, and that appellant was aware of this practice at the time when it entered into the contract here at issue. Appellant has proffered no proof that the Bonneville Power Administration could and should have made the energization test prior to the time when the mud flow occurred.

The reasonableness of the Government's conduct in not accepting the work before the tower was damaged is also supported by the fact that appellant's letter requesting final acceptance bears the date of September 5, 1961, which was four days after the damage was discovered. While appellant alleges that written notice of completion was given by it on August 18, 1961, proof for this assertion is entirely lacking.

Appellant's second contention that payment by the Government for the cost of removal of logs and debris from around the tower warrants Government responsibility for the expense of repairing damage to the tower is also untenable. A change order was issued by the contracting officer subsequent to the mud flow, authorizing payment for such

removal, which had been directed in order to prevent further damage to the tower. The correspondence between appellant and the Government shows that when appellant made the repairs to the tower it was fully aware that the Government, while willing to pay for the removal of logs and debris, disclaimed any responsibility for the expense of repairing damage to the tower. These circumstances negate, rather than support, any assumption of liability by the Government for the tower repairs.

Appellant further avers that the logs and debris which caused damage to the tower were the property of the Government and not of a third party, and that by reason thereof the cost of repairing the tower should be borne by the Government.

We do not find the question of ownership of the logs and debris to be of particular legal significance. The evidence discloses that the mud flow which was of deluge proportion, was triggered by a heavy rainstorm that fell upon a glacier, the lower portions of which had been made unstable by exceptionally high melting induced by exceptionally hot weather.² The cause of the damage must therefore be attributable to an Act of God or to other forces of nature. We find that neither the appellant nor the Government was at fault.

This appeal falls within the application of the general rule of contract law that a contractor must bear the risk of increases in the cost of contract work caused by the forces of nature, without the fault of either party, unless there is, as there is not here, a contract provision shifting this responsibility to the Government.

This rule is carried over into subject contract by the incorporation of Clause 11 and Clause 2-108 (both of them are quoted above), which specifically placed upon appellant the responsibility for all work until it was accepted in writing by the contracting officer.

It is well settled by the courts³ and by opinions of this Board⁴ that where work is damaged before completion and acceptance by an Act of God or by other forces of nature, without the fault of either party, and in the absence of a contract provision shifting the risk of such a loss to the Government, the contractor is obligated to repair the damage at its own expense.

² Report of Bonneville Power Administration geologist, dated October 9, 1961.

³ *Day v. United States*, 245 U.S. 159 (1917); *W. F. Maxwell v. United States*, Ct. Cl. No. 392-58 (January 12, 1962); *Jack Carmen v. United States*, 143 Ct. Cl. 747 (1958); *DeArmas v. United States*, 108 Ct. Cl. 436 (1947).

⁴ *Montgomery-Macri Company and Western Line Construction Company, Inc.*, IBCA-59 and IBCA-72 (June 28, 1963), 70 I.D. 242, 279, 1963 BCA par. 3819, 5 Gov. Contr. par. 419; *Barnard-Curtis Company*, IBCA-82 (August 9, 1957), 57-2 BCA par. 1373; *McWaters and Bartlett*, IBCA-56 (October 31, 1956), 56-2 BCA par. 1140; *Osberg Construction Company*, IBCA-32 (June 19, 1956), 63 I.D. 180.

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Under the circumstances of this case, the Board is of the opinion that appellant is not entitled under the contract to payment for the costs of repairing damage to the tower. The unforeseen results caused by the melting of the glacier, the rainstorm, and the concomitant mud flow with its burden of logs and debris was, in our opinion, a happening of which the Government was not the cause and for which it is not liable to pay.

CONCLUSION

For reasons set forth above, the appeal is denied.

JOHN J. HYNES, *Member.*

I CONCUR:

I CONCUR:

PAUL H. GANTT, *Chairman.*

HERBERT J. SLAUGHTER, *Member.*

APPEAL OF PROMACS, INC.

IBCA-317

Decided January 31, 1964

Contracts: Interpretation—Contracts: Specifications

Where a duly issued modification of specifications incorporated in the contract eliminates provisions for adjustment of price for excavation in the event that rocks of a certain size and extent are encountered, and substitutes a provision that all excavation shall be paid for at the stipulated contract price without any adjustment, an interpretation by the contractor of such modification, as constituting a representation by the Government that no rock would be encountered in the excavation work, is so strained as to be unreasonable. The unreasonableness of the interpretation precludes application of the doctrine of *contra proferentem*.

Contracts: Changed Conditions—Contracts: Additional Compensation

A contractor is not entitled to additional compensation on the theory of a changed condition, where the only basis for the claim is the absence of contract warnings as to possible rock and permafrost, if the contractor had the same opportunity before bidding, as did the Government, to ascertain that rock and permafrost were being encountered at nearby excavation work, and should have known that they probably would be found at the job site also.

BOARD OF CONTRACT APPEALS

This timely appeal, involving a claim of \$20,511.41, was heretofore the subject of a motion by the Government to dismiss for failure to comply with the notice requirement of Clause 4, "Changed Conditions," of Standard Form 23A (March 1953). The motion was denied by the Board on the ground that in addition to the issue of

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timely notice under the Changed Conditions clause, there is also in issue the interpretation of Clause 1-04 of the specifications, entitled "Excavation."¹

The contract, dated September 17, 1959, contains Standard Form 23A (March 1953) and a number of additional General Provisions, Special Provisions and Specifications, including, in particular, a Modification of Section 1, entitled "Clearing, Excavating and Grading," of the specifications.

The project covered by the contract included "Utilidor, Utilities, Boiler House and Steamheating of Buildings, Headquarters Area, McKinley National Park, Alaska." The completion date required by the contract, as extended, was June 26, 1961. Final inspection took place during the period of June 26 to June 30, 1961, and the work was accepted subject to correction of a number of minor deficiencies. The last of these deficiencies was finally corrected early in 1962.

The contract price of \$385,981.26 was made up of several lump sum bids for items such as the construction of a boiler house and the conversion to steam heating in several existing buildings, together with a number of unit bid prices based on estimated quantities such as Item 1, Reinforced Concrete Utilidor (estimated quantity 2000 lineal feet) and Item 10, Over-Excavation and compacted gravel backfill for Utilidor (estimated quantity 1000 cubic feet).

In a letter dated July 25, 1961, the contractor notified the contracting officer that it had encountered "quantities of boulders and in some places, permafrost * * *" during the excavation of the trench for the boiler house and Utilidor, and furnished a tentative estimate of the additional cost of excavation caused by those conditions as "exceeding \$15,000." The contracting officer replied by letter of August 1, 1961, acknowledging receipt of the contractor's letter, and confirming a conversation with Mr. Guy McGee, Project Manager of the contractor, on August 1, 1961. That conversation was to the effect that the letter of July 25, 1961 could not be construed as a formal claim; that it would be considered as a notice of intent to file a formal claim; and that the letter of July 25, 1961 "* * *" was the first notification you have tendered us regarding a claim for additional payments. * * *"

No further claim was filed until the contractor's letter of February 27, 1962. That letter included a detailed tabulation of work hours and costs for the additional work alleged to have been performed, during the period of June 11 through August 10, 1960, as to the excavation for the boiler house, drain pipe, and Utilidor. The tabulation

¹ *Promacs, Inc.*, IBCA-317 (May 29, 1962), 4 Gov. Contr. 291 (g).

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covers the time and hourly rental rates for various types of equipment, as well as the time and hourly rates for foreman and common labor involved.

Presumably it was not feasible for the contractor at that late date to make any distinction between those additional costs of excavation which were attributable to removal of rock and removal of permafrost, compared with what it would have cost if no rock or permafrost had been encountered. Moreover, there is no information in the contractor's claim or appeal instruments or elsewhere in the appeal file as to the total actual costs incurred by the contractor in excavating the areas involved, nor as to the quantities or sizes of rock or boulders excavated, nor as to the basis on which the contractor determined to assign to the additional work the particular amounts of work-hours stated in its letter. The submission of proof concerning such matters would be vital in order to arrive at any equitable adjustment of the claim.

The contractor does not assert that there was any misrepresentation by the Government concerning the presence or absence of permafrost, apart from the fact that the possibility of its presence was not mentioned in the contract. Nor does the contractor claim that the presence of rock or permafrost was unusual in the vicinity of the site. Likewise, it is not stated that the existence of rock or of permafrost in the region of the work site was unknown to the contractor, prior to submission of its bid.

The contracting officer denied the claim in his letter decision of March 9, 1962, on the ground that the specifications, as modified prior to receipt of any bids, provided as follows:

1-04 Excavation. Any reference in the specifications to the definition of rock excavation shall be disregarded; *all excavation required to be performed under the contract shall be considered to be paid for under the lump sum contract price and no adjustment will be made in the contract for excavation of any nature.* (Italics added.)

Prior to such modification, the specifications provided in pertinent part as follows concerning rock excavation:

1-04 *Excavation:*

All material shall be removed by the Contractor without additional cost except for material herein defined as rock. If rock is encountered the contract price shall be adjusted.

a. *Rock Excavation.* Rock is defined as (1) boulders over $\frac{1}{2}$ cubic yards in volume and (2) any other material in such condition as to require the use of explosives or systematic drilling for removal.

The contracting officer denied the claim on the additional ground that—

* * * at no time during the process of excavating this material was any claim made by you, either formal or informal, to the Contracting Officer, for additional payment. * * *

The contractor appealed timely by letter of April 9, 1962.

Although the contractor's claim and appeal papers do not identify the claim as being presented under the Changed Conditions clause (Clause 4 of Standard Form 23A) of the contract, that clause is the only possible source of relief in the contract for claims based on subsurface conditions.²

If, however, the contractor did not intend to base its claim on the Changed Conditions clause, but instead claims that the alleged acts or omissions of the Government amounted to an actionable misrepresentation, entitling the contractor to additional compensation over and above the contract price, then the Board would not have jurisdiction to consider such a claim.³ That type of claim is one for which recourse, if any, would have to be sought from either the Comptroller General or the Courts.⁴ Only in a case where the alleged misrepresentation forms the basis of a claim for which relief is specifically provided in the contract, as in the Changed Conditions clause, does the Board have jurisdiction concerning a claim of misrepresentation.⁵ The Board's capacity to grant relief must be found within the "four corners" of the contract.⁶

In substance, the contractor's claim is based on alleged misrepresentation by the Government concerning the presence of subsurface

² It reads as follows: "The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (1) subsurface or latest physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment hereunder shall not be allowed unless he has given notice as above required; provided that the Contracting Officer may, if he determines the facts so justify, consider and adjust any such claim asserted before the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 hereof."

³ Cf. *Martin K. Eby Construction Co., Inc.*, IBCA-355 (March 8, 1963), 1963 BCA par. 3672, 5 Gov. Contr. 183 (e), and cases cited therein.

⁴ *Jensen-Rasmussen and Co. and B-E-C-K Corp.*, IBCA-363 (March 14, 1963), 1963 BCA par. 3687, 5 Gov. Contr. 183 (e), and cases cited therein.

⁵ Cf. *Morgen & Oswood Construction Co., Inc.*, IBCA-389 (November 21, 1963), 70 I.D. 495, 1963 BCA par. 3945.

⁶ *Martin K. Eby Construction Co., Inc.*, note 3, *supra*. Accord: *Joseph F. Monsini, Jr.*, ASBCA No. 6928 (October 23, 1961), 61-2 BCA par. 3197, 4 Gov. Contr. 127 (e).

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rock and permafrost at the site of the work. The particular form of the misrepresentation as to rock is claimed to be contained in the modification of the specifications, quoted *supra*, to the effect that any reference to the definition of rock excavation shall be disregarded; that all excavation performed should be paid for under the lump sum bid price; and that no adjustment would be made for any kind of excavation. Basically, it is the contractor's theory that the Government indicated by the foregoing modification that no rock would be encountered in the excavations.

The contractor is correct in stating that the existence of rock, boulders and permafrost is not mentioned in the specifications as modified, and the Government does not contend that any of these conditions are shown on the contract drawings. The contractor also states that the Government "was aware of the presence of rock and permafrost" by reason of "the fact that shortly before the letting of the referenced contract, the Park Service built an apartment house close to the work covered by this contract, and boulders and frost were encountered in the excavation and footings for the structure. The owner [presumably the Government] had ample opportunity to observe these conditions and to evaluate the added cost to the contractor for this referenced contract. * * *" Hence, the alleged misrepresentation as to permafrost consists merely of its non-mention by the Government.

The basic concept underlying the Changed Conditions clause is that the long-term interest of the Government, in attempting to eliminate excessive contingency allowances from bid prices, justifies the Government in assuming a portion of the risk concerning subsurface conditions. The portion of the undertaking as to which the Government assumes the risk is that the subsurface conditions will conform to those described in the contract, or, if not there described, to normal conditions for the area involved.⁷

The risk thus assumed by the Government with respect to conditions not described by the contract is the risk that such conditions may turn out to be abnormally bad; the Government does not guarantee by this clause that conditions will prove to be abnormally good.⁸ Hence, the contractor's bid price should not reflect assumptions that the subsurface conditions will be either better or worse

⁷ *Ruff v. United States*, 96 Ct. Cl. 148, 164 (1942).

⁸ *Erhardt Dahl Andersen*, IBCA-229 (July 17, 1961), 68 I.D. 201, 61-1 BCA par. 3082, 3 Gov. Contr. 505, and cases cited therein. We quote the elegant formula stated therein: "The risk thus assumed by the Government with respect to [changed] conditions not described in the contract is, however, the risk that they will turn out to be abnormally bad; not the risk that they will fall short of being abnormally good."

than those conditions "ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract," *unless he knows or should know* that unusual conditions do actually exist at the site.⁹

In such a case, where the bidder is aware or should have been aware of conditions at or near the site, his bid price should reflect the anticipated cost of performing the contract under such conditions. As the Board has previously said:

The purpose of article 4, is, however, to protect prudent contractors against unforeseen abnormalities, and a contractor who ignores the warnings in the specification and all warning signs that would have been revealed by a reasonably thorough investigation is not entitled to the benefit of the article.¹⁰

Similar considerations are expressed in Standard Form 22, "Instructions to Bidders," attached to the Invitation for Bids. Article 1 states that explanations will be furnished to bidders as to the meaning or interpretation of drawings and specifications. Article 2 provides for visiting the site of the work. These two articles read as follows:

1. *Explanation to Bidders.* Any explanation desired by bidders regarding the meaning or interpretation of the drawings and specifications must be requested in writing and with sufficient time allowed for a reply to reach them before the submission of their bids. Oral explanations or instructions given before the award of the contract will not be binding. Any interpretation made will be in the form of an addendum to the specifications or drawings and will be furnished to all bidders and its receipt by the bidder shall be acknowledged.

2. *Conditions at Site of Work.* Bidders should visit the site to ascertain pertinent local conditions readily determined by inspection and inquiry, such as the location, accessibility and general character of the site, labor conditions, the character and extent of existing work within or adjacent thereto, and any other work being performed thereon.

While Standard Form 22 provides that the instructions contained therein "are not to be incorporated in the contract," Article 2 is expressly excepted from this general language by Clause 30, entitled "Site Visitation," of the instant contract. That clause reads as follows:

Failure to visit the site (as provided in Article 2 of Standard Form 22, Instructions to Bidders) will in no way relieve the Contractor from the necessity of furnishing all equipment and materials and performing all work required for the completion of the contract in conformity with the specifications.

⁹ Cf. *Otis Williams and Co.*, IBCA-324 (September 5, 1962), 69 I.D. 135, 1962 BCA par. 3487, 4 Gov. Contr. 471.

¹⁰ *J. A. Terteling & Sons, Inc.*, IBCA-27 (December 31, 1957), 64 I.D. 466, 484, 57-2 BCA par. 1539.

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In a letter dated September 3, 1959, from the contractor to Mr. D. D. Jacobs, Superintendent, Mt. McKinley Park, the first paragraph thereof indicates that the writer of the letter, Mr. McGee, had visited the site:

(a) In connection with the storage of construction materials, we would like to use the warehouse at the railway station that we surveyed when I visited the site.

Thus, it would appear that the contractor had availed itself of the opportunity to investigate the conditions at the site. The contractor nowhere alleges that the subsurface conditions at the apartment house nearby could not, during this investigation, have been "readily determined by inspection and inquiry," within the meaning of Standard Form 22. In fact, the contractor does not even allege that at the time of bidding it lacked actual knowledge of the rock and permafrost conditions which, it asserts, had been found at the apartment house. The burden of the contractor's complaint and the basis of its claim is that the possibility of encountering rock and permafrost were not specifically set out in the contract specifications or drawings. Yet the contractor does not assert that it was actually misled by that omission.¹¹ The contractor's main argument, set forth in its letter of July 25, 1961, is that

* * * There is a well known and authenticated rule of specification writing that states that if the owner has knowledge of sub-surface conditions that change the progress of the Contractor's work, or affects his cost, it must be set out fully in the specifications. * * *

The contractor's statement of the rule is incorrect. There is no duty on the part of the Government to describe subsurface conditions about which the contractor knew, or should have known from the available information, before bidding.¹²

Here, there is no evidence that any test borings or similar investigations were performed by the Government. Likewise, there is no showing that the subsurface conditions at the job site and in the nearby apartment area were unknown to the contractor or unascertainable through an investigation of the type contemplated by Standard Form 22.

It is also the opinion of the Board that the elimination by the Government of the contract provisions for price adjustment for rock excavation did not constitute a representation that no rock would be encountered in the excavation work under this contract. It was

¹¹ See *Ivy H. Smith Company v. United States*, Ct. Cl. No. 273-58 (June 7, 1961).

¹² *Leal v. United States*, 149 Ct. Cl. 451, 459-62 (1960).

clearly stated that one price would be paid for all excavation, irrespective of its nature. The interpretation, by the contractor, of such modification as a representation that no rocks would be encountered is so strained as to be unreasonable. Neither the original nor the substituted provision purports to be a statement of fact as to whether rock will or will not be encountered. On the contrary, each purports to be a statement of how much will be paid for excavating rock *if it is encountered*. The modification could be of little value to the Government unless rock were encountered, and, hence, the fact that the Government chose to make such a modification would offer a prudent bidder more reason to believe rock was anticipated than to believe it was not anticipated.

Giving the most favorable consideration to the contractor's view of the contract provisions in controversy, the best that can be said for that view is that the contractor was faced with an uncertainty as to what was intended, and undertook to resolve that uncertainty on its own by adopting an unreasonable interpretation of the contract. The contractor could have protected itself by seeking to have the matter clarified by the contracting officer before the bid opening.¹³ This was not done by the contractor, and, therefore, the Government had no opportunity to resolve any supposed inconsistencies. Accordingly, the contractor is not entitled to the application of the rule of *contra proferentem*—that an ambiguity in a contract provision will be interpreted in favor of the party who did not draft the contract—since this rule is applied only where that party's interpretation has a reasonable basis.¹⁴ Hence, the requirements for establishing a changed condition of the first category (on the basis of contract representation) have not been met by the contractor.

Additionally, it must not be supposed that the contractor is entitled to relief under the Changed Conditions clause for a changed condition of the second category merely because some rocks or boulders were encountered. As previously indicated, the contractor has not stated the quantities or sizes of rock involved. The requirements of the Changed Conditions clause concerning "unusual nature" must be met. If Clause 1-04 had not been modified, the contractor would have been entitled to a price adjustment only in the case of boulders exceeding ½ cubic yards in volume, and in the case of rock requiring blasting or systematic drilling. However, the contractor's claim seems to be predicated on the proposition that a price adjustment should be made

¹³ *E-W Construction Company, IBCA-297* (October 23, 1963), 1963 BCA par. 3922, 5 Gov. Contr. 565(d). See also "Instructions to Bidders", quoted in text, *supra*.

¹⁴ *E-W Construction Company*, note 13, *supra*.

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for all rock encountered. It seems significant that there is no assertion as to the volume of any boulders found in the excavations or as to any need for blasting or systematic drilling (no costs are specifically claimed for either).

That part of the claim related to permafrost is not as worthy of consideration as the rock claim. The contract provisions did not at any time contain any statements concerning permafrost or price adjustment therefor. It is common knowledge that permafrost is prevalent throughout much of the State of Alaska, and the Board takes official notice to that effect. Moreover, the contractor had visited the site before bidding and had the same opportunities for inquiry and for examination of nearby excavations as was the case with rock and boulders. Accordingly, the contractor has failed to show the existence of a changed condition of the second category.

Concerning the question of notice, there appears to be no statement or evidence submitted by the Government to the effect that the Government was prejudiced by the delay of the contractor in giving notice of the supposed changed condition. However, the contractor's appeal letter of April 9, 1962, says without equivocation:

The Contractor states further that no notice of these adverse conditions was given Contracting Officer during the progress of the work.

Without deciding this issue, there is reason to assume that the rights of the Government must necessarily have been injured or prejudiced by such a long delay.¹⁵ It was given no opportunity to verify the contractor's claim or the extent thereof while the work was going on, as required by the Changed Conditions clause.

In any event, the contractor's appeal must perforce be denied for the several reasons discussed elsewhere in this opinion.

CONCLUSIONS

The appeal is denied in its entirety.

THOMAS M. DURSTON, *Member.*

I CONCUR:

I CONCUR:

PAUL H. GANTT, *Chairman.*

HERBERT J. SLAUGHTER, *Member.*

¹⁵ Cf. *Korshoj Construction Company*, IBCA-321 (August 27, 1963), 1963 BCA par. 3848, 5 Gov. Contr. 501.

INTERPRETATION OF THE SUBMERGED LANDS ACT

Submerged Lands Act: Generally—Oil and Gas Leases: Applications

The Departmental decision in *Henry S. Morgan, Floyd A. Wallis, et al.*, BLM-A-036376 (1956), affirmed by the Secretary of the Interior, 65 I.D. 369 (1958), is overruled to the extent that it is inconsistent or in conflict with the conclusion reached in the opinion of the Solicitor General issued December 20, 1963.

Submerged Lands Act: Generally

The Submerged Lands Act of May 22, 1953, 67 Stat. 29, 43 U.S.C., sec. 1301 *et seq.*, released to the States any former title of the United States to lands which were formerly beneath navigable waters as defined in section 2(a) of the Act, but which emerged as islands through natural processes within the boundaries of the States before the effective date of the Act.

Submerged Lands Act: Generally—Words and Phrases

Lands which are "made" as that term is used in section 2(a)(3) of the Submerged Lands Act of May 22, 1953, 67 Stat. 29, 43 U.S.C., sec. 1301 *et seq.*, include lands which are formed as islands by natural processes as well as those which are man made.

See Solicitor General's Opinion December 20, 1963, p. 22.

M-36665

January 31, 1964

TO: THE SECRETARY OF THE INTERIOR

SUBJECT: INTERPRETATION OF THE SUBMERGED LANDS ACT.

On December 20, 1963, the Attorney General approved and transmitted to you an opinion prepared by the Solicitor General dealing with the question of title, under the Submerged Lands Act of May 22, 1953, 67 Stat. 29, 43 U.S.C., sec. 1301 *et seq.*, to certain lands which formed as islands in the marginal sea within the boundaries of a State after such State was admitted to the Union but before the effective date of the Submerged Lands Act. That opinion, together with the Attorney General's letter of transmittal, is attached hereto.

The opinion approved by the Attorney General establishes the legal principle under which the Department of the Interior will now operate. However, the opinion contemplates further administrative action on the part of this Department as outlined below.

First, the Solicitor General has expressly advised that the Departmental decision in *Henry S. Morgan, Floyd A. Wallis, et al.*, BLM-A-036376 (1956), affirmed by the Secretary, 65 I.D. 369 (1958), is in conflict with his conclusion that the Submerged Lands Act released to the States any former title of the United States to lands which were

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formerly beneath navigable waters as defined in Section 2(a) of the Submerged Lands Act, but which emerged as islands through natural processes. To the extent that the *Wallis* decision is inconsistent or in conflict with the conclusion of the Attorney General, that decision must be and is hereby disapproved and overruled.

Second, several matters presently pending before the Department are materially affected by the opinion approved by the Attorney General and should be disposed of in accordance therewith. Among the matters awaiting Departmental action are the applications received by the Bureau of Land Management for the issuance of oil and gas leases on lands which were formed as islands by natural processes prior to the effective date of the Submerged Lands Act and which may, therefore, be affected by the Solicitor General's opinion.

Also pending before the Department are the protests filed by the States of Louisiana and Florida¹ to the granting of the lease applications. The pending lease applications which are the subject of the protests presently before me² are hereby denied. Such other lease applications covering lands in areas which may be affected by the Solicitor General's ruling, as may be pending before the Bureau of Land Management, should be denied by the Bureau as soon as possible.

The State of Florida has also filed a formal protest to the action of the Bureau of Land Management in ordering the Florida islands opened for leasing as public lands (25 Fed. Reg. 10954 (1960)). The Bureau is, therefore, instructed to take appropriate action to amend and modify the order opening the lands to public domain oil and gas leasing to conform to the opinion of the Solicitor General.

FRANK J. BARRY,
Solicitor.

APPROVED:

(Sgd.) STEWART L. UDALL,
Secretary of the Interior.

¹ Lease applications protested in this proceeding are as follows:

Louisiana :		Florida :	
BLM	040338	BLM	053264
BLM-A	040339	BLM	054147
BLM	042672	BLM	054142
BLM-A	042673	BLM	054442
BLM-A	042775	BLM	054465
BLM	042776	BLM	054466
		BLM	054510
		BLM	054823
		BLM	054845
		BLM	056495

² *Ibid.*

December 20, 1963.

THE HONORABLE
THE SECRETARY OF THE INTERIOR
MY DEAR MR. SECRETARY:

I enclose an opinion prepared by the Solicitor General at the request of the President dealing with title under the Submerged Lands Act to certain lands originally formed as islands in the marginal sea.

I am in full accord with the opinion expressed by the Solicitor General.

Please let me know whether you have any objection to the publication of this opinion in accordance with 5 U.S.C. 305.

Sincerely,

(Sgd.) ROBERT F. KENNEDY,
Attorney General.

OPINION OF THE ATTORNEY GENERAL OF THE
UNITED STATES

TITLE TO NATURALLY-MADE LANDS UNDER THE SUBMERGED
LANDS ACT

The Submerged Lands Act (act of May 22, 1953, c. 65, 67 Stat. 29, 43 U.S.C. 1301-1315) relinquished any former title of the United States to lands naturally-made as islands, which formerly were "lands beneath navigable waters," as that phrase is defined in the act. Title to accretions to public lands of the United States was not affected by the act.

The ruling of the Bureau of Land Management of the Department of the Interior in the case of Floyd A. Wallis (BLM-A 036376), as affirmed by the Secretary of the Interior (65 I.D. 369 (1958)), to the contrary is erroneous and should be revoked.

December 20, 1963.

THE SECRETARY OF THE INTERIOR.

MY DEAR MR. SECRETARY: I have the honor to submit for your guidance, pursuant to a request from the President on October 30, 1963, an opinion formally embodying the advice which I gave him on January 30, 1963, concerning the title, if any, of the United States to lands which formed as islands in the marginal sea within the boundaries of a State after the State was admitted to the Union but before May 22, 1953, the effective date of the Submerged Lands Act, c. 65, 67 Stat. 29 (43 U.S.C. 1301 *et seq.*). The most important of the disputed areas

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lie along the Florida coast and in Louisiana at the mouth of the Mississippi.

A brief description of the factual and legal background is necessary to clarify the issue. Off the Florida coast the tides and ocean currents sometimes form shoals that become tiny islands. The islands may grow quite rapidly, especially if a mangrove seed is dropped by a passing bird and takes root, for the roots hold the shifting earth. Although the exact chronology is uncertain because of the incompleteness of the early charts, many such islands were formed within the past century. Since their formation they have sometimes been incorporated as part of the mainland or other offshore islands. The lands were formed within the political boundaries of Florida and for many years were commonly believed to belong to the State of Florida as the owner of the bed of the marginal sea. In some cases the State transferred title to private owners. The lands have been used for camps and cottages, and even real estate developments. Considerable investments appear to have been made on the strength of the State's supposed title.

The situation along Louisiana's coast is quite different, although the legal question is the same. The Mississippi River carries enormous quantities of silt into the Gulf of Mexico. As the river reaches the Gulf it makes its own channel through the growing delta, building up natural levees on either hand which have been enhanced by dredging to keep the passes (channels) open to navigation. A glance at any large-scale chart reveals the extraordinary length of these arms reaching out into the Gulf. A break in one of the levees, made by natural forces or by man, would permit the current to flow through and, as it slackened, to deposit silt on the other side building up fast land. Some land might attach itself to the levee as accretion. Other land might be formed as islands. The islands might be joined either to each other, to the levee or to the mainland. The whole area is low and wet. The foregoing process is remarkably complex. The comparison between early and current charts makes it plain that many acres of fast land have been formed in this fashion, some as islands, some as islands which by accretion have been joined to the mainland, and some, perhaps, as direct accretion to the mainland.

Other islands in the delta area were formed as a result of the geological structure of the bed of the sea. As the Mississippi deposits its tons of silt, their weight sometimes causes the immediate area to sink and the pressure of the sinking mass then raises the bed of the sea in other spots into new islands, often called mudlumps, that may

later be incorporated into other new land in the delta area or may, indeed, sink back beneath the sea.

These processes have been taking place continuously for many years. As in Florida the general assumption was that Louisiana owned the bed of the sea within its political boundaries and therefore became the owner of any newly formed islands within the marginal sea. The area is valuable for oil fields and possibly other natural resources.

The controversy over title arises in the following manner. Under the common law the sovereign is the owner of the bed of all navigable streams and of navigable inland waters. In *Pollard's Lessee v. Hagan*, 3 How. 212 (1845), the Supreme Court held that newly admitted States became the owners of the lands beneath navigable waters within their political boundaries, except as a prior sovereign might have granted the land to another owner. Although the case involved land in Mobile Bay, which is inland waters, throughout the rest of the nineteenth century and during the early decades of the twentieth century it was generally assumed that the same rule applied to lands beneath the marginal sea. It is also a settled rule that new islands formed in a body of water by natural forces became the property of the owner of the bed. *City of St. Louis v. Rutz*, 138 U.S. 226, 247 (1891). The States therefore administered both the submerged lands and the new islands as their own, and made both grants and leases.

During the 1930's and 1940's, after the discovery of vast natural resources under the marginal sea, the Federal Government began to challenge the States' claims of title to submerged lands. In *United States v. California*, 332 U.S. 19 (1947), the Supreme Court overturned the widespread prior assumption; limited the rule of *Pollard's Lessee v. Hagan* to tidelands and inland waters; and held that the United States had paramount rights in the lands under the marginal sea. Although the opinion spoke only of paramount rights, the decision sustained the claim of the United States to all the oil, natural gas, sulphur and other minerals so that we can say, for all practical purposes, that the United States was held to have title to the bed of the marginal sea. For present purposes it is also proper to assume that title to the islands formed by natural forces within the political boundaries of a State after the State was admitted to the Union was vested in the United States as the owner of the bed of the marginal sea. *City of St. Louis v. Rutz*, *supra*.¹

¹ The issue is actually disputed, but the dispute is irrelevant to the issue considered in this opinion.

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In subsequent rulings the decision in *United States v. California* was extended to Louisiana and Texas;² obviously it applied to all other States. The rationale cast doubt upon private titles on the strength of which investments had been made.

The decisions gave rise to a national controversy which was resolved on May 22, 1953, when Congress enacted and President Eisenhower signed the Submerged Lands Act, 67 Stat. 29 (43 U.S.C. 1301 *et seq.*).

Generally speaking, the effect of the Submerged Lands Act is to release and relinquish to the States title to and ownership of "the lands beneath navigable waters" within State boundaries, including all the natural resources therein. Lands beneath navigable waters are defined in section 2(a) in three parts. Subdivision (1) includes lands covered by nontidal waters "up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion and reliction * * *." Subdivision (2) covers "all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coastline of each such State * * *."³ Subdivision (3) brings within the definition:

"(3) all filled in, made or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined."

The Submerged Lands Act conveys to the State whatever title the United States had to lands within the foregoing limits. It is equally plain that the act conveyed to the States whatever claim the United States might have to islands in the same area filled in or reclaimed by man (except as they might fall under one of the exceptions in section 5).

Sovereignty over islands existing when a State was admitted to the Union passed to the State. Title to some of those islands might have already passed into private hands and thenceforth be governed by State law. Title to others might have remained in the United States, just as other public lands on the mainland, but some of the latter may later have passed into private hands in the same manner as other public lands. In any event the status of the islands formed before statehood would not be different from that of other land under the State's jurisdiction.

² *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. Texas*, 339 U.S. 707 (1950).

³ The omitted words put the line farther seaward in certain instances. Since that issue is not involved in the present controversy, I shall speak as if the limit were three miles.

Islands in the marginal sea formed after May 22, 1953, belong to the State as the owner of the bed. *City of St. Louis v. Rutz*, 138 U.S. 226, 247 (1891).

Thus, the only question raised by the pending controversy is whether the lands *naturally formed* as islands in the marginal sea within the boundaries of an admitted State but before the enactment of the Submerged Lands Act belong to the States (and their grantees) or to the United States.

This question has once already been the subject of formal consideration. On June 7, 1956, the Director of the Bureau of Land Management of the Department of the Interior in the so-called *Floyd A. Wallis* case (BLM-A 036376 *et al.*), ruled that certain lands formed as mud-lumps in the Louisiana delta region belonged to the United States in its sovereign capacity and had not been transferred to Louisiana under the Submerged Lands Act. This decision was affirmed by the Secretary of the Interior, 65 I.D. 369 (1958).⁴

In my opinion, this ruling was erroneous and the title to the naturally formed lands in dispute belongs to the States and their grantees.

I

The words of the Submerged Lands Act do not resolve the issue. Although they can be read, standing alone, to mean that only man-made lands passed to the States, they lend themselves as readily to an interpretation covering both man-made and naturally-made islands.

The critical provision is section 2(a)(3) which includes among the lands conveyed:

“all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters * * *.”

The words “filled in” and “reclaimed” suggest the works of man, and since the word “made” is used in close association with “filled in” and “reclaimed”—indeed, it comes between them—they tend to color its meaning. Moreover, “made” is defined by many dictionaries to distinguish what is artificial from what is natural. *E.g.*, *Dictionary of American English*. The University of Chicago, 1942; *Oxford English Dictionary* (10 vol.), Clarendon Press, 1908; *Webster's New International Dictionary*, 2d ed., G. & C. Merriam Co., 1957.

⁴ Although the Decision of the Secretary was sustained in subsequent court proceedings, *Morgan v. Udall*, 306 F. 2d 799 (C.A.D.C.) (1962); *certiorari denied*, 371 U.S. 941 (1962), the question under review was not in issue and not determined. See the Memorandum for Stewart L. Udall, Secretary of the Interior, in Opposition.

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It is said that some significance must be attached to the fact that "made" was inserted into some of the bills dealing with submerged lands well along in the controversy, and that the only possible purpose was to add "naturally-made" land. However, "made" can be given significance without going so far; for some purposes an island formed by artificially altering the course of a stream so as to cause the deposit of silt might well be described as "made by man," although it might be neither "filled in" nor "reclaimed."⁵

It does no violence to the words of section 2(a)(3), however, to read "made" as including both man-made and naturally-made islands. Lawyers have often used the word "made" to describe lands newly formed by nature. *E.g.*, *Jefferis v. East Omaha Land Co.*, 134 U.S. 178 (1890); *County of St. Clair v. Lovington*, 23 Wall. 46, 59 (1874); *Linthicum v. Coan*, 64 Md. 439, 451 (1885), 2 Atl. 826, 828; *Trustees of Hopkins Academy v. Dickinson*, 63 Mass. 544, 545 (1852) (Shaw, C. J.); *Union Depot, Street Ry. & Transfer Co., v. Brunswick*, 31 Minn. 297, 303 (1883), 17 N.W. 626, 629; *Clark, A Treatise on the Law of Surveying and Boundaries*, §§ 259, 269 (2d ed.); *id.*, § 598 (3d.). The word "made" was applied to lands formed by natural forces on several occasions during the debates on the Submerged Lands Act.⁶ For example, Senator Paul H. Douglas, of Illinois, said (99 Cong. Rec. 2936):

"It is primarily in this delta region of made land that oil and gas have been found in Louisiana." He was describing land made long before the white man came to America.⁷

In sum, the words of section 2(a)(3) as a matter of etymology alone, may fairly be read, either (1) as covering both man-made and natu-

⁵ Strictly speaking, "filled in" applies to areas into which man has trucked or pumped earth and other solid fill. "Reclaimed" describes land from which the waters have been excluded.

⁶ Very slight support for this reading of "made" in section 2(a)(3) can be drawn from the fact that the word is omitted from section 5(a) which excepts lands "filled in, built up, or otherwise reclaimed by the United States for its own use." The contrast is probably fortuitous, but it may be significant that "made" was not used in the final version where the reference is plainly confined to the works of man.

⁷ "Made" was used in the same way by Senator Clinton P. Anderson, of New Mexico, in the course of hearings before the Senate Committee on Interior and Insular Affairs on the submerged lands bills. In discussing the location of the coastline from which the marginal sea would be measured, he said (Hearings in Executive Sessions, 83d Cong., 1st sess., p. 1356 (March 16, 1953)):

"I am sitting here looking at a map showing where the leases have been granted in Texas and Louisiana, both prior to and subsequent to June 23, 1947; and if I am not mistaken, a good deal of the land that lies south and east of New Orleans is made land. If Louisiana wants to have the advantage of all that made land around which there has been a great deal of leasing activity, then naturally it has to be limited by whatever has happened to this other land: If it wants to take its original boundaries and include them, it has that right."

rally-made lands, in which event the naturally-made islands were released to the States, or (2) as covering only man-made lands, in which event these naturally-made lands still belong to the United States. For their meaning as a matter of law, one must look to other evidences of congressional intent.

II

The legislative history contains no reliable evidence that Congress had any conscious and specific intent either to retain or to release the naturally-made islands.

Despite the lengthy hearings, the floor debates in several Congresses, and the exhaustive character of the debates, the legislative history of the Submerged Lands Act shows that neither Congress nor any committee ever directed its attention to naturally-made islands formed after statehood in the marginal sea. *A fortiori* there is no explicit evidence showing whether Congress intended to retain or convey them, and none showing its understanding of the meaning of "made" in that respect. Out of the mass of legislative history only three relevant conclusions can fairly be drawn.

1. The occasional expressions of understanding or intent that may be thought relevant are unpersuasive because they point sometimes to one conclusion and sometimes to another, and were uttered under circumstances that strongly suggest that the speaker was not aware of their possible bearing upon the present issue.

Thus, when Senator Guy Cordon, of Oregon, who presided at the hearings on the submerged lands bill and who was its floor manager, was describing the proposed legislation, he referred to the words "all filled in, made, or reclaimed lands," and said (99 Cong. Rec. 2633) :

"That would appear to be perfectly clear. It provides that the joint resolution shall apply to areas that are now above water, but which were under navigable waters at some time in the past." Senator Cordon's statement, read literally, applies to lands which rose above navigable waters because of natural forces as well as to those that were filled in or reclaimed by man.

On the other hand, the House Committee on the Judiciary, which handled the submerged lands bills, made a similar statement that cuts in the opposite direction. Earlier bills, including the joint resolutions vetoed by President Truman, relinquished the claim of the United States to "all lands formerly beneath navigable waters, as herein defined, which have been filled or reclaimed." Only a forced construction would bring natural islands within the words "filled or

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reclaimed." The word "made" was first inserted in a bill introduced by Congressman Francis E. Walter, of Pennsylvania, that was favorably reported by the Committee on the Judiciary (H. Rept. 2078, p. 3, 81st Cong., 2d sess.) and ultimately became the Submerged Lands Act. The report states that the title containing the words in question "is, in substance, the same as" the bills that omitted the word "made." If we read this report literally the addition of "made" did not change the substantive meaning, and since the words "filled in or reclaimed" do not cover naturally-made islands, the addition of "made" did not cover them.

The arguments based upon such general expressions clutch at straws. It requires an extraordinary stretch of the imagination to believe that any of the speakers had in mind the application of their remarks to naturally-made islands, a problem with respect to which they were otherwise utterly silent, as were all other Senators and Representatives.

2. The words "filled in, made, or reclaimed land" were used in the Anderson bill (S. 107, 83d Cong., 1st sess.) in a manner which plainly confined them to land made by man. The Anderson Bill was introduced by the opponents of legislation giving the submerged lands to the States. One of the arguments advanced by the proponents of such legislation had been that in a number of coastal States vast investments had been made in building up real estate developments, as in Florida, and recreational facilities, as at Rockaway Beach in New York, on filled-in lands in the marginal sea and in inland waters. The proponents had carried the argument to extreme length, maintaining that the Supreme Court's decisions had placed in jeopardy all filled-in and reclaimed lands such as the Back Bay area in Boston and the shores of the Great Lakes on which important parts of major cities now stand. The argument of the proponents, while of some pertinence to developments in the marginal sea, was utterly absurd as applied to situations like Boston's Back Bay area, for the Supreme Court decisions obviously did not apply to inland waters. In an effort to demolish the argument as a basis for giving away the submerged lands Senator Anderson and others proposed to recognize and confirm any right derived from a State or political subdivision "to the surface of filled in, made, or reclaimed land in such areas."

There was no doubt that the words "filled in, made, or reclaimed land," in this context, meant "made by man." The basic theory of the Anderson Bill was that the States and their citizens were entitled to the surface rights of land that was the product of their investment of labor and resources, but that the Nation as a whole was entitled to

the resources under the sea that were placed there by God. The Anderson Bill was debated at length and defeated before the same words were adopted as part of the Submerged Lands Act, hence it is argued that the words came to have an understood meaning that was carried over into the Submerged Lands Act. The weakness in the argument is that the meaning of all words depends in some degree upon their context; they take color not only from their verbal surroundings but from the purpose and understanding of their authors. It is not unusual to find the term "made * * * land" being understood to have one meaning when spoken by a man who thought that all natural resources belonged to the Nation while all investments built up by human effort should belong to the States (or those claiming under a State), and to find the same words—"made * * * land"—being used in a much broader sense by one who believed that the States should be given title to all the submerged or surface lands they had previously been supposed to have owned. In other words, the words "filled in, made, or reclaimed" did not become terms of art with a special meaning that would survive a radical change in context and purpose.⁸

3. The only "filled in, made, or reclaimed" lands mentioned in the long congressional debates were lands made by man. They were mentioned frequently and with great emphasis by numerous Senators, but especially by Senator Spessard L. Holland of Florida. There was no mention during the debates of naturally-made islands.⁹

⁸ The use of "made" in the Anderson Bill to mean only lands made by man is inconsistent with Senator Anderson's and Senator Douglas' use of the same word at least once in the debate when speaking of naturally-made lands. See Note 7 and the accompanying text. The only significance of the inconsistency would seem to be its tendency to prove that the word "made" was not used as a term of art with precise meaning but takes its color from the purpose and context. It is not suggested that the usage in debate *proves* that the word is used in the Submerged Lands Act in the broader sense.

⁹ Specific recognition of the existence of naturally-made islands does appear in the testimony of two witnesses from the State of Louisiana given in the course of the 1948 joint hearings on various submerged lands bills before the Committees on the Judiciary. These bills (e.g., S. 1988), which were essentially similar to the act ultimately adopted, proposed that the United States "confirm and establish titles of the States to lands and resources in and beneath navigable waters * * *." "Lands beneath navigable waters" were defined to include "all lands formerly beneath navigable waters, as herein defined, which have been filled or reclaimed * * *."

Discussing the difficulties in determining the location of the Louisiana shoreline due to the presence of bays, inlets and islands stretched along the coast, Mr. B. A. Hardey, Chairman of the State Mineral Board of Louisiana, stated as follows in answer to questions of Mr. Guy Woodward, Administrative Assistant to Senator E. H. Moore of Oklahoma (Joint Hearings on S. 1988 and similar House Bills, 80th Cong., 2d sess., pp. 111-112 (February 23, 1948)):

"Mr. WOODWARD. Is the land on these islands lying offshore Louisiana, which you mentioned, owned individually? Has that been patented or sold to individual owners?"

"Mr. HARDEY. Some of them are owned individually. Some of the islands disappear and bob up somewhere else sometimes. We have some litigation with landowners about

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Any one of three conclusions is consistent with the course of the congressional discussion:

(a) The Senators and the Congressmen believed that section 2(a) (3) conveyed man-made land formerly under navigable waters, and that alone. That is why they never spoke of naturally-made islands.

(b) The man-made land was used as an illustration during the debate only because these were the dramatically appealing instances of the "fairness" of the legislation, but the Senators and Congressmen consciously believed that naturally-made islands were also being conveyed.

(c) The Senators and Congressmen were conscious only of the man-made lands and they were either ignorant of, or wholly forgot, any naturally-made islands.

There is nothing in the legislative history to indicate that one explanation is more plausible than the others. Whether the bill has one meaning or the other must therefore be derived from an understanding of the general purpose of the legislation and the tenor of the debate concerning its larger justifications.

ownership of land bodies. Land ordinarily is owned by individuals, and of course the water bottoms are owned by the State.

"Mr. WOODWARD. Are any of these islands of such permanent character that they are populated by residents?"

"Mr. HARDEY. Oh, yes; some of them are. * * *"

Again, with respect to the difficulties of establishing a coastal boundary line, John L. Madden, Special Assistant Attorney General of the State of Louisiana, appearing for Fred S. LeBlanc, the State Attorney General, testified (*id.* at pp. 384-385):

"These indentations follow the outline of numerous lakes and bays, some of which not only extend inland for great distances but expand far to the south in a gulfward direction. Over broad and far-reaching spaces offcoast, our marginal waters are astoundingly shallow—so shallow, in fact, that islands therein appear to move in some mysterious manner, emerging here and sinking there, and being lost until they are discovered as forming a part of the coast or other islands of greater permanence.

"Obviously the lands beneath such shallow waters, extending gulfward over an extensive area, are well adapted for utilization and, by nature, are more closely related to the coastal region than they are to the ocean's bottom or the soils underlying the open sea. This is all the more true when we consider the fact that our coastal region is still in a state of constant change. What is land today may be water tomorrow, and the reverse is equally true.

"Upon reaching coastal outlets, an expansive confluence of waters joins with wind and tide to create physical curiosities of land and water. Water courses change from time to time, leaving great deposits of natural accretion. But largely inexplicable is the recession of our coast line, particularly on the west where about 1¼ miles of dry land has fallen into the Gulf since Louisiana was admitted to statehood."

III

The general intention of Congress in passing the Submerged Lands Act called for including naturally-made islands in the grant to the States. The legal theory on which Congress proceeded, if consistently applied, also required a relinquishment of naturally-made islands.

The general purpose of the Submerged Lands Act was "to restore" to the States and persons claiming under the States what was "taken away from them" by the decision in *United States v. California*, 332 U.S. 19 (1947). In *Pollard's Lessee v. Hagan*, 3 How. 212 (1845), the Supreme Court held that the States owned the lands beneath navigable waters within their political boundaries (except as either a prior sovereign or the State might have granted land to a private owner). The case involved land in Mobile Bay which may have been naturally made; in any event the Court made it clear that the same rule would apply to land naturally made. Although Mobile Bay is inland waters, it was assumed throughout the rest of the nineteenth century and in the early decades of the twentieth century that the same rule applied to lands beneath the marginal sea, *i.e.* to the strip three miles in width between the coastline and international waters. When an island is formed, it belongs to the owner of the bed of the waters. *City of St. Louis v. Rutz*, 138 U.S. 226, 247 (1891). For many years, therefore, the States assumed that they were the owners of all lands within their boundaries under the marginal sea and of all islands formed therein by natural forces. They administered the lands as theirs and made both grants and leases. Many sizable investments were made in reliance upon the validity of the States' title.

As pointed out above, the decision in *United States v. California*, 332 U.S. 19 (1947), undercut the assumptions and defeated the expectations of many people and business concerns in coastal areas. The rationale invalidated the private titles on the strength of which large investments had been made.

The general purpose of the Submerged Lands Act was to undo the effect of the Supreme Court decisions and "restore" to the States and to those claiming under the States, what they supposed that they already owned.

In legal terms, the "restoration" was to be accomplished by making the rule of *Pollard's Lessee v. Hagan* applicable to the marginal sea in accordance with the previous supposition. The Supreme Court recognized that this was the basic theory of the Submerged Lands Act

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in *United States v. Louisiana*, 363 U.S. 1 (1960).¹⁰ After referring to the rule laid down in *Pollard's Lessee v. Hagan*, the Court said (363 U.S. at 35): "Were that rule applicable also to the marginal sea—the premise on which Congress proceeded in enacting the Submerged Lands Act—it is clear that such a boundary would be similarly effective to circumscribe that extent of submerged lands *beyond* low-water mark, and within the limits of the Continental Shelf, owned by the State." * * *

"We conclude that, consonant with the purpose of Congress to grant to the States, subject to the three-league limitation, the lands they would have owned had the *Pollard* rule been held applicable to the marginal sea * * *."

It is plain that the general purposes and the legal theory are at least as applicable to naturally-made islands as they are to submerged lands. There was at least as much if not more reason to suppose that the naturally-made islands belonged to the States or their grantees. There was at least as much reason to wish to put the titles to rest. The rule of *Pollard's Lessee v. Hagan* was at least as applicable to the naturally-made islands; possibly more applicable because the *Pollard* case apparently involved naturally-made land. One asks, therefore, how can anyone suppose that Congress did not convey those islands along with the submerged lands.

The answer is offered that Congress did not adhere rigidly to the thesis that the rule of *Pollard's Lessee v. Hagan* should be extended to the marginal sea. Some of the exceptions set forth in section 5 reserve to the United States property which probably would have passed to the States under a strict retroactive application of the rule. It is argued that since the Congress made these exceptions to the fulfillment of its general thesis, it may also have intended to except the naturally-made islands.

Granting the possibility, there is not the slightest reason to suppose that Congress followed such an utterly irrational course. Each of the departures from the principle of extending *Pollard's Lessee v. Hagan* to the marginal sea rests upon a foundation of policy or commonsense practicality. There was no reason for making an exception of the naturally-made islands. The extent of such naturally-made land is small—almost insignificant—in comparison with the submerged lands and the man-made lands in the marginal sea. Congress was not in a niggardly mood, holding out every bit of land that it could

¹⁰ A wealth of legislative material is cited in the opinion and will not be repeated here.

find an excuse to retain. Not only is every consideration applicable to the submerged lands equally applicable to islands risen above the sea, but no one has ever suggested any rational reason for making a distinction. Viewing the problem in terms of the general purposes and policy of the statute, and of the practical situation confronting Congress, one is driven to conclude that the general purpose of Congress and the theory of its legislation apply no less to the comparatively insignificant problem of title to naturally-made islands than to other portions of the grant.

IV

To construe the Submerged Lands Act as retaining naturally-made islands would create arbitrary and impractical distinctions giving rise to years of complicated litigation.

As indicated above, the same considerations that persuaded Congress to release to the State submerged lands and new man-made islands in the marginal sea are equally applicable to new naturally-made islands. No reason for reserving the naturally-made islands has ever been suggested. In addition, there are very strong reasons for eschewing that distinction, which would have been apparent to anyone who studied the problem. For although the concept of "naturally-made islands" appears on the surface to be simple and easy of administration, any interpretation of the words "filled in, made, or reclaimed land" that incorporated such a distinction would in fact give rise to expensive and enormously time-consuming litigation impairing the value of the lands affected. Conversely, the problems are minimized or entirely avoided by reading the critical phrase to include naturally-made islands.

1. The apparently simple distinction between naturally-made islands and man-made islands is, in truth, hazy and perhaps unworkable. Off the Florida coast the line can be drawn without too much difficulty because the islands are quite plainly the result of natural forces working alone. In the Mississippi delta, the problems almost defy solution because the changes are the result of varying combinations of human and natural forces. Even in theory there is no way of telling which combinations deserve the label "man-made" and which are to be described as "naturally-made."

For the past 150 years man's works have substantially modified the natural regime of the delta region. Man is responsible for the extensive construction of jetties and spur dikes along the major passes. The creation of artificial levees that narrow the passes in order to increase the river's velocity; the dredging of canals; the artificial opening of natural levees; the damming of natural openings between

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islands to form continuous river banks—are only a few general examples. Upriver from the delta, the artificial levee system flanking nearly the entire length of the river has precluded normal sedimentary alluviation of the river banks, thereby modifying depositional processes within the delta. Whatever their effect upon the total quantity of deltaic sediment, man's activities have, without question, altered the depositional sites and rates. As a consequence, the present deltaic landscape is in great part a product of artificial forces.

A specific illustration will demonstrate the difficulty of making the distinction, both conceptually and practically. In 1862 a minor artificial cut was made across the narrow east bank levees of the Mississippi River a few miles above Head of Passes. This cut, reportedly made by the two daughters of a fisherman named Cubit, enlarged rapidly and formed a network of alluviating distributary channels. Through this outlet, subsequently known as Cubits Gap, poured a volume of sediment calculated to exceed 1,200,000,000 cubic yards. About 8 miles farther north a smaller artificial crevasse was made sometime prior to 1874, reportedly by an oyster fisherman named Baptiste Collette. Sedimentary deposits through Baptiste Collette Bayou and its distributaries have coalesced with those from Cubits Gap to form a subdelta covering an area in excess of 100 square miles, most of which had formerly been shallow water. In the process, however, these sediments have enveloped a number of islands which were present in the 1870's, for example, the islands composing Robinson's and Parry O'Neil's Reef, and the central and southern members of the Bird Island group.

The foregoing example suggests several questions. Did Cubit's daughters and Baptiste Collette "make" the subdelta covering an area in excess of 100 square miles? Perhaps the answer is yes; the subdelta would not have been formed if they had not cut the east bank levees. Perhaps not; it might be said that neither Cubit's daughters nor Collette intended to cause the land formation or were sufficiently intelligent to know what would follow from cutting the levee. Is the ownership of land formed in this manner to depend upon proof of the state of mind of someone who acted a century ago? If not, what is it to depend on?¹¹

¹¹ In *County of St. Clair v. Lovington*, 23 Wall. 46, 66 (1874), the Supreme Court indicated that an accretion to the bank of a river becomes part of the riparian parcel even though the deposit was the result of upstream obstructions placed by man. This holding may give some support to the view that an island is naturally-made and belongs to the owner of the bed even though some other person has caused its formation. The conclusion is by no means inevitable because of the difference between accretion and islands. Furthermore, the intent of the individual who built the obstruction might still be relevant, for it is plain that in the *Lovington* case the persons who built the obstructions had no intention to cause accretion to land downstream.

This is only one of many possible examples. In other cases the origin of breaks through the levee may be unknown; perhaps they were made by man, perhaps by nature. And quite different combinations of human and natural forces were working in other places.

2. Even when a clear theoretical distinction between naturally-made and man-made was developed, there would be virtually insuperable difficulties in applying the definitions to the delta area. The continuous deposit of sediment, coupled with the geological changes resulting from the pressure of the deposits, has often resulted in accretion to both islands and mainland, in the joining of islands, and in the envelopment of both old and new islands in what now appears to be mainland. If the proposed distinctions were made it would be necessary to mark off on the land (or on a detailed map) parcels having the following characteristics:

(a) Islands existing at the time of admission to statehood, with their accretions.

(b) Islands formed within the State after statehood but before the enactment of the Submerged Lands Act, with their accretions.

(c) Man-made islands, with their accretions.

(d) Accretions to the upland.

In each instance one would have to be ready to distinguish a true island from a shoal washed by high tide. Also, a rule would have to be developed for dividing accretions to the fast land after the "federal islands" had been enveloped. The difficulties of marking out these distinctions upon the 100-square-mile subdelta started by Cubit's daughters and Baptiste Collette will again serve as an illustration.

The tracing of lands throughout this process of envelopment in order to identify those to which the Federal Government would have title—even assuming that adequate charts may be found—would be exceedingly complicated. Historical and geological investigation stretching back for more than a century would be necessary. A costly core drilling program might succeed in making some differentiations of the now combined land masses. However, it appears that even this might not be possible where the fast land, the islands and the accretions thereto were produced from deltaic deposits of the same sedimentary characteristics. According to Dr. James P. Morgan, Professor of Geology and Managing Director of the Coastal Studies Institute of Louisiana State University, in many cases delineation of the former islands from their incorporating sediment "would necessitate the development of new scientific techniques beyond the scope of our present knowledge."¹²

¹² Letter from Dr. Morgan dated September 21, 1962, to Mr. Austin Lewis, Special Counsel for the State of Louisiana.

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Undoubtedly there will be some litigation between private parties, and between Louisiana and private parties, even if the Submerged Lands Act is interpreted to release the naturally-made islands. The Federal Government will have an interest wherever land was added to public or acquired lands by accretion. It seems plain, however, that to read into the Submerged Lands Act a distinction based upon the way in which new lands were formed would increase the litigation many hundredfold, both in volume and in difficulty. Any construction of "made" that retained some parcels as naturally-made would require extensive litigation to answer a most complex series of historical and geological questions in order to identify the lands belonging to the Federal Government. No one could establish good title to land in the delta area without an acre-by-acre investigation eventually covering thousands of parcels of offshore islands and mainland. Titles would turn not upon existing plat books and transfers but upon dimly charted land movements in the past.

3. In the Louisiana areas affected by the instant question it is almost impossible to distinguish between the lands under water, which were indisputably relinquished to the States, and the area above the line of mean high tide, which is the most that could be claimed by the United States as fast lands formed as naturally-made islands. The whole area is low, swampy, interlaced by waterways, and flooded during the higher stages of the Mississippi River. Even a shift in the wind may bring land out of water or submerge it. The areas now above mean high tide cannot be identified without an enormously costly survey, but the most likely areas are narrow levees on either side of the numerous channels. The sole distinguishing feature is that the levees, and sometimes the land for a short distance back of them, are a few inches or a few feet higher than the surrounding areas. It would have been utterly capricious for Congress to retain such winding tentacles while relinquishing all claim to the areas through which the tentacles run.

If there were any reason for Congress to give the States the tidelands, the lands under water and any man-made land in the marginal sea while retaining lands naturally formed as islands, then the seeming capriciousness of the distinction as applied to the Mississippi delta could be explained as the inevitable result of the necessity of drawing a sharp line on a finely graduated scale. In this instance, however, there was no reason for Congress to make the basic distinction. As pointed out above, every reason for giving the States the submerged lands and tidelands applied equally to lands formed as naturally-made

islands in the marginal sea. Furthermore, the absurdities of the fine distinction are the typical case, not the marginal extreme, because the whole problem is more important in the delta area than elsewhere.

Congress cannot be supposed to have intended a distinction so provocative of litigation, especially where there was no affirmative reason for drawing such a line.

V

To interpret section 2(a)(3) as covering naturally-made islands creates no difficulties in the interpretation and administration of other provisions of the Submerged Lands Act.

The considerations thus far discussed are either neutral—as in the case of the words and legislative debates—or argue strongly for the conclusion that naturally-made islands were relinquished to the States. The principal opposing argument is that to interpret “made” as including naturally-made would cast doubt upon the title of the United States to lands added by accretion to islands or upland owned by the United States as part of the public lands retained when the States were admitted to the Union. The argument runs as follows:

Section 3 grants lands beneath navigable waters. Section 2(a)(3) defines lands beneath navigable waters to include “all filled in, made or reclaimed lands which formerly were lands beneath navigable waters as hereinabove defined.” If “made” covers naturally-made islands, the word must also cover lands added to the mainland by accretion; indeed, the cases cited to show that “made” includes naturally-made land are all cases of accretion. Under this reading, then, the United States has surrendered to the States all its claim to accretions to upland held as part of the public lands. This would upset settled rules of land law. Everyone knows that the Submerged Lands Act was not intended to convey parts of the public lands which were never in dispute. The only way to avoid this conclusion is to limit “made” to man-made, in which event sections 2 and 3 would not grant accretions. Furthermore, the argument runs, even if this is not a necessary conclusion from the proposed interpretation of “made,” the United States should not adopt an interpretation of “made” which might cast doubt on the title to accretions to public lands.

It is undoubtedly true that the act was not intended to grant to the States land added by accretion to upland owned by the United States. One must also agree that if the word “made” includes naturally-made islands and former islands, the word “made,” standing alone, might also cover naturally-made mainland resulting from accre-

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tion. In my judgment, however, the argument breaks down for three reasons:

1. Lands added by accretion to upland owned by the United States are in every relevant sense utterly unlike newly-formed islands in the marginal sea. The law has always awarded natural accretions to the littoral or riparian owner. *County of St. Clair v. Lovington*, 23 Wall. 46, 48 (1874); *Shively v. Bowlby*, 152 U.S. 1, 35 (1894). The decision in *United States v. California* had no effect upon this rule. The case did not throw doubt upon the title to such accretions; indeed, the accretions were always regarded as part of the upland and not as land formerly beneath tidal or nontidal waters. This was not the case with naturally-formed islands which apparently were regarded as part of the bed of the sea even when they "rose" above the surface of the water, for the recognized rule is that they belong to the owner of the bed; in other words, the rising above the sea did not affect the title. *City of St. Louis v. Rutz*, 138 U.S. 226, 247 (1891). On this point, *United States v. California* did upset the expectations of the States for had the States been the owners of the bed, as most people assumed before that decision, they would also have held title to the naturally-made islands. The claim of the United States to the islands and former islands rests upon its ownership of the bed as established by *United States v. California*. The Submerged Lands Act deals with the problems resulting from that decision—not with lands and doctrines not involved in that controversy. The act is wholly inapplicable to accretions to what had long been upland, whether mainland or an established island. No one ever supposed that *United States v. California* affected those areas. There is every reason, therefore, to suppose that the act will be construed in such a way as to leave the ownership of accretions untouched.

2. The words of the act, when read with any imagination of the purposes that lie behind them, aptly express the foregoing distinction. Congress was dealing with the title to lands in two areas: (a) the submerged land and formerly submerged land on the water side of the high water mark on nontidal waters and (b) the areas between the "line of mean high tide" and the outer limit of the marginal sea, in the case of tidal waters, treating the "high water mark" and "the line of mean high tide" in each instance as a boundary line in accordance with established real estate law.¹³ No one familiar with the problem could doubt that this is the sense of the statute. It is also the natural meaning of the words.

¹³The foregoing references to "high water mark" and "the line of mean high tide" refer to lines on the mainland or islands established before statehood, as the case may be.

Thus, it is extremely unlikely that Congress believed that the words "all filled in, made, or reclaimed lands which were formerly lands beneath navigable waters" would cover accretions to upland parcels. Congress was concerned with what might be claimed under *United States v. California*, i.e., the bed of the waters and land which might be claimed to go with the bed. Conceptually, accretions are not considered formerly beneath the water, but an expansion or enlargement of the upland parcel. They do not raise land above the water; they move the boundary line. Title does not go to the owner of the bed or of the waters but to the owner of the shore as part of his original holding.

Section 2(a)(1) plainly confirms this interpretation as applied to inland waters, for in conjunction with section 3 it grants the States land up to the ordinary high water mark "as heretofore or hereafter modified by accretion, erosion and reliction." Obviously, this contemplates a shifting line with titles changing with accretion and erosion or reliction.

Obviously, section 2(a)(3) is not intended to undo the limitation imposed upon the grant by the quoted words of subdivision 1. Its evident purpose is to embrace not accretions but lands which, when they became fast lands, were within the area with which Congress was concerned—lands which would be under the water but for the fact that they had been "raised" by human or natural forces and which might be claimed as part of the bed.

Parallel reasoning applies to section 2(a)(2). The terms "the line of mean high tide" and "the coast line" connote a boundary line constantly changing as a result of accretion, erosion and reliction. One may fairly ask why Congress did not make this meaning clear in subdivision 2 as it had done in subdivision 1 by speaking of the line "as heretofore or hereafter modified * * *." The answer is twofold. First, the connotation of the phrases "line of mean high tide" and "coast line" was thought too clear to require the additional explanation. Second, the prior words of subdivision 2 did not give rise to the same need for negating the idea of unvarying limits that might have been supposed to have been created by subdivision 1 if the reference to changes by accretion, erosion and reliction were omitted. Subdivision 1 refers to two dates, one for the purpose of testing navigability and the other, submergence. From this reference it might have been inferred that the line was also fixed as of the latter date. In subdivision 2 no dates, past or present, were necessary; hence there was no comparable inference to dispel.

3. Any remaining danger that reading "filled in, made, or reclaimed lands" to cover naturally-made land would endanger the title of the

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United States to accretions to public lands is met by section 5 which excepts from the grant to the States:

“(a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; *all lands expressly retained by or ceded to the United States when the State entered the Union* (otherwise than by a general retention or cession of lands underlying the marginal sea); all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity; all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and any rights the United States has in lands presently and actually occupied by the United States under claim of right; * * *” [Italics added.]

The italicized words are more than sufficient to reserve public lands along the coast and all accretions thereto. The acts authorizing admission of all the coastal States in which public lands are located—Florida, Alabama, Mississippi, Louisiana, California, Oregon, and Washington—all contain language retaining the public lands. The acts authorizing admission of the States of Louisiana (2 Stat. 641, sec. 3), Alabama (3 Stat. 489, sec. 6), and Mississippi (3 Stat. 348, sec. 4), contain identical language which provides: “That the said convention shall provide, by an ordinance, irrevocable without the consent of the United States, that the people inhabiting the said territory do agree and declare, that they forever disclaim all right or title to the waste or unappropriated lands, lying within the said territory; and that the same shall be and remain at the sole and entire disposition of the United States * * *.” A comparable provision in the California Admission Act (9 Stat. 452, sec. 3) reads: “[The State of California] shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law or do no act whereby the title of the United States to, and the right to dispose of, the same shall be impaired or questioned; * * *.” See also section 7 of the Florida and Iowa Admission Act, 5 Stat. 742; section 4 of the Oregon Admission Act, 11 Stat. 383; and section 4 of the Washington Enabling Act, 25 Stat. 676.

These provisions of the Admission Acts of the coastal public lands States are sufficiently “express” reservations to except such public lands from the grant made by the Submerged Lands Act. To suggest that the foregoing provisions are not express reservations either because

specific parcels are not identified, or because the word "reserve" is not used, would be a hypertechnical construction. The legislative history requires no such reading. Early in the 1953 debate upon the proposed Joint Resolution, Senator Holland voiced the fear that some of the general reservations of public lands might be held to be implied reservations of offshore areas and sea bottoms, and that therefore the proposed exception would defeat the general purpose. At this stage the exception did not include the parenthetical phrase "(otherwise than by a general retention of lands underlying the marginal sea)." It is a fair inference that the phrase was inserted to meet Senator Holland's point. Certainly there is nothing to suggest that he was opposed to the United States retaining what had always been regarded as public lands and the accretions thereto. The first sentence of Senator Cordon's explanation gives rise to some difficulty for he said that it applies to "those facilities and those areas which are used by the Government in its governmental capacity for one or more of its governmental purposes." 99 Cong. Rec. 2619. One can argue about whether public lands fall within this description, but the Senator immediately returned to the main point saying that the provision reserved property "concerning which there has never been, in the history of this country, a question as to the Federal Government's right of ownership."

There can be no doubt that Congress intended each of the various categories of lands excepted by section 5(a) to include accretions. The terms of section 5(a) make this clear. The customary rights of landowners are set forth in full in the first of the several exceptions listed in section 5(a). Thus, it speaks of "all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon * * *." Each of the other exceptions speaks simply of "all lands." Obviously, the more comprehensive word "lands" was used instead of "tracts or parcels of land" and the explicit reference to accretions, resources and improvements was omitted in order to avoid repetition. There is no reasonable basis for any other conclusion. Congress would not have limited its exceptions of "all accretions thereto, resources therein, or improvements thereon" to lands "lawfully and expressly acquired by the United States" from any State or its grantees and then denied them where the lands were "expressly retained" or "acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity * * *."

It may be said that even if the exception in section 5(a) for lands "expressly retained" takes care of the accretions to public lands in the coastal States, it does not meet this problem in the case of certain non-

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coastal States whose Admission Acts contain no express reservations of public lands. The answer is that one need not look to section 5(a) for a reservation of the accretions to public lands along nontidal waters—the only waters in these noncoastal States. The definition of the lands beneath nontidal waters granted to the States in section 2(a) (1) of the act includes only those lands “up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction * * *.” Thus, the act specifically reserves from the grant any lands formed by accretion along such nontidal waters. Accordingly, the interpretation of “made” to include naturally-made islands presents no problem as to the accretions to public lands along nontidal waters in the coastal and noncoastal States.¹⁴

In sum, the legislative history makes it clear that Congress did not intend to affect the titles to upland accretions. Even if one supposes there to be danger of an extension of the act to the upland including accretions, section 5(a) reserves to the United States the accretions along all public lands located on the shore of navigable waters and section 2(a) (1) reserves the accretions on all lands bordering on nontidal waters. In either case, the interpretation of the act to provide for the grant of the naturally-made islands will not cause difficulty in the administration of the public lands of the United States.

VI

In summary the essential, and hardly debatable, elements of the problem are these:

1. When Congress conveyed to the States the lands under the marginal sea and at least the lands therein which were filled in or reclaimed by man. Congress omitted any specific, unmistakable reference to naturally-made islands. Congress conveyed “filled in, made, or reclaimed land”—a phrase whose literal meaning may, but does not necessarily, include naturally-made islands.

2. The only specific application which any Congressman or Senator ever consciously gave the words in debate, was to lands made by man. The words were applied, over and over again, to lands made by man.

¹⁴ It is also possible to argue that, although accretions to public lands on nontidal waters are expressly omitted from the grant by section 2(a) (1), they would nonetheless be included by section 2(a) (3) if “made” is interpreted to mean naturally-made. It may be questioned whether this interpretation, if it were ever adopted by any court, would affect any appreciable amount of land. However, to the extent it may have any practical effect, it is ruled out by the express omission in section 2(a) (1) and the obvious congressional intent not to change the rule that accretions belong to the littoral or riparian owners. Certainly this limited problem is not reason enough to restrict the reach of the act to man-made as against naturally-made lands.

No one ever said that they were or were not applicable to naturally-made lands.

3. Every consideration justifying the grant of submerged land was applicable *a fortiori* to the naturally-made islands in the marginal sea. The legal theory expounded in *Pollard's Lessee v. Hagan*, which Congress intended to "restore," would have given the States title to these lands. There is no conceivable explanation for an exception for naturally-made islands. Thus, the general purpose and legal theory called for including the naturally-made lands in the grant.

4. There were strong reasons for not excluding the areas in question. In the Louisiana delta region it would often be extraordinarily difficult to determine, both as a matter of legal definition and as a matter of fact, just what lands were naturally-made and what lands were man-made. These practical considerations strongly confirm the application of the general purpose to the words.

5. No serious collateral difficulties result from either interpretation. Thus, the ultimate question is whether the words "filled in, made, or reclaimed" should be interpreted so as to carry out the general purpose of the statute and give effect to its legal theory as applied to the specific problem of naturally-made islands, or should be confined to the narrower segment expressly mentioned in the debates.

The customary course is to construe Federal grants very strictly in favor of the Government. *United States v. Grand River Dam Authority*, 363 U.S. 229 (1960); *United States v. Union Pacific R. Co.*, 353 U.S. 112, 116 (1957); *Caldwell v. United States*, 250 U.S. 14 (1919); *Slidell v. Grandjean*, 111 U.S. 412 (1884); *Leavenworth, Lawrence, and Galveston Railroad Co. v. United States*, 92 U.S. 733 (1875). The rule of strict construction, however, is not to be used to defeat the intent of Congress when it unambiguously appears. As a matter of ordinary usage the word "made" is plainly broad enough to cover the lands in question. The reasons for enacting the Submerged Lands Act are as applicable to them as they are to any other lands covered by the act. The legal theory that permeates the act is as applicable to them as it is to the other lands covered by the act. The proposed distinction between man-made islands and naturally-made islands is not only irrelevant to any purpose or legal theory found in the statute but it would give rise to years of expensive litigation. Bearing in mind the character of this legislation it is not inconsistent with the rule of strict construction to give effect to the manifest intent of Congress as applied to a specific, included although unmentioned, instance well within a normal meaning of the statutory words.

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Accordingly, it is my opinion that the Submerged Lands Act releases any former title of the United States to the lands naturally-made as islands which formerly were lands beneath navigable waters as defined in section 2(a) of the Submerged Lands Act. The *Wallis* ruling, so far as inconsistent with this conclusion, should be disapproved.

Sincerely,

ARCHIBALD COX,
Solicitor General.

Approved: ROBERT F. KENNEDY.

CAROLYN C. STOCKMEYER, EXECUTRIX

A-29737

Decided February 7, 1964

Oil and Gas Leases: Acquired Lands Leases—Oil and Gas Leases: Description of Land

An acquired lands lease offer for a tract of land consisting of portions of several irregularly shaped surveyed tracts of land no part of the boundaries of which coincide with any part of the boundary of the tract applied for need not, in addition to giving a complete metes and bounds description of the tract tied to a corner of the public land surveys, give the section numbers of the surveyed tracts portions of which are included in the tract applied for.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Carolyn C. Stockmeyer, Executrix for the Succession of Edwin W. Stockmeyer, deceased, has appealed to the Secretary of the Interior from a decision dated July 13, 1962, by the Division of Appeals of the Bureau of Land Management which affirmed a decision of the Eastern States land office dismissing the protest of Edwin W. Stockmeyer against the award of a lease in response to S. R. Cain, Jr.'s, oil and gas lease offer, BLM-A 055740, which was filed simultaneously with Stockmeyer's offer, BLM-A 055744, and was awarded first priority in a public drawing of all the simultaneously filed offers.

The protest alleged that Cain's description of the land sought for leasing does not comply with the requirements of departmental regulation 43 CFR 200.5 (a), which provides in pertinent part that—

* * * If the lands have been surveyed under the rectangular system of public land surveys, and the description can be conformed to such survey system, the lands must be described by legal subdivision, section, township, and range. Where the description cannot be conformed to the public land survey, any boundaries which do not so conform must be described by metes and bounds, giving courses and distances between successive angle points with appropriate ties to established survey corners. * * *

Cain's offer describes by metes and bounds a long, narrow, irregularly shaped tract of acquired land comprising 505.24 acres which extends northeasterly through the northern part of one township (T. 8 N., R. 1 W., Wash. Mer.) and northward into the adjoining township (T. 9 N., R. 1 W., Wash. Mer.). The land is in the Natchez Trace Parkway in Mississippi. The metes and bounds description is tied to the township corner common to the two townships in which the land sought is located and the two adjoining townships on the east. It designates the townships in which the tract applied for is situated but does not give any section numbers or other reference to other subdivisions of the townships.

The appellant does not challenge the description on the grounds that it is not a proper metes and bounds description because it fails to include the proper courses and distances between the successive angle points or that it is not tied to an established survey corner or that it fails to close. She contends only that the description is inadequate because it fails to designate the sections of land in which the tract sought for leasing is located and thus does not comply with the plain requirement of the applicable regulation.

An examination of the official plats of the townships in which the land sought for leasing is located discloses that, although the townships are bounded by 4 lines, each 6 miles in length, which meet at right angles and enclose 36 square miles, there are no sections 1 square mile in area within these townships arranged in the regular manner and numbered continuously from 1 to 36 in the ordinary east-west, west-east progression of the public land surveys. The township boundaries are merely superimposed upon surveys of private land holdings of various shapes and sizes with few, if any, boundary lines which run in cardinal directions. The private holdings, referred to as sections, are designated by the names of the owners and also by numbers, probably assigned in the order in which the surveys were made, so that the number assigned to any tract affords no clue as to its location within the township. Furthermore, in some instances, a township boundary bisects a section. Thus, it is obvious that the interiors of the two townships in question were not surveyed in the manner of normal, rectangular township surveys. See 43 U.S.C., 1958 ed., secs 751, 752.

In view of the manner in which the interiors of the two townships in question were surveyed, a question is presented whether the quoted portion of 43 CFR 200.5(a) is applicable to this case. That portion of the regulation applies only to situations where the lands applied

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for have been surveyed "under the rectangular system of public land surveys." It may be questioned whether the lands applied for by Cain were so surveyed.

It is not necessary, however, to determine that question,¹ for, assuming the quoted portion of the regulation to be applicable, Cain's description literally complied with the requirements set forth. A plotting of the tract, as Cain described it in his offer, in the proper location upon the township plats discloses that, while it includes portions of two sections in one township and seven in the other, the boundaries of the tract do not, in a single instance, coincide with the boundaries of the sections shown on the plats. The boundary lines merely cut across section boundaries two, three, or four times in each section and, except for these crossings, run entirely within the sections. Since no part of Cain's boundary conforms to any surveyed lines, the first sentence of the regulation quoted above is not applicable and only the second sentence applies. Cain's description clearly complies with the second sentence.

Appellant argues that nonetheless the description must also comply with the first sentence and give the numbers of the sections in which the tract applied for lies. This interpretation is sanctioned neither by the express language of the regulation nor by necessary implication. Appellant seems to be confusing the situation here with a situation where parts of the boundaries of a tract applied for coincide and are coextensive with the boundaries of a surveyed subdivision or section and part does not coincide and is not coextensive. In the case here no portion of the boundary of Cain's tract coincides with any boundary of the surveyed sections within the two townships in question.

Accordingly, the protest against Cain's offer was properly dismissed.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

¹ If it were determined that the portion of the regulation quoted is not applicable, the sufficiency of Cain's description would have to be measured against the following portion of the regulation:

"If [the lands applied for are] not so surveyed [under the rectangular system] * * * the lands must be described by metes and bounds, giving courses and distances between the successive angle points on the boundary of the tract and connected with an official corner of those surveys by courses and distances." 43 CFR 200.5(a).

Cain's description clearly complies with this provision of the regulation.

CLAIM OF MICHAEL J. DOLAN, JR.

T-1176 (Supp.) *Decided February 10, 1964***Torts: Amount of Damages**

Upon the presentation of proper proof, an award of damages to one injured through the negligence of another may include an allowance for loss of wages and for pain and suffering.

Torts: Amount of Damages

As a general rule, any payment to an injured party from a collateral source is not deductible from an award made to the injured party against one who negligently caused the injury.

SUPPLEMENTAL ADMINISTRATIVE DETERMINATION

Our original administrative determination concerning the claim of Michael J. Dolan, Jr.¹ stated the details which gave rise to this claim. We found that the operator of the Government vehicle, an employee of the Geological Survey, was negligent, and that his negligence was the proximate cause of the accident.

Mr. Dolan had presented a claim in the amount of \$392.20 for personal injury and for damage to his automobile. An award was made to the claimant in the amount of \$186.50 (\$139.50 for property damage; \$47 for personal injury). An item of \$135.20 for loss of wages was not allowed because, "no verification of loss of wages has been submitted."

Mr. Dolan, by and through his attorney, Mr. John H. O'Neil, of Fall River, Massachusetts, has submitted a statement from Dolan's employer, Plymouth Rubber Company, Inc., and asked that the item be considered. The statement from the employer verifies that Mr. Dolan was absent from work for two weeks due to the accident, and that his salary amounted to \$67.60 per week.² This statement, when read together with the statement of Dr. Donald S. Winter, M.D., that Mr. Dolan was disabled during the period of "12-3-62 to 12-18-62," forms sufficient basis for allowing \$135.20 for loss of wages.

The two statements also establish that the claimant underwent some pain and suffering as a result of the accident. Mr. Dolan is entitled to compensation for this pain and suffering.³ An award of \$50 for pain and suffering is hereby made.

¹ T-1176 (June 3, 1963), 70 I.D. 208.

² During that period, Mr. Dolan received \$35 per week insurance payments. These payments from a collateral source are not deductible from any award made to Mr. Dolan. 15 Am. Jur. *Damages* sec. 198.

³ *Rodgers v. Boynton*, 315 Mass. 279, 52 N.E. 2d 576 (1943).

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Therefore, the award to Mr. Michael J. Dolan, Jr. is increased from \$186.50 to \$371.70.

EDWARD WEINBERG,
Acting Solicitor.

STATE OF ARIZONA

A-28752

Decided February 13, 1964

School Lands: Indemnity Selections—School Lands: Mineral Lands

Since sections 2275 and 2276 of the Revised Statutes, as amended, permit a State to select mineral lands as indemnity for numbered school sections if the land for which indemnity is being sought was mineral in character, Arizona may select school indemnity land which is mineral in character if such land is selected as indemnity for mineral sections lost to the State prior to survey.

School Lands: Indemnity Selections—School Lands: Mineral Lands

Where the Geological Survey classifies both selected and base lands in an indemnity selection as mineral, the State is entitled to the indemnity land without a reservation in the United States under the act of July 17, 1914, of minerals designated in the act.

Mineral Lands: Determination of Character of—Mineral Lands: Mineral Reservation—Mineral Lands: Nonmineral Entries

Lands which are reported by the Geological Survey to be prospectively valuable for minerals subject to leasing under the Mineral Leasing Act are not subject to entry or selection under the nonmineral land laws without a mineral reservation to the United States in accordance with the act of July 17, 1914.

Mineral Lands: Mineral Reservation—Mineral Lands: Nonmineral Entries—School Lands: Indemnity Selections—School Lands: Mineral Lands—Regulations: Applicability

Where a State has appealed to the Secretary from a requirement that it file a mineral waiver for selected school indemnity land reported to be prospectively valuable for oil and gas and the regulation requiring such waiver is amended to eliminate the requirement, the case will be remanded for further processing under the amended regulation.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The State of Arizona has appealed to the Secretary of the Interior from decisions of November 22, 1960, by the Director of the Bureau of Land Management affirming decisions by the manager and the acting manager of the Phoenix land office conditionally rejecting 18

school land indemnity selections¹ authorized by sections 2275 and 2276 of the Revised Statutes, as amended (43 U.S.C., 1958 ed., secs. 851, 852; *id.*, Supp. IV, sec. 852). Under these sections States may make indemnity selections of lands granted for the State's schools by enabling acts if, prior to survey, the numbered sections granted, which were designated by statute, had been appropriated under the public land laws, thus defeating the grant to the State. Four sections of land in each township were granted to Arizona in aid of the common schools of the State by the Enabling Act of June 20, 1910 (36 Stat. 557, 572). The applications here involved are lieu selections for all or parts of numbered school sections which did not vest in Arizona because the land was appropriated under the public land laws prior to survey. The numbered sections for which indemnity is sought, referred to hereafter as base lands, are identified in each of the selection applications along with the land selected as indemnity.

The Director's decisions affirmed requirements that Arizona file mineral waivers in accordance with the act of July 17, 1914 (30 U.S.C., 1958 ed., sec. 121 *et seq.*), which permits surface entries under the nonmineral laws on lands containing certain valuable minerals, including oil and gas, only if such minerals are reserved to the United States. In some instances, the decisions appealed from permitted the State to file mineral base to support mineral indemnity selections.

After the issuance of the Director's decisions and while this appeal was pending, a material change was made in the departmental regulation applicable to this case. 43 CFR 102.22. The effect of the change is to eliminate the necessity for the filing of a mineral waiver but to provide for a mineral reservation upon final approval and certification of a State selection where the circumstances require. See *Milton H. Lichtenwalner et al.*, 69 I.D. 71 (1962). However, the change in the regulation does not affect the substantive issues of law raised by the State's appeal. Accordingly, the case will first be discussed on the basis of the law and regulations in effect at the time the appeal was taken. Then consideration will be given to the effect of the change in the pertinent regulation.

Until recently, only nonmineral land could be selected as indemnity school land except as provided in the act of July 17, 1914, *supra*. However, sections 2275 and 2276 of the Revised Statutes were amended by the acts of August 27, 1958 and September 14, 1960 (43

¹ Arizona 011895, 011897, 013295, 016923, 016934, 016935, 016942, 016945, 016947, 017497, 019136, 019139, 019140, 019143, 019144, 019145, 019147, 019806.

Subsequent to the filing of the appeal, the State filed on August 5, 1963, a withdrawal of selection Arizona 016923 as to 200 acres of land.

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U.S.C., 1958 ed., secs. 851, 852; *id.*, Supp. IV, sec. 852), to provide generally that a State may select mineral land as indemnity for numbered school sections if the land for which indemnity is being sought was mineral in character. Thus, before mineral land may be granted to a State as indemnity for numbered school sections without a mineral reservation to the United States, it must appear that the base lands for which indemnity is sought are mineral in character.

All but one of the applications involved in this appeal were filed before the 1958 amendments to sections 2275 and 2276 of the Revised Statutes. However, the Geological survey reported on the mineral values of both the selected and the base lands in most of the applications, since administrative action had not been completed on them when the provisions of the act of August 27, 1958, became effective. But according to the records submitted with this appeal, Survey reports have been made only as to the selected lands and not as to the base lands included in at least five of the applications.² Almost all of the selected lands in these five applications are classified as prospectively valuable for oil and gas, and the Director's and the land office decisions required the State to file a mineral waiver of oil and gas deposits in the lands included in these five applications. This requirement was correct at the time only if the base lands were found to be nonmineral in character. *State of Arizona*, A-27743 (August 16, 1961). As the records do not show that the base in these five applications is nonmineral, the Director's decision was erroneous to the extent that it required a mineral waiver as to the selected lands which are prospectively valuable for oil and gas without a showing that the corresponding base is nonmineral.

In a number of other instances, the Director's affirmance of the land office requirement that the State file mineral waivers appears to have been incorrect. Specifically, Arizona 019136 includes selected and base lands, both of which were apparently reported by the Geological Survey to be valuable prospectively for oil and gas. If that is so, the application for the selected lands should have been allowed without a requirement of mineral waiver in accordance with the acts of August 27, 1958, and September 14, 1960 (*State of Arizona, supra*). Unless the Bureau had information not appearing in the appeal record showing that the base land listed in the application is nonmineral, the Director's decision affirming the land office requirement of a mineral waiver as to these selected lands was erroneous.

Similarly, the Geological Survey report on both the selected and the base lands included in Arizona 011897 indicates that all of the lands are valuable prospectively for oil and gas. Consequently, the

² These are Arizona 013295, 016935, 016942, 016947, 017497.

selected lands listed in this application may be granted to the State without mineral waiver, and the Director's decision to the contrary is set aside as to this application, all else being regular.

The Geological Survey report on the base and selected lands in Arizona 019139 indicates that all of the selected land is valuable prospectively for oil and gas as is one-half of the base land. If this is correct, the State is entitled to choose one-half of the selected land without a mineral reservation since one-half of the base land listed is mineral in character. Likewise, the Geological Survey report on the lands listed in Arizona 019806 classified the NW¼ of a section of selected land as valuable prospectively for oil and gas and the remaining portion of the section as nonmineral (only one section is included in this application). All of the base land listed in the application is nonmineral. All else being regular, the application should have been allowed as to three-fourths of the selected land without a requirement of mineral waiver, that part of the selected land being nonmineral. The Director's decision as to these two applications should be set aside to permit partial allowance of the selections in the absence of an objection not appearing in this record.

The Director's decisions affirming the requirement that the State file mineral waivers or substitute new mineral base appear to have been proper as to the rest of the applications involved in this appeal, since in each of them mineral lands were selected and the corresponding base listed is classified by the Geological Survey as nonmineral. The mineral reservations were properly required at the time because the lands had been classified by the Geological Survey as prospectively valuable for oil and gas.

On this appeal, the State asserts that a mineral reservation under the act of July 17, 1914, is not authorized on the basis of a finding that land is "prospectively valuable" for oil and gas. In effect, the State argues that a mineral reservation under the act of July 17, 1914, is authorized only as to land which is withdrawn, is classified, or is valuable for one of the minerals designated in the act, and that the requirement is improper as to land which is classified only as "prospectively" valuable for one of the named minerals.³ The Department

³ Sections 1 and 2 of the act of July 17, 1914, provide in pertinent part as follows:

"That lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same * * *.

"Sec. 2. That upon satisfactory proof of full compliance with the provisions of the laws under which the location, selection, entry, or purchase is made, the locator, selector, entryman, or purchaser shall be entitled to a patent to the land located, selected, entered, or purchased, which patent shall contain a reservation to the United States of the

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has held for many years that mineral reservations to the United States under the act of July 17, 1914, apply not only to lands known to be valuable for a leasable mineral, but also to lands reported by the Geological Survey to be prospectively valuable for one of the named minerals. Solicitor's opinion, 65 I.D. 39, 41-42 (1958), and cases cited therein; *State of New Mexico*, 52 L.D. 741 (1929). None of the matters asserted on appeal provides a basis for modifying the rule.

It has already been pointed out that the acts of August 27, 1958, and September 14, 1960, allowing selection of mineral land as indemnity only if the base is mineral, require that both base and selected lands be classified as to their mineral character before an indemnity selection can be allowed. Arizona objects to the determination under these provisions that selected indemnity is mineral when it is classified by the Geological Survey merely as "prospectively" valuable for oil and gas. However, the same standard is applied in determining whether base lands are mineral in character. That is, they are classified as mineral upon a finding that they are prospectively valuable for oil and gas. *State of Arizona, supra*.

The appeals to the Director in these cases included reports by a consulting geologist for the State of Arizona which concluded that the classification of the selected and base lands as prospectively valuable for oil and gas was not reasonable. After consideration of these reports, the Geological Survey concluded that they presented no new geologic information or findings warranting a change in the classification of the lands as prospectively valuable for oil and gas.

Arizona objects primarily to the inexactness of the term "prospectively valuable" as used by the Geological Survey, to the breadth of the criteria used in determining what lands are within that category, and asserts, additionally, that the classification is almost impossible to prove or disprove even when the possibility of oil and gas in the land is scientifically remote. The appeal asserts further, in effect, that the records show situations where classification by the Geological Survey of selected and base lands are inconsistent, although the lands are identical in known geology.

deposits on account of which the lands so patented were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same, such deposits to be subject to disposal by the United States only as shall be expressly directed by law. Any person qualified to acquire the reserved deposits may enter upon said lands with a view of prospecting for the same * * * *Provided*, That nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, select, enter, or purchase, under the land laws of the United States, lands which have been withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic mineral lands, with a view of disproving such classification and securing patent without reservation * * *"

Without specific instances of inconsistent classification, and the State has identified none, it is not possible to answer the last assertion except to say that, as a matter of course, the same criteria used in determining whether one section of land is prospectively valuable for oil and gas are presumably used in determining whether any other section is so valuable.

Arizona's remaining objections are directed against the classification policy of the Geological Survey. Arizona's opposition to the Survey's classification policy seems to be based on the incorrect assumption that the Survey's practice of classifying lands as prospectively valuable for oil and gas, if there is any possibility that the lands contain oil and gas, will almost preclude the patenting of indemnity lands to the State except with a reservation of minerals in the United States.

Arizona's assumption is mistaken because a reservation of minerals is required only if selected mineral land is indemnity for a numbered section (base) which is not mineral. Since the use by the Survey of a broad definition will also presumably increase the proportion of base which is classified as mineral, there should be no undue limitation in the amount of mineral lands which may be selected without a requirement for a mineral waiver.

A memorandum of November 16, 1960, from the Director of the Geological Survey to the Director of the Bureau of Land Management relating to these appeals, indicates that approximately two-thirds of Arizona may be regarded as prospectively valuable for oil and gas. It was pointed out in this memorandum that although Arizona might, when filing indemnity selections, have a problem anticipating what the Survey's classification of base and selected lands will be, the State may make adjustments after the Survey reports are made and attempt to match mineral base with mineral selections. If the selected and offered lands in a fairly large number of indemnity applications are considered at the same time, the State should be able to approximately balance mineral base lands with mineral selected lands so that reservations will not be required as to the selected lands. The memorandum of November 16, 1960, noted that in 78 recent Arizona indemnity selection applications, covering 37,000 acres of selected and base lands, 2,000 acres of the selected lands were classified as prospectively valuable for oil and gas, whereas 6,000 acres of the base lands were classified as prospectively valuable for oil and gas. Since the base included more mineral lands than did the selected lands, the State could substitute nonmineral base for all nonmineral selected lands and use the

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excess mineral base only as base for selections classified as mineral. The practice of considering at one time a substantial number of indemnity selections after the selected and base lands have been classified by Survey should make it possible to match mineral base with mineral selections in a large proportion of applications.

For the reasons discussed herein, Arizona's objections to the classification of indemnity selections as mineral on the basis of a determination by the Geological Survey that the land is prospectively valuable for oil and gas do not appear to be substantial. Arizona may amend any of its selection applications and avoid the imposition of a mineral reservation by substituting mineral for nonmineral base to correspond to selected lands which are classified as mineral. For this reason, there appears at this time to be no reason to engage in an evaluation of the criteria employed by the Geological Survey to determine when lands are prospectively valuable for oil or gas.

As was said earlier, the foregoing discussion has been of the issues raised at the time of the Director's decisions and the filing of the appeal, and, except in the instances noted, it has been concluded that the Director properly required the State to file a mineral waiver at the time he issued his decisions. The requirement was imposed under the departmental regulation then in effect, 43 CFR, 1954 rev., 102.22. This regulation provided that where the Geological Survey reported that land embraced in a nonmineral entry or claim which had not been perfected was, in effect, prospectively valuable for oil or gas, the entryman or claimant would be allowed 30 days from notice (1) to furnish consent to a mineral reservation (mineral waiver) under the 1914 act, (2) to apply for reclassification of the land as nonmineral and for a hearing if reclassification were denied, or (3) to appeal. The regulation further provided that if he did not take one of the actions indicated, his entry or claim would be canceled.

This regulation was amended on December 12, 1961 (26 F.R. 12128), to eliminate alternative (1), the requirement for a mineral waiver. The regulation now provides that an entryman or claimant will be notified of the Geological Survey's determination and allowed a reasonable time to take steps (2) or (3) and that if he does not "his entry or claim and any patent issued pursuant thereto will be impressed with a reservation of oil and gas to the United States."

The amended regulation is deemed applicable to the State's selections in this case and the case will be processed as though the State had appealed from a notification under the amended regulation and the propriety of the notification had been affirmed. The State will

not be required to furnish mineral waivers in those cases in which it has selected lands determined to be prospectively valuable for oil and gas but has not offered mineral lands as base. However, if the State desires to maintain such selections and they are processed to approval, the certification or clear listing of the selections will be with a reservation to the United States of the oil and gas in the selected lands. See *Milton H. Lichtenwalner et al., supra.*

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A (4) (a), Departmental Manual; 24 F.R. 1348), the decisions of the Director are set aside and the case is remanded for further proceedings consistent herewith.

EDWARD WEINBERG,
Acting Solicitor.

OTTO AND DELENA DELMOE
CHARLES ANDREAS

A-29939

Decided February 18, 1964

Public Sales: Preference Rights

One who fails to submit satisfactory evidence of his ownership of contiguous land within 30 days after the date of a public sale loses his preference right to purchase the land.

Public Sales: Preference Rights

Where the owner of land contiguous to an isolated tract of public land offered for sale properly asserts a preference right to purchase the land, and then disposes of the contiguous land after the close of the period allowed for the assertion of preference-right claims and before he receives a cash certificate or patent for the isolated tract, he does not thereby lose his preference right to buy the isolated tract nor does his successor in title succeed to that preference right.

Public Sales: Preference Rights

Where preference-right claimants fail to reimburse the applicant for a public sale for the costs of publication within the 10-day period after they are declared the purchasers or to file statements of citizenship, as provided by the Department's regulations, their bid is properly rejected and the land is properly awarded to the applicant.

Rules of Practice: Appeals: Standing to Appeal

A person who is not a party to a decision by a land office has no standing to appeal to the Director of the Bureau of Land Management from that decision, and such an appeal is properly dismissed.

February 18, 1964

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Otto and Delena Delmoe and Charles Andreas have appealed to the Secretary of the Interior from a decision dated January 10, 1963, whereby the Division of Appeals, Bureau of Land Management, dismissed the appeal of Andreas from a decision of the Montana land office awarding a tract of land, offered at public sale pursuant to section 2455 of the Revised Statutes, as amended (43 U.S.C., 1958 ed., sec. 1171), to Pauline Graff Redmond and affirmed that decision.

On May 1, 1957, lots 10, 11, 12, 13, and 14, sec. 28, E $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 32, NW $\frac{1}{4}$ NE $\frac{1}{4}$ and N $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 33, T. 3 N., R. 8 W., M.P.M., Montana, were offered for public sale pursuant to an application filed by Pauline Graff, now Pauline Graff Redmond. By a decision dated May 2, 1957, Mrs. Redmond was declared the high bidder at the sale. Within 30 days, Charles Andreas submitted a preference-right bid on the lands in behalf of Otto and Delena Delmoe and the Butte Ski Club. The preference-right claim was timely supported by certificates of ownership which showed that as of May 28, 1957, Otto and Delena Delmoe and the Butte Ski Club were the respective owners in fee simple of tracts of land contiguous to the offered lands. Final action on the public sale was thereafter suspended until determination could be made of the validity of a number of unpatented mining claims of Agnes Osenbrug, which were thereafter held invalid (*United States v. Agnes Osenbrug et al.*, Contest No. 1721 (Montana) (October 20, 1961)).

On June 11, 1962, Otto and Delena Delmoe and the Butte Ski Club were declared to be preference-right purchasers of the offered lands, subject to their meeting the additional requirements set forth in 43 CFR 250.12(a) and (b)(1).¹ No evidence of compliance with those requirements was filed within the prescribed time, and on August 7, 1962, the decision of June 11, 1962, was reversed, and Mrs. Redmond was declared the purchaser.

In affirming the land office decision of August 7, 1962, the Bureau held that the Delmoe's had not shown or attempted to show in what

¹ 43 CFR 250.12 provides in part that:

"(a) * * * If the applicant for the sale is an unsuccessful bidder, the person awarded the land must reimburse and pay directly to him the amount expended for publication of notice and file evidence thereof in the district land office within 10 days from the date he is declared the purchaser. If the evidence is not furnished, the manager will reject the bid and will accept the bid next in order, subject to the same conditions. * * *

"(b)(1) Unless he has previously done so, the purchaser must, within 10 days after he has been so declared, file with the manager a statement of his citizenship, or if a partnership, a statement of the citizenship of its members. If the purchaser is an unincorporated association, a statement must be filed showing the citizenship of each member. * * **"

way the decision appealed from was in error, or that their preference-right claim should not be rejected for failure to comply with the requirements of the application regulations, 43 CFR 250.12(a) and (b) (1). The appeal of Andreas was dismissed because he was not a party in interest and had no standing to appeal. The Butte Ski Club did not appeal from the land office decision.

Mrs. Redmond has filed a protest against the appellants' appeal to the Secretary on the grounds that it was not filed within the time allowed by the Department's rules of practice. The charge is without merit. The Bureau's decision was received by the appellants' attorney on January 21, 1963, as evidenced by a registry receipt card contained in the record. The appellants' notice of appeal was transmitted on February 18, 1963, and was received by the Department on February 20, 1963, within the time allowed for filing an appeal. The appellants have submitted evidence that a copy of their notice of appeal was served on Mrs. Redmond on February 19, 1963. The appellants' statement of reasons, required to be filed within 30 days after filing of their notice of appeal, was received by the Department on March 11, 1963, and a copy was served on Mrs. Redmond on March 12, 1963, as evidenced by a registry receipt card contained in the record. The appeal, therefore, will be considered on its merits.

The appellants contend, in substance, that Andreas succeeded to the interest of the Delmoes and is entitled to assert the rights of his predecessors in title, that, through his attorney, Andreas wrote to the land office on April 26, 1961, and, in effect, asserted the rights of his predecessors in interest and asserted his rights as a preference-right claimant, and that Mrs. Redmond did not qualify as an applicant for the land in question, and the Department is without authority to award the land to her.

Answering the last allegation first, the appellants apparently are contending that since Mrs. Redmond was not the owner of contiguous land, she was not qualified, under the provisions of 43 CFR 250.7(b), to apply to have the land sold. However, the record shows that the land in question is entirely surrounded by land held in non-Federal ownership and is, therefore, subject to sale under the provisions of 43 CFR 250.6 without regard to whether the public sale applicant owns contiguous land.

Considering now Andreas' claim to a preference right, the statute and the regulations provide that the owners of contiguous lands have a preference right, for a period of 30 days after the highest bid has been received at a public sale, to purchase the land offered for sale at the highest bid price. A preference right must be supported by proof

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of the claimant's ownership of the whole title to the contiguous land, and the failure to submit satisfactory proof to the land office during the 30-day period after the highest bid has been received will cause the preference right to be lost as to the particular public sale. 43 U.S.C., 1958 ed., sec. 1171; 43 CFR 250.11 (b).

In this instance, it was necessary that any preference-right claimant assert his claim within 30 days after May 1, 1957, and, within the same period, submit satisfactory proof of his ownership of contiguous land. During that period, the only claims asserted were those of the Delmoes and the Butte Ski Club, submitted by Andreas as their agent. Similarly, the proof of ownership of contiguous land was limited to the same parties.

In his appeal to the Director, Bureau of Land Management, Andreas submitted evidence that the Delmoes conveyed to him a part of the land upon which their preference-right claim was based on June 11, 1956, and that they conveyed the balance of that land to him on September 2, 1958. On April 26, 1961, Andreas advised the land office that he was the successor in interest to Otto and Delena Delmoe.

It appears that Andreas may have been entitled to assert a preference-right claim in his own right on May 31, 1957, when he asserted the claims of the Delmoes and the Butte Ski Club.² However, he did not attempt to do so, and no such claim could be considered on April 26, 1961.

As stated by the Bureau, the Department has held that where the owner of land contiguous to an isolated tract of public land offered for sale properly asserts a preference right to purchase the land, and then disposes of the contiguous land after the close of the period allowed for the assertion of preference-right claims and before he receives a cash certificate or patent for the isolated tract, he does not thereby lose his preference right to buy the isolated tract. *Martin J. Plutt et al.*, 61 I.D. 185 (1953). Thus, the Delmoes maintained their preference right to purchase the offered land notwithstanding their conveyance of the land upon which the preference right was based after the period for asserting the claim. Since Andreas has submitted no evidence that the Delmoes intended or attempted to assign

² Although part of the contiguous land was conveyed by the Delmoes to Andreas on June 11, 1956, the deed was not recorded until September 18, 1958. This is why the certificate of ownership of adjoining land submitted on May 31, 1957, in support of the Delmoes' preference-right claim stated that the county records showed the Delmoes to be the owners when in fact they were not. No explanation appears as to why Andreas did not record the conveyance of June 11, 1956, and assert a preference-right claim on his own behalf within the 30-day period following the sale.

to him their preference right and since he did not assert one on his own behalf, there is no basis for holding that he had one.³

The appellants have cited the Department's decision in *Charles H. Hunter*, 60 I.D. 395 (1950), as authority for the proposition that once a right is asserted, though done informally and not in strict compliance with the provisions of the applicable statute, it will be recognized and the party asserting the right will be given notice of what need be done to comply with the provisions of the statute.

That decision held that a preference-right claim for an isolated tract offered at public sale may be asserted by a person who acquires the ownership of contiguous land after the date of the sale but during the period of time allowed for the assertion of preference-right claims and that a preference-right claimant is not necessarily required to submit, prior to the expiration of that period, proof that he is the owner of contiguous land but may submit such proof within a reasonable time thereafter. The holding of that decision was subsequently modified by the amendment of the regulations to require that proof of ownership of contiguous land be submitted within the same 30-day period allowed for the assertion of preference-right claims. See *Fred and Mildred M. Bohlen et al.*, 63 I.D. 65 (1956).

Aside from the change in the regulations, the holding in the *Hunter* case, *supra*, is not applicable to this case. Hunter asserted a preference-right claim within 30 days after the high bid but failed to submit proof of his ownership of contiguous land within that time. Andreas did not assert any claim in his own right until four years after the bidding was completed. At that time, the assertion of a claim could gain him no rights, and he was, therefore, not deprived of the opportunity to perfect the rights he asserted in his letter of April 26, 1961, as he had no rights to perfect. Inasmuch as he did not assert a claim during the period allowed for that purpose, he was properly not included as a party to the decision awarding the land as between claimants. As Andreas was not a party to that decision, he had no standing to appeal from it, and the dismissal of his appeal by the Bureau was proper. See 43 CFR 221.1.

With respect to the appeal as it concerns the Delmoes, in their appeal to the Secretary, as in their appeal to the Director, Bureau of Land Management, they have not attempted to show any error in the decision appealed from nor have they submitted any evidence of compliance with the regulations.

³ This is not to be interpreted as a ruling that the preference right of an owner of contiguous land is a right that can be assigned, even to a purchaser of the contiguous land.

February 20, 1964

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

APPEAL OF COSMO CONSTRUCTION COMPANY

IBCA-412

Decided February 20, 1964

Contracts: Appeals—Rules of Practice: Appeals: Generally

The Board of Contract Appeals has authority to apply equitable principles in determining matters over which it has jurisdiction. It has authority to direct contract administration action by the contracting officer if the contractor has a substantive right to such action, and if such action pertains to a matter over which the Board has jurisdiction. Its powers and those of the Office of the Survey and Review complement each other.

Contracts: Appeals—Rules of Practice: Appeals: Timely Filing

The Board of Contract Appeals does not have jurisdiction to entertain an appeal with respect to a claim which the contracting officer has neither determined, nor refused to determine, nor delayed unreasonably in determining.

BOARD OF CONTRACT APPEALS

Department Counsel transmitted the appeal file and simultaneously moved the Board to dismiss the appeal on the grounds (1) that the Board lacks jurisdiction since the contracting officer has not rendered a final decision as yet; (2) that the Board cannot direct a contract administration action; and (3) that the Board does not possess general equity powers. He contends that, since the appeal is premature, and does not set forth a cause of action upon which the Board may grant relief, it should be dismissed.

Appellant, through its President, opposed the motion and stated:

The purpose of filing a Notice of Appeal was to obtain relief as provided for under the terms of the contract. The ultimate end sought by the Appellant is an "Equitable Adjustment." In Appellant's prayer for relief, any reference to "equity" is not intended to imply that the Board of Contract Appeal is a Court of Equity, but rather the enforcer of the terms of the contract to the extent that the administrative action provided for therein be adhered to by the Contracting Officer. ***

*** Contracting Officer was repeatedly requested by written communications to take the administrative action required to relieve the Appellant of the burden imposed upon it as a result of the changed conditions. The Contracting Officer's

failure in this regard constituted a proper basis on which the Appellant was entitled to file its Notice of Appeal, and vested in the Board of Contract Appeal the necessary jurisdiction to grant the relief prayed for.

Jurisdiction of the Board and "Equity"

We agree with appellant's interpretation concerning the authority of the Board to apply equitable principles in determining matters over which it has jurisdiction. In *Eastern Maintenance Company*,¹ the Board emphasized that two Court of Claims decisions² would provide the basic guidelines for the proper exercise of the functions of the Board. These—and other—Court of Claims decisions enjoin contracting officers, boards of contract appeals, and the heads of departments "to prevent unjust and inequitable results."³

In *Globe Indemnity Company v. United States*,⁴ Judge Whitaker stated:

From this case two lessons are to be drawn: (1) contracting officers and heads of departments *should exercise the great powers conferred on them by these contracts to do equity*; they should *not* feel under obligation to take advantage of technicalities, where to do so would defeat justice; (2) contractors must study their contracts and insist on compliance with their terms; before relying on any promise they should ascertain that it is made by a person having authority to make it. (Italics supplied.)

Judge Madden construed the authority and jurisdiction of the Armed Services Board of Contract Appeals broadly in *McWilliams v. United States*:⁵

It is evident that the Secretary was authorizing the Board to act for him in the way that any owner would act if a contractor was dissatisfied with the way he was treated by the owner's representative in charge. He would listen to the contractor's story, and if he thought that his representative had been unfair, he would reverse him. He would do this, not because the contract gave him any authority to make a final decision which would bar the contractor from relief in the courts for breach of contract, but because it would be the natural and fair way for an owner to act. * * *

The authority given to the Interior Board of Contract Appeals is broader than the authority given to the Armed Services Board of Contract Appeals. But—even in absence of any difference—Judge Madden's counsel would equally apply to either Board.

¹ IBCA-275 (November 29, 1962), 69 I.D. 215, 1962 BCA par. 3583.

² *Globe Indemnity Company v. United States*, 102 Ct. Cl. 21 (1944), cert. den. 324 U.S. 852 (1945); *McWilliams Dredging Company v. United States*, 118 Ct. Cl. 1 (1950).

³ *H. B. Fowler & Company, Inc.*, IBCA-294 (October 23, 1961); 61-2 BCA par. 3168, 3 Gov. Contr. 551(c), and decisions of the Court of Claims cited therein.

⁴ Fn. 2 *supra*, at 38.

⁵ Fn. 2 *supra*, at 16-17.

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After citing *Globe* and *McWilliams*, the Board stated in *Eastern Maintenance Company*,⁶ that it is—

cognizant of the limitations on its powers "to do equity" outside of the four corners of the contract. That lack of jurisdiction does not, however, restrict the Board's power to act equitably within the four corners and to make an equitable adjustment promised to the contractor by the explicit terms of the contract. Accordingly, what the contracting officer, through inadvertence or error, has failed to do by way of completing such an equitable adjustment, the Board will do.

Directions to Contracting Officers

Department Counsel asserts that the Board "has no authority to direct a contract administration action by a Contracting Officer." This statement, like almost any generality, is half right, and half wrong. But Department Counsel seems to misunderstand the basis why in certain situations the Board will decline jurisdiction. Hence, a discussion of this side issue seems necessary. In *John Martin Company, Inc.*,⁷ the Board mentioned that there were certain disputes concerning which Boards will not take jurisdiction. Examples are:

1. Request for the immediate preparation and payment of partial or final estimates.⁸
2. Request for prompt payments.⁹
3. Request for remission of liquidated damages pursuant to 41 U.S.C., 1958 ed., 256a.¹⁰
4. Request that a claim be compromised instead of adjudicated.¹¹
5. Request for reinstatement of a terminated contract.¹²
6. Request for cancellation of a contract.¹³

Analysis of the foregoing rulings discloses that, in general, the reasons for their holdings were that the matter in issue either was one as to which the contracting officer had made no decision whatsoever, or was one for which no relief was expressly or impliedly authorized by the contract, or was one as to which the contractor had no substantive right to relief.

This declination of jurisdiction by the Board, which is basically appellate in character, and which must act within the framework of contract provisions and legal rules, does not mean that an aggrieved contractor is without a remedy in the Department of the Interior.

⁶ Fn. 1 *supra*, at 220.

⁷ IBCA-316 (September 21, 1962), 1962 BCA par. 3486, 4 Gov. Contr. par. 520 (d).

⁸ *John Martin Company, Inc.*, fn. 7 *supra*.

⁹ *Ibid.*

¹⁰ *Monarch Lumber Company*, IBCA-217 (May 18, 1960), 67 I.D. 198, 60-2 BCA par. 2674, 2 Gov. Contr. par. 290; *Samuel N. Zarpas, Inc.*, IBCA-24 (January 4, 1956), 68 I.D. 1, 6-7, 6 CCF par. 61,756.

¹¹ *M. Hoard*, IBCA-6 (May 11, 1955), 6 CCF par. 61,665.

¹² *Adams Manufacturing Company*, ASBCA No. 2555 (May 31, 1955).

¹³ *Missouri Paper Stock Company*, ASBCA No. 2198 (August 25, 1954).

The above enumerated instances are typical of situations in which relief may be obtained by review from the superiors of the contracting officer, from the head of a bureau or agency, or, on the secretarial level, from the Office of Survey and Review.¹⁴ The just released 1963 Annual Report of the Secretary of the Interior, Stewart L. Udall, states:¹⁵

The Office of Survey and Review was established during the year to strengthen management processes in the Department with special emphasis upon financial policies and methods, procedural modernization, auditing policies, *contract review*, and other potentially sensitive subjects. Creation of this Office was one of the most significant management improvements during the year. (Italics supplied.)¹⁶

The powers of that office do not conflict with the jurisdiction of the Board but the respective powers rather complement each other. An example may suffice to illustrate. The Office of Survey and Review has a broad administrative jurisdiction over the correcting of mistakes in bids asserted prior to award.¹⁷ That office may also reform contracts because of mistakes discovered after award in specifically stated situations.¹⁸ On the other hand, the limitations upon the jurisdiction of the Board inherent in its charter¹⁹ and in the forms of contract "Disputes" clauses now standard²⁰ are such that matters which call for application of the legal rules relating to mistakes or reformation rarely come within the cognizance of the Board.²¹

Premature Appeals

The appeal file contains a letter to appellant from the "Project Construction Engineer,"²² Charles H. Clark, of January 16, 1964,²³ which, in its pertinent part, reads as follows:

¹⁴ These statements do not apply to liquidated damages that have been validly assessed. Authority to remit them is vested in the Comptroller General, 41 U.S.C., 1958 ed., 256a. The function of making recommendations to him for their remission has been delegated to the Solicitor, 24 F.R. 1348, 210 DM 2.2B(2).

¹⁵ Annual Report 1963, The Secretary of the Interior, Stewart L. Udall, Government Printing Office (1963).

¹⁶ At p. 466.

¹⁷ 405 DM 6.2A(1).

¹⁸ 405 DM 6.2A(2).

¹⁹ 43 CFR 4.4; 211 DM 2.1.

²⁰ Clause 6 of Standard Form 23A (April 1961 Edition) for construction contracts; Clause 12 of Standard Form 32 (September 1961 Edition) for supply contracts.

²¹ Decisions involving situations of this latter type are *Clifford W. Gartzka*, IBCA-399 (January 22, 1964); *Framlau Corporation*, IBCA-228 (August 18, 1961), 61-2 BCA par. 3116, 3 Gov. Contr. par. 472; *United Concrete Pipe Corporation*, IBCA-42 (May 31, 1956), 63 I.D. 153, 6 CCF par. 61,870.

²² The Board has not been favored by either party with a description of the functions of the "Project Construction Engineer" that is sufficiently definite and detailed to show the extent of his authority as an "authorized representative" of the contracting officer, as defined in Clause 1 of Standard Form 23A (April 1961 Edition). The contract does not contain any reference to him.

²³ The appeal was docketed on December 18, 1963, roughly one month before the date of this letter.

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In order that a final decision as to an equitable adjustment may be made at an early date, it is suggested that you submit your claim as soon as possible and that you provide for the contracting officer's consideration any pertinent factual detail data which you have available in support of your claim. If you desire to have a conference to discuss the final adjustment, such a conference can be arranged at a mutually agreeable date in the near future. It is recommended, however, that you submit your claim in sufficient time to allow us at least 10 days to review the claim prior to such a conference.

If it is still your intention to not submit cost data in support of your claim, please advise promptly so that the Government may proceed without this information.

Appellant included in the appeal file its reply of February 3, 1964, which in its pertinent part, reads as follows:

Your suggestion that our Claim be filed on the basis of our actual cost and that further discussion of this matter be held at an early date are *acceptable* to this firm. We will proceed in the near future to file our detailed request utilizing actual cost figures, where possible; but keeping in mind that a portion of *the effects of the Changed Condition have not yet been completed*. We will at the time of such filing suggest a date for *further discussion*. When our detailed request is submitted, you will be advised concerning the use of actual cost figures and the necessary qualifications that will be placed upon the use of such figures in any negotiations that are of a *preliminary nature*. (Italics supplied.)

These instruments, and other evidence contained in the appeal file, establish beyond any doubt that whatever controversies exist between the Contracting Officer and the appellant, they are still in the claims stage, and that no findings of fact or decision has been rendered by the Contracting Officer or his authorized representative. Hence, the appeal is premature.²⁴

The contracting officer has not refused to make an equitable adjustment, nor does he appear to have unreasonably delayed a determination of its amount. On the contrary, he has already made a tentative adjustment on the basis of the data then available and, as the foregoing quotations indicate, is engaged in the process of obtaining and evaluating such additional data as may be needed for a final decision. Nothing has been presented to the Board which would authorize or require it to take the drastic action, urged by the contractor-appellant, of assuming jurisdiction pending the conduct of negotiations and

²⁴ *McLinn Construction Company*, IBCA-369 (July 24, 1963), 1963 BCA par. 3798; *John Martin Company, Inc.*, fn. 7 *supra*; *Barkley Pipeline Construction, Inc.*, IBCA-264 (April 6, 1961), 68 I.D. 103, 61-1 BCA par. 3006, 3 Gov. Contr. par. 271; *Westinghouse Electric Supply Company*, IBCA-107 (July 30, 1957), 57-2 BCA par. 1365; *Urban Plumbing and Heating Company*, IBCA-43 (November 21, 1956), 63 I.D. 381, 56-2 BCA par. 1102; *Gila Construction Company, Inc.*, IBCA-79 (September 21, 1956), 63 I.D. 378, 56-2 BCA par. 1074.

pending the issuance of a decision or findings of fact by the Contracting Officer.²⁵

Appellant has submitted motions to hold the proceeding in temporary abeyance and to require completion of the appeal file. These motions necessarily are rendered moot by reason of our determination that jurisdiction is lacking over the appeal.

CONCLUSION

1. All motions of the Department Counsel and of the Appellant are denied.

2. The appeal is dismissed as premature.

PAUL H. GANTT, *Chairman.*

I CONCUR:

I CONCUR:

HERBERT J. SLAUGHTER, *Member.* THOMAS M. DURSTON, *Member.*

JOHN E. BALMER ET AL.

A-29418

Decided February 24, 1964

Indian Allotments on Public Domain: Classification

An Indian allotment application for nonirrigable grazing land is properly rejected on the ground that the land applied for is not proper for acquisition as an Indian allotment because it contains insufficient forage to comprise an economic grazing unit.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

John E. Balmer and James W. Balmer have appealed to the Secretary of the Interior from a decision of the Division of Appeals of the Bureau of Land Management dated December 21, 1961, affirming a decision of the land office at Phoenix, Arizona, which rejected their applications for Indian allotments of 160 acres and 120 acres, respectively, of public land under section 4 of the act of February 8, 1887, as amended (25 U.S.C., 1958 ed., sec. 336).

²⁵ The authorities upon which appellant chiefly relies are *Sheriden-Murray*, ASBCA No. 7615 (November 26, 1962), 1962 BCA par. 3604; *Leader Manufacturing Company*, ASBCA No. 4416 (July 31, 1958), 58-2 BCA par. 1877; and *A. C. Clothing Manufacturing Company*, ASBCA No. 4065 (June 21, 1957), 57-1 BCA par. 1321. These cases stand for the propositions that (1) an express or implied refusal to decide is itself an appealable decision, and (2) a dispute will not be remanded for the making of a formal decision by the contracting officer if the record already shows what that decision would hold. Here, however, the contracting officer has not refused to decide, and the record does not reveal what will be the amount of the equitable adjustment allowed by his final decision.

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The land office rejected the applications on the ground that the land described in each application is nonirrigable grazing land which does not constitute an economic grazing unit. The appellants contend that, once having found that they are Indians entitled to allotments of the public domain and that the land applied for is nonirrigable grazing land, the Bureau of Land Management has no authority to reject their applications because it is of the opinion that the land does not comprise economic units.

The statute upon which the appellants rely provides for Indian allotments of public land not otherwise appropriated, not to exceed 40 acres of irrigable land, 80 acres of nonirrigable agricultural land, or 160 acres of nonirrigable grazing land to any one Indian.

Since the land is in Arizona, it was withdrawn by Executive Order 6910 on November 26, 1934, from settlement, location, sale, or entry and reserved for classification pending the determination of the most useful purpose for which it might be used. Under section 7 of the Taylor Grazing Act, as amended (43 U.S.C., 1958 ed., sec. 315f), the Secretary of the Interior is authorized, in his discretion, to examine and classify land which is more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants or more valuable or suitable for any other use than for grazing purposes or proper for acquisition in satisfaction of any outstanding lien, exchange, scrip rights, or land grant and to open it for disposal in accordance with the classification made under an applicable public land law.

The land described in the two applications is grazing land and is presently leased under the Taylor Grazing Act for grazing purposes. Since, however, the forage is so scanty, the land is grazed as a part of a large acreage during the portions of the year which follow the spring and fall rainy seasons and cannot be relied upon to furnish during these periods of seasonal use more than the equivalent of the needs of from two to three cows per section on a year-long basis. The two tracts applied for aggregate less than half a section.

Since the intent of the Indian Allotment Act is to provide, in effect, a homestead which will constitute the source of a livelihood for an Indian family, as indicated by the language of the act which allows the different acreages of land suitable for different purposes, it is within the authority of the Secretary of the Interior to determine that 160 acres of grazing land that is incapable of supporting a ranch family

is not proper for acquisition in satisfaction of rights acquired by Indians under the Indian Allotment Act.

The case is substantially indetical with that of *Amos A. Hopkins (Dukes)*, Colorado 0112669, decided by the Secretary on December 20, 1963. In that case an Indian allotment application for 160 acres was rejected for the reason that the tract would support only two units of livestock on a year-round basis, although grazing was not possible during the entire year, whereas in the area an economic ranch unit would require enough land to support in excess of 100 units of livestock. For this reason it was concluded that the land could not be properly classified for an Indian allotment.

An Indian applicant is not, of course, deprived of his right to an allotment when his application is rejected. He is merely required to apply for other land that is suitable for acquisition under the Allotment Act.

Therefore, the decision appealed from is affirmed.

JOHN A. CARVER, JR.
Assistant Secretary of the Interior.

APPEAL OF EDISTO CONSTRUCTION COMPANY

IBCA-409

Decided February 28, 1964

Contracts: Contracting Officer—Contracts: Delays of Contractor

Where a claim for a time extension is presented to the contracting officer, it is the duty of the latter to make an impartial and objective determination of all questions that are directly relevant to the extent of the delays upon which such claim is founded.

Contracts: Appeals—Rules of Practice: Appeals: Timely Filing

The timeliness of an appeal is governed by the period of time elapsed between the date when the findings of fact and decision were received by the contractor and the date when the notice of appeal was mailed or otherwise furnished to the contracting officer. The day on which the findings of fact and decision were received by the contractor is not included in the computation.

Contracts: Contractor—Rules of Practice: Appeals: Standing to Appeal

An appeal will not be dismissed for technical defects consisting of the inadvertent omission of the corporate name of the contractor in the notice of appeal and the substitution therefor of the name of the contractor's representative or officer.

Contracts: Appeals—Rules of Practice: Appeals: Standing to Appeal

An appeal will be remanded to the contracting officer for issuance of new or supplemental findings of fact and decision where it appears that the con-

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tractor was in receivership prior to the filing of the notice of appeal and no information is contained in the appeal file concerning the present status of the receivership or as to the identity of the legal owners and representatives of the contractor.

BOARD OF CONTRACT APPEALS

The Government has moved to dismiss this appeal on the following grounds:

"1. The letter of October 31, 1963, received November 7, 1963, does not use proper words or disclose an intention to appeal the decision of the Contracting Officer by the Contractor, the Edisto Construction Company, under its Contract No. 14-16-0004-2171.

"2. That E. J. Ayers, Jr., does not show capacity to appeal from the Findings and Decision of the Contracting Officer. He neither signs his letter of October 31, 1963, in an official capacity nor does the name of the Corporation Contractor appear.

"3. This Appeal is docketed as 'Appeal of E. J. Ayers, Jr.,' IBCA-409, whereas the Edisto Construction Company is a Corporation of the State of South Carolina, a legal entity and the Contractor, and distinct under the law from E. J. Ayers, Jr., an individual and not a party to the said contract.

"4. The 'so-called' appeal letter from E. J. Ayers, Jr., was not sent to the Contracting Officer as directed under the contract but mailed directly to the Secretary of the Interior where it was received 31 days after the time the Findings and Decision was received by the Corporation, at its place of business."

Concerning the alleged defects specified in paragraphs 1 through 3 above, the language used in the letter is not as precise as one could wish, but we conclude that it shows an intent to appeal on behalf of the Edisto Construction Company from the decision of the contracting officer, dated October 2, 1963. The pertinent portion of the letter is as follows:

This letter may reach you one day late since I was not told by Mr. Barrineau or anyone else *that I had the right to appeal my case to you.* * * * I certainly cannot give you all of the details in this letter, but am sure that Mr. Barrineau, Contracting Officer at the Bureau of Sport Fisheries and Wildlife in Atlanta can forward them to you. * * * Mr. Barrineau stated in his report of 2 October 1963 that there was less than one month total of bad weather throughout the duration of this job. * * * (Italics supplied.)

It is true, as Department Counsel points out, that the correct name of the contractor is the Edisto Construction Company, and that that name does not appear any place in the purported notice of appeal.

However, the contract is identified correctly by number in the heading of the letter, with the name and location of the project, as follows:

"Re: Contract No. 14-16-0004-2171
Orangeburg Fish Hatchery
Orangeburg, S. C."

Mr. E. J. Ayers, Jr., who signed the notice of appeal, also signed the contract as President of the Edisto Construction Company. Other letters in the appeal file from the Edisto Construction Company are on the company's letterhead, bearing the name "Edisto Construction Co." Some of those letters are signed simply "E. J. Ayers, Jr." The notice of appeal was not on the company letterhead. However, the original claim letter of July 29, 1963, bore the company letterhead and was also signed merely E. J. Ayers, Jr., without giving his official title.

The Board will not dismiss an appeal for technical defects consisting of the inadvertent omission of the official capacity of the person signing the notice of appeal or of the corporate name of the contractor.¹

The defect of misdirection of the notice of appeal, described in paragraph 4 above, is not a fatal one, as we have held on several occasions.²

The Government's Statement of Position also states that the notice of appeal letter was received in the Office of the Solicitor, Department of the Interior, "on the 31st day after receipt of Findings and Decision, i.e., November 7, 1963." The Findings and Decision were received by Edisto Construction Company on October 8, 1963, according to the Post Office Return Receipt in the file. The day of receipt is not included in the reckoning of the period of 30 days in which the contractor may appeal. Hence, October 9 was the date the period began to run, and November 7 was the 30th day after receipt of the Findings and Decision. Therefore, the time for taking an appeal expired at the end of that day, that is, at midnight on November 7, 1963.³

¹ *Barkley Pipeline Construction, Inc.*, IBCA-264 (April 6, 1961), 68 I.D. 103, 61-1 BCA par. 3006, 3 Gov. Contr. 621(g).

² *Bushman Construction Company*, IBCA-193 (April 23, 1959), 66 I.D. 156, 59-1 BCA par. 2148, 1 Gov. Contr. 812 (mailing of notice of appeal to Board instead of to contracting officer not "jurisdictional" defect); *Larsen-Meyer Construction Company*, IBCA-85 (November 24, 1958), 65 I.D. 463, 58-2 BCA par. 1987 (mailing of notice of appeal to Department Counsel instead of to contracting officer not fatal). *Accord: Vitro Corporation of America*, IBCA-376 (November 7, 1963), 70 I.D. 479, 1963 BCA par. 3923, 5 Gov. Contr. 565(i) (mailing of supporting brief to the Board instead of to the contracting officer not fatal).

³ *Lewis Construction Company, Inc. and S. L. Boutelle*, IBCA-340 (July 3, 1963), 70 I.D. 352, 1963 BCA par. 3779, 5 Gov. Contr. 363(e), and cases cited therein. *Accord: The Cardell Company*, IBCA-384 (September 3, 1963), 70 I.D. 405, 1963 BCA par. 3847, 5 Gov. Contr. 515(e).

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Accordingly, the appeal is timely.

Moreover, the Findings and Decision of the Contracting Officer dated October 2, 1963, do not identify the decision as a final decision, and do not call to the attention of the contractor his right to appeal therefrom within 30 days.⁴ It is not sufficient that a separate transmittal letter, describing the decision as a "Findings of Fact," contains a statement that:

The Findings have been prepared in accordance with Clause 5 of Standard Form 23-A, General Provisions (Construction Contracts).

The language of the decision must in substance fairly and reasonably inform the contractor that a final decision is intended and that pursuant to Clause 6, Disputes, of the contract, he may appeal within 30 days from the receipt of the decision.⁵

Two other matters are of concern to the Board. First, the notice of appeal states in effect that it is based on the disallowance by the contracting officer of a claim of excusable delay because of "inclement weather conditions," from January 1962 until March 1963, when it is alleged there were 181 days of precipitation and temperatures below freezing on 87 days. These data are not sufficient. The contractor must identify all of the specific dates on which he alleges it was not possible to perform work under the contract because of "unusually severe weather" (not merely inclement weather) based on the contractor's daily logs or similar records, in order to comply with the requirements of Clause 5, and to enable the contracting officer to make findings of fact with respect to such dates, as required by the clause.

The findings of fact of the contracting officer should include climatological data from official records of the Weather Bureau, Department of Commerce, as to the dates involved, and for about ten years prior thereto, as well as excerpts from daily logs of the Government Inspector or other documents concerning the days not worked and the reasons therefor. The findings should also include a tabulation comparing the "reasons for loss of time as advanced by the contractor and the reasons as ascertained by the contracting officer,"⁶ and should state those reasons.

⁴ *Earl B. Bates Nursery*, IBCA-368 (May 13, 1963), 70 I.D. 163 1963 BCA par. 3738, 5 Gov. Contr. 289(a); *Production Tool Corporation*, IBCA-262 (April 17, 1961), 63 I.D. 109, 61-1 BCA par. 3007, 3 Gov. Contr. 324, and cases cited therein.

⁵ *Barkley Pipeline Construction, Inc.*, note 1 *supra*, and cases cited in note 4 *supra*.

⁶ *Paul A. Teegarden*, IBCA-382 (September 27, 1963), 70 I.D. 436, 1963 BCA par. 3876, 5 Gov. Contr. 515(a).

The second matter of concern is the status of the receivership of the Edisto Construction Company. On page 9 of the contracting officer's findings and decision, the following statement appears:

The Contracting Officer also received a letter dated May 6, 1963, from Mr. O. Harry Bozardt, Jr., Attorney, pertaining to the Edisto Construction Company. Mr. Bozardt stated that:

As you are no doubt aware Edisto Construction Company was placed in receivership on the 20th day of February, 1963, and by proper Court Order I was duly appointed receiver of said company. During the process of marshalling the assets of Edisto Construction Company I find that the United States is indebted to the said Edisto Construction Company for some \$20,000 for buildings which were erected at the U.S. Fish Hatchery here in Orangeburg.

This letter is to notify you that payment of this balance will be made to me as receiver for said Construction Company to be disbursed according to law.

No further information as to the receivership is provided in the findings of fact or in appeal file, nor is the letter from the receiver included in the appeal file.

Conclusion

The appeal is remanded to the contracting officer to proceed in accordance with these directives.

1. The Contracting Officer should present an opportunity to the Edisto Construction Company or its legal representatives to present data or other documents as to the specific dates when it is alleged that work could not be performed under the contract because of unusually severe weather.

2. Based on this data, or on the failure to submit data within a reasonable time, the Contracting Officer should issue a new or supplemental findings of fact and decision with respect to the days allegedly lost by reason of unusually severe weather, in accordance with the foregoing opinion and as amplified in the *Teegarden* decision, note 6 *supra*.

3. The new or supplemental findings of fact and decision should dispose of all matters concerning the receivership, its present status and the identity of the present legal owners and legal representative of the Edisto Construction Company.

THOMAS M. DURSTON, *Member*.

I CONCUR:

PAUL H. GANTT, *Chairman*.

March 2, 1964

APPEAL OF TRIANGLE CONSTRUCTION COMPANY

IBCA-296

Decided March 2, 1964

Contracts: Delays of Contractor—Contracts: Unforeseeable Causes

Where official records of water levels and rates of flow in a river over a period of 9 years show that high water occurred on 195 occasions, the occurrence of such high water on several occasions during more than a year of contract performance is not an unforeseeable cause of delay within the meaning of Clause 5 of Standard Form 23A.

Contracts: Performance—Contracts: Changes and Extras—Contracts: Additional Compensation

Where the contractor's chosen method of performance of a contract for construction of a bridge was the building of a dike across the river for accommodating contractor's equipment, and the impounding of the river during high water due to insufficient openings in the dike caused erosion damage to the river bank, the work of restoring the bank at the Government's direction pursuant to contract provisions requiring the contractor at his own expense to restore landscape features damaged by the contractor's operations, is not extra work. No additional compensation is due the contractor.

Contracts: Waiver and Estoppel—Contracts: Payment—Contracts: Interpretation—Rules of Practice: Appeals: Dismissal

An appeal will not be dismissed where a waiver and exception provision in a payment voucher omitted mention of one of the contractor's claims, but did not provide for release of all claims not excepted, where it appears that the voucher was prepared prior to the original submission of the omitted claim and the conduct of both parties at all times until the hearing of the appeal indicated an intent to preserve the claim. The presentation of such a motion to dismiss during the hearing is untimely.

BOARD OF CONTRACT APPEALS

Two claims are involved in this timely appeal, one in the amount of \$4,500 for remission of liquidated damages, and the other for additional compensation of \$17,303.41, representing the cost of restoring an eroded river bank.

The contract, dated February 24, 1958, was in the total sum of \$678,014.10. It provided for the construction of a bridge across the James River in Virginia, with approaches and other work, as part of the Blue Ridge Parkway. The contract contained Standard Form 23A (March 1953), together with certain Special Provisions, Special Requirements, and it incorporated by reference "Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects" dated January 1957.

Under an arrangement of several years' standing, the contract was executed and funded by the Department of the Interior, while the administration of the contract was performed by the Bureau of Public Roads, Department of Commerce.

A hearing was held on January 10 and 11, 1963, in Washington, D.C. At the hearing (to outline the principal issues briefly), appellant sought to show that the delay in completion of the contract was excusable, being due principally to floods; that such floods eroded the bank of the river, and that such floods and damage were unforeseeable and without the contractor's fault or negligence.

The Government attempted to prove that the occasions of high water (rather than floods) in the river were not unusual and should have been anticipated by appellant; that the delays in performance were caused by appellant's use of a dike to assist in the construction of the bridge, with insufficient openings in the dike for passage of water, which caused overflow and washouts in the dike. The Government also introduced evidence to the effect that the improper construction and maintenance of the dike was the cause of the erosion of the river bank.

At the outset of the hearing it was stipulated by the parties that, if the Board should find that appellant was entitled to additional compensation for restoration of the river bank, the amount of such compensation should be, as claimed by appellant, \$17,303.41.

The contract required the completion of the work within 375 days. With extensions of time granted for winter shutdown, less a charge of 14 days for work accomplished during the shutdown, the contract should have been completed on November 10, 1959. It was actually completed on December 10, 1959, resulting in the assessment of liquidated damages of \$4,500 for 30 days' delay.

Claim No. 1—Restoration of River Bank—\$17,303.41

In its letter of June 30, 1958, the contractor advised the Bureau of Public Roads (hereinafter called the Bureau) that it was preparing to construct a temporary rock and earth fill across the river immediately upstream from the bridge site, to be used as a road for hauling equipment and material used in construction of the bridge. The letter further stated that a study of the flow characteristics of the river indicated a normal discharge rate of less than 2000 cubic feet per second (hereinafter designated as cfs) for the months of July through October. The letter also described plans for placing pipe culverts in the temporary road fill to accommodate the expected flow of 2000 cfs.

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Any discharge in excess of this amount (the letter went on to say) will result in cresting over the temporary road. In the event of an impending storm we plan to restrict damage to the temporary road¹ by removing the upper portion of the fill at a point where the discharge will cause least damage to the bridge itself or any false-work, etc., in place.

Upon completion the temporary road fill, culverts, etc., will be removed.

Your approval of the above is respectfully requested.

Although the contract did not require approval by the Government of the method of construction used by the contractor, the Bureau replied to the contractor's letter on July 8, 1958, by stating that

* * * it is agreeable with the Bureau of Public Roads for you to proceed with the construction of a temporary rock and earth fill * * *

As agreed, it is the obligation of the Triangle Construction Company * * * to perform such post construction removal and cleanup as required for satisfactory restoration of the area.

On August 6, 1958, when the dike was only partially (about 60%) completed, not as yet having been extended entirely across the river, high water crested over the dike and washed away the top 2 feet of earth.² At this time, there were 3 steel culvert pipes, each 6 feet in diameter, in the lower portion of the dike. Two more such pipes were added to the dike by the time the open portion of the dike was closed at the south bank of the river about August 22-23, 1958. The James River is about 400 feet in width at the site of the work.

Further high water broke through the south end of the dike on August 26, 1958, and washed out 12 feet of the south bank completely where the dike joined the south bank. Here the dike was somewhat lower than it was elsewhere.

Mr. Tore M. Hult, President of the contractor, testified as follows concerning the planning of the dike, at Tr. 80:

A. That was mainly handled—the details in the contract that were made by Harold Hanson who is no longer with the firm, but as for a general way I know that we considered the flow of water in there. We knew of course that at times one would expect the water to go over the dyke. I remember we decided on this. Harold Hanson used to be a highway man. He said the same way as a highway is designed there. You don't design a highway to carry

¹ The terms temporary road, work road, roadway, dyke and dike were used interchangeably throughout the hearing and in the transcript. Henceforth, in the interest of uniformity, the term "dike" will be used in this opinion except where direct quotation requires the use of other terms meaning "dike."

² Government's Exhibit B, 4 sketches of cross sections of the dike showing its condition on August 5, 6, 22-23, and 26, 1958.

traffic at Labor Day and days like that. You design it for a normal condition there and we considered this. There would [be] times when water would flow over the dyke and we picked the figure, rather he did, of whatever that was designed for.

Mr. Hult testified further as to the planning of the dike at Tr. 81:

Q. Now in connection with the so-called normal factor that it was to meet, was it also contemplated in constructing the dike that sometimes abnormal conditions would come about?

A. Well, yes, of course.

Q. You were aware that that could happen?

A. Yes.

Q. In connection with that, what provision was made insofar as the construction was concerned that any emergency steps could be taken?

A. Well we had certain areas lower and the idea was that when water flows out if you have limited flood there that water would break through the lower areas and then in rebuilding it you would go from sort of island to island.

It is apparent from the testimony of Mr. Hult that it was anticipated that there would be a limited flood condition where the dike was low, as it was at the south bank. After the damage of August 26, 1958, when the dike and the south bank had been repaired, further high water did minor damage to the south bank on October 25, 1958.³ On November 6, 1958, a channel was cut through the dike near the north bank. Mr. Hult testified on cross-examination (Tr. 97) that originally 8 openings (or pipe culverts) were planned for the dike. Actually, no more than 5 culverts were placed. These culverts were frequently clogged up with river debris and with material from the dike itself, because the pipes were not quite long enough to extend beyond the dike. Moreover, the culvert pipes were "squashed" somewhat by the weight of the dike above them, so that it was occasionally necessary to remove the pipes, straighten them, clear the debris, and re-lay them in the dike.⁴

During the period of December 28-30, 1958, the river rose several feet and broke through and around the south end of the dike, flooding the south bank and undermining a number of trees and shrubs which had lined the banks for many years. Some trees and shrubs had been cleared at the site to permit operations, but no more than was necessary. The bank was eroded for a distance of about 150 to 200 yards downstream, and for a distance of about 50 feet inland at its deepest penetration.⁵

³ Government's Exhibit C, 5 sketches of cross-sections of the dike showing its condition on September 13, October 25, November 6, December 28, 1958, and January 23, 1959.

⁴ Testimony of Mr. Fred F. Jaeger, Government Project Engineer, at Tr. 145-146.

⁵ Testimony of Mr. Edward Howard Burton, job superintendent for the contractor, at Tr. 13.

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The next occasion of high water was on January 23, 1959, when the south bank was further eroded to a point about 8 feet short of Pier No. 6, which was about 100 feet inland from the original shoreline. Pier No. 5 was erected at the original waterline of the south bank, and these piers were 100 feet apart.⁶ Just prior to this time, two channels had been cut through the dike in an effort to accommodate the flow of the river. After the January 23d flood, a discussion took place between Mr. Jaeger, the Government Project Engineer, and a Mr. Dennis, who was employed by the contractor as a consultant. Mr. Jaeger states that he recommended to Mr. Dennis that an opening or channel 100 feet wide be cut in the dike. However, a channel of only about 50 feet was cut through the dike, with a bridge supported by cribbing filled with rock. This measure proved to be insufficient. Mr. Jaeger testified that on February 13, 1959, high water washed out the concrete slab which covered the southerly portion of the dike, and there was further erosion of the south bank (Tr. 153-154).

Additional occasions of high water took place on April 16 and June 3, 1959, when the river reached inland as far as Pier No. 6. This was the ultimate extent of the erosion damage to the south bank.⁷

Upon instructions from the Government, the contractor repaired the damage to the south bank, using, for the most part, the material from the dike, which it had agreed to remove on completion of the contract.

The contractor sought to show that the erosion of the south bank was caused by extensive clearing and grubbing in the area of work. However, examination of the photographs submitted by the parties (in particular the folder of photographs comprising Government's Exhibit J) do not bear out the contractor's contention. The eroded area was much more extensive than the cleared area. Also, according to the Government witness, Mr. Jaeger, there was no grubbing (removal of roots of trees) performed even at Pier No. 5.⁸ Mr. Hult testified on rebuttal that it would have been necessary to remove roots in the area of the cofferdam for Pier No. 5, in order to drive the steel piling for the cofferdam. He admitted, however, that he did not actually see the roots removed at that point, and he did not

⁶ Jaeger, Tr. 150.

⁷ Government's Exhibit E, a sketch map showing successive high water marks and erosion made by floods on August 26 and December 30, 1958, and on January 5, April 16, and June 3, 1959.

⁸ Tr. 250.

contradict the Government's evidence as to the nonremoval of roots in the adjacent work areas (Tr. 279).

According to the Government's Exhibit H, entitled "Work Progress," work on Pier No. 5 was commenced in November 1958, and some erosion had already taken place in the high water of August 26 and October 28, 1958. Photographs of the vicinity, taken before any great amount of erosion had occurred, show large numbers of trees of considerable size, indicating that previous high water or floods had not damaged the banks of the river for many years except for the recent erosion of the south bank at the point of its junction with the dike, and for a distance of about 150 to 200 yards downstream from that point. Once the river had flooded the south bank so that it flowed around and behind the trees and shrubs, it was able, through the violence of its flow, to undermine the root systems which had hitherto protected the bank from erosion. The trees and shrubs then toppled into the river, leaving the bank vulnerable to more extensive erosion.

In the opinion of the Board, the principal cause of the flooding (and consequent erosion) was the manner of construction of the dike by the contractor. It is plain to see that there was insufficient provision for passage of water through the dike, in the light of previous records of high water (which will be discussed *infra*). The build-up of the water behind the dike was sometimes as much as 2 feet above the level of the river on the downstream side of the dike. This condition, coupled with the low height of the dike at its junction with the south bank, served to create a "mill-race" when the water flowed over and broke through the south end of the dike. The violence and turbulence of the water flow at that point is clearly visible in the photographs.

Although the contractor maintained that his construction of the dike was the only feasible method of building the bridge, Government witnesses testified to the contrary. The contractor had considered, but rejected the possibility of using pontoon barges because of uncertainty as to navigability of the James River downstream from the bridge site. The river was about 10 feet deep at the site. However, as Mr. Edward Stuart Burch⁹ testified (Tr. 211) it would have been possible to transport barges by highway. Also, it should have been possible to use a series of piers (consisting of cribbing filled with rocks) connected by several bridges. Mr. Hult testified that cribbing was not adopted because of the rocky bottom of the

⁹ Mr. Burch was the Assistant Project Engineer on the project.

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river, with no anchorage. However, cribbing was eventually used for the supporting piers of the one bridge in the dike.

Moreover, it is apparent that the period of use of the dike as anticipated by the contractor was much too brief. The contractor's letter of June 30, 1958, requesting approval of the construction of a dike, describes the period studied for flow characteristics of the river as being from July through October. Mr. Hult testified concerning that period as follows (Tr. 99) :

A. We probably had anticipated a length of use [of the dike] which of course was then too short.

The contractor continued to use the dike until the contract was virtually completed.

It is also apparent that the assumption by the contractor of a rate of flow normally "substantially less than 2,000 cfs" was too optimistic, even for the comparatively dry season of July through October. Bulletins No. 17 and 25,¹⁰ of the State of Virginia, entitled "Surface Water Supply of Virginia, James River Basin," cover respectively the years of 1951 to 1955 and 1956 to 1960. The Board has held that a period of 10 years is acceptable for establishing a pattern of weather behavior.¹¹

The contracting officer's decision dated July 17, 1961, analyzes the data for the months of July through October in the Bulletins to show that the average maximum rate of discharge (at Holcombs Rock, the gaging station nearest the work site) for the period of October 1950 to September 1959, varied from 2,836 cfs for July to 6,576 cfs for October. During July 1958, when the dike was started, there was a maximum flow of 3,680 cfs. On the occasion of the first erosion, August 26, 1958, the rate was 6,360 cfs. On December 28-30, 1958, when the first major erosion occurred, the maximum flow was 9,440 cfs on December 30, when the gage height reached 8.95 feet. On April 16, 1959, the discharge rate was 13,000 cfs and the river level rose to 10.52 feet. On June 3, 1959, the rate of discharge was 23,900 cfs with a river level of 14.14 feet. During the period of 1950-59, the river rose to a stage of 9.5 feet on a total of 195 occasions, or an average of once every 17 days. If appellant had anticipated the possibility that the use of the dike would be prolonged only as long as through November and December of 1958,

¹⁰ Bulletin No. 25 was introduced by appellant as Appellant's Exhibit No. 5. Bulletin No. 17 is Government's Exhibit I.

¹¹ *Allied Contractors, Inc.*, IBCA-265 (September 26, 1962), 69 I.D. 147; 1962 BCA par. 3501, 4 Gov. Contr. 512; *Triangle Construction Company*, IBCA-232 (March 14, 1962), 69 I.D. 7, 1962 BCA par. 3317, 4 Gov. Contr. 316(c).

a study of the data in the bulletins described above would have revealed that the river rose to a stage of 9.5 feet no less than 18 times during those months in the eight-year period just prior to 1958.

The specifications in the last paragraph of Article 7.8 "Protection and Restoration of Property," of FP-57, provide, in substance, that in the event of damage to public or private property due to the contractor's fault, he shall restore the property at his own expense to its condition before the damage.¹²

Appellant's brief cites Article 7.11 of FP-57 as being a modification of the liability imposed on the contractor by Article 7.8.¹³ We cannot agree with that contention. Article 7.11 clearly deals with the contractor's responsibility for the work performed under the contract (in this case, the bridge), while Article 7.8 is just as clearly concerned with the preservation of property in the vicinity of the contract work. We perceive no ambiguity between these distinctly separate provisions. It has been held that where no ambiguity exists, there is no need to construe the contract.¹⁴

Moreover, even if we accept appellant's argument that the damage to the river bank was caused by an act of God or by action of the elements, Article 7.11 would not excuse the contractor from responsibility, under the facts of this case. The excusability clause in Article 7.11 also provides that such causes shall be unforeseeable and without the fault or negligence of the contractor. We consider that the conclusion is unescapable that the contractor did not construct

¹² The paragraph referred to reads as follows: "When or where any direct or indirect damage or injury is done to public or private property by or on account of any act, omission, neglect, or misconduct in the execution of the work, or in consequence of the nonexecution thereof on the part of the contractor, he shall restore or have restored, at his expense, such property to a condition similar or equal to that existing before such damage or injury was done, by repairing, rebuilding, or otherwise restoring same, or he shall make good such damage or injury in some other acceptable manner."

¹³ "7.11 Contractor's Responsibility for Work. Until notified by the engineer of the satisfactory completion of the work, in accordance with article 5.6, the contractor shall have the charge and care thereof and shall take every precaution against injury or damage to any part thereof by the action of the elements, or from any other cause, whether arising from the execution or from the nonexecution of the work. The contractor, at his own expense, shall repair, restore, and make good all damages to any portion of the contract work except those damages due to unforeseeable causes beyond the control of and without the fault or negligence of the contractor. Such unforeseeable causes shall include but shall not be restricted to acts of God or of the public enemy, acts of the Government, extraordinary action of the elements, unavoidable slides, and ordinary wear and tear on any section of the road opened to traffic by order of the engineer.

"In case of suspension of work for any cause whatever, the contractor shall be responsible for all materials, and shall properly store them, if necessary, and shall provide suitable drainage of the roadway and erect necessary temporary structures at his expense. He shall properly and continuously maintain all living material in newly established plantings, seedings, and soddings furnished under his contract, and shall take adequate precautions to establish and protect against injury new tree growth and other important vegetative growth."

¹⁴ *Hongkong & Whampoa Dock Co., Ltd. v. United States*, 50 Ct. Cl. 213 (1915).

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the dike in a proper manner, and, that it did not plan the dike so as to accommodate the flow of the river at rates of discharge which it should have anticipated. Hence, the causes were neither unforeseeable nor without the fault or negligence of the contractor.¹⁵

The cases cited in appellant's brief (such as, *Chesapeake & Ohio R. Co. v. Meriwether*, 120 Va. 55, and *Crawford v. Rambo*, 44 Ohio St. 279) are not relevant to the issues in this appeal, since they do not apply the law of contracts, but are based principally on the respective riparian rights of owners of land bordering a common stream.

During the hearing, Government Counsel moved for the first time to dismiss appellant's appeal as to all claims except the claim for setting aside the assessment of liquidated damages, on the ground that a "pre-trial" payment voucher signed by appellant had omitted reservation of the claim for restoration costs. The voucher had been prepared prior to the submission of the omitted claim; hence, a reservation as to that claim could not have been included in the voucher when it was prepared by the Government. Moreover, the conduct of both parties at all times until the hearing, including full consideration by the contracting officer of the restoration claim on the merits, indicated an intent to recognize and preserve the claim. The hearing official denied the motion on the ground that it was not timely, and for the further reason that the basis of the motion was insufficient.

In any event, we hold that the contractor is responsible for restoration of the river bank under the clear requirements of Article 7.8 of FP-57, the erosion damage having been caused by the acts, omission or neglect of the contractor in the construction and maintenance of the dike.

Accordingly, the appeal is denied as to Claim No. 1 for cost of restoration of the river bank.

Claim No. 2—Liquidated Damages—\$4,500

The contractor's claim for setting aside the assessment of liquidated damages for 30 days' delay in completion of the contract has its principal basis in the same set of facts as to floods, which, it was alleged, excused the contractor from responsibility for the erosion damage to the river bank. However, the contractor also claims that

¹⁵ See *Carman v. United States*, 143 Ct. Cl. 747 (1958).

the Government was responsible for delay in approval of redesign of the bridge.

Prior to the construction of the dike, certain administrative delays on the part of the contractor were already accumulating. The contracting officer's findings and decision contains an analysis of these delays. The contract had been awarded on February 24, 1958. On April 17, 1958, the contractor received notice to proceed. On May 12, 1958, the contractor requested authority to redesign the superstructure of the bridge, in order to permit the use of more readily available stock sizes of steel forms and pre-stressing steel. The contract provided for consideration of alternate designs, but did not provide for additional time for redesign. On May 29, 1958, the contractor received Bureau instructions to proceed with the redesign. On July 23, 1958, the contractor submitted design drawings for approval. The Bureau approved the drawings, subject to minor corrections on August 1, 1958. There followed further requests for approval of final designs, corrections, resubmissions, final approval and, ultimately, delivery of redesigned steel to the site on September 19, 1958. The contracting officer's analysis shows that out of a total of 207 days of elapsed time from the award of the contract to the delivery of steel on September 19, 1958, the Bureau used 33 days for its work. The remainder of 174 days (except for a stop order of 14 days duration) was used by the contractor, or by its design consultant and suppliers. We consider that the time taken by the Bureau for its work in this activity was reasonable. The contractor has not furnished any evidence to the contrary.

Under paragraph (c) of Clause 5, "Termination for Default—Damages for Delay—Time Extensions" of Standard Form 23A, it is provided that the contractor shall not be charged with liquidated damages because of any delays in the completion of the work:

* * * due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, * * * floods * * *

Appellant's argument is, in substance, that the occurrence of a flood, *ipso facto*, precludes the imposition of liquidated damages. This was originally the view (with one dissent) taken by the Court of Claims in *Brooks-Callaway Co. v. United States*.¹⁶ This view, however, violates the grammatical sense of the proviso by holding that floods and other events listed in the clause are always unforeseeable. That decision was reversed by the Supreme Court¹⁷ in a land mark

¹⁶ 97 Ct. Cl. 689, 698 (1942).

¹⁷ *United States v. Brooks-Callaway Co.*, 318 U.S. 120 (1943).

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case which is particularly dispositive of this appeal. The Court said:

Rather, the adjective "unforeseeable" must modify each event set out in the "including" phrase. Otherwise, absurd results are produced, * * *

The Court also quoted, with approval, a portion of the dissenting opinion of Judge Madden in the Court of Claims decision. Judge Madden stated in part:

The same is true of high water or "floods." The normally expected high water in a stream over the course of a year, being foreseeable, is not an "unforeseeable" cause of delay. Here plaintiff's vice-president testified that in making its bid plaintiff took into consideration the fact that there would be high water and that when there was, work on the levee would stop * * *.

The Supreme Court stated further:

Whether high water or flood, the sense of the proviso requires it to be unforeseeable before remission of liquidated damages for delay is warranted.

Government's Exhibit F is a compilation of the days spent by appellant in repairs to the dike and in temporary repairs to the adjacent shore line in order to render the dike usable by the contractor's equipment. A total of 86 days was so spent, and although not all of these days represent total loss in the progress of the work, the major portion of the time involves work stoppage.

The remaining aspect of the claim of excusable delay has to do with the partial suspension of work during the winter months, from December 19, 1958, to March 19, 1959. The contracting officer charged the contractor with 14 days of contract time by reason of useful work performed during the suspension period. Appellant claims that no charge should be made, and that it is entitled to full credit for the entire suspension period.

Government's Exhibit H includes a Progress Analysis—Payment Chart, indicating that appellant earned the sum of \$25,004.81 in pay estimates during the suspension period, equivalent to 15 days of contract schedule progress. However, since the contracting officer found that only 14 days of progress should be charged, we see no reason to disturb his decision.

The Board holds that appellant has failed to show, by preponderance of evidence, that the delays which were encountered in the performance of the contract were excusable within the meaning of the contract clause.

On the other hand, on the basis of the entire record before us, we consider that the delays complained of were avoidable on the part of

appellant. These delays include the administrative delays in connection with redesign of the bridge superstructure, discussed *supra*, as well as the failure to anticipate and provide sufficiently against the occurrence of high water greatly in excess of the 2,000 cfs estimated by appellant.

Accordingly, the appeal is denied as to Claim No. 2 and the contracting officer's assessment of liquidated damages of \$4,500 for 30 days' delay in performance of the contract is affirmed.

CONCLUSION

The appeal is denied in its entirety.

THOMAS M. DURSTON, *Member.*

I CONCUR:

PAUL H. GANTT, *Chairman.*

CLAIMS OF ED BREWER, MYRON J. THOMPSON, DARRELL C. COOK,
HAROLD E. COOK, W. J. AND VIOLET DENISON, FORREST W.
MARTIN, AND COY BOWEN

TA-253 (Ir.) *Decided March 2, 1964*

Irrigation Claims: Generally

Under the current Public Works Appropriation Act, and its predecessors, awards may be made only upon a finding that the damage was a direct result of non-tortious activities of employees of the Bureau of Reclamation.

Irrigation Claims: Generally

In determining what proof a claimant must supply in support of his claim, due consideration must be given to the availability of the proof to the claimant on the one hand and to the Government on the other. All evidence in the administrative record must be given proper consideration regardless of its source, that is, whether it was presented by the claimant or by the Government.

Irrigation Claims: Water and Water Rights: Generally

In dealing with subterranean water, it is rare that conclusions can be drawn with mathematical precision. Such precision is not necessary. Reasonable and logical conclusions can and must be drawn from the evidence presented, and a decision will then be rendered consistent with the preponderance of the evidence.

Irrigation Claims: Generally

When the administrative record establishes a *prima facie* case in favor of the claimant, and there is nothing in the administrative record which adequately rebuts this *prima facie* case, the claimant is entitled to a determination in his favor.

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APPEAL FROM ADMINISTRATIVE DETERMINATION

Ed Brewer, Myron J. Thompson, Darrell C. Cook, Harold E. Cook, W. J. and Violet Denison, Forrest W. Martin, and Coy Bowen, all of Prineville, Oregon, by and through their attorneys, Mr. James B. Minturn of Prineville, Oregon, and Cake, Jaureguy, Hardy, Buttler and McEwen of Portland, Oregon, have timely appealed from an administrative determination (T-P-227(Ir.)) of December 4, 1962. By that determination, the Regional Solicitor, Portland Region, denied their claims in the following amounts:

Ed Brewer-----	\$432.12
Myron J. Thompson-----	473.26
Darrell C. Cook-----	567.85
Harold E. Cook-----	513.66
W. J. and Violet Denison-----	418.35
Forrest W. Martin-----	471.00
Coy Bowen-----	1,593.75

All claimants allege that their water wells went dry as a result of the construction of a drainage ditch by the Bureau of Reclamation. It is alleged that the wells went dry within a few days after the ditch construction passed the respective properties during June and July of 1961.

In the original determination, the Regional Solicitor denied the claims under the Federal Tort Claims Act¹ because none of the claimants alleged any negligence on the part of the Government, and the administrative record contained no evidence of negligence on the part of the Government. The claims were denied under the Public Works Appropriation Act, 1963,² because:

It is incumbent upon a claimant to supply proof in support of his claims. A review of the various claims submitted indicates that the claimants have merely alleged the facts that their domestic wells went dry and have pointed out that shortly prior to that time the United States, through the Bureau of Reclamation, constructed a drain ditch. The Government, nevertheless, investigated the claims filed, but nowhere is there any evidence uncovered from which to conclude that the act of the Government in constructing the drain ditch was a cause without which the injury would not have occurred, and which by itself is a self-sufficient cause of the injury, the injury in this case being the drying up of the domestic wells. To the contrary, the investigation indicates that other wells similarly situated did not dry up. Further, as the investigating officer observes, the wells went dry during a summer when a severe drought condition existed in the area. Considering all the evidence

¹ 28 U.S.C., 1958 ed., sec. 2671 *et seq.*

² 76 Stat. 1216. This appeal will be decided under the Public Works Appropriation Act, 1964, 77 Stat. 844, which is the current Act.

submitted, it does not appear that the activities of the Bureau of Reclamation resulted in the injuries claimed and, therefore, these claims cannot be settled under the Public Works Appropriation Act, 1963, *supra*.

The claimants through their attorneys contend that the original determination erred in concluding that:

1. The injuries to the claimants were not directly caused by the activities of the Bureau of Reclamation.

2. There was no causal connection between the construction of the drainage ditch and the drying up of the claimants' wells.

3. The claimants were not entitled to relief under the Public Works Act.

It is clear from the notice of appeal that the appellants do not seek to have the original determination reversed on any theory of negligence on the part of the Government. The appellants do not allege negligence, nor does the investigation reveal any negligence. Therefore, the denial of the claims under the Federal Tort Claims Act in the original determination is sustained.

Under the current Public Works Appropriation Act, and its predecessors, awards may be made only upon a finding that the damage was a direct result of non-tortious activities of employees of the Bureau of Reclamation.³

In determining what proof a claimant must supply in support of his claim, due consideration must be given to the availability of the proof to the claimant on the one hand and to the Government on the other. In a determination⁴ which discusses the principles of proof of claims presented to the Department of the Interior for administrative determination, it was stated:

It is usually difficult, and often impossible, for the claimant in an accident such as this to secure such information. However, in order to be able to render a determination that is fair and equitable to all parties, the Department of the Interior in the assembly and consideration of the evidence resembles more an impartial judicial body than a party litigant. Further, since the Department is usually in a better position to secure the evidence, it has assumed the burden of investigating claims and of obtaining all available material evidence.

The instant case involves water wells and their water supply. The problems of subterranean water are present. Therefore, it is well to remember that:

³ *Wilbur B. Cassidy*, TA-235 (Ir.) (November 7, 1962), 69 I.D. 193, and authorities cited therein.

⁴ *Hannah Cohen*, TA-247 (May 22, 1963), 70 I.D. 188.

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In dealing with subterranean water, it is rare that conclusions can be drawn with mathematical precision. Such precision is not necessary. Reasonable and logical conclusions can and must be drawn from the evidence presented, and a decision will then be rendered consistent with the preponderance of the evidence.⁵

As the two foregoing quotations show, all evidence in the administrative record must be considered, regardless of its source, and reasonable and logical conclusions must be drawn, even though this cannot be done with mathematical precision.

The administrative record relating to the instant claims contains evidence establishing the following:

1. The claimants' wells went dry within a matter of days after drainage ditch passed the claimants' properties.

2. The wells had supplied necessary water to the claimants for several years prior to the construction of the ditch.

3. While the excavation for the ditch progressed north to the highway near the properties in question, very little water was encountered. However, when the excavation turned east parallel to this highway and began to pass the claimants' properties, a substantial flow of water was intercepted.

4. The water table at the ditch is now seven to eight feet lower than it was before the ditch was constructed.

5. The ditch has had no noticeable affect on some, at least, of the other wells in the area.

6. There was a drought in the area at the time in question.

7. The drainage ditch was constructed because "With the prospect of additional lands to be irrigated at higher elevations within the district it is estimated the present water table would rise in certain areas. In order to prevent this water table from rising and to remove excess surface water Drain D-2 [drainage ditch in question] was constructed to keep the adjacent lands in production."

The most reasonable and logical conclusion to be drawn from the first four circumstances is that the construction of the drainage ditch caused the wells to go dry.

The fifth circumstance appears to oppose this conclusion. However, a review of the information in the administrative record concerning the wells which went dry and those which did not reveals that the unaffected wells had depths of seventy to seventy-two feet, while the wells which went dry had depths of fourteen to sixty-five feet with only one of them deeper than forty-six feet. The unaffected wells penetrated, moreover, to elevations that were from nine to eleven feet below the average elevation, and from one to three feet

⁵ *Harold D. Jensen, TA-227 (Ir.) (March 14, 1963), 70 I.D. 97.*

below the lowest elevation, reached at the bottom of the affected wells. They are also farther from the drainage ditch than the wells which went dry.

The sixth circumstance raises a question as to what effect the drought had in the drying up of the wells. This question would be more serious if the wells were new and had not been furnishing necessary water to the claimants for several years. The drought experienced could hardly be the first drought experienced by this area in the lifetime of the wells; nor would a drought explain why the wells went dry in the order of their proximity to the then excavated portions of the ditch.

The seventh circumstance shows that the Bureau of Reclamation expected the ditch to affect the water table on adjacent lands, and, hence lends support to the conclusion that a causal relationship existed between the construction of the ditch and the drying up of the wells.

All in all, the administrative record establishes at least a *prima facie* case in favor of the claimants' contention that the construction of the drainage ditch caused their wells to go dry. There is nothing in the administrative record which adequately rebuts the *prima facie* case. Therefore, it is determined that the damages of which the claimants complain were the direct result of activities of employees of the Bureau of Reclamation. There remains to be determined how much damage was suffered by each claimant.

A Bureau of Reclamation engineer visited the sites of the wells in question to assess the cost of deepening or replacing the wells as necessary. He found that in all instances, the claimants who had completed the necessary work now had wells superior to the old wells, and the claimants who had not done so had submitted estimates for work which would give them wells superior to the old wells. Since the measure of damages is the cost necessary to furnish the claimants with wells of the same quality as the old ones, but deep enough to supply water to the claimants notwithstanding the presence of the drainage ditch, the amounts claimed are excessive.

The engineer's estimate of the reasonable and necessary costs of obtaining proper wells is:

Ed Brewer.....	\$313. 37
Myron J. Thompson.....	224. 53
Darrell C. Cook.....	387. 60
Harold E. Cook.....	306. 33
W. J. and Violet Denison.....	207. 72
Forrest W. Martin.....	304. 60
Coy Bowen.....	675. 25

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It is determined that the engineer's appraisal of the amount of damages sustained by each claimant is reasonable, fair and equitable. Accordingly, the original determination is hereby reversed, and the following sums are awarded to the claimants:

	<i>Awards</i>	<i>Original Claims</i>
Ed Brewer-----	\$313. 37	\$432. 12
Myron J. Thompson-----	224. 53	473. 26
Darrell C. Cook-----	387. 60	567. 85
Harold E. Cook-----	306. 33	513. 66
W. J. and Violet Denison-----	207. 72	418. 35
Forrest W. Martin-----	304. 60	471. 00
Coy Bowen-----	675. 25	1, 593. 75

EDWARD WEINBERG,
Deputy Solicitor.

HUGH E. PIPKIN ET AL.

A-30021

Decided March 4, 1964

Oil and Gas Leases: Cancellation—Oil and Gas Leases: Six-Mile Square Rule

An oil and gas lease offer which describes land within an area over six miles in width and within an area covering five whole sections and parts of two end sections in width does not comply with the regulation requiring that land sought for leasing must be within an area six miles square or within an area not exceeding six surveyed sections in length or width, and a lease issued in response to such offer is improperly issued and subject to cancellation if proper junior offers have been filed for the land.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Hugh E. Pipkin and Raymond J. Stipek have appealed separately to the Secretary of the Interior from a decision of the Division of Appeals of the Bureau of Land Management which affirmed decisions of the Sacramento land office rejecting their noncompetitive oil and gas lease offers for certain public land in Kern County, California, on the ground that the land had been leased to Mrs. Verna I. Clancy in response to her simultaneously filed offer, which included the land covered by both of their offers.

Mrs. Clancy's offer, Sacramento 072582, described the land to be leased as:

T. 30 S., R. 20 E., M.D. Meridian
 Sec. 2: SW $\frac{1}{4}$ NW $\frac{1}{4}$
 Sec. 3: SE $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$

T. 30 S., R. 21 E., M.D. Meridian

Sec. 3: lots 3, 4, S $\frac{1}{2}$ NW $\frac{1}{4}$, W $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 4: lots 3, 4, S $\frac{1}{2}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$

Sec. 7: lot 1

Sec. 8: lots 1, 2, 3

Pipkin's offer, Sacramento 072766, described the same land in secs. 3 and 4 of T. 30 S., R. 21 E., M.D. Meridian. Stipek's offer, Sacramento 072809, described the same land as Mrs. Clancy's in secs. 2 and 3, T. 30 S., R. 20 E., M.D. Meridian. Mrs. Clancy's offer was awarded first priority as the result of a public drawing and she was awarded a lease for the land described in her offer, and the second priority offers of Pipkin and Stipek were rejected in their entirety.

Pipkin and Stipek base their appeals upon the contention that each of them was the first qualified applicant for the land described in his offer because Mrs. Clancy's offer, which was the only one with a higher priority, did not comply with either of the alternative requirements of departmental regulation 43 CFR 192.42(d) which states that:

* * * The lands in the offer must be entirely within an area of six miles square or within an area not exceeding six surveyed sections in length or width. * * *

An examination of the official plats of the two townships in which the land described in the Clancy offer is located, discloses that this land comprises four noncontiguous tracts and that the east boundary of the most easterly tract is located in the sixth section east of, and exclusive of, the section in which the western portion of the most westerly tract is located. If these seven sections were each one mile square, the distance from the west boundary to the east boundary of an area encompassing all of the tracts sought for leasing would be 5 $\frac{3}{4}$ miles. However, none of these sections is of normal size with the consequence that the western limit of the area encompassing all the tracts is more than six miles from the eastern limit of that area. Although the extension of the entire area from north to south is less than two miles, it is clear that the land cannot be contained within an area six miles square.

It is, therefore, necessary to consider whether the Clancy offer meets the alternative requirement that the land sought for leasing be within an area "not exceeding six surveyed sections" in length or width. Because this requirement is stated as an alternative,

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it is obvious that it cannot be construed to mean that the land is merely limited to the extent of six normal sections, for this, obviously, would be saying, in part, the same thing as the first requirement. Accordingly, it can mean only that an area described in a lease offer must be within an area six miles square or within an area not longer or wider than six of the surveyed sections shown by the official plats of the land described in the offer. Thus, an area not extending beyond six contiguous sections in length or width is acceptable, even though, because some of these sections are over-size, one dimension of the area encompassing the land sought exceeds six miles.

As we have seen, however, the tracts described in the Clancy offer cannot be encompassed in an area comprising six whole sections running in an east-west direction. The question then is whether "six surveyed sections" means only six whole sections or whether it includes, as well, five sections plus parts of each of the two sections abutting on the ends of the five sections so long as the whole is equivalent to six sections. For example, does it apply to a description covering the $W\frac{1}{2}$ sec. 1, secs. 2, 3, 4, 5, 6, and the $E\frac{1}{2}$ sec. 1 of the next township west where the lineal distance is more than six miles?

The answer seems clearly to be in the negative. The regulation speaks of an "area not exceeding six surveyed sections in length or width." It does not say an "area *equivalent* to six surveyed sections in length or width." To interpret it in this fashion would be to create difficulties of administration, for it would require in each case taking the fractions of the two end sections covered by the tracts applied for and adding them together to determine whether they total one section, so that added to the five intervening sections they make an area six sections in length or width. There is nothing whatever in the language of the regulation to suggest that such a mathematical exercise was contemplated to determine compliance with the regulation. In view of the plain language of the regulation limiting the exception to six "surveyed" sections, it is our opinion that its coverage cannot be extended to lands lying in seven surveyed sections.

Because Mrs. Clancy's lease offer did not meet either of the two requirements imposed by 43 CFR 192.42(d), it did not qualify her for the award of a lease, and the lease was improperly issued to her in response to her offer. Because the lease was improperly is-

sued, it must be canceled (see *Boesche v. Udall*, 373 U.S. 472 (1963)) if there is another applicant or applicants qualified to hold a lease.¹

Therefore, 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 reversed, and the case is remanded for further proceedings consistent herewith.

ERNEST F. HOM,
Assistant Solicitor.

**EMPIRE STATE OIL COMPANY
JACK J. GRYNBERG**

A-29761

Decided March 6, 1964

Oil and Gas Leases: Cancellation

An oil and gas lease is properly canceled where it was issued pursuant to an application which described less than 640 acres which were available for leasing at the time the application was filed and did not include adjoining lands which were available for leasing.

Oil and Gas Leases: Known Geological Structure—Oil and Gas Leases: Lands Subject to—Oil and Gas Leases: 640-Acre Limitation

A determination that land is within the undefined known geologic structure of a producing oil or gas field is, in effect, a withdrawal of that land from noncompetitive leasing, and where that determination is reflected by the records of the Bureau of Land Management, the land is unavailable for noncompetitive leasing and must be excluded in determining whether a lease offer complies with the requirements of 43 CFR 192.42(d).

Oil and Gas Leases: Lands Subject to—Oil and Gas Leases: 640-Acre Limitation—Words and Phrases

"Available for leasing," as used in 43 CFR 192.42(d) and decisions interpreting that regulation, means lands which are available for noncompetitive leasing under the Mineral Leasing Act.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Empire State Oil Company has appealed to the Secretary of the Interior from a decision of the Division of Appeals, Bureau of Land Management, dated July 27, 1962, which directed the Colorado land

¹ In her appeal Mrs. Clancy alleged that each of the appellants was part of a separate group that may have sought to obtain an unfair advantage in the drawing by which priorities were determined. This matter is to be investigated before Mrs. Clancy's lease is canceled, for if the appellants are disqualified her lease may remain in effect, in the absence of other offerors who have maintained their rights. *D. Miller*, 63 I.D. 257, 258 (1956).

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office to cancel the appellant's noncompetitive oil and gas lease, Colorado 064794, and to issue a lease to Jack J. Grynberg, if he is otherwise qualified to receive a lease.¹

The appellant filed its offer on May 22, 1961, to lease 640 acres pursuant to section 17 of the Mineral Leasing Act, as amended, 74 Stat. 782 (1960); 30 U.S.C. § 226 (Supp. IV, 1963). A lease was issued, effective January 1, 1962, for the N $\frac{1}{2}$ SW $\frac{1}{4}$ and the SE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 20, T. 1 N., R. 101 W., 6th P.M., Colorado, containing 120 acres.

The Division of Appeals found that another 120 acres of the 640 acres described in the appellant's offer were included in the undefined limits of the known geologic structure of the South Rangely Field and were, therefore, not available for noncompetitive leasing. It further found that there was other adjacent land available for leasing and that the offer did not meet the requirement of the oil and gas regulation that an offer must describe not less than 640 acres unless the land described is surrounded by lands not available for leasing. 43 CFR 192.42(d).

The appellant contends that its offer met the requirements of that regulation and that, even if the offer did not satisfy the requirements of the regulation, the Department has no authority to cancel a lease administratively for noncompliance with a regulation prior to issuance of the lease.

The latter contention has been settled by the Supreme Court in the case of *Boesche v. Udall*, 373 U.S. 472 (1963), which upheld the authority of the Secretary to cancel an oil and gas lease issued in violation of the Mineral Leasing Act, 41 Stat. 437, as amended, 30 U.S.C. § 181 *et seq.* (1958), and the regulations promulgated thereunder. Since that case involved a lease issued in violation of the 640-acre regulation, the Bureau had authority, in this instance, to cancel the appellant's lease if it was initially issued in error.

The appellant's principal argument depends upon the interpretation placed upon 43 CFR 192.42(d), which provides in pertinent part that:

No offer may be made for less than 640 acres except * * * where the land is surrounded by lands not available for leasing under the act.

The appellant contends that the 120 acres within the known geologic structure, although not available for noncompetitive leasing,

¹ Grynberg filed lease offer Colorado 064795 on the same date that the appellant's offer was filed. His offer included, among other lands, the land covered by the appellant's lease. Grynberg appealed to the Director of the Bureau of Land Management from the rejection of his offer by the land office and the issuance of the appellant's lease.

are, nevertheless, available for competitive leasing under the Mineral Leasing Act and should be included in the acreage necessary to satisfy the regulation. It further contends that there is a possibility that land within an undefined area of a known geologic structure may, at any time, be determined not to be in the structure and may become subject to noncompetitive leasing without notice to any prospective applicants. Since such land might, in fact, be available for leasing, the appellant argues, it should not be deducted from the leasable acreage contained in the offer.

The rule is well established that in determining whether or not an offer describes 640 acres of land, as required by 43 CFR 192.42(d), only those lands which are available for leasing on the date that the offer is filed may be considered. *R. S. Prows*, 66 I.D. 19 (1959); *Janis M. Koslosky*, 66 I.D. 384 (1959); *J. Penrod Toles*, 68 I.D. 285 (1961). That "available for leasing" means "available for noncompetitive leasing" is clear from the usage of the term in innumerable departmental decisions as well as from its use in regulation 43 CFR 192.42, which pertains solely to noncompetitive leasing. There is no rational or conceivable reason why the Department would have intended in the regulation to have the phrase "available for leasing" mean "available for leasing on a noncompetitive or competitive basis." The clear intent of the regulation is that an offeror is to be excused from having to include 640 acres in his offer only when the land applied for is surrounded by other land not available for noncompetitive leasing. Accordingly, the appellant's contention that lands which may be leased competitively only are available for leasing within the meaning of 43 CFR 192.42(d) is without merit.

The appellant contends, however, that land shown on the records of the land office to be within a known geologic structure may nonetheless be subject to noncompetitive leasing.

Section 17 of the Mineral Leasing Act, *supra*, permits the leasing of lands within a known geological structure of a producing oil or gas field only after competitive bidding. Therefore, a noncompetitive oil and gas lease offer which includes lands that are found to be within a known structure must be rejected as to those lands. In this respect, lands in a known geological structure are similar to lands which are already under lease or lands that are withdrawn from mineral entry.

The Department has held that a definition of the known geologic structure of a producing oil or gas field is, in effect, a withdrawal of the lands included within the boundaries of such structure

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from noncompetitive leasing, and while the lands remain so defined, they may be leased only by competitive bidding. *H. A. Hopkins*, 50 L.D. 213 (1923); *Lincoln-Idaho Oil Company*, 51 L.D. 235 (1925); *George C. Vournas*, 56 L.D. 390 (1938); *W. Nelson Shell*, A-26623 (June 1, 1953).²

In the *Shell* case the Department said:

A definition of the known geologic structure of a producing oil or gas field is, in effect, a withdrawal of the lands included within the boundaries of such structure from noncompetitive leasing. *Lincoln-Idaho Oil Company*, 51 L.D. 235 (1925). While the lands remain so defined, they may be leased only by competitive bidding. *George C. Vournas*, 56 L.D. 390 (1938). Mr. Shell's application, having been filed at a time when the land was still defined to be within the structure was, therefore, properly rejected.

Furthermore, it is well settled that an application for land filed while the land is withdrawn from entry is invalid; that the revocation of a withdrawal during the pendency of an applicant's appeal from the rejection of his application does not validate the application; and that an application relating to withdrawn land may not be suspended to await the lifting of the withdrawal and then considered as if filed at the instant that the land is restored to entry. *D. Miller*, 60 I.D. 161 (A-24692, April 15, 1948); *Charles W. Trounson*, 60 I.D. 182 (A-24583, May 27, 1948). Hence, where an application for a non-competitive oil and gas lease is filed covering lands which are at the time of the filing of the application within the known geologic structure of a producing oil or gas field, it may not be suspended to await action by the Department on the redefinition of the boundaries of the structure.

This well established rule makes it plain that the land in Empire's application which was within the known geologic structure of a producing oil and gas field was not available for leasing and cannot be counted in determining whether it complied with the 640-acre rule.

In other decisions in which the 640-acre rule was involved the Department has reached a similar conclusion. Lands embraced within an outstanding oil and gas lease and lands withdrawn from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, are not available for leasing under the Mineral Leasing Act and cannot be counted toward the 640 acres necessary to satisfy the regulation. *J. Penrod Toles*, *supra*; *Janis M. Koslosky*, *supra*.

On the other hand, lands which are covered by outstanding lease offers, but for which a lease has not been issued, are available for leasing, and such lands may be counted toward the required 640 acres. *Boesche v. Udall*, *supra*; *Natalie Z. Shell*, 62 I.D. 417 (1955).

² See also *Maw Barash, The Texas Co.*, 63 I.D. 51, 63 (1956), reversed on other grounds, *Barash v. McKay*, 256 F. 2d 714 (D.C. Cir. 1958); but cf. *Udall v. King*, 308 F. 2d 650 (D.C. Cir. 1962).

Land which is included within a homestead entry for which acceptable final proof has been filed and for which the entryman has met all other requirements is to be considered as available for oil and gas leasing within the meaning of the 640-acre rule even though a patent may be issued subsequent to the filing of a lease offer without reservation of oil and gas, thus requiring rejection of the offer as to that land. *Standard Oil Company of California*, 70 I.D. 422 (1963).

In all of the foregoing situations, the information upon which a determination is made as to whether or not the lands are available for leasing is a matter of record in the Bureau of Land Management and is discernible to any prospective lease offeror. This is not necessarily so with respect to lands within a known geologic structure. As to such lands, the pertinent regulation provides that:

* * * if the producing character of a structure underlying a tract of land is actually known prior to the date of the Department's official pronouncement on that subject, it is the date of the ascertainment of the fact, and not the date of the pronouncement, that is determinative of rights which depend upon whether the land is or is not situated within a known geologic structure of a producing oil or gas field. Ernest A. Hanson, A-26375 (May 29, 1952); and cases cited therein. All determinations are subject to change at any time upon receipt of further information through the drilling of wells and other sources. Accordingly, lessees or applicants for leases should not rely upon the maps, diagrams, determinations or notices thereof, as currently controlling documents. 43 CFR 192.6(c).

Before any noncompetitive oil and gas lease is issued, a report is requested from the Geological Survey as to whether any of the lands described in the lease offer are within a known geologic structure. If any of the lands are reported to be within a structure, the availability of those lands for noncompetitive leasing will depend not upon the date that the determination was made that they were in such a structure but upon the date on which facts became known upon which a determination was subsequently made. If those facts were known prior to the date on which the lease offer was filed, the offer will be rejected as to such lands even though there was no information in the land office records which indicated that the lands were within a known geologic structure, and no report to that effect had been made by the Geological Survey. If the facts became known after the filing of the lease offer, the lands may still be leased noncompetitively. *John P. Dever*, 67 I.D. 367 (1960); *John J. King*, A-28543 (October 13, 1960);³ *Columbian Carbon Company*, A-28706 (October 10, 1962).

³ Affirmed by the United States Court of Appeals for the District of Columbia Circuit in *Udall v. King*, *supra*, note 2.

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It is, also, possible that lands which have previously been reported to be within the limits of a known geologic structure, and are so shown by the Bureau's records, may subsequently be determined to lie outside of that structure. Upon a proper showing that lands presently included in a known geologic structure should be excluded, those lands may be leased noncompetitively. However, only after the lands have been restored from a defined structure may a non-competitive lease offer be accepted for those lands. As we have seen, a noncompetitive offer filed while the lands are included in a defined structure may not be suspended to await action by the Department on the redefinition of the boundaries of the structure but must be rejected without affording the offeror any priority of filing. *H. A. Hopkins, supra; W. Nelson Shell, supra.* The distinction drawn by the regulation (43 CFR 192.6(b)) between "structures defined" and "structures undefined" is for administrative purposes, and the regulation sets forth the manner in which notice will be given of each class of structure but does not differentiate the terms by which each may be leased.

It is apparent, therefore, that when the regulation states that—lessees or applicants for leases should not rely upon the maps, diagrams, determinations or notices thereof, as currently controlling documents,

it is not saying that a determination that land is within a known geologic structure is ineffective to withdraw the land from noncompetitive leasing until a redetermination is made of the facts that may be currently controlling, nor is the Department inviting prospective offerors to file noncompetitive offers for lands within known geologic structures upon the possibility that redefinition of the structures will exclude those particular lands. Rather, the offeror is put on notice by the regulation that even though the Bureau's records may show that lands are available for noncompetitive leasing, there is a possibility that geological information, not yet reflected by any Bureau records, may necessitate the rejection of the offer.

From the foregoing, I conclude that a determination that lands are within a known geologic structure, whether defined or undefined, if it is reflected by the Bureau's records, makes those lands unavailable for leasing within the meaning of 43 CFR 192.42(d). Where the Bureau's records indicate that lands are available for noncompetitive leasing at the time a lease offer is filed, a subsequent determination that the lands were, in fact, known to be in a producing structure at that time will not prevent the inclusion of those lands in determining whether or not the 640-acre requirement has been met,

even though the offer must thereafter be rejected as to those lands. In effect, then, the question of the availability of lands for noncompetitive leasing within the meaning of 43 CFR 192.42(d), under the circumstances presented here, is determined by the facts which are reflected by the Bureau's records at the time an offer is filed. The question of whether a lease will be issued to a particular offeror, of course, must be determined upon the basis of all factors which may affect the issuance of a lease at the time action is taken on the offer as well as those of record at the time of filing of the offer.

In the present case, the record shows that the S $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 19 and the NW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 29, T. 1 N., R. 101 W., 6th P.M., described in the appellant's lease offer, were in the undefined known geologic structure of the South Rangely Field effective July 26, 1956. This information was reported by the Director, Geological Survey, by memorandum dated August 23, 1956.

The appellant does not deny that it knew, at the time of filing its lease offer, that part of the lands described were in a known geologic structure, nor has it suggested that this fact was not reflected by the land office records at that time. The appellee, Grynberg, has stated affirmatively that he and other parties "did check the records and did note that the 120 acres were within the undefined known structure." Accordingly, the Bureau was correct in finding that the appellant's offer did not comply with the Department's regulation and in directing the cancellation of the appellant's lease.

Therefore, 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.

ERNEST F. HOM,
Assistant Solicitor.

ESTATE OF STELLA CONGER

IA-1292

Decided March 10, 1964

Indian Lands: Descent and Distribution: Wills

An unapproved alleged contract to make a will devising restricted Indian land is inappropriate for approval and a claim for specific performance thereof against a restricted Indian estate must be denied.

APPEAL FROM AN EXAMINER OF INHERITANCE

This is an appeal from an order of the Examiner of Inheritance denying appellants' petition for rehearing in the estate of Stella Conger, Salt River Allottee No. 178, and denying their claim for

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specific performance of an alleged contract to devise certain properties included in this estate.

Stella Conger died August 7, 1960, at about the age of 90 years, leaving no surviving spouse or issue. Four documents purporting to be her wills are of record. The first three, in point of time, are dated respectively May 5, 1950, June 23, 1950, and March 23, 1951. Each is similar in that it gives her own allotment to her nieces and nephews and further provides that in the event she is found to be the sole heir of her deceased husband, Charles Juan Conger, whose estate then awaited probate action, all the property inherited from him is to go to her husband's brother and sisters, William Conger, Suzie White and Mary Conger Sampson. The fourth document, dated April 2, 1953, which the Examiner approved as Stella's will in his order of December 22, 1961, gives all of her property, including that which she inherited from her husband, to her nephews and the only niece who survived on the date the will was executed.

If Stella died intestate the Examiner determined in his order of December 22, 1961, that her property would be inherited by her nephews, all nieces having predeceased her leaving no surviving issue.

Appellants herein are Suzie White, the sister of Charles Juan Conger who predeceased his wife Stella, and Theresa Conger on behalf of the heirs and next of kin of William Conger, the deceased brother of Charles. The appellants contend that they are entitled to receive the property which Stella inherited from her husband because of a contract which they allege she made with them to devise such property to her husband's brother and sisters.

In support of their claim, the appellants state that Charles Juan Conger, Salt River Allottee No. 177, died in 1950 survived by his wife and sole heir Stella Conger. Charles Juan Conger left three documents purporting to be last wills and testaments in which Suzie Conger and William Conger were named beneficiaries. Stella is not named in the will dated September 26, 1947, but is devised and bequeathed certain property interests, including life estates, by the wills of October 1, 1947 and October 24, 1947.

Appellants say that during the course of the probate of Charles' estate, Suzie and William Conger entered into a contract with Stella to the effect that they would request disapproval of all three instruments so that Stella would take the entire estate as sole heir. They also allege that Stella promised that she would in turn devise and bequeath all property inherited from Charles to William Conger, Suzie White and Mary Conger Sampson, another sister of Charles.

The three instruments purporting to be the last wills and testaments of Charles Juan Conger were disapproved and on March 29,

1951, the Examiner of Inheritance entered an order finding Stella to be the sole heir and entitled to the estate of her husband. *Estate of Charles Juan Conger*, Salt River Allottee No. 177, G-54-51, probate 5258-51.

Appellants contend the three wills dated May 5, 1950; June 23, 1950; and March 23, 1951, were executed by Stella pursuant to the alleged agreement.

In their statement of claim, appellants asked the Examiner to enforce the alleged contract and to disapprove the April 2, 1953 will insofar as it purports to dispose of property inherited by Stella from her husband Charles.

On September 8, 1961, the Examiner entered an order denying the claim on the ground that he lacked jurisdiction to decree specific performance of the alleged contract. Appellants' petition for rehearing was denied December 22, 1961, on the same ground.

A response and an amended response to the statement of claim and a response to the petition for rehearing were filed on behalf of James, John and Peter Shelde, beneficiaries under the April 2, 1953 will of Stella Conger. The responses deny the alleged contract, raise certain affirmative defenses, including lack of approval by the Secretary of the Interior of the alleged contract, and assert the Department lacks jurisdiction to grant the relief requested.

At the outset, we note that due to the nature of the Examiner's ruling in respect to the claim for specific performance of the alleged contract, no hearing has been held on whether in fact there was an agreement and we express no opinion thereon. We therefore confine our inquiry to the legal question of whether the Examiner of Inheritance was correct in refusing the relief requested, and for this limited purpose, we take appellants' allegations concerning the existence of such an agreement as true.

In addition to the three earlier alleged wills executed by Stella Conger, appellants in support of their claim also refer to the three documents purporting to be wills of Charles Juan Conger, affidavits purportedly executed by Suzie White and William Conger and filed in the probate proceedings of Charles Juan Conger, portions of the transcript of those proceedings, and the Examiner's order disapproving the wills and finding Stella the sole heir, which order, appellants say, was entered pursuant to the alleged agreement. They also rely on a letter dated November 1, 1954 from the Examiner of Inheritance to the administrative officer of the Pima Area Field Office withholding approval as to form, of Stella's April 2, 1953 will, which was approved in this proceeding.

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Appellants ask the following questions in their brief on appeal:

1. Assuming that STELLA CONGER breached a valid contract to devise and bequeath inherited allotment lands, does the Examiner of Inheritance, in the course of probating her estate, have jurisdiction to entertain, hear, pass upon and adjudicate the merits of a claim for specific performance of said contract?

IF HE DID HAVE JURISDICTION, DOES THIS APPELLANT TRIBUNAL HAVE JURISDICTION TO DETERMINE THE CONTROVERSY ON ITS MERITS AT THIS JUNCTURE?

2. The Will of STELLA CONGER, dated April 2, 1953, not having been approved by the Examiner of Inheritance (at that time MR. J. LEE RAWHAUSER) as required by Title 25, Sub Chapter (c) Section 15.1 Code of Federal Regulations, does the Examiner of Inheritance now have the jurisdiction to probate same?

3. From the record it appears that two different Examiners of Inheritance either participated in the alleged contract, or recognized same, thus is not the Secretary of the Interior estopped from taking a different position?

4. From the record it appears that there was virtually no evidence before the Examiner, E. S. STEWART, sufficient to compel him or permit him to disapprove the Last Will and Testament of CHARLES JUAN CONGER. Thus, did he have jurisdiction to enter the Order disapproving same, and if not, is it not true that as a matter of law the Last Will and Testament of CHARLES JUAN CONGER is still susceptible of probate, the terms of same hereby compelling a distribution to Appellants herein?

Questions 2, 3, and 4 are simply set out in the brief, and are not answered by argument or with authorities and do not raise meritorious issues.

Insofar as question 2 is concerned, appellants are in error in referring to 25 CFR 15.1, which provides for approval of wills of *deceased* Indians only. Section 15.28 and its predecessor 25 CFR 81.28 (1949 ed.) provide for approval only as to the form of a will during the life of the testator. Examiner Rawhauser's refusal to approve the will as to form six years prior to Stella's death was not and could not be a disapproval pursuant to Section 15.1. Action on the will under Section 15.1 was not taken until the order approving it was entered on December 22, 1961.

In question 4, appellants ask whether the Examiner had jurisdiction to approve the last wills and testaments of Charles Juan Conger. Even if the Examiner entered an erroneous order, appellants have pointed to no reason why the Examiner was without jurisdiction to act, and we see nothing to indicate that the Examiner lacked jurisdiction under the Act of June 25, 1910, 36 Stat. 855, as amended, 25 U.S.C. §§ 372 and 373 (1958).

As for question 3, even assuming that appellants could sustain the burden of proving that two Examiners recognized or participated in the alleged agreement, this would not estop the Secretary from tak-

ing a different position now. *Federal Crop Insurance v. Merrill*, 332 U.S. 380 (1947); *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917); *United States v. West*, 232 F. 2d 694 (9th Cir. 1956), *cert. denied*, 352 U.S. 834 (1956).

But regardless of any such alleged participation or recognition, without the Departmental approval required by section 5 of the Act of February 8, 1887, 24 Stat. 388, 389-390; 25 U.S.C. § 348 (1958), the alleged agreement which affects restricted Indian property, is void and appellants' claim based upon it is not enforceable by this Department or the courts. "*Validity of Unapproved Side Agreements Between Indians and Lessees of Restricted Lands*," M-36549 (Feb. 3, 1959); *Estate of Ortego Lopez*, IA-860 (Apr. 14, 1958); *Estate of Johnnie G. Goodluck*, Probate 46871-45; *Spector v. Pete*, 157 Cal. App. 2d 432, 321 P. 2d 59 (1958), *cert. denied*, 358 U.S. 822 (1958), *rehearing denied*, 358 U.S. 938 (1959); *Wah-Hrah-Lum-Pah v. To-Wah-E-He*, 77 Okla. 295, 188 Pac. 106 (1920).

Regarding approval of the alleged contract, Examiner Stewart, who conducted the probate of the Charles Juan Conger Estate, in his final order neither recites an alleged agreement nor alludes to one. On the contrary, the Examiner merely stated in his order that the wills of Charles Juan Conger were not proper instruments for approval and that the devisees had requested disapproval so that Stella Conger could be found sole heir. Such action does not amount to the express approval required.

The references to an agreement and the comment that Stella should not be allowed to rescind it, contained in Examiner Rawhauser's November 1, 1954 letter, also do not constitute the required approval of the alleged contract.

Finally and conclusively, even assuming either or both of the Examiners actually did attempt to approve the purported arrangement, neither had the authority to approve a contract touching restricted Indian land as required by 25 U.S.C. § 348, *supra*, which authority has never been delegated to them.

As to whether this alleged agreement should now be approved, no instance has been cited by the appellants and our research has revealed none in which Departmental approval has been accorded contracts to make wills. Whenever the problem has been considered, relief has been denied. *Bismark Mosier*, 63 I.D. 205 (1956); *Estate of Petints or Louise Yumsunkin* probate No. 32423-39. Approval of the alleged contract in question here appears particularly inappropriate since it was not reduced to writing. Certainly there is nothing in the statutes pertaining to restricted Indian property or in the regulations to indicate that this type of transaction is approvable.

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In view of the foregoing, appellants' first question as to whether their claim for specific performance of the alleged contract may be granted must be answered in the negative, and their claim is accordingly denied.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior 210 DM 2A(3)(a), 24 F.R. 1348, the order of the Examiner of Inheritance denying the petition for rehearing is affirmed and the appeal is hereby dismissed.

EDWARD WEINBERG,
Deputy Solicitor.

**ESTATE OF FRANK SIMPSON
PAWNEE ALLOTTEE NO. 645**

IA-1270

Decided March 11, 1964

Indian Lands: Descent and Distribution: Wills

Where the sole devisee of restricted Indian property dies prior to the death of the testator, in approving the will under the Act of February 14, 1913, 37 Stat. 678, 25 U.S.C. § 373, this Department, unless contrary to the intent of the testator, applies the rule that the devise does not lapse but that the lineal descendants of the devisee take by substitution under the will.

APPEAL FROM AN EXAMINER OF INHERITANCE, BUREAU OF INDIAN AFFAIRS

Lois Morris Knife Chief, Anna Audrey Morris Mulder, Rowena Kate Morris Salmon, Georgia May Morris Adson and Francis E. Morris have appealed to the Secretary of the Interior from a decision of an Examiner of Inheritance dated September 15, 1961, affirming the original order disapproving wills and determining the heirs of Frank Simpson, deceased Pawnee Allottee No. 645. The decedent died on May 18, 1959, at the age of 83, a resident of Oklahoma, leaving no surviving spouse or issue.

Frank Simpson made a will dated June 2, 1939, which was unrevoked when he died, by which he devised and bequeathed all of his property to his sister, Alice Simpson Morris, who predeceased him. The appellants are all the children of Alice Simpson Morris.

This appeal is from the order of the Examiner disapproving the will and from his order determining the heirs of Frank Simpson to be Fred James Long, Margaret Claudine Long, and Grover Long, Jr., who were determined by the Examiner to be the adopted children of the decedent under a court decree of July 22, 1938.

Appellants contend that the Act of February 14, 1913, 37 Stat. 678; 25 U.S.C. § 373, gave the decedent the right to make a will and gave the Secretary of the Interior or his representative the broad discretionary power to approve or disapprove it; that it was the testamentary desire of the decedent that his property should go to his sister, Alice Simpson Morris, and that none of his property should go to the three children named in the adoption decree of July 22, 1938; and that appellants, the children of Alice Simpson Morris, are entitled to the property under the Oklahoma anti-lapse statute.¹ In the alternative, appellants contend that decedent did not know what was transpiring on July 22, 1938, when they allege he was overreached by his then wife and others into adopting three of her children by a former marriage. On this ground the appellants ask that the adoption not be recognized and that the children of Alice Simpson Morris be determined the heirs of the decedent.

Frank Simpson divorced Palma Simpson, the mother of Fred James Long, Margaret Claudine Long, and Grover Long, Jr., on February 6, 1939. According to the record in case No. 1900 in the County Court of Pawnee County, Oklahoma, the three children, then of ages 19, 13, and 4, respectively, were adopted by Frank Simpson on July 22, 1938. Appellants attack the validity of the adoption decree principally because Frank Simpson could not read or readily understand and speak the English language and thus allegedly did not understand what was occurring in said proceedings.

In the original order, dated April 8, 1960, disapproving wills by Frank Simpson and determining heirs, the Examiner disapproved the last will, dated June 2, 1939, because, "By virtue of the lapse of all devises, legacies and bequests under this will, it becomes totally inoperative and ineffective upon the death of the said Alice Simpson Morris."

In his order affirming the original order which disapproved the will of Frank Simpson, the Examiner held that appellants should not take as lineal descendants of the sole beneficiary of the decedent's will under the provision of the Oklahoma anti-lapse statute² because (1) the will was not executed pursuant to the laws of Oklahoma but pursuant to the federal law; (2) the state law is inapplicable and the Secretary of the Interior is without authority to change or modify the terms of the will; and (3) the application of state statu-

¹ 84 O. S. (1951) 142. The Oklahoma "anti-lapse" statute is as follows:

"When any estate is devised or bequeathed to any child or other relative of the testator, and the devisee or legatee dies before the testator leaving lineal descendants, such descendants take the estate so given by the will in the same manner as the devisee or legatee would have done had he survived the testator."

² See note 1, *supra*.

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tory provisions would be impractical and would lead to utter confusion as to the status of any such will.

An examination of the will, dated June 2, 1939, shows that it was witnessed by two attesting witnesses, signed by Frank Simpson and that by its terms he left "all of my property which consists of the following allotments * * *" to his sister, Alice Simpson Morris, Pawnee Indian. The will provides that the residue of the estate also goes to Mrs. Morris. The will further states "I have adopted the following children of my former wife: Fred James Long, Margaret Claudine Long, and Grover Long, Jr., but do not desire that they have any part of my estate." The testator made a similar statement in an affidavit which is attached to the will and which was executed on the same date that the will was executed. The foregoing definitely shows that Frank Simpson did not intend that his property should go to the three adopted children.

The purpose of the Act of February 14, 1913, *supra*, giving Indians the right to make wills, was to allow them to change the normal course of descent of their property, and to permit them to execute wills disposing of their trust or restricted property in the manner of their choice, subject, however, to the approval of the Secretary of the Interior. A cardinal principle in all jurisdictions and adhered to by the Secretary is that the intent of the testator must be carried out if the law permits.

We agree with the Examiner that with respect to Indian wills falling within the purview of the Act of February 14, 1913, *supra*, the state law of Oklahoma is inapplicable. The Secretary of the Interior is not bound to apply the state law but on the other hand he may apply such rules as he finds proper for application to Indian wills.³

However, it has long been the Department's policy to apply a rule similar to the statutory law of Oklahoma in approving wills under the 1913 act in order to prevent lapses of devises in Indian wills.⁴

Accordingly, the determination of the Examiner that the 1939 will is not susceptible of approval as a matter of law is in error because it thwarts the expressed intention of the testator and fails to properly consider and apply the Departmental anti-lapse rule. How-

³ *Homovich v. Chapman*, 191 F. 2d 761 (D.C. Cir. 1951); *Hanson v. Hoffman*, 113 F. 2d 780 (10th Cir. 1940).

⁴ 54 I.D. 584, 585 (1934); *Estate of Osotewin* (Smoky Woman or Mrs. White Tallow) IA-845 (January 16, 1959); *Estate of Lawrence Bull Bear* (January 10, 1933, modified July 19, 1933), Indian Bureau file Nos. 19437-33 and 71377-33; *Estate of Big Plume* (October 19, 1915), Indian Bureau file No. 76725-15.

ever, because of insufficient evidence in the record on the factum of the 1939 will, there is no present basis upon which to determine whether the will has been properly executed and is otherwise approvable.

Until the Examiner can conduct further proceedings to decide these matters, we think it inadvisable to consider the other point raised by the appellants, which becomes moot if the will is approved.

Pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (Sec. 210 DM 2.2A (3) (a), 24 F.R. 1348), the Order of the Examiner of Inheritance, dated September 15, 1961, is reversed, and this case is remanded to the Examiner for further proceedings in conformity with this decision.

EDWARD WEINBERG,
Deputy Solicitor.

APPEAL OF COMMONWEALTH ELECTRIC COMPANY

IBCA-347

Decided March 12, 1964

Contracts: Additional Compensation—Contracts: Changed Conditions—Contracts: Delays of Government

Under the "Changed Conditions" clause of a contract for the stringing of electrical conductor on towers to be provided by the Government, where the contractor knows when bidding the job that some of the towers have not yet been completed, and where the Government fails to have these towers completed by the time when they are reasonably needed for stringing, an equitable adjustment is not allowable for the extra expense incurred by the contractor in moving crews back to these towers after they have become available for stringing, since such events do not amount to a changed condition, and since, if they did, such expense would be in the nature of consequential damages flowing from delay.

Contracts: Breach—Contracts: Delays of Government

A claim for additional compensation on account of delay by the Government in performing its own obligations under a contract is not a claim for relief under the contract that the contracting officer or a board of contract appeals would have authority to adjudicate by virtue of a standard-form "Disputes" clause, since it is a claim for breach of contract.

BOARD OF CONTRACT APPEALS

Commonwealth Electric Company has taken a timely appeal from a decision of the contracting officer in which the latter declined to consider claims for additional compensation presented by appellant,

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on the ground that "they are for unliquidated damages which I, as contracting officer, have no authority to entertain or settle under the terms of the contract."

The claims in question spring from a contract of the Bureau of Reclamation for the addition of a second circuit to three existing transmission lines in the States of South Dakota and Iowa. The conductors for the second circuit were to be strung by appellant on towers erected for the Government by other contractors. The contract, which was dated February 6, 1961, and designated No. 14-06-D-3754, was on Standard Form 23 (Revised March 1953) and incorporated the General Provisions of Standard Form 23A (March 1953) for construction contracts.

Appellant alleges that at three substations or switchyards, erection of the towers had not been completed by the time when its stringing crews reached these locations. Accordingly, they were by-passed and when the towers did become available at each of them, a crew was sent back to finish the stringing work at that substation or switchyard. Appellant concedes that at the time of bidding the job it knew the towers in question had not been completed, but contends that the terms of the contract were such as to justify an assumption that the towers would be available by the time when the stringing crews could reasonably be expected to arrive at their sites. So reasoning, appellant filed claims for additional compensation on account of the expense of moving its men and equipment to and from the previously by-passed locations in order to finish the stringing work at them. It is these claims that the contracting officer declined to consider because he believed them to be claims for "unliquidated damages," a term which, when used with reference to claims under Government contracts, is essentially synonymous with the more apt term "breach of contract."¹

The correctness of the contracting officer's action is challenged by appellant on the ground that its claims are within the scope of Clause 4, entitled "Changed Conditions," of the General Provisions of the contract. That clause authorizes the making of an equitable adjustment in the event the contractor encounters either one of two categories of changed conditions, namely, "(1) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the

¹ *R. P. Shea Company, IBCA-37* (November 30, 1955), 62 I.D. 456, 463, 6 CCF par. 61, 738.

character provided for in this contract.”² The natural sense of the language used imports that both categories are limited to physical conditions which exist when the contract is made and that neither comprehends physical conditions which come into being only after the contract has been executed.³

The circumstances of which appellant complains plainly do not amount to a changed condition within the meaning of Clause 4. The incompleteness of the towers at the time when the contract was made did not amount to a changed condition since such incompleteness was neither latent, as required for conditions of the first category, nor unknown, as required for those of the second. The subsequent delay in completing the towers did not amount to a changed condition since delay is not a physical condition at the site, as required for conditions of both categories. The physical difference between the incomplete and the complete towers likewise did not amount to a changed condition since such difference was not a condition that existed when the contract was formed, but was a condition that arose only after the contract had been made. For like reasons, it has been held in other appeals that Clause 4 is inapplicable to work dislocations brought about through the failure of the Government to take timely or adequate measures for clearing the site,⁴ erecting structures,⁵ furnishing materials,⁶ or otherwise discharging its own obligations under the contract.⁷

² The full text of the clause reads as follows:

“4. CHANGED CONDITIONS. The contractor shall promptly, and before such conditions are disturbed, notify the contracting officer in writing of: (1) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The contracting officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the contractor for adjustment hereunder shall not be allowed unless he has given notice as above required; provided that the contracting officer may, if he determines the facts so justify, consider and adjust any such claim asserted before the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 hereof.”

³ *Montgomery-Macri Company and Western Line Construction Company, Inc.*, IBCA-59 and IBCA-72 (June 28, 1963), 70 I.D. 242, 253-55, 1963 BCA par. 3819, pp. 19,010-11, 5 Gov. Contr. 419, and authorities cited therein.

⁴ *Montgomery-Macri Company and Western Line Construction Company, Inc.*, *supra*, note 3.

⁵ *Flora Construction Company*, IBCA-101 (September 4, 1959), 66 I.D. 315, 322-25, 328-30, 59-2 BCA par. 2312, 1 Gov. Contr. 647-50.

⁶ *Hagerman Construction*, IBCA-183 (January 21, 1959), 59-1 BCA par. 2065, 1 Gov. Contr. 97; *Weardoo Construction Corporation*, IBCA-48 (September 30, 1957), 64 I.D. 376, 378-82, 57-2 BCA par. 1440; *Tucker McClure*, ASBCA No. 193 (August 31, 1950).

⁷ *Seal and Company*, IBCA-181 (December 23, 1960), 67 I.D. 485, 440-43, 61-1 BCA par. 2587, 3 Gov. Contr. 39; *Nolan Bros., Inc.*, ASBCA No. 4846 (June 18, 1958), 58-2 BCA par. 1843; *Condon-Cunningham Company and Paul B. Reis*, W. D. BCA No. 1355 (April 23, 1946).

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Appellant argues that the delay in completion of the towers was due to no fault or negligence on its part, and that the extra moving in and out expense could not have been reasonably foreseen when its bid was prepared. These circumstances, as the authorities previously cited show, would be pertinent in establishing a claim for a changed condition only if the delay in completing the towers or the extra moving in and out expense had been caused by a physical condition at the site that existed when the contract was formed; and then only if appellant had been reasonably unaware of the existence of such condition, either because of what was said about the site in the contract, or because of the hidden and exceptional nature of the condition itself. Here, however, it is conceded that the incompleteness of the towers—the only relevant physical condition at the site—was known to appellant when its bid was prepared.

Furthermore, even if it could be said that a changed condition had been encountered, appellant would not be entitled to additional compensation for the extra moving in and out expense alleged to have been sustained. Equitable adjustment provisions such as those of Clause 4 have been interpreted by the Supreme Court as meaning that where a changed condition (or a change under Clause 3) has the effect merely of delaying the performance of work not otherwise altered, the contractor is only entitled to an extension of time, but not to an increase in monetary compensation.⁸ In the instant case the alleged failure of the Government to have the towers ready when appellant needed them had the effect of postponing the time when the conductor could be strung at those towers, but did not alter either the result which the contract required appellant to achieve or the methods of stringing requisite for its accomplishment. Thus, the claim here put forward is one for consequential damages flowing from delay, for which additional compensation would not in any event be allowable under Clause 4 (or Clause 3).⁹

The conclusions stated in the foregoing discussion dispose of the only reasons which appellant has advanced for reversal of the contracting officer's decision. The situation, hence, appears to call for application of the widely recognized principle that a claim for

⁸ *United States v. Rice*, 317 U.S. 61 (1942).

⁹ *Seat and Company* (reconsideration), IBCA-181 (March 28, 1961), 68 I.D. 94, 96, 98-99, 61-1 BCA par. 2988, 3 Gov. Contr. 298(j); *Utah Construction Company*, IBCA-133 and IBCA-140 (June 10, 1960), 67 I.D. 248, 253-54, 60-1 BCA par. 2649, 2 Gov. Contr. 397; *Weardeco Construction Corporation*, *supra* note 6; see *Weldfab, Incorporated*, IBCA-268 (August 11, 1961), 68 I.D. 241, 245-48, 61-2 BCA par. 3121, 3 Gov. Contr. 500.

additional compensation on account of delay by the Government in performing its own obligations under a contract which contains a standard-form "Disputes" clause—such as Clause 6 of the instant contract—is not a claim for relief under the contract that the contracting officer or a board of contract appeals would have authority to adjudicate by virtue of the "Disputes" clause. In the absence of provisions specifically authorizing administrative payment for delay by the Government it is a claim for breach of contract over which the Board of Contract Appeals does not have jurisdiction.¹⁰

HERBERT J. SLAUGHTER, *Member.*

I CONCUR:

PAUL H. GANTT, *Chairman.*

CHARLES J. BABINGTON

A-29688

Decided March 20, 1964

Oil and Gas Leases: Description of Land—Surveys of Public Lands: Generally

A description in an oil and gas lease offer for acquired land of land in a right-of-way which is excluded from the land applied for is insufficient where the right-of-way is described only by giving the course and distance of the center line and the width of the right-of-way and by tying the description to a quarter-quarter section corner.

Oil and Gas Leases: Description of Land

Where an oil and gas offer for land described as the $S\frac{1}{2}S\frac{1}{2}$ of a section is deficient because it improperly describes land in the $S\frac{1}{2}S\frac{1}{2}$ which is to be excluded from the offer, the offer cannot be accepted for the $S\frac{1}{2}SE\frac{1}{4}$ because it is ascertained that the excluded land lies in the $S\frac{1}{2}SW\frac{1}{4}$ of the section.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Charles J. Babington has appealed to the Secretary of the Interior from a decision dated June 5, 1962, by which the Division of Ap-

¹⁰*Jensen-Rasmussen and Company and B-E-C-K Corporation*, IBCA-363 (March 14, 1963), 1963 BCA par. 3687, 5 Gov. Contr. 183(e); *Martin K. Eby Construction Company, Inc.*, IBCA-355 (March 8, 1963), 1963 BCA par. 3672, 5 Gov. Contr. 183(e); *Northolt Electric Company and William Collins & Sons, Inc.*, IBCA-279 (May 26, 1961), 68 I.D. 148, 61-1 BCA par. 3060, 3 Gov. Contr. 358(d); *Allied Contractors, Inc.*, IBCA-265 (May 16, 1961), 68 I.D. 145, 61-1 BCA par. 3047, 3 Gov. Contr. 348; *McCready Reforestation Company*, IBCA-167 (June 23, 1959), 59-1 BCA par. 2239, 1 Gov. Contr. 471.

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peals, Bureau of Land Management, affirmed a decision of the Division of Field Services, dismissing his protest against the prospective issuance of an oil and gas lease to Clyde E. Moss on the S $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 28, T. 1 S., R. 12 W., St. Stephens Meridian, in Forrest County, Mississippi.

Responding to a posted notice in the land office, announcing the availability for leasing of certain land designated by legal subdivisions of the public land survey with an exception comprising a transmission line right-of-way, Moss filed his noncompetitive oil and gas lease offer describing, with other acquired land, the following land:

Section 28: S $\frac{1}{2}$ S $\frac{1}{2}$ less 3.05 acres for right-of-way Mississippi Power Co., transmission line as now located and more particularly described: being a strip of land 100 feet in width, 50 feet on each side of centerline of said right-of-way, said centerline being described as: Beginning at a point in the North line of SW $\frac{1}{4}$ SW $\frac{1}{4}$, Section 28, 19.60 chains East of NW corner of SW $\frac{1}{4}$ SW $\frac{1}{4}$, thence S. 6 deg. 53 min. E., 18.32 chains; thence S. 9 deg. 35 min. E., 1.79 chains to a point in the South line of Section 28, 22.09 chains E. of SW corner.

Moss' offer received first priority in a public drawing.

Babington protested the award of a lease covering the S $\frac{1}{2}$ S $\frac{1}{2}$ of section 28 on the ground that the description of land in the Moss offer is not in accordance with departmental regulation 43 CFR 200.5(a), which provides in pertinent part as follows:

* * * If the lands have been surveyed under the rectangular system of public land surveys, and the description can be conformed to such survey system, the lands must be described by legal subdivision, section, township, and range. Where the description cannot be conformed to the public land survey, any boundaries which do not so conform must be described by metes and bounds, giving courses and distances between successive angle points with appropriate ties to established survey corners. * * *

The land office held that the description of the right-of-way to be excluded from the lease should have consisted of a complete metes and bounds description of the outside boundaries of the right-of-way in order to comply with 43 CFR 200.5(a). It concluded, however, that, because the right-of-way traverses only the SW $\frac{1}{4}$ SW $\frac{1}{4}$ and the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of section 28, and the SW $\frac{1}{4}$ SE $\frac{1}{4}$ and the SE $\frac{1}{4}$ SE $\frac{1}{4}$ were included in their entirety in the lease offer under the designation of the S $\frac{1}{2}$ S $\frac{1}{2}$, the description of these subdivisions conformed to the public land survey system and met the requirements of the applicable regulation. It sustained the protest as to the S $\frac{1}{2}$ SW $\frac{1}{4}$ and

dismissed it as to the $S\frac{1}{2}SE\frac{1}{4}$ of section 28 and the Division of Appeals affirmed on Babington's appeal. While this appeal was pending, Moss withdraw his offer as to the $S\frac{1}{2}SW\frac{1}{4}$ of section 28 less the right-of-way land.

In his appeal to the Secretary, Babington contends that when an offeror inserts an unacceptable description in his offer to lease a portion of a public land survey section properly designated as the $S\frac{1}{2}S\frac{1}{2}$ of that section, the land office cannot alter the description by subdividing it to make it acceptable for a portion of the land.

I believe there is merit in the appellant's contention. It is clear that the description of the land to be excepted from the lease did not comply with the requirements of the regulation. First, it was tied to a quarter-quarter section corner, not to an established survey corner, which includes township corners, section corners, quarter-section corners and meander corners, as the regulation requires. *Jack S. Stanley, A-29148* (January 24, 1963). Second, it did not constitute a metes and bounds description delineating the boundaries by giving courses and distances between successive angle points. The boundaries would have to be computed from the description given of the center line of the right-of-way and the width of the right-of-way. Moss apparently agrees that the description of the land in the right-of-way is not in accord with the regulation since he has withdrawn the $S\frac{1}{2}SW\frac{1}{4}$, containing the right-of-way, from his offer.

The only issue presented on this appeal is whether Moss' offer can be accepted as a proper offer for the $S\frac{1}{2}SE\frac{1}{4}$ of section 28. I do not think so. Moss applied for the " $S\frac{1}{2}S\frac{1}{2}$ " of section 28. He did not apply for the " $S\frac{1}{2}SW\frac{1}{4}$ " and the " $S\frac{1}{2}SE\frac{1}{4}$ " of section 28 or for the " $SW\frac{1}{4}SW\frac{1}{4}$, $SE\frac{1}{4}SW\frac{1}{4}$, $SW\frac{1}{4}SE\frac{1}{4}$, and $SE\frac{1}{4}SE\frac{1}{4}$ " of section 28. Nor did he apply for the " $S\frac{1}{2}SW\frac{1}{4}$ and the $SW\frac{1}{4}SE\frac{1}{4}$ and $SE\frac{1}{4}SE\frac{1}{4}$ " of section 28 or the " $S\frac{1}{2}SE\frac{1}{4}$ and the $SW\frac{1}{4}SW\frac{1}{4}$ and $SE\frac{1}{4}SW\frac{1}{4}$ " of section 28. These descriptions represent all the possible ways of describing the four smallest legal subdivisions making up the $S\frac{1}{2}S\frac{1}{2}$ sec. 28.

At first glance there appears to be logic in saying that, since a description of the $S\frac{1}{2}S\frac{1}{2}$ is a composite description of the four legal subdivisions therein, if there is a flaw in the description of one or more of the legal subdivisions, the offer should be acceptable as to the legal subdivisions that are not affected. This, however, overlooks the purpose of the regulatory requirements for describing the land applied for. The purpose of the regulation is to require an

March 20, 1964

offeror to give a description which is at least sufficient on its face to delimit the land applied for. If the description is not sufficient on its face, the offer is defective. It is not for the Department to salvage from the description some land that may be considered properly described. *Joe Bart Moore*, A-29361 (July 1, 1963); *Lendal R. Smith, Sr.*, A-28868 (August 10, 1962); *Duncan Miller*, A-28767 (July 23, 1962); *Daniel H. Cruz*, A-28524 (February 28, 1961); *W. H. Burnett, William Weinberg*, A-28037 (August 20, 1959).

Specifically, in this case, for the Bureau to determine that the offer was acceptable for the $S\frac{1}{2}SE\frac{1}{4}$ it was necessary for the Bureau to determine that the defective description of the right-of-way affected both the $SW\frac{1}{4}SW\frac{1}{4}$ and the $SE\frac{1}{4}SW\frac{1}{4}$. This did not appear from the face of the description. The offer gave the center line of the right-of-way as beginning at a point in the north line of the $SW\frac{1}{4}SW\frac{1}{4}$ but gave the ending point only as a "point in the South line of Section 28." Only by computing the course of the center line on a plat could it be determined that the right-of-way invaded also the $SE\frac{1}{4}SW\frac{1}{4}$ but did not invade any part of the $S\frac{1}{2}SE\frac{1}{4}$. In other words, Moss' description was not sufficient on its face to show what part of the $S\frac{1}{2}S\frac{1}{2}$ was affected by the description of the right-of-way.

It is no answer to say that the angle of the course given for the center line was such that it was obvious that the right-of-way did not extend into the $S\frac{1}{2}SE\frac{1}{4}$ and that the right-of-way was not confined to the $SW\frac{1}{4}SW\frac{1}{4}$ but extended also into the $SE\frac{1}{4}SW\frac{1}{4}$. This is so assuming that section 28 is a regular section with regularly sized and shaped legal subdivisions. Even so, a computation had to be made, simple though it may have been in this case. This is not within the contemplation of the regulation or permitted by its terms.

In the case of irregular sections, which are oversized or undersized with portions which are surveyed as lots, it would be impossible without plotting out a description such as that given here to determine what legal subdivisions might not be affected by the error in description.

It is true in this case that Moss could have avoided the problem of how to describe the right-of-way by simply describing the $S\frac{1}{2}S\frac{1}{2}$ of section 28 without any exception. Any lease issued to him would have excluded the right-of-way. However, he would have had to

pay for this method of description by remitting rental for the entire $S\frac{1}{2}S\frac{1}{2}$ without any diminution for the land in the right-of-way and his offer would have been chargeable with the full acreage in the $S\frac{1}{2}S\frac{1}{2}$.

Therefore, 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 reversed and the case is remanded for further proceedings in conformity with this decision.

ERNEST F. HOM,
Assistant Solicitor.

RUSSEL A. BEAVER
J. F. BEAVER

A-29847

Decided March 23, 1964

Color or Claim of Title: Generally—Color or Claim of Title: Applications

A color of title application is properly rejected when a sale for taxes to a governmental agency has interrupted the statutory period of a 20-year holding in good faith adverse possession under claim or color of title within the meaning of the Color of Title Act and an action to obtain possession by the United States, the true owner, has been instituted prior to the end of 20 years from the date of the tax sale.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Russell A. and J. F. Beaver have appealed to the Secretary of the Interior from a decision of the Division of Appeals, Bureau of Land Management, dated November 1, 1962, which affirmed as modified a Phoenix, Arizona, land office decision, dated April 11, 1961, rejecting their color of title application, Arizona 030521. The land office decision concluded that the land described in the appellants' application, the $SE\frac{1}{4}NE\frac{1}{4}$ sec. 20, T. 1 N., R. 23 W., G. & S.R.B.M., Arizona, was patented to Cherry S. E. Carlin on January 30, 1914, under homestead Phoenix 017132, and was thus not under the jurisdiction of the office. The Bureau decision agreed that the land was patented (Patent No. 381486), as stated, but concluded that the land had subsequently eroded away and is no longer in existence and that the appellants have presented no evidence purporting to convey the land to them.¹

¹ The decision points out that the land in question has accreted to sec. 4, T. 9 S, R. 22 E., S.B.M., and is now considered part of California.

March 23, 1964

The appellants contend that their deed "precisely" describes the subject land and that the land does exist and can be located "either on the face of the earth or upon plats."

Prior to the time the appellants filed their application, the United States instituted an action to condemn the land applied for. By decision dated December 31, 1963, the United States District Court for the Southern District of California, Southern Division, in *United States of America v. 11.8 acres of land, more or less, in the County of Imperial, State of California, et al.*, Civil No. 2468-SD-K, decided that the appellants' contention that they hold a vested interest in the subject land under color of title cannot be sustained. The court determined that, although a patent was issued in 1914, the appellants have not maintained uninterrupted possession for the necessary 20 years to qualify under the Color of Title Act, as amended, 67 Stat. 227 (1953); 43 U.S.C. § 1068 *et seq.* (1958), since in 1940 the land was taken by Arizona for delinquent taxes and on February 18, 1942, the State sold the property to the predecessors in interest of the appellants.

The court stated:

* * * The time must be held to commence from the date of the Arizona tax deed to defendants' predecessors which was dated February 18, 1942, rather than from 1914, the date of the Government patent to Carlin, for the reason that a sale for taxes to a governmental agency interrupts the statutory period. 3 Am. Jur. 2d, *Adverse Possession* § 75. Here there was no showing that during the period the State of Arizona claimed the property for taxes between 1940 and 1942, that any of defendants' predecessors in interest or the State of Arizona were in possession of the parcel. Defendants contend that although it be true that the twenty-year period did not commence until February 18, 1942, the twenty-year period elapsed for the reason that the Government was not granted possession in this action until June 14, 1962. However, it is uniformly held that an action to obtain possession by the true owner interrupts the statutory period and that possession obtained through such action by the true owner relates back to the date of the bringing of the action. 3 Am. Jur. 2d, *Adverse Possession* § 91; *Weber v. Commissioners*, 18 Wall 57, 21 L.Ed. 798 (1873). The complaint in the instant action contains allegations that the Government claimed title to the land involved and that it was only seeking to condemn the adverse interest of the defendants. Furthermore, a declaration of taking was filed together with a nominal deposit on the same day that the action was commenced on October 10, 1960, pursuant to the Declaration of Taking Act, § 258, Title 49 U.S.C.A. This Act provides that where a declaration of taking is filed pursuant to the Act, title to the property vests in the United States as of the date of the filing of declaration. See *United States v. Dow*, 357 U.S. 17 (1958).

We concur in these conclusions and find that the appellants are not qualified to assert a color of title claim against the United States.² Thus, the contentions made by the appellants, set forth above, need not be discussed.³

Therefore, 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.

ERNEST F. HOM,
Assistant Solicitor.

CLAIM OF F. W. MATTSON

T-1294-3-64 (Ir.) *Decided March 24, 1964*

Irrigation Claims: Generally

Under Public Works Appropriation Acts, an award may be made only upon a showing that the damage was the direct result of nontortious activities of employees of the Bureau of Reclamation.

Irrigation Claims: Water and Water Rights: Seepage

Under Public Works Appropriation Acts, with respect to seepage claims, the liability of the Bureau of Reclamation is limited to water arising from its own irrigation structures. A claim cannot be allowed in the event the damage is caused by private irrigation.

ADMINISTRATIVE DETERMINATION

F. W. Mattson of Moses Lake, Washington, has filed a claim against the United States in the sum of \$14,820¹ for crop losses in 1962 on Farm Unit 38, Irrigation Block 83, Columbia Basin Project, Washington. It is alleged that 114 acres of beans were destroyed by seepage of water from the RB5J1 lateral, an irrigation canal of the Bureau of Reclamation.

²The case record indicates that the public land to which the accretion attached has been at all times material subject to a reclamation withdrawal. If this is so, the land added by accretion fell within the withdrawal and was never open to the establishment of a color of title claim. *Axel Ursin, A-28310* (August 4, 1960).

³As to whether the court was the proper tribunal for the appellants to assert their color of title claim in, see *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 338-340 (1963).

¹An initial claim was submitted by Mr. Mattson's attorneys, Messrs. Ries and Kenison, by Mr. Charles T. Schillberg of Moses Lake, Washington, for \$10,850. By letter dated December 10, 1962, the amount of the claim was increased to \$14,820 by claimant's attorneys.

March 24, 1964

The claim has been submitted to us for determination under the Public Works Appropriation Act, 1964 (77 Stat. 844).² That Act authorizes the payment of claims for damage to or loss of property arising out of activities of the Bureau of Reclamation. However, this authority is applicable only with respect to claims which are the *direct* result of some *nontortious* action by Bureau of Reclamation personnel. 39 Op. Atty. Gen. 425, 428 (1940); *Harold D. Jensen*, TA-227 (Ir) (March 14, 1963), 70 I.D. 97; *Northern Pacific Railway Co.*, T-560 (Ir.) (May 10, 1954).

A direct cause has been defined as a cause without which the injury would not have occurred, and which by itself is a self-sufficient cause of the injury.³ As applied to seepage claims, the liability of the Bureau of Reclamation is limited to water arising from its own irrigation structures. It cannot be extended to damage caused by private irrigation.⁴ The requirement of direct cause has been stated as follows:⁵

Consequently, the record must show that seepage water from project facilities alone, without contribution from other sources, was sufficient to cause the damage complained of. If, however, water from sources other than such facilities was sufficient alone to cause the damage, any seepage contribution from canals or laterals must be considered as an indirect cause thereof.

Farm Unit 38 was operated by claimant in 1962 under lease from Phil Anderson of Grandview, Washington. The unit is very hilly. The land slopes generally from the north and south to a low area in the center of the farm. The southern and highest portion of the farm is bounded by the RB5J1 lateral which delivers irrigation water to the unit.

In 1962 claimant Mattson planted approximately 152 acres of beans.⁶ The crop was sprinkler irrigated from a farm reservoir which claimant built below the RB5J1 lateral. By June 15, 1962, after about thirty days' irrigation, a wet area formed near the center of the farm. As the season progressed, the wet area increased to

² The claim cannot be considered administratively under the Federal Tort Claims Act (28 U.S.C., 1958 ed., Supp. I, sec. 2671 et seq.), since it is in excess of that act's \$2,500 jurisdictional limitation for administrative determination.

³ *Sanguinetti v. United States*, 264 U.S. 146 (1924).

⁴ *Isabelle S. Gorrell*, T-616 (Ir.) (March 4, 1954).

⁵ *Chicago, Milwaukee, St. Paul, and Pacific Railroad Co.*, T-1001 (Ir.) (May 18, 1960); *Howard D. Gallentine*, T-980 (Ir.) (May 5, 1960), 67 I.D. 191; *Ralph E. Osborne*, T-832 (Ir.) (September 17, 1959).

⁶ Farm Unit 38 has 65 acres of Class 6 nonirrigable land interspersed with the irrigable land. In planting the bean crop, Mattson ignored the classification and put under cultivation approximately 40 acres of this Class 6 land.

approximately 60 acres, and a pond of standing water formed. Adjacent areas of the farm also became too soft to support harvesting equipment. On August 20, Mattson ceased irrigating and by September 25, the pond of water had disappeared. From the 152 acres planted, the claimant was only able to harvest 38.5 acres of beans in the northeast corner of the unit—the remaining 114 acres being either unharvestable or unproductive.

The investigating officer in his report⁷ found that the wetness on this unit was not directly caused by leakage from the RB5J1 lateral, but rather was the result of farm irrigation runoff.

This finding is supported by tests made by the Bureau of Reclamation in 1962 and 1963. These tests show an extremely small leakage rate in this reach of the lateral. Coupled with this is the fact that the farm was wet only in 1962 when claimant irrigated. In 1961 and 1963, when no irrigation was practiced, the farm was dry although the lateral in those years was operated and maintained in the same manner as in 1962.

There is in addition very substantial evidence that the wetness on the unit was caused by claimant's own irrigation water. Underlying the unit is an impervious bedrock much like a saucer which severely restricts sub-surface drainage. In 1962, claimant applied 2.5 acre feet of water to the bean crop over a 90-day period. Beans, being a shallow rooted crop, would consume only a small portion of this applied water.⁸ In addition, the claimant's spinkler pond was unlined and constructed by merely excavating the top soil to caliche, which is highly porous. Water from these sources would readily drain toward the center of the farm and there be retained by the underlying bedrock and cause the damage.

Based on this evidence, we find that the claimed crop loss was not caused by the Bureau of Reclamation's canal.

The amount of water contributed by the lateral is almost negligible in comparison to the runoff from farm irrigation which is vastly greater. In addition, the fact that no wet lands appeared in 1961 and 1963, when the unit was not irrigated eliminates the RB5J1

⁷ On January 9, 1964, the findings of the investigating officer were submitted by the Field Solicitor, Ephrata, Washington, to the claimant and his attorneys for comment or additional evidence. No reply was received.

⁸ Beans have an approximate consumptive use of only 13 inches of water as compared to alfalfa, a deep rooted crop, which has a consumptive use of about 33 inches. It is interesting to note that Farm Unit 71, which adjoins on the east and is geologically similar to Farm Unit 38, raised an alfalfa crop thereon without seepage problems.

March 30, 1964

lateral as a factor of direct cause. It is therefore my conclusion that the findings of the investigating officer are sound and based on the evidence appearing in the record.

Accordingly, the claim of F. W. Mattson is denied under the Public-Works Appropriation Act, 1964.

EDWARD WEINBERG,
Deputy Solicitor.

ROBERT VERNIE LABELLE

IA-1355

Decided March 30, 1964

**Indian Lands: Descent and Distribution—Rules of Practice: Appeals:
Standing to Appeal**

Where regulations (25 CFR 15.19) provide an appeal to the Secretary of the Interior by a party aggrieved by a decision of the Examiner of Inheritance on a petition for rehearing, an appeal which is based on matters which were not before the Examiner on the petition for rehearing will be dismissed.

APPEAL FROM A DECISION BY AN EXAMINER OF INHERITANCE

This is an appeal from an order of an Examiner of Inheritance which denied a petition for rehearing in the matter of determining the heirs of Robert Vernie LaBelle, deceased enrollee No. 5164 of the Fort Peck Indian Reservation in Montana.

Robert Vernie LaBelle died intestate August 8, 1960, and as a result of a hearing held on June 13, 1961, at Poplar, Montana, for the purpose of determining heirs, Roberta Ann LaBelle was determined to be the decedent's issue and sole heir. The Examiner of Inheritance entered an order to that effect on March 14, 1963. The determination of heirship was based largely on the testimony of the appellant, Mrs. Leona Crispino, mother of the decedent, given at the June 13 hearing.

On April 19, 1963, appellant petitioned the Examiner of Inheritance to "reopen" the matter on the ground that there existed claims against the estate in the amount of \$3,500 all of which had not been presented during the June 13, 1963, hearing. While the petition failed to meet the requirements of Part 15 of Title 25 of the Code of Federal Regulations which governs petitions for rehearing and re-

opening, it was treated as a valid petition insofar as the Examiner of Inheritance passed upon the sufficiency of the grounds therein alleged. He ruled that even if a rehearing were ordered the claims would have to be disallowed on grounds of waiver and on grounds of their being claims of a general creditor against an estate valued at less than \$1,500, the payment of which is prohibited by 25 CFR 15.25 (b) when the decedent is survived by a minor child. Thereafter this appeal was filed solely on the ground that there is new evidence bearing on the question of identity of the decedent's heirs.

The appeal provisions, 25 CFR 15.19, which govern this case allow an appeal by a person aggrieved by an Examiner's action on a petition for rehearing. The grievance must arise from the Examiner's action on the petition, and the right of appeal does not accrue until the Examiner has acted. See *Estate of John Naranjo*, IA-95 (April 30, 1953). The petition for rehearing in this case dealt only with claims against the estate. It raised no question on heirship, which is the only question raised on appeal.

Because the appeal, as presented in the Notice of Appeal filed September 30, 1963, (the time for submitting written arguments to the Secretary having expired on November 29, 1963) does not relate to the subject matter upon which the Hearing Examiner acted in denying appellant's petition for rehearing, the appellant was not aggrieved by that decision and her appeal is dismissed pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.A (3) (a), 25 F.R. 1348).

EDWARD WEINBERG,
Deputy Solicitor.

**DUNCAN MILLER
SAMUEL W. McINTOSH**

A-30071

A-30081

A-30106

Decided April 2, 1964

Oil and Gas Leases: Applications

Oil and gas lease offers which do not draw first priority in a drawing of simultaneously filed offers may be conditionally rejected, subject to reinstatement in the event offers with higher priorities do not ripen into leases.

Oil and Gas Leases: First Qualified Applicant—Oil and Gas Leases: Generally—State Laws

A protest by a junior offeror in a drawing of simultaneously filed oil and gas lease offers which charges disqualification of a senior offeror because the senior offeror is married to another offeror so that neither was actually the sole party in interest in the separate offers filed is properly dismissed in the absence of any proof that either of the two offerors in question was not acting in his own behalf and that under the law of the State in which the land applied for lies a married person cannot hold or acquire property for his sole benefit without the other spouse's consent.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Duncan Miller and Samuel W. McIntosh have separately appealed to the Secretary of the Interior from decisions of the Division of Appeals, Bureau of Land Management, dated May 22, 1963, June 10, 1963, and July 8, 1963, respectively, which affirmed two decisions of the land office at Sacramento, California, dismissing Miller's protests against the issuance of oil and gas leases to offerors whose offers drew higher priority than his own in drawings of simultaneously filed offers and affirmed a decision of the Division of Field Services land office conditionally rejecting McIntosh's lease offer and dismissed his protest against inclusion of two offers which drew higher priorities than his own.

The appeals involve noncompetitive lease offers filed pursuant to section 17 of the Mineral Leasing Act, as amended, 74 Stat. 782; 30 U.S.C. § 226 (Supp. IV, 1963), or the Mineral Leasing Act for Acquired Lands, 61 Stat. 913 (1947); 30 U.S.C. § 351 *et seq.* (1958), and the regulations contained in 43 CFR, 1963 rev., 192.43, 200.4, and 295.8. Inasmuch as all of the appeals involve essentially the same issue, they are consolidated in this decision.

Miller has protested the issuance of oil and gas leases Sacramento 065932 to Joan Witmer and Sacramento 068302 to Harold M. Bosworth in preference to his own offers Sacramento 065912 and 068348, respectively, and the determination that five lease offers had priority higher than his offer 073844 for the same lands. McIntosh has protested the inclusion in a drawing of offers BLM-A 068123, filed by Phil Rodsky,

and BLM-A 068128, filed by Rita Wasserman, both of which drew higher priorities than his offer BLM-A 068120.

Although some of Miller's allegations are not explicit, the substance of all of the protests is that the husband or wife of each of the offerors drawing higher priority also filed an offer for the same land at the same time. Such filings, it is alleged, constitute a scheme for increasing the numerical chances of those offerors for success in the drawing and result in an unfair advantage over other offerors.

The Department has previously considered similar charges that filing of simultaneous lease offers for the same land by husband and wife is collusive and contrary to the Department's regulations, and it has held that the relationship of husband and wife does not prevent the filing of competing oil and gas lease offers. *Duncan Miller, A-29735* (September 17, 1963). McIntosh admits his familiarity with the Department's ruling but contends that the Department has directed its attention only to the qualifications of husband and wife as leaseholders and has failed to distinguish between qualified leaseholders and qualified applicants.

This contention is without merit. The Department has held that a husband and wife may each hold, in his or her own right, the maximum acreage in oil and gas leases authorized for an individual or association in any one State, regardless of State laws pertaining to property rights of husbands and wives. Solicitor's Opinion, 64 I.D. 44 (1957). It must necessarily follow that if each may hold the maximum acreage independently of the other each is qualified to apply for a lease of the same tract of land in competition with the other or any other interested applicant, the offerors being qualified in all other respects. In short, nothing in the statutes or the regulations precludes a husband and wife from engaging in separate and independent oil and gas leasing operations.

The Department is fully aware that husbands and wives may take advantage of the opportunities afforded them by the law and may engage in the filing of offers that are, in fact, collusive. It is equally possible that collusive filing may be practiced by other offerors whose relationship is not so readily identified as that of husband and wife. However, in the absence of any evidence that a husband and wife actually represent a common business interest and that the statement made by each with respect to his offer that he is the sole party in interest is not true, the filings are not found to be collusive, and the parties are qualified lease offerors. The appellants have alleged no more than that some of the competing offerors are married to other offerors; this affords no basis for rejecting their offers.

McIntosh also alleges that it is inherently unfair for a husband and wife to participate in a drawing because, as a matter of law, each has an interest in the offer of the other. He, however, offers nothing in

April 2, 1964

support of his premise, and, aside from the contingent interests of curtesy and dower, which are not pertinent for our purposes, there seems to be no basis for so sweeping an assertion. However, it is unnecessary to treat the contention in general because the laws of the States in which the lands involved in these appeals lie, California and West Virginia, permit a husband and wife to own and convey property and to contract without the other's consent and for each's sole interest even though, in the case of California, it is a community property State. 2 W. Va. Code ch. 48, § 4731 *et seq.*; 10 Cal. Jur. 2d *Community Property* §§ 43, 21; 26 *id.*, *Husband and Wife* §§ 6, 40, 41. Thus, so far as the present appeals are concerned, a claim of unfairness cannot rest solely upon the existence of a marital relationship between two of the offerors.

Appellants' protests were, therefore, properly dismissed.

In addition to the issue raised by the protests, McIntosh has appealed from the conditional rejection of his offer upon the determination that it did not receive first priority in the drawing. His principal contention is that the Bureau's procedure in conditionally rejecting offers, subject to a right of reinstatement if offers having a higher priority are disqualified, is inconsistent with the Department's regulations. In substance, he contends that the Bureau's procedure is not authorized by the Department's rules of practice and there is a possibility that an offeror may be deprived of his rights by failure to appeal from a conditional rejection of his offer if the Bureau's procedure should be changed in the meantime.

The same contentions as those now urged upon the Department have previously been considered at length, and, while flaws in the Bureau's procedure have been acknowledged, the procedure has not been shown to be inherently unfair to any offeror, nor has it been found incompatible with other practices or regulations of the Department, nor has any complainant been found to be deprived of any right by the conditional rejection of his lease offer. *Robert B. Nation, Theodore R. Barker, A-29071, A-29523* (December 5, 1962); *Katherine M. Barker, A-29566* (November 26, 1963); *Robert B. Nation, A-29822* (February 18, 1964). The appellant's arguments are not persuasive that a different conclusion should be reached here.

It may be noted that the Department has recently adopted new regulations which eliminate the procedure complained of by McIntosh. See 43 CFR 3123.9, 29 F.R. 4519. They will not, of course, affect this decision.

Therefore, 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 decisions appealed from are affirmed.

ERNEST F. HOM,
Assistant Solicitor.

WILLIAM B. COLLISTER

A-30116

Decided April 15, 1964

Oil and Gas Leases: Description of Land

Under regulation 43 CFR 3123.8, which requires that oil and gas lease offers for lands shown on protracted surveys include only entire sections of land or describe all of the lands available for leasing in each section by legal subdivisional parts, where only a portion of a section is available, it is not proper to reject an offer for such land which describes all of the land in the section with a statement that the offer is to be deemed to include all of the land in the described section which is available for lease if the offer is accompanied by the first year's rental payment for the entire section.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

William B. Collister has appealed to the Secretary of the Interior from a decision dated August 2, 1963, whereby the Division of Appeals, Bureau of Land Management, modified and affirmed a decision of the Colorado land office rejecting his noncompetitive oil and gas lease offer filed pursuant to section 17 of the Mineral Leasing Act, as amended, 74 Stat. 782 (1960), 30 U.S.C. § 226 (Supp. IV, 1963).

On November 15, 1962, Collister filed lease offer Colorado 096913 for all of the land available for leasing in sec. 6, T. 2 N., R. 89 W., and sec. 1, T. 2 N., R. 90 W., 6th P.M., Colorado. The land office rejected the offer because the lands were embraced in prior oil and gas leases Colorado 012761, 014367, 016342 and 021078, and any of the lands which might have been available had not been posted for filing in accordance with 43 CFR, 1964 rev., 192.43, now 43 CFR 3123.9, 29 F.R. 4519.

The Division of Appeals found that there was no indication that any of the lands which might be available for leasing were included in canceled, relinquished or terminated leases, thus requiring posting as provided in the cited regulation. It further found that the SE $\frac{1}{4}$ sec. 6, T. 2 N., R. 89 W., and the S $\frac{1}{2}$ SE $\frac{1}{4}$ sec 1, T. 2 N., R. 90 W., appeared to be available for leasing, but that the appellant's lease offer was properly rejected since it did not describe the available lands by subdivisional parts as required by 43 CFR, 1964 rev., 192.42a (c) (1), now 43 CFR 3123.8(c) (1), 29 F.R. 4519.

The appellant contends that he did comply with the regulation, since the regulation provides that if it is not feasible to describe land by subdivisional parts, the offer must describe the entire section and contain a statement that it shall be deemed to include all of the land in the section which is available for leasing.

All of the lands embraced by the appellant's offer are in unsurveyed townships in the Routt National Forest. The four leases cited in the land office decision described, by metes and bounds, lands which

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included all of what would, supposedly, when surveyed, be sec. 6, T. 2 N., R. 89 W., and sec. 1, T. 2 N., R. 90 W. Upon the approval, subsequent to the issuance of those leases, of protracted surveys of the two townships in question, tracts of land approximating the SE $\frac{1}{4}$ sec. 6, T. 2 N., R. 89 W., and the S $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 1, T. 2 N., R. 90 W., were found to be not included in the description of any existing lease. Thus, it appears that the Division of Appeals was correct in its conclusion that those tracts had not been under lease, and posting in the land office was not a prerequisite to the leasing of the tracts.

However, the decision would appear to place an unduly narrow construction upon regulation 43 CFR 3123.8(c), which provides that:

When protracted surveys have been approved and the effective date thereof published in the Federal Register, all offers to lease lands shown on such protracted surveys, filed on or after such effective date, must, except as provided below, include only entire sections described according to the section, township, and range shown on the approved protracted surveys.

(1) An offer may include less than an entire protracted section where only a portion of such a section is available for lease. In such case the offer must describe all the available lands by subdivisinal parts in the same manner as provided in paragraph (a) of this section for officially surveyed lands. If this is not feasible, as e.g., in the case of an irregular section, the offer must describe the entire section and contain a statement that it shall be deemed to include all of the land in the described section which is available for lease.

The clear intent of the regulation is to facilitate the leasing of lands in protracted surveys by entire sections and to eliminate small unleased tracts surrounded by leased areas.¹ Thus, an offeror is required to apply for all of a section, or, if only part of the section is available for leasing, he may apply only for that part but must describe all of the available land in the section in the same manner as in describing surveyed land. However, the language is permissive as to the manner for describing the land when only a portion of a section is available, *i.e.*, the offeror is not precluded from describing the entire section if only part of it is available for leasing. The offeror may, in that event, describe the entire section, remitting with his offer the first year's rental for the entire acreage as required by 43 CFR 3123.2(b), 29 F.R. 4517, or he may describe only the subdivisions that are available for leasing, remitting the correspondingly smaller rental for that acreage.

The Department has never required the rejection of a lease offer merely because it described land that was not available for leasing. On the contrary, if an offer describes an entire section of land and only one quarter of that section is available for leasing, a lease is issued for that quarter and the offer is rejected as to the balance of the section.

¹ See former provisions of the regulation (24 F.R. 4141) and Departmental decision interpreting the effect of those provisions (*Jack V. Walker, A-29402* etc. (July 22, 1963)).

See *Charles J. Babington*, 71 I.D. 110 (A-29688, March 20, 1964). Had the appellant omitted his reference to "all of the land in the described sections which are available for lease," his description would have been clearly acceptable. I am unable to see any reason for a different result in the present situation.

The appellant's lease offer was accompanied by the rental payment for 1,348 acres, the total acreage of the two sections applied for. No additional burden was imposed upon the land office by the appellant's statement that his offer was deemed to include all of the land available for lease. Whether the offer had described all of the sections without qualification or had described the particular subdivisions thought to be available, it would have been incumbent upon the land office to make a determination as to the exact land available for leasing. Had the appellant described only the subdivisions, and the land office found other adjacent land available, the offer would have been subject to rejection. 43 CFR 3123.1(d), 29 F.R. 4517. Moreover, the unleased tracts may not correspond exactly with the respective legal subdivisions. It was, therefore, quite natural that, in view of some uncertainty as to what was the exact description of the available lands, the appellant chose what appeared to be the safest description. The purpose of the regulations is to insure the orderly leasing of the public lands, not to impose unnecessarily burdensome technical requirements upon applicants for the use of those lands. Accordingly, the rejection of the appellant's lease offer for the failure to describe each subdivision was improper.

Therefore, 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 reversed, and the case is remanded to the Bureau of Land Management for further action consistent with this decision.

ERNEST F. HOM,
Assistant Solicitor.

ATHERTON SINCLAIR BURLINGHAM ET AL.

A-30118

Decided April 16, 1964

Public Lands: Classification—Taylor Grazing Act: Classification—State Selections

State selections in satisfaction of a legislative grant of public land are preferred over conflicting private applications even though the State application may have been filed subsequent to the private application if the interval between the two filings is not so great as to indicate that the State failed to exercise reasonable diligence in exercising its selection right.

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Public Lands: Classification—Taylor Grazing Act: Classification—State Selections

The filing of a State selection application within six weeks after the filing of public sale applications for the same land evidences reasonable diligence by the State in the exercise of its selection right so that the State application merits consideration with the public sale applications and allowance unless such allowance would serve the public interest less effectively than allowance of the public sale applications.

Public Lands: Disposals of—State Selections

The statutory grant of a 6-month preference period for the filing of State selection applications after every revocation of a withdrawal of public land within 10 years after August 27, 1958, is entirely consistent with the existent departmental policy of permitting the public interest in the satisfaction of a legislative grant of public land to a State to tip the scales in favor of the State in the Department's consideration of a State selection application and a conflicting application for the initiation of private rights in the land.

State Selections

The period of delay in the filing of a State selection application by which the diligence of a State in exercising its selection right is measured runs from the time an application for the acquisition of private rights in public land is filed until the State selection application is filed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Atherton Sinclair Burlingham and Hilda S. Burlingham have appealed to the Secretary of the Interior from a decision dated June 5, 1963, of the Division of Appeals of the Bureau of Land Management which vacated a land office decision dismissing their protests to suspension of their public sale applications covering certain public land in New Mexico on the ground that the State of New Mexico had filed an application to select some of the same land, New Mexico 0321650, and that, because the State had exercised reasonable diligence in the attempted exercise of its right to select, its application was entitled under Bureau policy to priority over the private applications.

The Division of Appeals vacated the land office decision on the grounds that the validity of the State selection application had not been considered and that a determination had not been made as to the applicable law under which the lands are subject to disposal. The decision directed that the case files be returned to the land office for further appropriate action without, however, giving any directive as to what further action would be appropriate in the present posture of the conflicting applications.

In this state of affairs, the Burlinghams insist that further action in the land office would be prejudicial to their rights since, in the absence of instruction from the Bureau, the land office would persist in its announced purpose to afford the State's application priority over their

applications and they have prosecuted their appeal, from what they regard as a decision only ostensibly in their favor, in order to obtain the exercise of the Secretary's supervisory jurisdiction in the matter.

To understand fully the basis for the protests and the situation as it existed when the public sales applications were suspended, certain facts must be recited.

All of the land now covered by the State's application and most of the land covered by the Burlingham applications was withdrawn for reclamation purposes in 1914. While the land was in that status, it was, of course, not available for disposition under the provisions of the public sale law, Rev. Stat. § 2455 (1875), as amended, 43 U.S.C. § 1171 (1958),¹ or in satisfaction of the lieu selection rights granted to the States under Rev. Stat. §§ 2275 and 2276 (1875), as amended, 43 U.S.C. §§ 851, 852 (1958), amended, 43 U.S.C. § 852 (Supp. IV, 1963).

The act of August 27, 1958, 72 Stat. 928, 43 U.S.C. §§ 851, 852 (1958), generally amended the provisions of the Revised Statutes relating to the selection of lands by the States in satisfaction of deficiencies in their school grants and provided, in subsection (c) of § 2276, that upon the revocation, not later than 10 years after the date of approval of that act, of any order of withdrawal, in whole or in part, the order taking such action

* * * shall provide for a period of not less than six months before the date on which it otherwise becomes effective in which the State or Territory in which the lands are situated shall have a preferred right of application for selection under this section * * *.

According to the present record, the State of New Mexico was notified on December 16, 1960, of the proposed restoration of certain lands in the 1914 withdrawal and the State indicated that it intended to exercise its selection right under the 1958 act. Thereafter, and prior to the actual revocation of the withdrawal, the State, on June 26, 1961, filed an application (New Mexico 0164248) to select some of the land to be restored.

Thereafter, on September 25, 1961, by Public Land Order No. 2509, 26 F.R. 9228, the revocation was made. Under the terms of that order, the lands affected thereby were restored to the operation of the public land laws with the proviso that:

* * * until 10:00 a.m., on March 27, 1962, the State of New Mexico shall have a preferred right to apply to select the lands in accordance with subsection (c) of section 2 of the act of August 27, 1958 * * *.

On September 18, 1962, the State was notified that its application for selection filed on June 26, 1961, was premature, having been filed

¹ The Buringhams attempted to acquire the land covered by their present applications while a part thereof was in a withdrawn status. The rejection of their applications insofar as it covered the withdrawn land was affirmed in *Atherton S. Burlingham and Hilda S. Burlingham, A-29029* (August 6, 1962).

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while the land was still in a withdrawn status, and on September 20, 1962, the State withdrew its application and notified the land office that a new selection application would be filed. The State filed its new application, New Mexico 0321650, on October 16, 1962.

Meantime, however, the Burlinghams had filed their public sale applications. Those applications were filed on September 4, 1962, the first day on which applications for the sale of public lands could have been filed following the end of the moratorium on the filing of such applications announced by the Secretary of the Interior on February 14, 1961.

The notices of suspension of the Burlingham applications, out of which the protests grew, followed on January 10, 1963.

In their appeal to the Secretary, the appellants contend that, because the State failed to file an application to select within the preference period, it lost the statutory preference and any application that it filed after the end of the preference period is junior to any application that was filed earlier. They conclude that, because the State had no right of priority, it is immaterial whether or not it acted with reasonable diligence but, in any event, it clearly failed to act with diligence since its application was not filed until more than a year after the land became available for its selection.

These views seem to reflect a misconception of the situation. It is clear that the State failed to file within the preference period and thereby lost all of the advantages that inhere in the statutory grant of an absolute preference. Its application, filed almost six weeks after the public sale applications were filed, is therefore a nonpreference-right application so far as the statute is concerned. It is, however, an application filed by a State in the exercise of its statutory right to receive a specified acreage in full satisfaction of a legislative grant of public land. As such, it is entitled to consideration with other applications for the same land and to allowance, if it is allowable, even though a conflicting application might be allowed but for the existence of the State selection application. *Olaf H. Iverson et al.*, A-28810 (July 12, 1962).

In *Nelson A. Gerttula*, 64 I.D. 225, 229 (1957), the Department stated that a selection application proffered by a State in the exercise of a lieu selection right should, as a matter of principle, be honored over competing applications for the initiation of private rights in the same land even though the applications for private rights may more nearly conform to the characteristics of the land. The decision indicated that both kinds of applications are to be considered together and the public interest in the full satisfaction of legislative grants of public land to the States will be allowed to tip the scales in favor of a State even though the land may be equally well adapted to the different

purposes indicated by the conflicting applications. And in the application of this principle, consideration will be afforded to the State application whether it was filed earlier, contemporaneously, or within a period following the filing of the conflicting application or applications which is sufficiently restricted to indicate that the State acted with reasonable diligence in preparing and filing its application.

It is true that the Congress has made explicit provision in favor of States for a preference period of 6 months' duration to be operative throughout an interval of 10 years from August 27, 1958, in every instance of the revocation of a withdrawal of public land. Thus, it appears that the effect of the statute establishing the preference is to encourage the States to make selections in satisfaction of their public land grants as rapidly as possible (H.R. Rep. No. 2347, 85th Cong., 2d Sess. 5 (1958)), but it does not, of course, compel them to do so. Hence, one must suppose that States selection applications will continue to be filed after the preference right to file has terminated. Since the State selection preference is temporary in nature, I am unable to accept the appellants' argument that the statutory provision for the State preference constitutes a Congressional preemption of the entire area of State selection which amends existing administrative policy to conform thereto so that the Secretary of the Interior no longer has any discretion in the consideration of State selection applications and conflicting applications for private rights. The appellants have furnished no evidence of a legislative intent to that effect.

On the contrary, before the Congress granted a State selection the preference right described, the Department had recognized that a State selection application proffered pursuant to a legislative grant of public land evidences a claim rising from a higher source than the application of a person who seeks to avail himself of the privilege of acquiring a portion of the public domain. The Congress did not include in the preference provision of the 1958 act any inconsistent provision which casts any doubt upon the validity of the Department's previous evaluation of State lieu selection rights or the procedures which reflect such evaluation. Hence, I am persuaded that the statutory 10-year period affording an absolute preference right for the filing of State selection applications is entirely consistent with the Department's established conception of the nature of a legislative grant of public land and with the Department's established procedures for the consideration of selection applications and conflicting applications for the initiation of private rights in public lands. *Of. Union Oil Company of California, A-29905* (March 30, 1964).

This does not mean, however, that a nonpreference-right State selection application is entitled to priority of consideration; only that such application and applications for the initiation of private rights in

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the same public land are to be considered at the same time and a decision reached as to the suitability of the land for the different purposes indicated in the two applications. Thus, in this instance, the land office is now called upon to determine whether the land described in the conflicting applications is proper for acquisition by the State of New Mexico in satisfaction of the deficiency in its school grant or whether it would be proper to order the land into market to be sold.

If the State selection application is in proper form, if the records indicate that the State is entitled to indemnity for the land for which indemnity is sought, and if the land is suitable for State acquisition and need not be retained for some public purpose, the State's application should be granted, even though, in the absence of the State application, the land could be classified as suitable for public sale. If the State application is not in proper form, if the State is not entitled to indemnification for the land which is the basis of its request for this land, or if the land cannot properly be classified as suitable for disposition in satisfaction of a State grant, the State's application should be rejected. If there are no defects in the public sale applications, in the event of rejection of the State application, these applications can be allowed if it is determined that the land is suitable for public sale and if any reason that may have precluded a favorable classification for State selection is not also a bar to public sale.

Consideration of the applications in this manner is proper, however, only if the State application is entitled to consideration because the State exercised reasonable diligence in presenting it following the filing of the Burlingham applications. In previous decisions, the Department has held that 11 months' delay after the filing of an application seeking private rights does not constitute reasonable diligence on the part of a State (*Nelson A. Gerttula, supra*), but that a delay of 6 months (*Gerald Kolterman et al., A-27735* (November 20, 1958)) or of 8 months (*George E. Fahey, A-27606* (November 4, 1958)) is within the limits of reasonable diligence. Accordingly, it is apparent that a delay of six weeks need not require a conclusion that the State failed to proceed with reasonable diligence. The appellants' contention that the period of delay by which the diligence of the State is measured commenced when the land became available for selection by the State cannot be accepted in lieu of the date of the conflicting application from which the diligence of a State has previously been measured since the problem thus presented is whether the applicant for private rights will be measurably affected by possible changes in conditions during a period between the filing of his application and that of the State selection application. Obviously, the applicant cannot suffer detriment because of a lapse of time which occurs before

his application is filed. Therefore, the period by which the reasonableness of the diligence exhibited by a State is measured runs from the time that the application for private rights is filed.

Therefore, 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 case is remanded for consideration of the State selection application and the public sale applications in accordance with the views set forth in this decision.

ERNST F. HOM,
Assistant Solicitor.

APPEAL OF R & M CONTRACTORS, INC.

IBCA-325

Decided April 21, 1964

Contracts: Changes and Extras—Contracts: Additional Compensation—Contracts: Contracting Officer

A contractor is not entitled to additional compensation where the extra work on which the claim is founded was performed outside of the paylines established by the contracting officer pursuant to his contract authority. Under such circumstances the work was unnecessary and the contractor was a mere "volunteer" with respect thereto.

Contracts: Interpretation—Contracts: Specifications—Contracts: Drawings

Where the contract specifications and drawings are not ambiguous, there is no need to construe the contract. The contractor's interpretation being unreasonable, the doctrine of *contra proferentem* does not apply.

Contracts: Delays of Contractor—Contracts: Changes and Extras—Contracts: Performance

A contractor is entitled to an extension of time pursuant to the Clause 5 of Standard Form 23-A (April 1961 edition) where unforeseeable overruns of estimated quantities delayed the performance of the contract.

BOARD OF CONTRACT APPEALS

The contractor has appealed timely from the Findings of Fact and Decision of the contracting officer dated March 30, 1962, which denied the contractor's claims concerning measurement and payment for services and materials, and as to excusable delay. The aggregate value of the claims is \$8,150.

On August 9, 1961, the contractor was awarded a contract in the total estimated amount of \$90,788 for 18 items of work and supplies, based (with one exception) on estimated quantities and unit bid prices. Standard Form 23-A (April 1961 edition) was included in the contract, as well as certain other provisions and specifications. Liquidated damages of \$50 per calendar day were specified for delay

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in completion of the work, which was required to be completed within 50 days after receipt of notice to proceed.

The contract describes the principal components of the work to be performed near Yuma, Arizona, as follows:

- a. Earthwork for and construction of approximately 2.5 miles of unreinforced-concrete lined channel, having a bottom width of 2 feet.
- b. Earthwork for and construction of structures, including siphons, siphon with metering structure outlet, and pipe drop outlet.
- c. Furnishing and installing metal bridge railings and open flowmeter.

Claim No. 1—Measurement and Payment for Embankments—\$7,500

Contract Drawing No. 6 (423-300-158) is entitled "South Gila Valley Pump Outlet Channel No. 2. Typical Sections and Lining Details." It is conceded by the Government that the drawing prescribed minimum dimensions for embankments, and this can readily be seen by examination of the "Typical Section" portion of Drawing No. 423-300-158. The left side of the section shows an embankment "In Cut" area while the right embankment is "In Fill." The top width of each embankment is shown as "3'0" Min.," while the height of each is shown as "1'0" Min."

The contract provides, in substance, that the actual (or maximum) dimensions will be determined by the contracting officer. Subparagraph (b) of Paragraph 86—Drawings, of the Specifications, sets forth the authority of the contracting officer in the following terms:

- b. General—Some of the drawings are typical designs only and the dimensions of each structure will be fixed by the contracting officer to adapt the structure to the existing conditions at the structure location. * * *

Similar provisions are found in the first sentence of Paragraph 18 of the Specifications, which states as follows:

18. *Staking Out Work*

- a. Lines and Grades. The contracting officer will establish lines and grades required for proper execution of the work. * * *

From the foregoing, it is clear that the contract permitted the contracting officer to establish maximum dimensions in the performance of the work. These maximums could be the same as, but not less than the minimum dimensions prescribed by the drawings (except, of course, that a change order could have been issued to reduce further the minimum dimensions).

During the pre-construction conference the contractor was instructed by representatives of the contracting officer that the 3-foot width and 1-foot height described on the drawings would be sufficient, except for an operating road on the south side of the east branch.

The contractor, although he voiced no dissent at that time, apparently regarded the instructions at the pre-construction conference (and

also during performance at the site when similar directions and warnings were given) as being the result of misinterpretation by the contracting officer of the contract drawings. It is the position of the contractor that the contracting officer mistakenly considered the drawing dimensions to be maximum requirements, whereas such dimensions were actually minimum requirements. In taking this position, the contractor seems to have ignored the plain provisions of the Specifications quoted *supra*. In the performance of the work, he persisted in ignoring the directions and advice of the contracting officer's representatives, to the effect that the 3-foot top width and 1-foot height requirements should be adhered to, and that no payment would be made for quantities outside these lines. The contractor's theory, concerning the dimensions which should govern the quantities of material and volume of work, was that since no maximum dimensions were specified by the contract, the maximum dimensions should be those determined by the contractor from his experience and knowledge as being (according to his brief) "reasonably necessary to effect a proper embankment," which "would fully insure protection for the canal lining * * *."

It was stipulated by the parties under date of October 8, 1962, that the quantity of material covered by Claim No. 1 is 7,408.4 cubic yards. This represents the volume of material placed in embankments, outside the paylines and in excess of the instructions of the Government. It is also stipulated that the quantity of 7,408.4 cubic yards "includes an appropriate shrinkage factor, to compensate for the fact that the material was compacted when placed in the embankments."

The stipulation that the shrinkage factor is an appropriate one leads us to assume that appellant is not now pressing the argument advanced in his brief dated May 10, 1962, to the effect that the shrinkage factor was not properly computed by the Government because of the fact that a large proportion of the borrow material was placed in muddy areas where a greater volume of the material was necessarily used. The total quantity of borrow, measured in excavation, was used in the Government's calculation of compaction. Actually the taking into consideration of such additional quantities of borrow material would result in a higher ratio of borrow to embankment for the shrinkage factor, and thus would be more favorable to the contractor rather than otherwise. In any event, we conclude that the method of computation used by the Government was proper.

The principal remaining argument advanced by appellant involves invocation of the doctrine of *contra preferentem*. We have applied that doctrine, where properly applicable, on numerous occasions. Here, however, there was no ambiguity. The authority of the contracting officer to "fix the dimensions of each structure" and to "establish lines and grades for proper execution of the work" was clearly

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spelled out by the contract. It has been held that where no ambiguity exists there is no need to construe the contract.¹

Also, if the contractor, in computing his bid price, relied, as claimed, on his alleged assumption that the minimum dimensions on the drawing could be reasonably exceeded, the absence of specific maximum dimensions in the contract should have prompted an inquiry by him, since such absence of maximum dimensions is the alleged ambiguity complained of by appellant.

Here the contractor remained silent as to the supposed ambiguity, not only during the bidding period but in the preconstruction conference, where he appeared to acquiesce in the instructions concerning the limitation of pay lines for embankments. The contractor offers an interpretation of the contract, which is based mainly on the presence of minimum dimensions in the drawing and the absence of explicit maximum dimensions for embankments. This construction of the contract would make the contractor, rather than the contracting officer, the arbiter concerning the maximum quantities and volume of work to be performed.

Such an interpretation is so strained as to be unreasonable. The unreasonableness of the interpretation precludes the application of the doctrine of *contra proferentem*.²

In *Consolidated Engineering Co., Inc. v. United States*,³ the Court said:

* * * We think that plaintiff, aware of an ambiguity, perhaps inadvertent, in the defendant's invitation to a contract, could not accept the contract and then claim that the ambiguity should be resolved favorably to itself.

Accordingly, the Board concludes that, as to the work performed and materials used in the construction of embankments outside of the pay lines established by the representatives of the contracting officer, the contractor was a mere "volunteer" and may not recover additional compensation.⁴

Claim No. 2—Concrete Encasement of Mitered Pipe Bends—\$800.00

The contractor claims that it is entitled to additional compensation for work of encasing in concrete 9 mitered pipe bends. A total of 11 such pipe bends were involved, the encasing of 2 of them having been paid for by the Government. The contracting officer found that

¹ *Hongkong & Whampoa Dock Company, Limited v. United States*, 50 Ct. Cl. 213, 222 (1915); *Triangle Construction Company*, IBCA-296 (March 2, 1964); *Northwest Marine Iron Works*, IBCA-213 (October 26, 1960), 60-2 BCA par. 2837, 2 Gov. Contr. 568 (i).

² *Promacs, Inc.*, IBCA-317 (January 31, 1964), 71 I.D. 11, 1964 BCA par. 4016, 6 Gov. Contr. 116 (a); *E. W. Construction Company*, IBCA-297 (October 23, 1963), 1963 BCA par. 3922, 5 Gov. Contr. 565 (d), and cases cited therein.

³ 98 Ct. Cl. 256, 280 (1943).

⁴ *Breymann Dredging Co. v. United States*, 105 Ct. Cl. 400 (1946); citing *Great Lakes Dredge & Dock Company v. United States*, 104 Ct. Cl. 818 (1946); *Carson Construction Company*, IBCA-21, IBCA-25, IBCA-28, IBCA-34 (November 22, 1955), 62 I.D. 422, 428, 6 CCF par. 61, 736.

only these 2 pipe bends were ordered by the Government to be encased in concrete, pursuant to the contract provisions and drawings which make the performance of any such encasement work dependent on specific instructions therefor by the contracting officer. The contractor contends that the contract provisions and drawings direct that all mitered pipe bends be encased in concrete.

The pertinent portion of Paragraph 59 of the Specifications entitled "Bends," is as follows:

59. *Bends.* Bends at changes in alinement or grade of pipelines may be made by the use of precast elbows or mitered bends, or where indicated on the drawings or where approved, bends may be made by opening the joints on one side of the pipeline a maximum of $\frac{1}{2}$ inch. Where shown on the drawings or where directed, pipelines shall be laid on long-radius curves in lieu of constructing bends.

The contractor shall furnish precast $2\frac{1}{2}$ degree elbows, containing not less than the prescribed reinforcement for the adjacent pipe, sufficient in number to provide the required bend in the pipeline; or *mitered bends may be fabricated* as shown on Drawing No. 10 (423-300-152).

Methods of constructing mitered pipe bends are shown on Drawing No. 10 (423-300-152). The contractor shall construct concrete encasements where shown on the drawings or directed, and in accordance with the details shown on Drawing No. 10 (423-300-152). The pneumatically applied mortar used for encasing mitered pipe bends shall conform to the requirements specified below for mitered bends. (Italics supplied.)

Drawing No. 10 (423-300-152), as stated in Paragraph 59 quoted above, merely shows *methods* of constructing mitered bends, and details of constructing concrete encasements therefor as one of the methods of reinforcement. It does not purport to show where mitered pipe bends are to be installed in the pipelines, nor does it purport to show which mitered pipe bends are to be encased in concrete. None of the other drawings attached to the contract show *where* concrete encasements shall be constructed.

Accordingly, since none of the drawings show *where* concrete encasements shall be constructed, such work is to be performed *where directed*.

The contractor had an option, under Paragraph 59, either of furnishing precast elbows for bends in the pipelines, or of fabricating mitered pipe bends. It chose the latter method; however, that option did not include the encasing any of the mitered pipe bends in concrete. Encasement in concrete was only one of several methods shown on Drawing No. 10 for constructing and reinforcing mitered pipe bends. Another method shown was that of bending the mitered pipe bends, which was the method the contractor was directed to use for the 9 pipe bends now in dispute. That method he failed to employ. We see no ambiguity in the drawing or in the specifications. Hence, there is no need to construe them.⁵

⁵ Note 1 *supra*.

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The contractor apparently chose to rely on its interpretation of the specifications and drawings, in lieu of following the correct explanation and directions of the contracting officer. In taking this course of action the contractor assumed the character of a "volunteer" concerning the additional work involved in the use of concrete encasement,⁶ and hence, is not entitled to additional compensation therefor.

Claim No. 2 is denied.

Claim No. 3—Excusable Delay—\$850

Notice to proceed was received by the contractor on August 19, 1961, thus establishing November 17, 1961, as the required date for completion of the work. It was actually completed and accepted on December 13, 1961. In paragraph 6 on page 3 of the contracting officer's Findings and Decision, it is stated that as a result of Change Order No. 2, "November 27, 1961 was considered the new contract completion date." The Board computes the delay period as consisting of the 3 days remaining in November plus the first 13 days of December, or a total of 16 days. Nevertheless, the contractor was charged with 17 days and \$850.00 liquidated damages. This, obviously, is incorrect.

Moreover, the Board differs from the position taken by the Government in denying extensions of time for overruns of estimated quantities. It is true, as stated by Department Counsel, that in the absence of appropriate contract provisions, there can be no adjustment of the established contract unit prices, where the actual quantities vary from the original estimated quantities.⁷ However, that is not the issue before us.

In order for a delay in performance of a contract to be excusable (as provided in subparagraph (d) (1) of Clause 5 of Standard Form 23-A), such delay must arise from " * * * unforeseeable causes beyond the control and without the fault or negligence of the Contractor * * *." The Board considers that these criteria have been satisfied, as will be discussed *infra*.

The Government relies (mistakenly) on the so-called "Approximate Quantities" clause in paragraph 4 of the Specifications of the contract, which reads as follows:

4. *Quantities and Unit Prices.* The quantities noted in the schedule are approximations for comparing bids, and no claim shall be made against the Government for excess or deficiency therein, actual or relative. Payment at the

⁶ Note 4 *supra*.

⁷ *Otis Williams and Company, IBCA-324* (September 5, 1962), 69 I.D. 135, 1962 BCA par. 3487, 4 Gov. Contr. 471; *J. D. Armstrong Company, Inc., IBCA-40*, 63 I.D. 289, 305 (1956).

unit prices agreed upon will be in full for the completed work and will cover materials, supplies, labor, tools, machinery, and all other expenditures incident to satisfactory compliance with the contract, unless otherwise specifically provided.

The foregoing clearly applies to claims for increased compensation. Extensions of time are not mentioned.

We consider that the foregoing provisions do not in any way modify subparagraph (d) (1) of Clause 5, quoted in part *supra*, and cannot be said to deprive the contractor of his right under Clause 5 to an extension of time for completing the work. This Board, as well as the Armed Services Board of Contract Appeals, has held that overruns of estimated quantities constitute a proper basis for granting extensions of time.⁸

The Government's principal argument concerning this claim seems to be that the "approximate quantities" provision has the effect of causing the dimensions and specifications, set forth elsewhere in the contract, to prevail over the estimated quantities stated in the schedule. We are in agreement with this reasoning only in so far as it concerns the effect of the overrun or underrun on the unit prices. If the actual quantities, as determined by the drawing dimensions and specifications, exceed the estimated quantities, the contractor has a measure of protection as to price and cost. In such an event he receives an automatic and commensurate increase in total payments based on unit prices for the increased volume of work.

However, this type of protection does not shield the contractor against the imposition of liquidated damages, where the increases in quantities have prolonged the performance period. Although it may be said that the contractor should make an independent calculation of the real quantities involved, from a study of the drawings, specifications, logs of exploration, and examination of the site, such an independent estimate can be only an approximation at best. Hence, it may not afford adequate protection against liquidated damages in the event of delay due to overruns. For example, in the instant case no agreement was made between the parties at any time concerning the shrinkage ratio for determining compaction quantities. Hence, the actual quantities could not be determined until completion. Also, excessive moisture in portions of the work site made it necessary to use larger quantities of fill than would have been necessary under normal conditions. This was without any fault on the contractor's part.

Moreover, it is possible for an overrun of a comparatively moderate extent to delay the work by a matter of one or more days. Where

⁸ *R. G. Brown, Jr., and Company*, IBCA-356 (July 26, 1963), 1963 BCA par. 3799, 5 Gov. Contr. 406 (k); *R. G. Brown, Jr., and Company*, IBCA-241 (December 12, 1961), 61-2 BCA par. 3230, 4 Gov. Contr. par. 39; *Ashton-Meridian Company*, ASBCA No. 7912 (July 26, 1963), 1963 BCA par. 3836, 5 Gov. Contr. 523; *R. G. Foster & Company*, ASBCA No. 6459 (February 24, 1961), 61-1 BCA par. 2957, 3 Gov. Contr. 298 (g).

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such minor variations occur as to several contract items, a considerable delay may result, subjecting the contractor to assessment of a substantial amount in liquidated damages. Such small overruns (and under-runs) are not susceptible of being anticipated, and we consider them to be unforeseeable within the meaning of Clause 5, as well as being without the fault or negligence of the contractor.

These difficulties are recognized by the Bureau of Public Roads, which includes an express provision in its contracts.⁹ Such an express provision is, of course, merely the product of what we consider to be the applicable law with respect to delays caused by overruns.

Appellant sets forth, in its letter of February 2, 1962, several instances of overruns in the performance of the contract, with requests for extensions of time. That letter revises the claims in the contractor's letter of November 13, 1961, and states that the actual quantities listed are exclusive of those quantities which are in dispute with respect to alleged over-building of embankments, described in Claim No. 1. The details are shown in the following tabulation:

Item No.	Description	Unit	Estimated quantity	Actual quantity	Excess	Number of days' extension requested
1	Excavation for channel.....	Cu. yd.	24,000	25,946	1,946	2
3	Overhaul.....	Mile cu. yd.....	8,000	8,945	945	1
4	Excavation for structures.....	Cu. yd.....	1,750	2,100	350	1
7	Trimming earth foundations for concrete lining.	Sq. yd.....	18,115	19,586	1,471	1
9	Unreinforced concrete in channel lining.....	Cu. yd.....	1,020	1,090	70	1
10	Furnishing and handling cement.....	Bbl.....	1,400	1,713.49	313.49	1
11	Furnishing and placing reinforcement bars.	Lb.....	4,260	7,821	3,561	2
	Total number of days' extension requested.....					9

Under paragraph (d) of Clause 5 of the contract, it is the respon-

⁹ "Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects" (January 1961 edition). Similar provisions are found in Section 8.6 of the 1957 edition.

Section 8.6 Contract Time, of the 1961 Specifications incorporated by reference in a number of contracts of the National Park Service and administered by the Bureau of Public Roads, meets the problem as follows, in paragraph (2):

(2) If the satisfactory performance of the contract with changes, extensions, or increases ordered or authorized by the engineer results in the final amount earned, exclusive of the cost of all changes covered under paragraph (1) above, being greater than the original contract amount, the contract time shall be increased in the same ratio that the total amount earned, exclusive of the cost of all changes covered under paragraph (1) above, bears to the original contract amount, except that in exceptional cases where this procedure is inadequate to provide an equitable adjustment in time, some other basis for time adjustment may be authorized.

sibility of the contracting officer to

* * * ascertain the facts and the extent of the delay and extend the time for completing the work, when, in his judgment, the findings of fact justify such an extension * * *.

The contracting officer has not made specific findings concerning the extent of the delays claimed to be excusable, presumably for the reason that, in his judgment, an extension was not justified. However, the Board finds that the facts justify an extension of time for the number of days claimed. As we said in *Eastern Maintenance Company*¹⁰

Accordingly, what the contracting officer, through inadvertence or error, has failed to do * * *, the Board will do.

Additionally, considering the lapse of time which has occurred since the contractor's last claim letter of February 2, 1962, the Board concludes that no useful purpose will be served by remanding this portion of the appeal to the contracting officer for the preparation of new or supplemental findings as to the extent of the excusable delay.¹¹

We conclude that the contractor is reasonably entitled to an extension of time of nine days, from November 27, 1961, to December 6, 1961. The unexcused portion of the delay is therefore reduced to 7 days, from December 6 to 13, 1961. The unexcused period of 7 days is presumably related to the additional work involved in the quantity of 7,408.4 cubic yards placed in embankment outside of pay lines, as described under Claim No. 1, *supra*.

Conclusion

A. The appeal is sustained in part, as to Claim No. 3, and an extension of time of nine days is granted, to December 6, 1961.¹²

B. The appeal is denied as to Claims Nos. 1 and 2 in their entirety.

THOMAS M. DURSTON, *Member*.

I Concur:

PAUL H. GANTT, *Chairman*.

REX N. AND MILDRED B. ANDERSON

A-29881

Decided April 24, 1964

**Withdrawals and Reservations: Reclamation Withdrawals—Mining Claims:
Mill Sites—Mining Claims: Withdrawn Land**

Land withdrawn for reclamation purposes can be opened to location under the mining laws only where the land is known or believed to be valuable for minerals; consequently, nonmineral land in a reclamation withdrawal can-

¹⁰ IBCA-275 (November 29, 1962), 69 I.D. 215, 1962 BCA par. 3583, 5 Gov. Contr. 44(h).

¹¹ *Idem*.

¹² The remaining 7 days of delay, to December 13, 1961, are not excused.

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not, in the absence of other considerations, be opened for location of a mill site, which is locatable only on nonmineral land.

**Withdrawals and Reservations: Reclamation Withdrawals—Mining Claims:
Mill Sites—Mining Claims: Withdrawn Land**

In opening reclamation withdrawn land to mining location it is necessary that each 10-acre subdivision be mineral in character but it is not required that every acre of the 10-acre tract be mineral in character; consequently where a tract of land is opened to mining location and part of the land is non-mineral in character, that part of the land can be included in a mill site.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Rex N. and Mildred B. Anderson have appealed to the Secretary of the Interior from a decision dated November 23, 1962, in which the Acting Assistant Director of the Bureau of Land Management affirmed a decision of the land office at Boise, Idaho, rejecting their application for opening to mineral entry of certain land in the vicinity of a reservoir area under reclamation withdrawal. The rejection was predicated upon the conclusion that a mill site can be located only on land nonmineral in character (Rev. Stat. § 2337 (1875), 30 U.S.C. § 42 (1958)) while land under reclamation withdrawal which may be opened to mineral entry must be known or believed to contain valuable deposits of minerals (act of April 23, 1932, 47 Stat. 136, 43 U.S.C. §§ 154, 155 (1958)).

The appellants hold a number of mining claims located in October 1912, referred to as the Daley claims, and one known as the Daley Mill Site, located in June 1919, in lots 1 and 3, sec. 14, T. 1 S., R. 8 E., B.M., Idaho. These lots, with others, were withdrawn for reclamation purposes on February 10, 1942, and the Anderson Ranch Dam was built about two and one-half miles above on the South Fork of the Boise River. On August 14, 1959, the claimants located the Rex Mill Site on an area of 4.952 acres, partly within the existing Daley Nos. 1 and 36 claims and partly on land not included in any mining claim but included in the reclamation withdrawal. Subsequently, they filed an application for patent for the King B lode claim and the Rex Mill Site. The Rex Mill Site was declared null and void and the application rejected as to it because the location was made on withdrawn land. This decision was affirmed by the Director of the Bureau of Land Management on September 11, 1961. Subsequently, the claimants filed an application for opening lots 1 and 3, totaling 57.50 acres, to mineral location.

The land office rejected the application to open the withdrawn land to mineral location on the ground that, although the applicable statute could be interpreted to permit the location of a mill site on reclamation withdrawn land, such interpretation might be in conflict with the departmental regulation which requires that land to be opened to mineral

location be "known or believed to contain valuable deposits of minerals." 43 CFR 3400.4, 29 F.R. 4569. On appeal, the Director held that there is no conflict between the statute and the regulation because the statute also requires that withdrawn land which may be opened to mineral location must be known or believed to be valuable for minerals.

On appeal to the Secretary of the Interior, the appellants request that the Department allow them to obtain use of the requested area by whatever legal or equitable procedure is available.

Section 1 of the act of April 23, 1932, *supra*, provides in pertinent part:

That where public lands of the United States have been withdrawn for possible use for construction purposes under the Federal reclamation laws, and *are known or believed to be valuable for minerals* and would, if not so withdrawn, be subject to location and patent under the general mining laws, the Secretary of the Interior, when in his opinion the rights of the United States will not be prejudiced thereby, may, in his discretion, open the land to *location, entry, and patent under the general mining laws* * * *. (Italics added.)

The appellants' basic position seems to be that locations for mill sites come under the general mining laws and that therefore, since the statute authorizes the Secretary to open reclamation withdrawn lands to "location, entry, and patent under the general mining laws," he can do so even though the withdrawn land sought for a mill site is non-mineral in character. This argument cannot be accepted since to do so would be to read out of the statute the specific qualifications that only land "known or believed to be valuable for minerals" can be opened to location. The appellants have submitted no plausible basis for reading the statute in this fashion even though it may be conceded that the disposition of lands for mill sites comes under the general mining laws. I agree, therefore, with the decisions below that the Department cannot open to disposition under the mining laws land which is not known or believed to be valuable for minerals.

This does not, however, mean that appellants' application must be rejected in its entirety. The appellants have applied for the opening of two lots comprising a total of 57.70 acres (lot 1, 18.80 acres; lot 3, 38.90 acres). This appears to be in accordance with the regulation governing the filing of such applications, which provides that the land the applicant desires to locate must be described by legal subdivision, if surveyed. 43 CFR 3400.4, 29 F.R. 4569. This, in turn, is consonant with the long-standing administrative practice of disposing of public lands in the terms of smallest legal subdivisions, i.e., a quarter-quarter section or a lot.

In the case of the mining laws, however, it is provided with respect to placer claims that legal subdivisions of 40 acres may be subdivided into 10-acre tracts. Rev. Stat. § 2330, as amended, 30 U.S.C. § 36 (1958). Because of this, the Department has required that each 10-

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acre tract included in a placer claim be shown to be mineral in character. *United States v. Charles H. and Oliver M. Henrikson*, 70 I.D. 212 (1963); *Crystal Marble Quarries Co. v. Dantice et al.*, 41 L.D. 642 (1913). Accordingly, in opening reclamation withdrawn land to location under the mining laws, it would seem essential that each 10-acre subdivision be shown to be mineral in character.¹

In determining the character of each 10-acre subdivision, it does not appear to be essential that each acre be found to be mineral in character before the 10-acre tract can be opened to mining location. See the *Henrikson* case, *supra*. Thus it may be that a portion of a 10-acre tract which is opened to mining location will be nonmineral land.

According to appellants' statements on appeal, only 3 acres of the 57.50 acres applied for are not included in existing mining claims. If the 10-acre subdivision or subdivisions including the 3 acres are known or believed to be valuable for minerals, there would seem to be no question that the subdivision or subdivisions could be opened to location under the mining laws despite the fact that 3 acres contained therein are nonmineral land. Once the subdivision or subdivisions are opened to location, there would appear to be no legal bar to including the nonmineral land in a mill site.

It may be objected that this conclusion circumvents the plain language of the 1932 act. However, the public land laws are, of necessity, based upon practical considerations. They do not require that the character of each acre or of each square foot of land must be determined in making disposals under the mineral and nonmineral land laws. The practice of dealing with land in terms of smallest legal subdivisions of 40 acres or 10 acres or even 2½ acres² reflects this.

Accordingly, the case should be reconsidered to determine whether all of lots 1 and 3 or parts thereof including the three acres in question may be opened to mining location under the 1932 act in accordance with the principles discussed in this decision.³

Therefore, 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 set aside and the case remanded for further consideration in accordance with this decision.

ERNEST F. HOM,
Assistant Solicitor.

¹ As for lode claims, which are not located in conformity with the public land surveys, it would still seem proper to require that each 10-acre subdivision part of which is to be located be shown to be mineral in character.

² See *John McFayden et al.*, 51 L.D. 436 (1926).

³ This assumes that no other withdrawal or reservation would bar a mill site location even if lots 1 and 3 are opened under the 1932 act.

UNITED STATES

v.

ALVIS F. DENISON ET AL.

A-29884, etc.

*Decided April 24, 1964***Mining Claims: Discovery—Mining Claims: Determination of Validity**

Although a mining claim may have been valid in the past because of a discovery on the claim of a valuable deposit of mineral, the mining claim will lose its validity if the mineral deposit ceases to be valuable because of a change in economic conditions.

Mining Claims: Discovery—Mining Claims: Determination of Validity

Mining claims located for manganese must be declared null and void for lack of a discovery where, although manganese was sold from some of the claims and other claims in the vicinity during World War II and the post-war period when a Government buying program was in existence, the evidence shows that since the end of the buying program in 1959 the price of manganese has dropped 50 percent and sales of domestic manganese have ceased and there is no reasonable prospect of a future market, the need for manganese being supplied by higher grade imported manganese.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Separate contest proceedings¹ initiated by the United States Forest Service, Department of Agriculture, were brought against certain lode mining claims located in Coconino County, Arizona, within either the Coconino or Sitgreaves National Forests, following the filing of mineral patent applications for the claims by the locators or their successors in interest. In all the proceedings, the Forest Service charged basically that the claims were invalid because no valid discovery, within the meaning of the mining laws,² existed on the claims, and because the lands were nonmineral in character. In the proceedings against Leo E. Shoup's mining claims, a third charge was made that patent was not sought in good faith because the applicant seeks ownership of the land for purposes other than mining. Separate hearings were held on the charges in each case.

In two of the proceedings, those involving claimants Reid Smith and the Estate of Robert F. Becroft, the hearing examiners dismissed the contests on the ground that the claims were valid. The Assistant Director, Bureau of Land Management, affirmed those actions, finding

¹The contest numbers, mineral patent application numbers, and the names of the claims involved are set forth in the appendix by the claimant's name and the appeal numbers listed above, together with a general description of the sections where the claims are located. Also listed in the appendix are the dates of the hearing examiners' decisions, with the action taken therein, and the dates of the decisions of the Assistant Director, Bureau of Land Management, with the action taken on the appeals from the hearing examiners' decisions.

²Rev. Stat. §§ 2319, 2320, 2325 (1875); 30 U.S.C. §§ 22, 23, and 29 (1958).

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that there was a discovery as required by the mining laws on each claim. The Forest Service has appealed to the Secretary of the Interior from the Assistant Director's decisions.

In the proceeding involving Leo E. Shoup's mining claims, the hearing examiner found that there was not a valid discovery of a vein or lode in rock in place bearing a valuable mineral deposit and declared the claims to be null and void. On the charge that there was not good faith he ruled that there was no showing that the claimant had not *located* the claims in good faith and therefore evidence which was produced at the hearing showing his intent to sell the claims after patent was obtained was not sufficient ground for invalidating the claims. The Assistant Director affirmed the decision on the first ground but held that it was unnecessary, therefore, to make a ruling on the good faith question. Shoup has appealed to the Secretary from that decision, requesting a reversal or a rehearing.

In the proceeding involving Alvis F. Denison's mining claims, the hearing examiner found that none of the claims had mineralization of value or extent as lodes in rock in place, rather than as placers, sufficient to constitute lode discoveries, and rejected Denison's mineral patent applications. The Assistant Director in effect reversed that decision as to the question whether the claims may be considered as lodes or whether they are actually placers and vacated the decision as to four of the sixteen claims involved, finding that there was a valid lode discovery on those claims. However, he affirmed the action of the hearing examiner in declaring the other claims to be null and void for lack of discovery by finding that there was no discovery on them. Both the Forest Service and Denison have appealed from that decision.

All of the claims in these proceedings were located for, and the claimants allege them all to be valuable for, manganese. The Shoup, Smith, and Beecroft claims lie in adjoining townships and the Denison claims are about 40 miles distant. In all of these cases, the Forest Service has raised a central issue as to what criteria should be applied to determine whether there has been a valid discovery. It contends that the Bureau improperly failed to consider present economic conditions in determining whether the mineral deposits on the claims are "valuable" within the meaning of the mining laws and that the Bureau improperly relied only on past economic conditions and hypothetical possibilities in the future. It contends that there is no general market in this country for manganese of the quality and quantity that may be found on these claims, that market conditions are depressed due to the availability of imported manganese of a much higher quality at cheaper prices and the termination of the United States Government's stockpiling program in manganese, with manganese currently being declared in excess quantities in the stockpiles.

The mining claimants object to these contentions. Generally, the claimants allege that manganese is a mineral having intrinsic value and that therefore marketability need not be shown, citing a *Solicitor's opinion* of September 20, 1962 (69 I.D. 145), and that the test of discovery as enunciated in the leading case of *Castle v. Womble*, 19 L.D. 455, 457 (1894), requires only that a prudent man have a reasonable prospect of success in developing a "valuable" mine and not a "profitable" mine, as contended by the Forest Service.

Although in these cases there does appear to be a diversity in the quality and quantity of manganese present on the claims, which may to a certain extent account for the differences in the rulings of the hearing examiners and the Assistant Director in these cases, there also appears to be some inconsistency in the application of the prudent man test to these cases. Because of the importance of the central issue raised by the Forest Service and similarities in these cases as to the nature of the minerals involved, their disposition, and their commercial usage and marketability, and because several of the witnesses testified in two or more of the hearings,³ these cases have been consolidated for consideration of the appeals.

The prudent man test, as originally stated in *Castle v. Womble*, *supra*, is:

* * * where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. (P. 457.)

This test has been quoted or cited with approval by the United States Supreme Court in *Chrisman v. Miller*, 197 U.S. 313, 322 (1905), and other cases, most recently in *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335 (1963).

After establishment of the basic rule on discovery, the Department was confronted with situations in which applications for mineral patent were filed for claims which might previously have been valuable for gold but which were not shown to be valuable for gold at the time of the applications for patent. In *United States v. Margherita Logomarcini*, 60 I.D. 371 (1949), the Department held that before a patent can be issued it must be shown as a present fact that the claim is valuable for minerals. The Department held to the same effect in *United States v. Lem A. and Elizabeth D. Houston*, 66 I.D. 161 (1959), pointing out that although a mining claimant need not apply for a patent to his claim he exposes himself to the chance that at some time the conditions on his claim will no longer support the issuance of a patent.

³ Alvis Denison testified for the claimants in all four cases, John Beecroft for the claimants in all but the Denison case, and H. J. Vander Veer for the claimants in the Smith and Beecroft cases. Joseph H. Morgan and Donald J. Morgan were counsel for the claimants in all the cases.

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Both the *Logomarcini* and the *Houston* decisions were cited for these propositions by the Supreme Court in *Best v. Humboldt Mining Co.*, *supra* at 336.

In the *Houston* case, the Department cited as precedent not only the *Logomarcini* case but also the cases of *United States v. Pumice Sales Corporation*, A-27578 (July 28, 1958), and *United States v. Alonzo A. Adams*, A-27364 (July 1, 1957). The *Pumice* case, unlike the others, involved mining claims located for a mineral of widespread occurrence, pumice. The validity of such claims depends upon an affirmative showing of a present demand or market for the mineral. *Foster v. Seaton*, 271 F. 2d 836 (D.C. Cir. 1959). In the *Pumice* case it was shown that pumice from one of the claims had been sold and used for commercial purposes in the past but that operations were then shut down and no present demand existed for the pumice. The Department held that although the claims may have been valid in the past they had become invalid for lack of a discovery. The *Pumice* case did not involve applications for patent.

The *Adams* case involved applications for patent to gold placer claims. The Department held the claims to be null and void for the reason that the evidence showed that the gold values on the claims were so low in comparison to the cost of operations required to recover the gold that a prudent man would not be justified in the further expenditure of labor and means with a reasonable prospect of developing a valuable mine. The Department rejected the claimant's contention that more weight should have been given to the evidence of values recovered in the past, saying that it was not sufficient that a valuable discovery may have been made in the past, citing the *Logomarcini* case.

The *Adams* decision was challenged in court but sustained in *Alonzo A. Adams v. United States*, 318 F. 2d 861 (9th Cir. 1963). The court expressly affirmed the ruling in the *Logomarcini* case.

More recently the same court has rendered another decision which appears to be decisive of the central issue presented in the appeals under consideration. In *Mulkern v. Hammitt*, 326 F. 2d 896 (1964), the court sustained a decision of the Department holding two mining claims null and void for lack of a valid discovery of gypsum or silica. *United States v. G. C. (Tom) Mulkern*, A-27746 (January 19, 1962). The claims, which were located on December 23, 1922, were contested in 1944 and a hearing was held in 1957. The issue was whether during the period from December 23, 1922, to May 15, 1926, or between August 31, 1928, and May 3, 1929, there had been a valid discovery on the claims. The two periods of time were the only times in which the land in the claims was open to mining location. The evidence at the hearing was largely to the effect that at the time of the hearing there was no

market for the minerals in the claims. There was only slight evidence as to marketability prior to May 3, 1929. The Department held the claims to be null and void for lack of a showing of marketability during the two periods of time when the land was open to location.

In the ensuing litigation, the claimant contended that conditions in the 1957 period, when the hearing was held, had no bearing on the issue of discovery; that the testimony as to such conditions was irrelevant; and that the only question was whether, in 1922 and the years immediately thereafter, the situation satisfied the *Castle v. Womble* test. The court rejected the contention, saying—

The appellant's contention is erroneous. This court, in the recent case of *Adams v. United States*, 318 F. 2d 861, dealt with this very question, and held that even though the mining claim there in litigation would, at one time, have satisfied the test, nevertheless the Government rightfully denied a patent to the claimant since, *because of changed economic conditions*, the claim did not *presently* satisfy the test. The fact that in *Adams* the attack was upon the Government's refusal to issue a patent, while in the instant case the Government was seeking to nullify the appellant's claim as to which he had never requested or received a patent, does not distinguish the *Adams* case from the instant one. The problem in both cases is whether the public lands of the United States should be perpetually incumbered and occupied by a private occupant just because, at one time, he had there a valuable mine which has now been completely worked out; or because he had on his location a mineral which, in the then practice of the building industry, had a market, but which, on account of a change in building practice, *no longer has a market or a reasonable prospect of a future market*; or because, at the time of his discovery, transportation facilities were available which made exploitation feasible, which facilities are no longer available. (P. 898; italics added.)

The *Mulkern* case, then, is clear authority for the proposition that although a mining claim may once have been valid because it contained a valuable deposit of mineral the claim will become invalid if the mineral deposit loses its value because of changes in economic conditions, such as the loss of a market or transportation facilities. That the ruling is not confined to instances involving minerals of common occurrence, such as pumice, is plain from the court's statement that the *Adams* case decided the same question. That case, of course, dealt with gold.

In the *Adams* case, also, the court ruled that in applying the prudent man rule "evidence as to the cost of extracting the mineral is relevant" and that the Department properly considered evidence on that point with respect to the *Adams* claims. 318 F. 2d at 870. And, years earlier, the Supreme Court had indicated that "the cost of mining, transportation and reduction" was relevant to determining whether a valid discovery had been made. *Cole v. Ralph*, 252 U.S. 286, 299 (1920). That case, too, concerned claims located for gold.

Thus, the economic conditions which may be considered in determining whether a valuable mineral deposit has been discovered include such factors as the cost of mining, transporting, and processing the

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mineral and the existence of a market for the mineral, whether it be deemed one of intrinsic value, such as gold, or one of common occurrence, such as pumice.

In this connection, note should be taken of references by the parties to the Solicitor's opinion of September 20, 1962, *supra*, on the "Marketability Rule" as applied to the law of discovery. The claimants purport to find comfort in the statement in the opinion that

An intrinsically valuable mineral by its very nature is deemed marketable, and therefore merely showing the nature of the mineral usually meets the test of marketability. 69 I.D. at 146.

Claimants state that manganese is an intrinsically valuable mineral and therefore is marketable. This overlooks the fact, however, that the opinion carefully states that showing the mineral discovered to be an intrinsically valuable one only "*usually* meets the test of marketability" (*italics added*). The opinion otherwise makes it amply clear that the marketability test

* * * is in reality applied to all minerals, although it is often mistakenly said to be applied solely to nonmetallic minerals of wide occurrence. *Id.*

Thus, it is entirely proper to require the holder of a claim containing a low grade of an intrinsically valuable mineral to show that there is a market or demand for the mineral in the claim.

What does the application of these rules to the four cases under consideration show?

First, the evidence developed at the respective hearings seems to show that deposits of manganese exist on the claims in question and that some of the manganese is of a grade that was mined and sold in the past from patented manganese claims in the same area and from some of the contested claims themselves. The quantity of such manganese in each claim is not clearly established and it is questionable to what extent minable deposits exist on the claims.

Second, the evidence establishes that, except possibly in the case of the Beecroft claim, all sales of manganese were made during World War II and the post-war period to August 5, 1959, when a Government carlot buying program was in effect. Upon termination of the Government program on August 5, 1959, sales of manganese in the area of the claims, and, indeed, of practically all domestically produced manganese, ceased. This apparently was caused by a break in the price of manganese from around \$90 per ton to \$40-50 per ton.

Third, up to the time of the respective hearings (the last one being held on March 1, 1963, in the Beecroft case), no further sales of domestic manganese had been made, except possibly in the case of some captive mines owned by steel companies, because no profit could be realized from sales. The market for manganese has been supplied by imported manganese of the same or higher grade.

Fourth, the claims are being held in reserve with the hope and expectation that some day the market will return. However, little basis has been given for this hope or expectation.⁴

In the hearing on the Beecroft claim, it was asserted by the claimant that manganese was sold from the claim up to August 5, 1960, but there is at least a question whether the proper date was not August 5, 1959 (Beecroft Tr. 60).

Considering the evidence as a whole, it seems inescapable that what sales of manganese have been made from some of the claims and from other patented claims in the area were made during a period of national emergency and of a Government price support program which ended on August 5, 1959, and that the manganese on the claims has had no market since that date because of a 50 percent reduction in the market price which makes it unprofitable to mine and sell domestic manganese today. Outside of some speculation about development of new processes for utilizing low grade manganese economically, there is no evidentiary basis for any reasonable expectation that in the reasonably near future high price levels will return which will make it economic to mine the claims. The fact is that manganese has not been sold from the area in recent years and there is no evidence that sales may reasonably be expected in the future.

In the circumstances, the ruling in the *Mulkern* case is clearly applicable and it must be concluded that the contested claims are null and void for lack of a present discovery of valuable mineral deposits due to changed economic conditions.⁵

This makes it unnecessary to consider other issues raised in the appeals, such as whether the claims were properly located as lode claims instead of as placer claims and whether the Shoup claims are invalid because of bad faith on the part of the claimant.

Therefore, 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 decisions of the Assistant Director are affirmed to the extent that they held that some of the contested claims are null and void and reversed to the extent that they held the remaining claims to be valid.

EDWARD WEINBERG,
Deputy Solicitor.

⁴ The evidence referred to up to this point may be found in the transcripts of the various hearings as follows: Denison Tr. 294, 355, 357, 360, 362, 386, 388, 391, 439-441, 455, 456; Shoup Tr. I (first hearing) 137, 139, 177, 210, 212, 213; Shoup Tr. II (second hearing) 79, 113-116, 128, 130, 131, 170, 211; Smith Tr. 105, 111, 112, 124, 187, 232-233, 237, 243, 257, 263; Beecroft Tr. 33-37, 51, 57, 60, 61, 75-78, 89-91, 97.

⁵ The burden is on a mining claimant to show by a preponderance of the evidence that he has a valid mining claim. *Foster v. Seaton*, *supra*. Thus, the claimants had the burden of showing that their manganese deposits were still valuable under current economic conditions. They clearly did not sustain the burden.

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APPENDIX

Claimant and Appeal No.	Arizona Contest No. and Patent Application No.	Names of Lode Claims and General Description of Area of Claims	Date of Hearing Examiner Decision and Action Taken	Date of Assistant Director's Decision and Action Taken
Alvis F. Denison, A-29884.	Contest No. 10406. Mineral Patent Application 023529, filed Oct. 1, 1959.	B.V.D. Nos. 1 & 2, Hillcrest No. 22. Within sec. 19, T. 11 N., R. 15 E., G. & S.R.M., Arizona.	Aug. 23, 1961. Found claims invalid as no valuable mineralization in lodes, rejected patent applications.	Oct. 30, 1962. Vacated decision as to 4 claims (Miss Lottie Nos. 5 & 6, B.V.D. No. 3, Little Pine No. 9), found them valid as lodes, affirmed as to other claims on ground no discovery.
	Contest No. 10407. Mineral Patent Application 021383, filed June 4, 1959.	Miss Lottie Nos. 4, 5, & 6, D & W Nos. 3, 4, & 5. Within sec. 14, T. 11 N., R. 14 E., G. & S.R.M., Arizona.		
	Contest No. 10408. Mineral Patent Application 021390, filed June 4, 1959.	Little Pine Nos. 7, 8, & 9, B.V.D. Nos. 3, 4, & 5, Hillcrest No. 23. Within secs. 18 & 19, T. 11 N., R. 15 E., G. & S.R.M., Arizona. All within Coconino County and the Sitgreaves National Forest.		
Leo E. Shoup A-29983.	Contest No. 10426. Mineral Patent Application 024012, filed Dec. 4, 1959.	Manganese Nos. 3, 4, & 5, Black Diamond Nos. 1* & 2 (*No. 1 was relinquished by the claimant on May 15, 1962, and is not involved in the appeal.) Within secs. 19, 20, 29, & 30, T. 14 N., R. 10 E., G. & S.R.M., Arizona.	Feb. 28, 1962. Found claims invalid for lack of discovery of valuable mineral in lodes, rejected patent applications.	Feb. 15, 1963. Affirmed.
	Contest No. 10427. Mineral Patent Application 024013, filed Dec. 4, 1959.	Manganese Nos. 9 & 10. Within sec. 20, T. 14 N., R. 10 E., G. & S.R.M., Arizona. All within Coconino County and the Coconino National Forest.		
Reid Smith A-30190.	Contest No. 10507. Mineral Patent Application 030459, filed Mar. 6, 1961.	Sunset Nos. 1-16, inc. Within secs. 13 & 24, T. 14 N., R. 9 E., and secs. 18 & 19, T. 14 N., R. 10 E., G. & S.R.M., Arizona. All within Coconino County and Coconino National Forest.	Feb. 20, 1963. Found claims valid, dismissed contest.	Oct. 23, 1963. Affirmed.

APPENDIX—Continued

Claimant and Appeal No.	Arizona Contest No. and Patent Application No.	Names of Lode Claims and General Description of Area of Claims	Date of Hearing Examiner Decision and Action Taken	Date of Assistant Director's Decision and Action Taken
Estate of Robert F. Beecroft A-30210.	Contest No. 10506. Mineral Patent Application 030188, filed Jan. 26, 1961.	Rough Hill #1 Lode. Within sec. 30, T. 14 N., R. 10 E., G. & S.R.M., Arizona. Coconino County, Coconino National Forest.	June 7, 1963. Found claims valid, dismissed contest.	Nov. 6, 1963. Affirmed.

APPEAL OF KORSHOJ CONSTRUCTION COMPANY

IBCA-321

*Decided April 29, 1964***Contracts: Appeals**

Questions of law may be determined by the Board of Contract Appeals under a standard-form Government contract, as well as questions of fact.

Contracts: Appeals—Contracts: Contracting Officer—Contracts: Interpretation

A provision in a standard-form Government contract which specifically grants the contracting officer authority to decide particular matters does not exempt his decisions upon such matters from review under the "Disputes" clause of the contract, even though the provision is written in terms that call for the exercise of judgment and discretion by him, unless the provision affirmatively discloses an intent that decisions by the contracting officer with respect to such matters shall be final.

Contracts: Appeals—Contracts: Contracting Officer—Contracts: Waiver and Estoppel

Decisions by a contracting officer not to waive the defense that a claim is untimely are subject to review under a standard-form "Disputes" clause, irrespective of whether the waiver authority of the contracting officer is express, as under the "Changes" clause, or is implied, as under some provisions of "Protests" clauses.

Contracts: Appeals—Contracts: Comptroller General

Decisions upon questions of law made by the Comptroller General are without binding effect in "Disputes" clause proceedings that have as their subject claims which, although they involve the same problems, are not the same claims, as were the subject of his rulings. In such situations the decisions of the Comptroller General constitute significant and valuable precedents, but should not be followed if outweighed by other precedents.

BOARD OF CONTRACT APPEALS

In an interlocutory decision, dated August 27, 1963,¹ and a supplemental decision, dated September 27, 1963,² the Board denied motions

¹ 70 I.D. 400, 1963 BCA par. 3848, 5 Gov. Contr. 501.

² 70 I.D. 434, 1963 BCA par. 3865.

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for the dismissal of this appeal and for summary judgment thereon in favor of the Government. The ground for those motions was that appellant had not submitted to the contracting officer timely notices of its claims, or timely protests against the administrative action that allegedly gave rise to such claims. The Board's reasons for denial of the motions were that the notice and protest requirements of the contract could be waived by the contracting officer, that the correctness of his determination not to waive them could be reviewed by the Board, and that pertinent factual issues had been joined which could not properly be resolved without according appellant an opportunity for a hearing pursuant to the "Disputes" clause (Clause 6) of the contract.³

A motion for reconsideration of the decisions just mentioned has been filed with the Board by the Department Counsel. The motion, which is dated February 7, 1964, asserts that those decisions are in conflict with a decision of the Comptroller General, which was rendered after our decisions had been issued. The decision thus invoked is Dec. Comp. Gen. B-152346 (November 22, 1963).

The decision of the Comptroller General, in so far as here relevant, dealt with a claim for an equitable adjustment on account of an alleged change in the specifications. The claim arose under a Coast Guard contract which contained a "Changes" clause identical with Clause 3 of the contract here involved.⁴

³ That clause—Clause 6 of Standard Form 23A (March 1953) as amended to conform to the Wunderlich Act—reads as follows:

"DISPUTES—Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the contracting officer, who shall furnish to the contractor a written copy of his decision. Such decision shall be final and conclusive unless within 30 days from the date of receipt thereof, the contractor appeals therefrom by mailing or otherwise furnishing to the contracting officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representatives upon such appeal shall be final and conclusive unless the decision is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence. In connection with any appeal proceeding under the 'Disputes' clause, the contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the contractor shall proceed diligently with the performance of the contract and in accordance with the contracting officer's decision."

⁴ That clause—Clause 3 of Standard Form 23A (March 1953)—reads as follows:

"CHANGES—The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim of the Contractor for adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the Contractor of the notification of change: *Provided, however,* That the Contracting Officer, if he determines that the facts justify such action, may receive and consider, and adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Clause 6 hereof. But nothing provided in this clause shall excuse the Contractor from proceeding with the prosecution of the work as changed. Except as otherwise herein provided, no charge for any extra work or material will be allowed."

The contracting officer denied the claim upon the ground that there had been no change in the substance of the specifications, and also on the ground that the claim had not been presented within the 30 days allowed by the "Changes" clause. An appeal was taken to a Coast Guard Board of Contract Appeals that had recommendatory authority only. The Board recommended that the claim be denied upon the ground that there had been no change, seemingly without discussing the question of whether consideration of the claim was barred by the lateness of its presentation. This recommendation was adopted by the head of the Department, whereupon the contractor submitted the claim to the General Accounting Office. The Comptroller General rejected the claim on the ground that it was untimely, saying:

The Board proceeded to hear, consider and, upon request, recommend denial of the contractor's claim on the merits. Irrespective of the merits of the claim, the record shows no dispute as to the fact that the contractor did not present its claim for adjustment within the period required by the contract, i.e., 30 days of the issuance of the change in the specifications. The question of whether a claim is timely and in conformity with the contract provisions is one of law. *Poloron Products, Inc. v. United States*, 126 Ct. Cl. 816; 116 F. Supp. 588 (1953). Therefore, it may be decided by this office. See 42 Comp. Gen. 357, B-150173, dated January 11, 1963.

It is clear under the language of the Changes clause of the contract that an untimely claim is barred unless the contracting officer chooses to waive the defense of untimeliness. *The Arundel Corporation v. United States*, 96 Ct. Cl. 77 (1942), and cases cited therein. The Board itself cannot waive the defense. See *P.L.S. Coat & Suit Corp. v. United States*, 148 Ct. Cl. 296, 300-301; 180 F. Supp. 400, 403 (1960). In the instant case, the contracting officer has not only not waived the defense, but has consistently relied upon it. Accordingly, since claim No. 1 for \$13,605.30 was not presented in accordance with the provisions of the contract to which the contractor had agreed, we find no legal basis on which the claim might be allowed. See 18 Comp. Gen. 232, citing *Plumley v. United States*, 226 U.S. 545 (1913), and B-140907, dated November 6, 1960, citing *Yuhasz v. United States*, 109 F. 2d 467 (7th Cir. 1940).

The asserted conflict in decisions springs, of course, from the statement in the foregoing quotation that "The Board itself cannot waive the defense." The Government's concept of the applicability of this statement to the two claims involved in the instant appeal is explained by Department Counsel in the following words:

As to Claim No. 1, the first notice that the Government received was in the letter of October 26, 1961 which was received almost 4 months after completion of all work under the contract (July 3, 1961). As to Claim No. 2, the first indication of claim was a vague reference in a letter dated July 31, 1961. The details were not supplied until February 17, 1962. In the Findings of Fact of February 28, 1962, the contracting officer specifically invoked the provisions of Paragraph 9, Protests, and denied Claim No. 1 on that basis. Similarly, as to Claim No. 2, the contracting officer denied the claim on the same basis in the letter decision of March 27, 1962. The contractor has never controverted these facts. In all pertinent respects, the facts in this

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appeal are identical with those in B-152346 except that the contracting officer here relied upon Paragraph 9, Protests, rather than Clause 3, Changes. These provisions are identical in meaning and substance as to the necessity for the filing of written protests within 30 days of any action by an officer of the Government which he considers requires him to do work outside the scope of the contract or which he considers unfair. No such protests were made. The rule of B-152346 is equally applicable to Paragraph 9, Protests.⁵

These contentions necessitate an exploration of the foundations for the statement that "The Board itself cannot waive the defense." The reasons—whether logical or practical—for the adoption of such a rule are not specified in the decision of the Comptroller General.

If we look at the language of the "Disputes" clause (Clause 6), we see it says that "*any* dispute concerning a question of fact arising under this contract" (Italics supplied) shall be decided, in the first instance, by the contracting officer and, on appeal, by the Secretary or his duly authorized representatives. If we then look at the language of the "Changes" clause, we see it says that when the parties fail to agree upon the adjustment to be made for an alleged change, "the dispute shall be determined as provided in Clause 6 hereof." The meaning naturally to be drawn from these provisions is that any dispute which the contracting officer has authority to decide under the "Disputes" clause may be made the subject of an appeal to the Secretary or his duly authorized representatives, and that the disputes which the contracting officer has authority to decide under that clause include disputes over matters that have to do with equitable adjustments under the "Changes" clause.

Furthermore, the "Changes" clause also says that the contracting officer may consider late claims "if he determines that *the facts* justify such action" (Italics supplied). The natural meaning of this phrase is that the contracting officer shall be guided by "the facts" whenever he decides the question of whether to waive the defense of untimeliness, and, consequently, that the contracting officer makes a determination "concerning a question of fact arising under this con-

⁵ That paragraph—Paragraph 9 of the General Conditions of the contract—reads as follows:

"Protests. If the contractor considers any work demanded of him to be outside of the requirements of the contract, or considers any record or ruling of the contracting officer or of the inspectors to be unfair, he shall immediately upon such work being demanded or such record or ruling being made, ask, in writing, for written instructions or decision, whereupon he shall proceed without delay to perform the work or to conform to the record or ruling, and, within thirty (30) calendar days after date of receipt of the written instructions or decision (unless the contracting officer shall grant a further period of time prior to commencement of the work affected) he shall file a written protest with the contracting officer, stating clearly and in detail the basis of his protest. Except for such protests as are made of record in the manner herein specified and within the time limit stated, the records, rulings, instructions, or decisions of the contracting officer shall be final and conclusive. Instructions and/or decisions of the contracting officer contained in letters transmitting drawings to the contractor shall be considered as written instructions or decisions subject to protest as herein provided."

tract," within the meaning of the "Disputes" clause, whenever he decides that question.

The "Protests" paragraph provides for two distinct types of action by a contractor who believes that extra work is being required of him or that he is being treated unfairly. The first is the submission of a request for written instructions. This is to be done "immediately" upon the making of the demand or ruling to which the contractor objects. The second is the submission of a protest to the written instructions. This is to be done within 30 days after their receipt "unless the contracting officer shall grant a further period of time prior to commencement of the work affected." The language just quoted has no counterpart in the provision which enjoins the contractor to ask for written instructions "immediately." Authority to waive lack of compliance with that provision is neither expressly conferred nor expressly withheld by the terms of the "Protests" paragraph.

The decisions relating to "Protests" provisions consistently hold, however, that a failure to comply with their terms may be waived, notwithstanding the absence of an express authorization for so doing.⁶ These holdings may be explained on the ground that the requirements imposed by "Protests" provisions are procedural, rather than substantive, in nature and, not being prescribed by law, may be waived by the agents of the party intended to be benefited thereby, that is, the Government. Thus, it has been said that "The provision requiring protest within ten days was a provision inserted for the benefit of the defendant and, of course, could be waived by it."⁷ Nor has the presence of an express authorization been deemed a necessary prerequisite for the waiver of other forms of contract notices.⁸

With respect to the "Protests" paragraph, then, we see that waiver of a failure to request written instructions is impliedly authorized, and that waiver of a failure to protest written instructions is expressly authorized. The contracting officer is mentioned only in connection with situations of the second type, and the wording used—"unless the contracting officer shall grant a further period of time prior to commencement of the work affected"—⁹ is not materially different from

⁶ *Grier-Lowrance Construction Company, Inc. v. United States*, 98 Ct. Cl. 424, 461-62 (1943); *J. D. Armstrong Company, Inc.*, IBCA-40 (August 17, 1956), 63 I.D. 289, 316-17, 56-2 BCA par. 1043; *Jack Willson*, IBCA-7 (June 14, 1955), 62 I.D. 225, 228, 6 CCF par. 61,875; see *McWaters and Bartlett*, IBCA-56 (October 31, 1956), 56-2 BCA par. 1140; *Korshoj Construction Company*, IBCA-9 (May 2, 1956), 63 I.D. 129, 134, 6 CCF par. 61,867.

⁷ *Arundel Corporation v. United States*, 96 Ct. Cl. 77, 110 (1942).

⁸ *Palumbo v. United States*, 125 Ct. Cl. 678, 687-89 (1953) (notices of delays).

⁹ The Board expresses no opinion upon the question whether the presence of this phrase negates the existence of an implied authority whereby a failure to protest written instructions could be waived after commencement of the work affected. *Of. P.L.S. Coak & Suit Corporation*, 148 Ct. Cl. 296, 298-301 (1960).

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the wording used throughout the contract to confer authority upon that official over matters within the scope of the "Disputes" clause.

It must be concluded that the terminology of the "Changes" and "Protests" provisions of the instant contract offers no valid reason for a holding that waiver determinations by the contracting officer constitute a class of determinations to which the appeal provisions of the "Disputes" clause do not apply.

Department Counsel seems to find a reason for such a holding in the statement, which appears in the foregoing quotation from Dec. Comp. Gen. B-152346, that "The question of whether a claim is timely and in conformity with the contract provisions is one of law." But the question with which we are confronted, when a contractor appeals to us from a failure or refusal of the contracting officer to waive the defense of untimeliness, is not whether the claim is timely and in conformity with the contract provisions. It is the entirely different question of whether, as a matter of fact, the Government has or will be prejudiced by reason of the lateness of the assertion of the claim and whether, as matter of fact, consideration of the claim is justified, notwithstanding its lateness.

The Court of Claims has, upon occasion, distinguished between determinations as to whether particular circumstances do or do not exist, which it regards as determinations upon questions of fact, and determinations as to whether the contract does or does not attach particular consequences to given sets of circumstances, which it regards as determinations upon questions of law.

The leading case of *Shepherd v. United States*¹⁰ illustrates the application of this distinction to the subject of timeliness. One issue there raised was whether the contractor had complied with the notice provisions of articles 3 and 4 of the contract, relating, respectively, to "Changes" and "Changed Conditions."¹¹ With respect to that issue, the decision states:

* * * the contracting officer held that plaintiff was not entitled to maintain his claim because it had not been filed until after all the work had been completed. *His finding that the claim was not filed until after all the work had been completed, unreversed on appeal, is binding on us, but his conclusion that for this reason plaintiff is not entitled to recover is not binding.*

Also, the finding of the [War Department] Board [of Contract Appeals] that plaintiff did not tell the Chief of Operations and the resident engineer that he intended to make a claim for extra compensation under article 4 is binding on us; but its conclusion that for that reason plaintiff cannot recover is not binding.

¹⁰ 125 Ct. Cl. 724 (1953).

¹¹ The contract was a Corps of Engineers contract that included the same "Changes" and "Changed Conditions" clauses as Standard Form 23 (Revised April 3, 1942), except that the provision requiring approval by the head of the department for changes exceeding \$500 was omitted.

since this conclusion calls for a construction of the contract. (Italics supplied.)¹²

Another noteworthy example is provided by *Poloron Products, Inc. v. United States*.¹³ This case is cited in Dec. Comp. Gen. B-152846 as authority for the statement that "The question of whether a claim is timely and in conformity with the contract provisions is one of law." A major point of controversy was whether a determination of the contracting officer had been communicated to the contractor in a manner that was sufficient to start the running of the appeal period of 30 days allowed by the "Disputes" clause. Concerning this point, the decision states:

The [War Department] Board of Contract Appeals granted plaintiff a full hearing on the merits of its claims because it deemed a consideration on the merits necessary to a decision on the jurisdictional question presented, that is, whether a timely appeal had been made. The Board then, in addition to dismissing the appeal for failure to perfect it within the required time, made and incorporated as part of its decision, detailed findings of fact which were adverse to plaintiff on all its claims. While the decision of the head of the department as to the facts is binding on this court under *United States v. Wunderlich*, 342 U.S. 98, its decision as to whether a timely appeal has been perfected within the meaning of the contract, being a question of law, is not one to which the limitation of *Wunderlich* attaches. *W. C. Shepherd v. United States*, 125 C. Cls. 724, 729; See *Callahan Construction Co. v. United States*, 91 C. Cls. 538, 616.

Thus, we have in effect a two fold decision by the Board, part of which is binding here and part which is not. (Italics supplied.)¹⁴

These decisions, together with such contract provisions as the waiver authorization of the "Changes" clause, clearly show that the process of reviewing determinations by a contracting officer with respect to the subject of timeliness, and, in particular, the process of reviewing determinations as to whether lack of timely notices or protests should be waived, is largely a process of determining matters of fact.

It is true, of course, that the question of what ultimate conclusions should be drawn from the facts found is, as the foregoing decisions indicate, a question which the Court of Claims sometimes regards as a question of law, even where the applicable standards of decision are contractual provisions rather than rules of statutory or common law. This, however, does not mean that the Court regards the drawing of such legal conclusions, much less the making of the findings of fact from which they are drawn, as beyond the jurisdiction conferred by the "Disputes" clause or by such documents as the Charter of this Board.¹⁵ It merely means that the Court regards such legal conclusions as not possessing the degree of finality prescribed by the "Disputes" clause or by section 1 of the so-called *Wunderlich Act*,¹⁶

¹² 125 Ct. Cl. at 729.

¹³ 126 Ct. Cl. 816 (1953).

¹⁴ *Id.* at 824.

¹⁵ 43 CFR 4.4.

¹⁶ 41 U.S.C. sec. 321.

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and as open to the wider type of judicial review permitted by section 2 of that Act.¹⁷

The previously cited *Shepherd* case is a good example. There the Court disagreed with, and refused to abide by, the conclusions of the contracting officer and the War Department Board of Contract Appeals with respect to certain subjects. But it specifically held that the factual determinations made by those officials with respect to the same subjects were binding. Nor did it so much as suggest that the jurisdiction conferred upon those officials had been exceeded when they drew the conclusions which were later overruled by the Court, or when they issued the decisions which gave effect to such conclusions.

A striking illustration of the proposition that the existence of jurisdiction to decide does not depend upon the finality of the decisions rendered is afforded by *McWilliams Dredging Company v. United States*.¹⁸ That case involved a question of contract interpretation which had been decided by the Army Board of Contract Appeals pursuant to a memorandum of the Secretary of War that authorized the Board, in certain circumstances, to "consider and administratively pass on appeals not specifically or impliedly authorized by the contract." The Court of Claims held that the decision of the Board was without binding effect, since the question decided related to contract interpretation and thus was a question of law, and since neither the "Disputes" clause nor the memorandum of the Secretary of War gave finality to decisions upon questions of law. The effect of the memorandum was described by the Court in the following words:

It is evident that the Secretary was authorizing the Board to act for him in the way that any owner would act if a contractor was dissatisfied with the way he was treated by the owner's representative in charge. He would listen to the contractor's story, and if he thought that his representative had been unfair, he would reverse him. He would do this, not because the contract gave him any authority to make a final decision which would bar the contractor from relief in the courts for breach of contract, but because it would be the natural and fair way for an owner to act. And just as the contractor in the supposed case could sue for breach of contract if his appeal to the owner did not give him satisfactory relief, so can the contractor with the Government, if he has not contracted away his right to do so.¹⁹

A more recent illustration is to be found in *William A. Smith Contracting Company, Inc. v. United States*.²⁰ There the Court of Claims was called upon to review a decision of the Interior Board.²¹ That

¹⁷ 41 U.S.C. sec. 322.

¹⁸ 118 Ct. Cl. 1 (1950).

¹⁹ *Id.* at 16-17. The significance of this passage as a guideline for the determination of contract disputes is stressed in *Cosmo Construction Company*, IBCA-412 (February 20, 1964), 71 I.D. 61, 62, 1964 BCA par. 4059, and *Eastern Maintenance Company*, IBCA-275 (November 29, 1962), 69 I.D. 215, 220, 1962 BCA par. 3583, 5 Gov. Contr. 44(h).

²⁰ 292 F. 2d 847 (1961).

²¹ *William A. Smith Contracting Company, Inc.*, IBCA-83 (June 16, 1959), 66 I.D. 233, 59-1 BCA par. 2223, 1 Gov. Contr. 481, 482.

decision had allowed one claim of the contractor, but had disallowed two others. Each of the disallowed claims turned upon an issue which the Court regarded as an issue of contract interpretation, and, therefore, as an issue of law. The Court, accordingly, held that the decision of the Board upon these claims was subject to review under section 2, rather than section 1, of the Wunderlich Act. It then turned its attention to the merits of the disallowed claims, held that the interpretation which the Board had placed upon the relevant contract provisions was the correct one, and gave judgment against the contractor. The Court, however, nowhere suggested that the Board erred in venturing to hear and decide claims which turned primarily, if not wholly, on what were, in the eyes of the Court, questions of law.

The Charter of the Interior Board expressly adopts the concept of jurisdiction we have been discussing. 43 CFR 4.4 states:

The Board exercises the authority of the Secretary in deciding appeals from findings of fact or decisions by contracting officers of any bureau or office of the Department of the Interior, wherever situated, or any field installation thereof. Decisions of the Board on such appeals are final for the Department. *The Board may, in its discretion, decide questions which are deemed necessary for the complete decision on the issue or issues involved in the appeal, including questions of law* (Italics supplied).

Pursuant to this provision, the Board has held that its jurisdiction comprehends the determination of questions of law, whether presented in the form of pure questions of law or in the form of mixed questions of law and fact.²²

When all of these considerations are taken into account, it is evident that the principles governing the determination of questions of law, in disputes pertaining to contracts, offer no support for a conclusion that the defense of untimeliness can be waived by the contracting officer alone.

A second ground which has been advanced as support for such a conclusion is that the authority to waive is conferred in terms which mention only the contracting officer and, hence, may be exercised only by him. This argument is necessarily inapplicable to situations where, as in the case of a failure to ask for written instructions, the authority to waive is conferred by legal implication, rather than by express provision, since the reasons for implying such an authority are no less valid when the persons who will exercise it include the head of the Department and his authorized representatives than they are when such persons consist of the contracting officer and his authorized

²² *Robert J. Gordon Construction Company*, IBCA-216 (April 21, 1960), 60-1 BCA par. 2594, 2 Gov. Contr. 236; *Commercial Metals Company*, IBCA-99 (August 27, 1959), 66 I.D. 298, 305, 59-2 BCA par. 2298, 1 Gov. Contr. 600, 601.

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representatives. Thus, the argument that the waiver authority of the contracting officer is intended to be exclusive could, in any event, be applicable only to situations where such authority is expressly granted to the contracting officer, as in the case of the provision of the "Changes" clause that "the Contracting Officer, if he determines that the facts justify such action, may receive and consider" late claims.

With respect to situations of the latter type, the argument in question lacks force because it is inconsistent with a well-established principle of Government contract law. This principle is to the effect that a contract provision which grants the contracting officer authority to decide particular matters does not exempt his decisions upon such matters from review under the "Disputes" clause, unless the provision affirmatively discloses an intent that the decisions made by the contracting officer with respect to such matters are to be final.

A notable discussion of the principle just mentioned appears in *Fred R. Comb Co. v. United States*.²³ The Bureau of Indian Affairs had made a contract which contained a "Disputes" clause (Article 15) applicable to "disputes concerning questions arising under this contract," and which also contained a clause (Paragraph 4) providing that the Commissioner of Indian Affairs—who was the contracting officer—"shall be the interpreter" of "the true intent and meaning of the drawings and specifications."²⁴ A dispute arose over the interpretation of one of the specifications, the Commissioner decided the dispute against the contractor, an appeal was taken, and the Secretary of the Interior reversed the Commissioner.²⁵ The Comptroller Gen-

²³ 100 Ct. Cl. 259 (1943).

²⁴ The contract was on a form, designed for use in connection with W.P.A. projects, that included the same "Disputes" clause as Standard Form 23 (Revised September 9, 1935), with modifications which made special provision for the determination of certain types of labor disputes and which, in the phrase first above quoted, substituted "questions" for "questions of fact."

²⁵ Prior to World War II, appellate decisions under "Disputes" clauses were usually made by the head, or an assistant head, of the department concerned. This arrangement had various drawbacks; for example, the officials concerned rarely had time to conduct formal hearings, give personal consideration to the record, or observe other quasi-judicial safeguards. As a result, most major contracting agencies now utilize boards of contract appeals, who serve, on behalf of the head of the department, as the "duly authorized representatives" mentioned in the "Disputes" clause. In the Department of the Interior, the first step away from the earlier arrangement was the vesting of jurisdiction to decide contract appeals in the Solicitor of the Department. This was accomplished by Order No. 2392 (12 F.R. 8423), dated December 9, 1947. The second step was the creation of the Interior Board of Contract Appeals, the vesting in it of jurisdiction over contract appeals, and the establishment of quasi-judicial rules of procedure to govern the presentation and consideration of such appeals. This was accomplished by Order No. 2509, Amendment No. 22 (19 F.R. 9423) and by 43 CFR, Part 4 (19 F.R. 9389), both of which became effective on December 31, 1954.

eral, however, refused to give effect to the determination of the Secretary, and the contractor brought suit for the amount allowed by the latter. The Court of Claims held for the contractor, saying:

Many times in this court the Government has defended a suit on the ground that the claimant had failed to pursue his contractual remedy of appealing to the head of the department from an adverse ruling of the contracting officer, but this is the first case that has been presented to us in which the Government has taken the position that the contractor has not even this remedy and that the contracting officer's decision is final and subject to review not even by his superior in the department.

* * * * *

In justice to Government counsel it should be said that this position is but half-heartedly advanced. It was the position taken by the Comptroller General when he denied the claim. It is patently unsound.

Paragraph 4 of the general conditions of the specifications did make the Commissioner of Indian Affairs, who was the contracting officer, the interpreter of the intent and meaning of the drawings and specifications, but it did not say that his interpretation thereof should be final and subject to review neither by the courts nor by his superior. It must be read in connection with another provision of the contract, of which it is a part, to wit, article 15 of the contract, which provides for an appeal to the head of the department from the decisions of the contracting officer on disputes concerning questions arising under the contract. Effect must be given, of course, to all parts of the contract; no provision should be construed as being in conflict with another one unless no other reasonable interpretation is possible. This is axiomatic. Paragraph 4 of the general conditions of the specifications is not in conflict with article 15 of the contract. Paragraph 4 makes the Commissioner of Indian Affairs the interpreter of the meaning of the specifications, but it does not make his interpretation final and conclusive; it does not say that there shall be no appeal therefrom to the head of the department.

The provisions of article 15 of the contract apply to such disputes as well as others. It is clear that the contractor in this case did have a right to appeal to the head of the department.²⁵

In *United States v. Joseph A. Holpuch Co.*,²⁷ the Supreme Court was presented with a problem which turned upon contractual provisions similar to those involved in the *Comb* case, *supra*, except that the function of interpreting the drawings and specifications was vested in a subordinate of the contracting officer. This subordinate had made a ruling upon a question of interpretation, from which the contractor had made no attempt to take an appeal either to the contracting officer or to the head of the department. The question presented was whether this failure barred the contractor from maintaining a suit to contest

²⁵ 100 Ct. Cl. at 264-66.

²⁷ 328 U.S. 234 (1946).

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the ruling. The Supreme Court held against the contractor, saying that the decision of the subordinate was "clearly appealable" under the "Disputes" clause, and that "no justifiable excuse is apparent for respondent's failure to exhaust the appeal provisions" of that clause.²⁸

The principle affirmed by these decisions has, moreover, been recognized as extending to decisions upon the question of whether the defense of untimeliness should be waived. In the appeal of *Burton-Rodgers, Inc.*,²⁹ counsel for the Government sought to have the Armed Services Board of Contract Appeals dismiss a claim which the contracting officer had denied on the specific ground of untimeliness. The claim was asserted under a "Changes" clause which provided that claims must be asserted within 30 days from receipt of the notification of change, but that "the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract."³⁰ The Board refused to dismiss, saying:

Counsel contends that the power to receive and act upon late claims is within the sole discretion of the Contracting Officer and that his decision in this respect is not appealable to the Secretary of the Navy, or this Board as his authorized representative for the purpose of deciding disputes on appeals.

* * * * *

Clearly, the question of whether Appellant's claim should be received and acted upon was a matter about which the parties could, and did dispute. The Contracting Officer rendered a decision adverse to Appellant in this respect. However, in the absence of any language giving finality to this particular determination, the case falls within the provision of the disputes clause, article 6. * * * In the absence of language giving finality to decisions called for by separate clauses, such as the one in the changes clause regarding temporal circumstances, such decisions are not exceptions to the disputes clause. This interpretation was established by the *Comb* case and its application extends as far back as to include the view taken by the predecessors of this Board. See *Leo Sanders*, BCA No. 955, dated 15 June 1945, 3 CCF 862; *Everett Marine Ways, Inc.*, NBCA No. 203, dated 14 March 1947. In the instant case, we hold that the Contracting Officer's decision as to whether the facts justify receiving and acting upon Appellant's claim is appealable to the Secretary of the Navy under the terms of the disputes clause of the contract. Hence, as the authorized representative of the Secretary

²⁸ *Id.* at 239-40.

²⁹ ASBCA No. 5438 (March 7, 1960), 60-1 BCA par. 2558.

³⁰ The contract was a Navy Department contract that included the same "Changes" clause and, so far as pertinent to the decision, the same "Disputes" clause as Standard Form 32 (November 1949 edition).

for such purpose, there is no lack of jurisdiction on the part of the Board to consider the matter.³¹

The position that determinations of the contracting officer with respect to waiver of the defense of untimeliness are subject to review under the "Disputes" clause has been upheld by us in a long line of decisions.³² It has been upheld by the Armed Services Board of Contract Appeals and its predecessors, not only in *Burton-Rodgers, Inc.* and the appeals there cited, but in other decisions as well.³³ It has also been upheld by the Corps of Engineers Board of Contract Appeals.³⁴

Further support for this position is to be found in the decision of the Court of Claims in *Guyler v. United States*.³⁵ There the contracting officer had rejected, under a "Changes" clause which contained the same temporal provisions as the clause here involved, a claim that had been presented more than 30 days after receipt of the notification of change.³⁶ The Court began its discussion of the subject by quoting the proviso in the "Changes" clause which permitted the contracting officer to consider late claims, and then went on to hold:

The contracting officer was hundreds of miles away. As soon as plaintiff learned that the contracting officer intended to require the plaintiff to paint the interior masonry walls, he immediately filed a claim for pay for the extra work. These facts clearly called for the contracting officer to make an adjustment under the plain terms of the proviso. The ends of justice required that he do so. If the facts of this case do not justify the use of the quoted proviso, it is difficult to conceive a set of circumstances that would.

³¹ 60-1 BCA at pp. 12, 416-17.

³² *Morgan Construction Company*, IBCA-299 (September 6, 1963), 1963 BCA par. 3855, 5 Gov. Contr. 489(g) (notices of changed conditions and delays); *C. O. Terry*, IBCA-330 (July 30, 1963), 1963 BCA par. 3805, 5 Gov. Contr. 405 (protests); *Montgomery-Macri Company and Western Line Construction Company, Inc.*, IBCA-59 and IBCA-72 (June 28, 1963), 70 I.D. 242, 253-59, 1963 BCA par. 3819, 5 Gov. Contr. 419 (notices of changes, changed conditions, and delays); *Monarch Lumber Company*, IBCA-217 (May 18, 1960), 67 I.D. 198, 200-03, 60-2 BCA par. 2674, 2 Gov. Contr. 290 (notices of changed conditions and delays); *Utility Construction Company*, IBCA-149 and IBCA-161 (June 19, 1958), 65 I.D. 278, 58-1 BCA par. 1804 (notices of delays); see *Flora Construction Company*, IBCA-101 (September 4, 1959), 66 I.D. 315, 322, 326, 59-2 BCA par. 2312, 1 Gov. Contr. 647-50 (protests and notices of changes); *McWaters and Bartlett*, *supra* note 6 (protests); *J. D. Armstrong Company, Inc.*, *supra* note 6 (protests).

³³ *Todd Shipyards Corporation*, ASBCA Nos. 2911 and 2912 (January 25, 1957), 57-1 BCA par. 1185 (notices of changes); *Raylaine Worsteds, Inc.*, ASBCA No. 1842 (January 21, 1955) (notices of delays).

³⁴ See *J. A. Jones Construction Company*, Eng. C & A No. 1082 (May 20, 1957) (notices of changed conditions).

³⁵ 314 F. 2d 506 (1963).

³⁶ The contract was a Corps of Engineers contract that included the same "Changes" clause and, so far as pertinent to the decision, the same "Disputes" clause as Standard Form 23A (March 1953).

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In the light of the entire record, we find that plaintiff is entitled to recover on his claim for the additional painting * * *.³⁷

These statements reveal that the Court of Claims is unwilling to attach finality to an arbitrary or capricious failure or refusal of the contracting officer to waive the defense of untimeliness. The appeal taken by the contractor under the "Disputes" clause had resulted in the contracting officer's rejection of the claim being sustained, and, hence, there was no occasion for the Court to make an explicit ruling that the defense of untimeliness could have been waived by the appeals board. Nevertheless, the holding of the Court that the contracting officer's determination was not conclusive leads naturally to an inference that his determination was open to review under the general appellate procedures established by the "Disputes" clause.

The only authority cited in Dec. Comp. Gen. B-152346 as support for the statement that "The Board itself cannot waive the defense" is *P.L.S. Coat & Suit Corporation v. United States*.³⁸ The claim involved in that case arose under a "Changes" clause which contained temporal provisions identical with those interpreted in *Burton-Rodgers, Inc.*³⁹ The Court summarized its ruling in the following words:

Deliveries under this contract were completed May 15, 1953, and final payment was made June 18, 1953. Plaintiff's claim directed to the contracting officer was made on January 12, 1954, some seven months after final payment. It was rejected on the very same grounds which we find applicable here, i.e., that it was untimely under the contract provisions. The ASBCA, despite the Government's assertion of untimeliness, rendered a decision against plaintiff on the merits of the claim. However, the question as to whether plaintiff's claim was timely and in conformity with the contract provisions is one of law which may be decided here. *Poloran Products, Inc. v. United States*, 126 C. Cls. 816, 824. We hold it was not, and plaintiff's petition with regard to its claim under this contract must be dismissed. Adherence must be had to those provisions of Government contracts which provide the mechanics for settling disputes on the administrative level. *United States v. Holpuch Co.*, 328 U.S. 234; *United States v. Blair*, 321 U.S. 730, 735.⁴⁰

This passage reveals that the Court of Claims rejected the claim because it was filed after final payment and, therefore, was not within

³⁷ 314 F. 2d at 510.

³⁸ *Supra* note 9.

³⁹ *Supra* note 29.

⁴⁰ *Supra* note 9, at 300-01.

the scope of the waiver authority expressly granted the contracting officer by the "Changes" clause. There is no intimation that if the claim had been filed before final payment, the Court would still have rejected it, on the quite different ground, nowhere mentioned in the opinion, that the ASBCA lacked authority to review the contracting officer's determination not to waive. On the contrary, the last sentence of the quoted passage with its citation of the *Holpuch* case, *supra*,⁴¹ in which the Supreme Court applied the "Disputes" clause to a decision upon a matter that another provision of the contract specifically authorized a particular official to decide, is an intimation that determinations with respect to waiver are not exempt from review under that clause.

A provision which states, as does the "Changes" clause, that the contracting officer "if he determines that the facts *justify* such action, *may*" (Italics supplied) consider a late claim, necessarily reposes a considerable measure of judgment and discretion in the contracting officer. The exercise of judgment and discretion, however, is something which is often required of contracting officers, and which is quite capable of being reviewed in an appropriate manner under the "Disputes" clause. The appeal of *Conn Structures*,⁴² contains an apt illustration. One of the matters there in controversy was the propriety of a ruling by the contracting officer that concrete forms should not be stripped from the lower floors of a building before the concrete pouring operations for the upper floors had been completed, unless secondary shoring was placed to support the upper floors. The contract provided that "Forms shall be removed only with approval of Contracting Officer." The decision of the ASBCA states:

* * * Having agreed to be bound by the discretionary decision of the contracting officer, appellant can prevail in its claim for additional compensation under the "Changes and Extras" article of the contract only by establishing that the discretion was abused and the decision was arbitrary or unreasonable.

* * * * *

The contracting officer here was obligated [by a contract provision] to prohibit the removal of supporting forms and shoring "until members have acquired sufficient strength to support safely their weight and the load thereon. * * *"
He was compelled to consider the "complete safety of the structure" requirements of the contract provision. In making his decision he had also to consider the safety of appellant's employees and Government personnel who were required to

⁴¹ *Supra* note 27.

⁴² ASBCA Nos. 5162, 5195 and 5245 (April 28, 1960), 60-1 BCA par. 2627.

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be in and about the buildings being constructed. To permit early stripping of forms, desired by appellant, the contracting officer decided complete safety of the structure and personnel required secondary shores as prescribed in his directives. The testimony of some of the experts indicates that secondary shoring was necessary. In these circumstances, that is, where qualified experts differ, a decision made and requirements imposed which are in accord with the opinions of some of the experts cannot be said to be arbitrary or unreasonable. Where the safety of property and personnel is involved, we believe it reasonable to expect the decision to be in accord with that opinion which assured the desired result. We find the decision to be reasonable and that the requirements imposed were not "Changes or Extras."⁴³

It follows that the presence in a contract of language explicitly authorizing the contracting officer to determine whether the defense of untimeliness should be waived, and in so doing to exercise the judgment and discretion inherent in such expressions as "justify" and "may," offers no valid reason for a holding that the exercise of such judgment and discretion is exempt from review under the "Disputes" clause.

We are forced to conclude that the statement "The Board itself cannot waive the defense" is inconsistent with sound principles that are supported by the weight of authority.

There remains the question of whether this statement, by virtue of its inclusion in Dec. Comp. Gen. B-152346, has binding effect with respect to the instant appeal. As Department Counsel points out, we have ruled that decisions by the Comptroller General on specific questions of law are binding upon the Board.⁴⁴ In making these rulings we had regard to the policy expressed in the Dockery Act of July 31, 1894, as amended by the Budget and Accounting Act of June 10, 1921, that "Balances certified by the General Accounting Office, upon the settlement of public accounts, shall be final and conclusive upon the Executive Branch of the Government * * *"⁴⁵

The situation presented by the instant appeal, however, does not fall within the statutory policy. The cases mentioned in the preceding

⁴³ 60-1 BCA at p. 12,988.

⁴⁴ *Merritt-Chapman & Scott Corporation*, IBCA-240 (November 9, 1961), 68 I.D. 863, 364, 61-2 BCA par. 3194, 4 Gov. Contr. 83; *Reid Contracting Company, Inc.*, IBCA-74 (December 19, 1958), 65 I.D. 500, 516-19, 58-2 BCA par. 2037, 1 Gov. Contr. 50-52. *Accord: Gainesville Scrap Iron & Metal Company*, ASBCA No. 3460 (May 28, 1957), 57-1 BCA par. 1274.

⁴⁵ July 31, 1894, sec. 8, 28 Stat. 207; June 10, 1921, title III, sec. 304, 42 Stat. 24; 31 U.S.C. sec. 74. See *Brooks-Calloway Company v. United States* (on remand by the Supreme Court), 97 Ct. Cl. 702, 704-05 (1943); *Economy Pumps, Inc.*, IBCA-94 (February 13, 1957), 57-1 BCA par. 1173.

paragraph were cases where the claim appealed to the Board was the selfsame claim upon which the Comptroller General had passed. In such circumstances the relitigation before the Board of a question of law which had been decided by the Comptroller General in the due exercise of authority conferred upon him by law would hardly seem to be consistent with the principle of "res judicata," as expressed in the statutory phrase "final and conclusive."⁴⁶ On the other hand, the claims now before the Board are ones upon which, so far as the record shows, the Comptroller General has never had occasion to pass. The holding in Dec. Comp. Gen. B-152346 was not rendered with respect to those claims and, hence, the claims are not "res judicata" and, as applied to them, the holding is not a "final and conclusive" determination, but merely a precedent.⁴⁷ Decisions of the Comptroller General are significant and valuable precedents in the field of Government contracts, and have been repeatedly followed by this Board. Here, however, the precedent is so outweighed by other precedents that it should not be followed.

The motion for reconsideration, therefore, is denied.

A review of the appeal file has convinced the Board that it was on sound ground when in the decision of August 27, 1963, it concluded "that the holding of a conference for the purposes stated in 43 CFR 4.9 would simplify procedures and may provide for a speedier disposition of the appeals." The matters that would be considered at such a conference include, among others, the definition of the precise content of the issues, the need for further findings of fact by the contracting officer, the scope of the issues to be covered at the hearing, the identity of the witnesses and documents to be presented, and the extent to which testimony relevant to issues of timeliness would also be relevant to other issues. The Board will, at an early date, set an appropriate time and place for the conference.

HERBERT J. SLAUGHTER, *Member*.

WE CONCUR:

THOMAS M. DURSTON, *Member*.

PAUL H. GANTT, *Chairman*.

⁴⁶ Cf. *Magnolia Petroleum Company v. Hunt*, 320 U.S. 430 (1943); *R. G. Brown, Jr., and Company*, IBCA-356 (July 26, 1963), 1963 BCA par. 3799, 5 Gov. Contr. 406(k).

⁴⁷ This is also true of Dec. Comp. Gen. B-153672 (April 1, 1964) which, as reported in 6 Gov. Contr. 189, appears to parallel in some respects Dec. Comp. Gen. B-152346.

UNION OIL CO. OF CALIFORNIA ET AL.

A-29560 *Decided April 17, 1964****Mining Claims: Patent—Administrative Practice**

The proceedings leading to the cancellation of a mining claim will not be reopened many years after the decision has become final in the absence of a compelling legal or equitable basis warranting reconsideration and an application for patent on a mining claim is properly rejected where, more than sixteen years before the patent application was filed, the claim had been declared null and void and thereafter canceled.

Mining Claims: Determination of Validity—Mining Claims:**Contests—Rules of Practice: Appeals: Failure to Appeal**

A decision declaring a mining claim null and void is conclusive and will not be reopened and vacated in the absence of a strong legal or equitable basis warranting reconsideration even though the basis for the cancellation has been found, in other proceedings, to be erroneous, where the claimant, who received notice of adverse charges against his claim, fails to answer the charges as required and fails to appeal or otherwise attack the decision declaring his claim invalid and takes no action with respect to the claim for many years.

Administrative Practice—Mining Claims: Hearings

A hearing is not required by departmental practice or by the requirements of due process on the rejection of an application for a patent on mining claims which, over 25 years before the patent application was filed, were declared null and void in adverse proceedings or by a default decision after notice of charges against the claims and an opportunity for a hearing thereon were given the record title owner of the claims.

Rules of Practice: Appeals: Failure to Appeal

One who fails to appeal from the cancellation of a mining claim is not entitled to a patent for which application is filed more than 25 years after such cancellation, even though the cancellation was erroneous.

Res Judicata

The doctrine of *res judicata* or its administrative law counterpart, the doctrine of finality of administrative action, has been recognized and applied in appropriate cases before the Department of the Interior since 1883. This doctrine is designed to achieve orderliness in the administration of the public lands as well as finality of decisions which have been closed finally and have not been appealed or otherwise attacked.

Res Judicata

When an administrative officer has acted within his jurisdiction and a judicial review of such action has not been sought on a timely basis, the principles of estoppel, laches and *res judicata* are merged in the doctrine of finality of administrative action and are operative to bar a claim for relief.

*Not in chronological order.

Administrative Practice

Administrative practice, no matter how long standing, is not controlling when it is clearly erroneous.

APPEAL FROM LAND OFFICE DECISIONS

The Union Oil Company of California and others¹ have each appealed to the Director of the Bureau of Land Management from decisions of the Manager of the Colorado Land Office issued on February 16 and 23, 1962. These decisions rejected mineral patent applications for oil shale placer mining claims on lands in Garfield and Rio Blanco Counties, Colorado. The Secretary assumed supervisory jurisdiction because of the importance of the issues involved and assigned the case to the Solicitor for final decision.² Since the facts out of which these appeals arise are identical or similar and, since all of the claims involve identical issues and common questions of law, the appeals will be considered together.

The Manager rejected each of the patent applications under consideration on the ground that appellant's mining claims had been declared null and void in adverse proceedings brought by the Government between 1930 and 1933 on the charge of failure to perform annual assessment work. In 1935, in a case not involved in this appeal, the Supreme Court held that failure to perform annual assessment work was not a ground for cancellation of oil shale placer claims by the Government. *Ickes v. Virginia-Colorado Development Corporation*, 295 U.S. 639 (1935). The basis of the Manager's decisions in the present cases was not that the original cancellations were correct as a matter of law at the time they were made, but rather, that "under * * * principles of finality of administrative action, estoppel by adjudication, and *res judicata* * * *," they cannot now be challenged.

As a preliminary matter, the appellants have joined in a motion to vacate the Colorado Land Office Manager's decisions or, in the alternative, to remand these cases for full hearing, after notice, of matters of fact and law relied upon by the Manager in rendering his decisions. The motion is based on assertions which, for the most part, raise the same issues involved in the appeal. The issues raised in the motion will, therefore, be disposed of in this opinion together with the issues raised by the appellants on the appeal.

The decisions of the Land Office Manager are first attacked on the ground that the Department was required by law and regulation to provide a hearing on the questions of fact and law decided by the

¹ The appeal numbers, the names of the appellants, the serial numbers of their patent applications, and the dates of the decisions appealed from are set forth in Appendix A.

² Memorandum of the Secretary, May 8, 1962.

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Manager. It is further asserted that the Manager exceeded his authority in that the decisions rendered by him were tantamount to an adjudication of the validity of the appellant's mining claims, no hearing having been held. This, appellants contend, operates to deprive them of due process of law.

The assertion is then made that the cancellations upon which the Manager based his decisions were of no effect since the Department never obtained personal jurisdiction over the contestees in the original proceedings and, in fact, never actually canceled some of the claims upon which the present appellants base their applications.

Assuming, *arguendo*, that the Land Office Manager had the authority to decide these cases without providing a *de novo* hearing in each case, the appellants assert that the principles upon which the Manager based his decision are not controlling here. They contend that, so long as he retains jurisdiction over the lands in question, the Secretary may, in the exercise of his supervisory authority, vacate any decision subsequently found to be in error even though the time within which an appeal could be prosecuted has expired. This, the appellants contend, is what occurred when the Secretary decided *The Shale Oil Company*, 55 I.D. 287 (1935), which "overruled" prior departmental decisions canceling oil shale placer claims for failure to perform annual assessment work.

Next, the appellants contend that the doctrine of *res judicata* is not applicable to administrative decisions.

The appellants further assert that the principles of finality of administrative action, estoppel by adjudication and *res judicata* are inapplicable in the present case since the Supreme Court, in *Ickes v. Virginia-Colorado Development Corporation*, *supra*, held that the cancellation of a mining claim upon the ground of failure to perform annual assessment work was beyond the jurisdiction and power conferred by law upon the Secretary and that such cancellation is now subject to collateral attack.

Finally, the appellants contend that since *Ickes v. Virginia-Colorado Development Corporation*, *supra*, and *The Shale Oil Company*, *supra*, the Department has consistently treated the early decisions of the Land Commissioner as being void and of no legal effect and has at all times prior to February 1962, recognized the validity of the appellants' claims.

Early Departmental Decisions and Policy

Before considering the appellants' contentions, the early decisions and departmental policy regarding oil shale placer claims will be examined briefly.

Prior to 1920, the Department of the Interior held that failure to perform annual assessment work on mining claims³ rendered the land subject to relocation by others but did not constitute grounds for the Government to cancel such claims. *P. Wolenberg*, 29 L.D. 302 (1899). Thereafter, all oil shale lands were withdrawn from location by the Mineral Leasing Act of February 25, 1920 (41 Stat. 451, 30 U.S.C., sec. 193), subject to the rights of owners of valid mining claims "thereafter maintained in compliance with the laws under which initiated."

In *Emil Krushnic*, 52 L.D. 282 (1927), the Department held that failure to perform annual assessment work was a failure to maintain a claim under the law and automatically subjected the claim to cancellation by the Government. The Supreme Court rejected this theory in *Wilbur v. Krushnic*, 280 U.S. 306 (1930), and held that a failure to do assessment work could not be challenged by the Government following the resumption of work on the claim.

Following *Wilbur v. Krushnic*, *supra*, the Department took the position that the United States could make a lawful challenge to the validity of an oil shale claim for failure to perform annual assessment labor if such challenge was made *before assessment work was resumed* on the claim.⁴ Accordingly, the Land Commissioner ordered that new adverse proceedings be commenced on each claim on which there was an actual default and no resumption of the annual labor required by the statute.

However, in *Ickes v. Virginia-Colorado Development Corporation*, *supra*, the Supreme Court declined to accept the Department's theory that oil shale claims could be canceled where assessment work was delinquent and had not been resumed. The Court said that the decision of the Department in canceling these claims " * * * went beyond the authority conferred by law." 295 U.S. at 647.

Shortly thereafter, the Department issued its decision in *The Shale Oil Company*, 55 I.D. 287 (1935), which recalled and vacated the departmental decision in *Virginia-Colorado Development Corporation*, 53 I.D. 666 (1932), and held that all other departmental decisions and instructions which were inconsistent with the decision of the Supreme Court were "overruled." The early decisions canceling the claims now being considered were never reopened, recalled or vacated in proceedings following *The Shale Oil Company*, *supra*.⁵

³ As required by the Mining Law of May 10, 1872 (Rev. Stat., secs. 2324, 2325; 30 U.S.C., secs. 28, 29).

⁴ *Instructions*, 53 I.D. 131 (1930).

⁵ With one exception, no appeals were taken from the decisions of the Land Commissioner which canceled the claims in issue here. In one case, the cancellation of the Oyler Nos. 1-4 oil shale placer claims was appealed to the Secretary of the Interior. The cancellation was upheld by the Secretary (*The Indew Shale Oil Company*, A-16465 (Mar.

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Procedural Requirements of Departmental Regulations, the Administrative Procedure Act, and the Fifth Amendment

As stated above, the appellants have joined in a motion to vacate the Land Manager's decisions and/or to remand the case for full hearing on issues of fact and law. The motion is based, in part, on the assertion that the Manager was required to refer the matter to a hearing examiner for a full hearing and that his failure to do so is tantamount to an attempt to invalidate the claims without a hearing of any kind. However, hearings were in fact held in the contest proceedings involving many of the claims included in this appeal⁶ and the then-owners of those claims participated in the hearings and preserved their right of appeal.⁷ The reapplication for a patent by a claimant after his claim has been contested successfully or after his patent application has been denied does not require the Department to grant a new hearing. (*Gabbs Exploration Co.*, 67 I.D. 160 (1960)). The assertion that a *de novo* hearing is now required is without merit where such cancellations were made in default proceedings in the manner prescribed by applicable departmental regulations,⁸ the owners having been properly served with notice of contest and provided an opportunity to challenge the cancellation of the claim. This same contention was raised and rejected by the Department in *Gabbs Exploration Co.*, *supra*. The latter case was upheld on review by the United States District Court for the District of Columbia and affirmed on appeal to the United States Court of Appeals for the District of Columbia Circuit.⁹ The opinion by the court contains the following pertinent discussion concerning the adequacy of notice:

10, 1932)), and the final Departmental decision was not challenged by subsequent court action. The Oyler Nos. 1-4 claims form the basis for an application filed by Pacific Oil Company which was rejected by the Manager in February 1962, and which is included among the rejections on appeal herein.

⁶ The following claims were canceled in contest proceedings in which the owners of the claims participated:

Carbon Nos. 1-4 (Colo. No. 030979), canceled in Contest No. 12029

Elizabeth Nos. 1, 2 and 4-12 (Colo. No. 030979), canceled in Contest No. 12029

Southeast (Colo. No. 028751), canceled in Contest No. 12972

Northeast (Colo. No. 028751), canceled in Contest No. 12972

Northwest (Colo. No. 028751), canceled in Contest No. 12972

Oyler 1-4 (Colo. No. 12327), canceled in Contest No. 12039

Jack Pot Nos. 4-11 (Colo. No. 045092), canceled in Contest No. 13038

⁷ The applicable Rules of Practice provided as follows:

No person who has failed to answer the contest affidavit, or having answered, has failed to appeal at the hearing, shall be allowed to appeal from the final action or decision of the Manager * * * 43 C.F.R., sec. 221.49, 19 F.R. 9056 (1954).

⁸ Circular No. 460, entitled "Manner of Proceeding in Contests Initiated Upon a Report by a Representative of the General Land Office," is reproduced in full and attached hereto as Appendix B. Sections 4, 5 and 6 thereof set forth the form and manner of issuing the notice of contest to the claimant in this class of cases. This Circular was effective at all times relevant here.

⁹ *Gabbs Exploration Co. v. Udall*, 315 F. 2d 37 (1963).

The owners of the * * * claims were not denied due process in the original contests, for it is clear that they had adequate notice of the contest against them, they were offered a hearing, and they were informed of the cancellation of their claims. In view of what we have previously stated, there was no jurisdictional defect in the 1929 contests. * * * 315 F. 2d at 39-40.

As recognized in the *Gabbs Exploration Co.* decision, *supra*, the essential elements of due process are notice and an opportunity to defend against the charges asserted. (*Simon v. Craft*, 182 U.S. 427 (1901); *Cameron v. United States*, 252 U.S. 450 (1920)). The failure of the owners of these claims to participate in the contest proceedings of which they had adequate notice and in which they had an opportunity to defend the validity of the claims at a hearing does not entitle such owners or their successors in interest to another opportunity for a hearing on the same question. The fact that an opportunity for a hearing was forfeited by the default of the owners of these claims does not furnish the basis for a claim that due process of law has been denied. (See *American Surety Co. v. Baldwin*, 287 U.S. 156, 169 (1932); *Opp Cotton Mills Inc. v. Administrator of the Wage and Hour Division of the Department of Labor*, 312 U.S. 126, 152 (1941)).

Appellants' assertion that failure to order a new hearing deprived them of due process is, therefore, rejected insofar as notice of contest is found to have been adequate in the original contest proceedings.

In those cases in which the requirements of notice were definitely met prior to the cancellation of the claim, the then owners of the claim having participated in the contest proceedings, the order affirming the decision of the Land Manager will, for reasons set out herein, become effective immediately.

In the remaining cases, the appellants will be granted 60 days within which to submit materials relating solely to their contention that their claims were canceled without compliance with the requirements of notice. Thereupon, a determination regarding the sufficiency of notice will be made. If necessary, hearings will be ordered to resolve any factual questions which remain unresolved on the record. If no such materials are received from these appellants within the 60-day period, they will be considered to have conceded that the Departmental records accurately reflect the facts regarding the issuance of notice in the early contest proceedings and the determination will be made on the basis of the present record.

Effect of the Shale Oil Company Case

Upon the authority of the decision of the Supreme Court in *Ickes v. Virginia-Colorado Development Corporation*, *supra*, the decision of the Commissioner declaring oil shale placer claims forfeited in

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The Shale Oil Company, supra, was reversed by the Department.¹⁰ It was stated in the Department's decision that:

* * * The above-mentioned decision of the Department in the *Virginia-Colorado Development Corporation* case and the instructions of June 17, 1930, are hereby recalled and vacated. The above-mentioned decisions in the cases of *Francis D. Weaver and Federal Oil Shale Company* and other Departmental decisions in conflict with this decision are hereby overruled. The Commissioner's decision is *reversed* and the record in the case *remanded* with instructions to reinstate the application and entry *in toto* and dispose of the same unaffected by the default in the performance of assessment labor, and if all else is found regular, to clear list the application for patent. (Italics supplied.) 55 I.D. at 290.

The appellants contend that, by overruling all departmental decisions in conflict with *The Shale Oil Company, supra*, the Secretary exercised his supervisory authority to nullify all conflicting decisions of the Land Commissioner including those involved in the present appeal. In other words, it is argued that while the earlier decisions purported to cancel appellants' claims, *The Shale Oil Company, supra*, reinstated or corrected them in accordance with the decision of the Supreme Court in *Ickes v. Virginia-Colorado Development Corporation*. We do not agree. This is not what the decision either said or accomplished.

The language in *The Shale Oil Company* case distinguishes those cases actually before the Secretary from those which were not. As to the former, the Commissioner's decisions canceling the claims were expressly *recalled* and *vacated*. The latter were merely "overruled."¹¹

The Department of the Interior has often "overruled" former holdings without in any way nullifying the action taken thereunder.¹² To nullify action previously taken by giving retroactive effect to a change in administrative practice or legal ruling does violence to the settled principle of finality of administrative action. In this regard, the following statement set forth in *Franco Western Oil Company*,

¹⁰ *The Shale Oil Company*, 55 I.D. 287 (1935). *The Shale Oil Company* decision had been held up to await the *Ickes v. Virginia-Colorado Development Corporation* decision then pending in the Supreme Court.

¹¹ See e.g., *Francis D. Weaver*, 53 I.D. 175 (1930), and *The Federal Shale Oil Company*, 53 I.D. 213 (1930), both of which were cited in *The Shale Oil Company* and merely "overruled." They have been treated as simply "overruled" ever since. See the cumulative *Table of Modified and Overruled Cases* in the frontispiece of Interior Department Decisions.

¹² See *Instructions*, 35 L.D. 549 (1907). And see *Franco Western Oil Company*, 65 I.D. 427 (1958); *Anna R. Paul*, A-24350 (1947) (upheld by the District Court for the District of Columbia in *Anna R. Paul v. Marion Clauson*, Civil No. 3309-48 (unreported)); *Solicitor's Op.*, 58 I.D. 319 (1943); *Timothy Sullivan, Guardian of Juanita Elsenpeter*, 46 L.D. 110 (1917), overruling *Heirs of Susan A. Davis*, 40 L.D. 573 (1912); *Bertha M. Birkland*, 45 L.D. 104 (1916); *Lillie E. Stirling*, 39 L.D. 346 (1910). The rule of prospective operation of administrative rulings has been followed by other Governmental agencies. See generally, *Davis, Administrative Law Treatise*; secs. 5.09 and 17.07.

65 I.D. 427 (1958), adequately summarizes the Department's long-standing practice:

* * * the rule applied by the Department on those occasions when it has specifically considered the question as to whether, because of a change in the interpretation of a statute, its holding should have retroactive effect, has been to deny such effect to its decisions. 65 I.D. at 429.

In *Safarik v. Udall*, 304 F. 2d 944 (D.C. Cir. 1962), the Court of Appeals for the District of Columbia Circuit upheld the long-standing practice of the Department of the Interior to give prospective application to its decisions. The Court therein stated:

* * * the Secretary of the Interior * * * should have and does have authority, when he promulgates an interpretive regulation, or *hands down a decision placing a different construction on a statute or regulation, from that laid down in an earlier decision or regulation, to give prospective operation only to the later regulation or decision.* (Italics supplied.) 304 F. 2d at 950.

It is therefore concluded that the departmental decision in *The Shale Oil Company, supra*, merely recalled and vacated the earlier decision in that particular case " * * * thereby depriving the earlier opinion of all authority as as precedent."¹³ It is further concluded that the decision in *The Shale Oil Company, supra*, had no effect on the cases presently before us in this appeal.

Application of the Doctrine of Finality of Administrative Action

The contention made by appellants that the doctrine of *res judicata* has no application to decisions of administrative agencies is erroneous.¹⁴ The contention that the doctrine of *res judicata* (or its administrative-law counterpart—the doctrine of finality of administrative action) has not been recognized and applied before the Department of the Interior is similarly unsupportable. Since 1883¹⁵ the Department has consistently held that the doctrine of *res judicata* is applicable to departmental decisions.¹⁶ In 1886, Secretary Lamar stated, in *Rancho San Rafael De La Zanja*, 4 L.D. 482, that:

* * * Unless the principle of *res judicata* is recognized administrative action may become involved in chaos; the labors of the Department would become too cumbersome to admit of their intelligent discharge; uncertainty would cloud every inchoate title and, in many instances, vested rights would be endangered. 4 L.D. at 482.

¹³ Black, Law Dictionary (4th ed. 1951).

¹⁴ See generally, 50 C.J.S., *Judgments-Public Officers and Boards*, sec. 606; 2 Davis, *Administrative Law Treatise*, sec. 18.10 and authority cited therein.

¹⁵ See *Meredith v. The Atlantic and Pacific Railroad Company*, 2 L.D. 499 (1883).

¹⁶ See, e.g., *Edward Christman*, 62 I.D. 127 (1955); *H. W. Rowley*, 58 I.D. 550 (1943); *Henshaw v. Ellmaker*, 56 I.D. 241 (1937); *Charles Perkins*, 50 L.D. 172 (1923); *Lillie M. Kelly*, 49 L.D. 659 (1923); *Fosdick v. Shackelford*, 47 L.D. 558 (1920); *Lacey v. Grondorf*, 38 L.D. 553 (1910); *Gammon v. Weaver*, 26 L.D. 383 (1898); *Mee v. Hughart*, 23 L.D. 455 (1896); *Mary C. Stephenson*, 11 L.D. 232 (1890); *A. T. Lamphere*, 8 L.D. 134 (1888); *Higgins v. Wells*, 3 L.D. 21 (1884).

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In addition to the numerous departmental decisions recognizing the doctrine of administrative action, it has been implemented in the rules of practice before the Department.¹⁷

The doctrine of *res judicata*, as applied in administrative decisions by this Department, is designed to achieve orderliness in the administration of the public lands as well as finality of decisions which have been closed finally and have not been appealed or otherwise attacked. Every reason of policy which supports the doctrine in the courts is applicable here. There must be an end to administrative litigation also. Public rights as well as private cannot be indefinitely suspended because further litigation may someday be initiated.

In applying the doctrine here, we are aware of the principle, urged so strongly by the appellants, that since the Secretary has a continuing jurisdiction with respect to public lands until a patent issues, he is not estopped by the principles of *res judicata* and finality of administrative action, from correcting or reversing an erroneous decision by his subordinates or his predecessor in office. However, where, as here, the claim has been declared null and void in regular proceedings and the mining claimant acquiesces in such decision for many years, the decision nullifying the claim will be treated as conclusive and will not be reopened in the absence of a legal or equitable basis warranting reconsideration. (*Gabbs Exploration Co.*, 67 I.D. 160 (1960); *Gabbs Exploration Co.*, A-28213 (May 24, 1960) and A-28213 (Supp.) (July 11, 1960); *Garfield County Exploration Co.*, A-28351 (August 30, 1960); *Langdon H. Larwill*, A-28697 (May 16, 1963). Nor does the fact that the legal basis for the decision has later been held by the court of appeals or the Supreme Court to be erroneous require a reconsideration and reversal of cases finally decided before the change in the interpretation or application of the law. (See *e.g.*, *Edward Christman*, 62 I.D. 127 (1955); *Lillie M. Kelly*, 49 L.D. 659 (1923); and *Mee v. Hughart*, 23 L.D. 455 (1896)).

In *Lillie M. Kelly*, *supra*, the Department of the Interior had canceled homestead entries after the issuance of the receiver's receipt. Kelly did not appeal from the decision and acquiesced therein for five years or more. In similar proceedings in another case (*Thomas J. Stockley*, 44 L.D. 178 (1915)), the decision of the Secretary was

¹⁷ Prior to revision in 1956, 43 C.F.R. sec. 221, provided as follows:

No appeal shall be had from action of Director affirming the decision of the manager in any case where the party adversely affected shall have failed to appeal from the decision of said manager. 43 C.F.R. sec. 221.74.

The pertinent portion of the revised regulations provides:

Effect of Failure to Appeal. When any party fails to appeal from an adverse decision of the Directors that decision shall as to such party be final and will not be disturbed except for fraud or for gross irregularity. 43 C.F.R. sec. 221.10, as revised in Circular 1950, 21 F.R. 1860, March 27, 1956.

challenged in a suit in equity and appealed eventually to the Supreme Court. The Court, in *Stockley v. United States*, 260 U.S. 532 (1923), held that:

The action of the Commissioner of the General Land Office, therefore, in directing a contest against Stockley's entry three years after the issuance to him of the receiver's receipt, *was unauthorized and void*. (Italics supplied.) 260 U.S. at 544.

Following the Supreme Court's decision in the *Stockley* case, Mrs. Kelly applied for an unrestricted patent claiming the earlier contest against her entry was "unauthorized and void." The Department's decision contains the following pertinent statement:

* * * The Department has held that a decision made in accordance with the practice prevailing at the time it was rendered, if accepted by the parties affected as final, will not be reopened for the reason that the practice then prevailing *has subsequently been held erroneous by the Supreme Court*. (Italics supplied.) 49 L.D. at 662.

The principle upon which the Department relied in canceling numerous oil shale placer claims was declared by the Supreme Court to be erroneous and beyond the authority conferred by applicable statutes. *Ickes v. Virginia-Colorado Development Corporation, supra*. The early decisions in the cases presently before the Secretary were not appealed and the Department has not vacated them. They were acquiesced in by those adversely affected for over 25 years. "The fact that * * *" the principle on which these earlier decisions are based is "* * * now held by the Supreme Court to be erroneous is not deemed a sufficient reason for reversing and annulling decisions which have become final." *Mee v. Hughart, supra*.

Jurisdiction of the Land Commissioner and Effect of Ickes v. Virginia-Colorado Development Corporation

The appellants contend that the Supreme Court, in *Ickes v. Virginia-Colorado Development Corporation, supra*, held that the Department of the Interior was without jurisdiction to cancel claims for failure to do assessment work. Of course, no adjudication can be said to be *res judicata* if it was rendered by a tribunal not having jurisdiction.¹⁸ But the Court did not hold that the Department lacked jurisdiction. To the contrary, it was held that:

There was authority in the Secretary of the Interior, by appropriate proceedings, to determine that a claim was invalid for lack of discovery, fraud,

¹⁸ Compare, *Best v. Polk*, 85 U.S. (18 Wall.) 112 (1873), with *Minter v. Crommelin*, 59 U.S. (18 How.) 87 (1855). And compare, *Doolan v. Carr*, 125 U.S. 618 (1887), with *Quinby v. Conlan*, 104 U.S. 420 (1882). And see, *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902).

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or other defect, or that it was subject to cancellation by reason of abandonment.¹⁹ 295 U.S. at 645.

And on the question of the Secretary's authority to cancel for failure to perform assessment work, the Court stated:

We think that the Department's challenge, its adverse proceedings, and the decision set forth in the bill went beyond the authority conferred by law. 295 U.S. at 647.

It is on the basis of this language that appellants contend that the Secretary was without jurisdiction to challenge these claims. A close examination of that language, the history of the litigation and related decisions require the rejection of appellants' contention.

Earlier, in *Wilbur v. Krushnic*, 280 U.S. 306 (1930), the Court had concluded that the Department could not cancel claims upon the ground of failure to do assessment work following the resumption of work. The Court did not deny the Secretary's jurisdiction. In fact, it affirmed his full authority to consider the case but found that he had "* * * interpreted and applied a statute in a way contrary to its explicit terms * * *."²⁰ In explaining the effect of the Secretary's error in construing the statute,²¹ *Roberts v. United States*, 176 U.S. 221 (1900), was quoted as follows:

* * * Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. * * * 176 U.S. at 231.²²

A clear analogy exists in the principles applicable to the public lands. *Cameron v. United States*, 252 U.S. 450 (1920). In the *Cameron* case the Court stated:

By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the Land Department, as a special tribunal; and the Secretary of the Interior, as the head of the Department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. 252 U.S. at 459-60.²³

¹⁹ Citing *Cameron v. United States*, 252 U.S. 450, 460 (1920); *Cole v. Ralph*, 252 U.S. 286 (1920); *Black v. Elkhorn Mining Co.*, 163 U.S. 445, 450 (1896); *Brown v. Gurney*, 201 U.S. 184, 192, 193 (1906); *Farrell v. Lockhart*, 210 U.S. 142, 147 (1908).

²⁰ 280 U.S. at 319.

²¹ The Mineral Leasing Act of 1920, 41 Stat. 451, 30 U.S.C., sec. 193.

²² See also, *United States, ex rel. Ness v. Fisher*, 223 U.S. 683 (1912); and *Decatur v. Pauling*, 39 U.S. (14 Pet.) 497 (1840).

²³ Citing Rev. Stat., secs. 441, 453, 2476; *United States v. Schurz*, 102 U.S. 378, 395 (1880); *Lee v. Johnson*, 116 U.S. 48, 52 (1885); *Knight v. United States Land Ass'n*, 142 U.S. 161, 177, 181 (1891); *Riverside Oil Co. v. Hitchcock*, 190 U.S. 316 (1903). The nature and extent of the Department's jurisdiction over the disposition of public lands, and particularly under the mining laws, was more recently discussed in *Duguid v. Best*, 291 F. 2d 235 (9th Cir. 1961), in the following terms:

And further:

True, the Mineral Land Law does not itself confer such authority on the land department. Neither does it place the authority elsewhere. But this does not mean that the authority does not exist anywhere, for, in the absence of some direction to the contrary, the general statutory provisions before mentioned vest it in the land department. 252 U.S. at 461.²⁴

These principles were most recently reiterated by the Supreme Court in *Best v. Humboldt Mining Co.*, 371 U.S. 334, 337 (1963).

In *United States v. Winona & St. P.R. Co.*, 67 Fed. 848 (8th Cir. 1895), aff'd., 165 U.S. 463 (1897), the Court of Appeals set forth the following test for determining whether the Land Department has jurisdiction over the subject matter with which it purports to deal:

* * * Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and determine whether or not they are sufficient to invoke the exercise of that power. *The test of jurisdiction is whether the tribunal has power to enter upon the inquiry, not whether its conclusion in the course of it is right or wrong.*²⁵ (Italics supplied.) 67 Fed. 959-60.

Having concluded that the Secretary or the Land Commissioner had jurisdiction over the subject matter of the claims presently in dispute, and that they had the necessary authority to enter upon the inquiry as to the validity of the claim, we have only to determine the ultimate effect of an error of law committed by these officials in the exercise of this authority. In this regard, we do not question that the appellants or their predecessors in interest could have invoked judicial review of the Department's decisions under applicable precedent,²⁶ even

It is undisputed that the Congress has granted to the Secretary of the Interior general supervisory authority over public business relating to public lands, including mines.

* * * there can be no question as to the power and authority of the Secretary of the Interior, under the grant of authority to supervise public business on public lands, including mines, to initiate through the subordinate Bureau of Land Management a contest in order, to see "that valid claims on public land may be recognized, invalid ones eliminated, and the rights of the public preserved." 291 F. 2d at 241.

²⁴ See also *Cole v. Ralph*, supra, fn. 19; *Farrell v. Lockhart*, supra, fn. 19; *Brown v. Gurney*, supra, fn. 19; and *Black v. Elkhorn Mining Co.*, supra, fn. 19. And see generally, *Standard Oil Co. of California v. United States*, 107 F. 2d 402 (9th Cir. 1940).

²⁵ See also, *United States v. Northern Pac. R. Co.*, 95 Fed. 864 (8th Cir. 1899), aff'd., 177 U.S. 435 (1900); and *Foltz v. St. Louis & S.R. Ry. Co.*, 60 Fed. 316 (8th Cir. 1894). And see *King v. McAndrews*, 111 Fed. 860 (8th Cir. 1901), wherein the court stated the principle as follows:

"The test of jurisdiction is not right decision, but the right to enter upon the inquiry and to make some decision. [Citations] Hence a patent evidencing an erroneous decision of a question of law or a mistaken determination of an issue of fact, which the department was vested with the power, and charged with the duty, to decide, is as impervious to collateral attack as one which is the result of correct conclusions." 111 Fed. at 864.

²⁶ See e.g., *El Paso Brick Co. v. McKnight*, 233 U.S. 250 (1914), wherein the court held that an order erroneously issued by the Department refusing a patent for a mining claim could not deprive the claimant of vested rights " * * [f]or while the General Land Office had power of supervision over the acts of the local officers, and could annul entries obtained by fraud or made without authority of law, yet if the Department's cancellation

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though the time within which the claimants could have appealed to the Secretary had expired. The claimants, following the decision in *Ickes v. Virginia-Colorado Development Corporation, supra*, had at least two alternatives open to them to protect their claims. They could have petitioned the Secretary to exercise his supervisory authority to recall and vacate the Land Commissioner's cancellation of the claim as he had done in *The Shale Oil Company, supra*, or they could have sought relief in the courts in proper proceedings instituted for that purpose.²⁷ The claimants did neither.

Since the judicial relief which was available to the claimants was equitable in nature, it was incumbent upon them to seek judicial relief within a reasonable time after the Supreme Court, in the *Virginia-Colorado Development Corporation* case, had determined that the cancellations by the Department were erroneous. Otherwise, the claimants' judicial remedy would be subject to the equitable defenses of estoppel and laches unless it were clearly shown that the decision of the Department was void *ab initio*.

When, as here, the administrative officer has acted within his jurisdiction and a judicial review of such action has not been sought on a timely basis, the principles of estoppel, laches and *res judicata* are merged in the doctrine of finality of administrative action and are operative to bar appellants' claim for relief. This conclusion is in accord with the principles set forth in the several recent cases discussed above, all of which involved oil shale placer claims.²⁸ The following

was based upon a mistake of law, its ruling was subject to judicial review when properly drawn in question in judicial proceedings, inasmuch as the power of the land office is not unlimited, nor can it be arbitrarily exercised so as to deprive any person of land lawfully entered and paid for." 233 U.S. at 257-58. (Italics supplied.)

²⁷ See e.g., *Sanford v. Sanford*, 139 U.S. 642 (1891); *Shepley v. Cowan*, 91 U.S. 330 (1875); *Silver v. Ladd*, 74 U.S. (7 Wall.) 219 (1868).

In *Sanford v. Sanford, supra*, the court said:

"* * * where the matters determined are not properly before the department, or its conclusions have been reached from a misconstruction, by its officers, of the law applicable to the cases before it, and it has thus denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting its judgment, *then the courts, can in a proper proceeding, interfere and control its determination so as to secure the just rights of parties injuriously affected.*" (139 U.S. at 647. (Italics supplied.)

See also, *Moffat v. United States*, 112 U.S. 24 (1884); *Bernier v. Bernier*, 147 U.S. 242 (1893); *Moore v. Robbins*, 96 U.S. 538 (1877); *Johnson v. Towsley*, 80 U.S. (13 Wall.) 72 (1871); *Lindey v. Hawes*, 67 U.S. (2 Black) 554 (1862); *Lytle v. Arkansas*, 63 U.S. (22 How.) 193 (1859); *Garland v. Wynn*, 61 U.S. (20 How.) 6 (1857); *Barnard's Heirs v. Ashley's Heirs*, 59 U.S. (18 How.) 43 (1855); *Cunningham v. Ashley*, 55 U.S. (14 How.) 377 (1852).

²⁸ See *Langdon H. Larwill*, A-28697 (May 16, 1963); *Gabbs Exploration Co.*, 67 I.D. 160 (1960); aff'd. *Gabbs Exploration Co. v. Udall*, 315 F. 2d 37 (D.C. Cir. 1960); *Garfield County Exploration Co.*, A-28351 (August 30, 1960); *J. C. Nelson*, 64 I.D. 103 (1957). See also, *Charles D. Edmonson*, 61 I.D. 355 (1954), and cases cited therein.

language, used by the court in *Gabbs Exploration Co. v. Udall*, *supra*, in rejecting similar claims, is particularly pertinent here:

Here neither plaintiff nor its predecessors in interest took timely action to have the wrong righted, and plaintiff cannot complain of the Secretary's failure to reopen the case. It is significant also that in all the cases cited to us in which a prior decision was reopened the longest period elapsing before reconsideration was three years. Here twenty-seven years have elapsed between the alleged wrong (1929) and plaintiffs attempt to have it corrected (1956). There might be some reason to impel the Secretary to reopen a prior decision in order to purge an incorrect determination, but the passage of time might prevent or greatly hinder a proper determination of the initial question, in which case it would be inappropriate for him to reopen the case even though he retains jurisdiction over the land in dispute * * * 315 F. 2d at 41.²⁹

It is evident that the Secretary or the Land Commissioner, in the *Krushnic* case, in the *Virginia-Colorado Development Corporation* case, and in the cases before us in this appeal, had the duty, the responsibility and, necessarily then, the jurisdiction to construe the statute. The construction placed upon the statute was appealed in *Krushnic* and in *Virginia-Colorado Development Corporation*, and the contention of the appellant that the Secretary erred was upheld. However, in the cases before us, appellants cannot complain after nearly 30 years of silence, inaction, and acquiescence. Neither they nor their "* * * predecessors in interest took timely action to have the wrong righted * * *." *Gabbs Exploration Co. v. Udall*, 315 F. 2d at 41.

Past Administrative Practice

Finally, the appellants contend that, following the decision in *Iokes v. Virginia-Colorado Development Corporation*, *supra*, and until the Manager's decision in February, 1962, rejecting their applications, the United States has consistently recognized the validity of the subject mining claims. They contend that there has been a long-standing, continuous and consistent administrative interpretation and application of the *Virginia-Colorado Development* case beginning with the Department's decision in *The Shale Oil Company*, *supra*. In this regard, the appellants rely upon certain letters written by officers of the Land Department which expressed the view that the previous

²⁹ The court also observed that:

The Department of the Interior, which has recognized the right of the Secretary to reconsider certain prior decisions, has also recognized that there must be some time limit on such reconsideration. As Assistant Attorney General Van Devanter said in *Aspen Consolidated Mining Co. v. Williams*, 27 L.D. 1, at 11:

"The parties remain the same and the one complaining of the former decision has taken timely and decisive action to have the alleged wrong corrected." 315 F. 2d at 40-41.

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decisions of the Land Commissioner canceling oil shale placer claims were void and had no effect on the claim.³⁰

The argument advanced by the appellants is not based on the facts. While some officials of the Department may have expressed the view that the original cancellations were void and of no effect, at the same time, action was taken with respect to the subject land which was entirely inconsistent with the recognition of valid and subsisting claims.

On April 15, 1930, pursuant to Executive Order No. 5327, all oil shale deposits owned by the United States were withdrawn, subject to valid existing rights, from lease or other disposal, except for application for patent under the mining laws for metalliferous mining claims or application based on claims initiated prior to the date of the withdrawal. The withdrawn lands were reserved for purposes of investigation, examination and classification. See *Instructions*, Circular No. 1220, 53 I.D. 127 (1930). Among the lands included in the withdrawal are those here under consideration as indicated in the instructions dated April 22, 1931, from the Commissioner of the General Land Office to the Register, Denver, Colorado, which listed among the subdivisions in Colorado covered by Executive Order No. 5327 all of secs. 7 to 36, T. 4 S., R. 99 W., 6th P.M.

Executive Order No. 5327, above-mentioned, attached to the lands here under consideration as a secondary claim and operated to withdraw them from the public domain when the determination that the mining claims were null and void for failure to do assessment work became final, since, on the termination of the mining locations, possessory title to the lands reverted to the United States. See *Cameron v. United States*, 252 U.S. 450 (1920); *Gabbs Exploration Company*, 67 I.D. 160, 169 (1960); and Solicitor's Opinion, 55 I.D. 205, 208 (1935). And see, *Vanadium Corporation of America, et al.*, A-26914 (September 8, 1954). As a result of the decisions of the Land Commissioner in 1930 and 1931 declaring these claims null and void for failure to do assessment work, Executive Order No. 5327

³⁰ The following documents were submitted by the appellants as evidence of the Department's position:

1. Letter of July 29, 1935, from the Commissioner of the General Land Office to the Register, Denver, Colorado (attached as Appendix C-1).
2. Letter of April 22, 1936, from Ida Dere, Grand Valley, Colorado (then owner of the Lucy Agnes Nos. 1-2 oil shale placer claims), to the Commissioner, General Land Office (attached as Appendix C-2).
3. Letter of May 4, 1936, from the Commissioner, General Land Office, to Ida Dere, Grand Valley, Colorado (attached as Appendix C-3).
4. Letter of July 4, 1944, from the Commissioner, General Land Office, to Mr. W. Porter Nelson, Denver, Colorado (attached as Appendix C-4).
5. Letter from the Commissioner, General Land Office, to Mr. Edward Altenbern, DeBeque, Colorado (attached as Appendix C-5).
6. Letter of October 31, 1935, from the Acting Secretary of the Interior to the Secretary of the Navy (attached as Appendix C-6).

was operative to exclude all subsequent entries thereon, except as permitted by the order.

On February 6, 1933, Executive Order No. 6016 authorized the issuance of oil and gas leases under the Mineral Leasing Act on lands withdrawn by Executive Order No. 5327.

Pursuant to the later Executive Order, the Department has issued numerous oil and gas leases and the rights of the third party lessees have intervened. Some of the oil and gas leases are still outstanding and proceedings have been instituted under the Multiple Mineral Development Act (Act of August 13, 1954, as amended (30 U.S.C., sec. 527)), to determine the rights as between oil shale placer claimants and lessees under oil and gas leases issued by the United States. Such proceedings have been suspended pending the outcome of the subject appeals.

The important point here is that, on many of the tracts in question, the United States, acting largely by and through this Department, has, for some 25 years since the cancellation of the oil shale placer claims, exercised exclusive control over the land and has permitted third parties to acquire rights therein. In view of these facts, the assertion on appeal that the United States or the Secretary of the Interior has recognized the validity of these mining claims and has not taken action which is inconsistent therewith, is without support.

But even assuming, *arguendo*, that a long-standing continuous and consistent departmental recognition of these claims is shown, such a showing would not entitle the appellants to patents on these claims. For reasons heretofore stated, the validity of these claims was not established by the decision of the Department in *The Shale Oil Company* case, *supra*, nor by any subsequent administrative or judicial action, and any administrative practice to the contrary would have been clearly erroneous. Administrative practice, however long-standing and consistent, is not controlling when it is clearly erroneous. *County of Marin v. United States*, 356 U.S. 412 (1958); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946); *Burnet v. Chicago Portrait Co.*, 285 U.S. 1 (1932); *Webster v. Luther*, 163 U.S. 331 (1896); *Merritt v. Cameron*, 137 U.S. 542 (1890); *United States v. Graham*, 110 U.S. 219 (1884); *Swift Company v. United States*, 105 U.S. 691 (1881). And see Solicitor's Opinion, 68 I.D. 372 (1961), and cases cited herein.

Furthermore, the application of doctrine of administrative practice or construction is "* * * restricted to cases in which the construction involved is really one of doubt and where those to be affected have relied on the practical construction, and rights have accrued by reason of such reliance." *Studebaker v. Perry*, 184 U.S. 258, 269 (1902).³¹

³¹ See generally, Annot., 73 L. Ed. 322 (1928), and, Annot., 84 L. Ed. 28 (1939).

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(Italics supplied.) Here the appellants have attempted to demonstrate the existence of a long-continued practice by this Department in recognizing the validity of their claims. In support thereof, they have submitted the documentation above-mentioned.³² Yet there is no clear showing that any of the appellants knew of or relied upon any of these documents at the time they acquired an interest in their claims. Indeed, it appears that the existence of such documents became known to the appellants only after their claims were challenged and their patent applications rejected by the Land Manager in 1962. Under these circumstances, no rights have accrued to the appellants by reason of the alleged departmental practice.

Summary

In summary, we have found (1) that the Secretary and his duly authorized agent, the Land Commissioner, had jurisdiction to enter upon inquiry as to the validity of oil shale placer claims under the applicable statutes; (2) that they had the jurisdiction to construe such statutes in defining their authority; (3) that in the exercise of this function they may have erred in canceling claims including some of the claims upon which the patent applications in the present case are based; (4) that these cancellations were not appealed from by the appellants or their predecessors in interest; (5) that neither the appellants nor their predecessors in interest sought to attack these decisions for over 25 years. We conclude that, on the principles of *res judicata*, finality of administrative action, and laches, the said decisions of the Land Commissioner and the Secretary of the Interior are binding on the parties thereto and their successors in interest insofar as these claims were actually canceled in the original contest proceedings in which the then-owners of the claims were properly served with notice of contest and provided an opportunity for a hearing respecting the validity of the claim.

As heretofore mentioned, the following claims were canceled in contest proceedings in which the then-owners of the claims participated, thus eliminating any question concerning the sufficiency of or defects in the issuance of notice:

<i>Claim</i>	<i>Patent Application</i>	<i>Contest</i>
Carbon Nos. 1-4.....	Colo. No. 030979	No. 12029
Elizabeth Nos. 1, 2, 4-12.....	Colo. No. 030979	No. 12029
Southeast.....	Colo. No. 028751	No. 12972
Northeast.....	Colo. No. 028751	No. 12972
Northwest.....	Colo. No. 028751	No. 12972
Oyler Nos. 1-4.....	Colo. No. 012327	No. 12039
Jack Pot Nos. 4-11.....	Colo. No. 045092	No. 13038

³² See footnote 30, *supra*.

As to these claims, the decisions of the Land Manager rejecting applications for patents are hereby affirmed.

As to all other claims involved in this appeal, the final order affirming or reversing the decision of the Land Manager will be held in abeyance pending a determination of the sufficiency of notice of contest in the contest proceedings in which the claims were canceled. The appellants holding such claims who wish to pursue the contention that their claims were canceled without compliance with the requirements of notice, are hereby granted 60 days within which to submit materials relating solely to such contention. Thereupon, a determination regarding the sufficiency of notice will be made and a final order entered on the appeal. If necessary, hearings will be ordered to resolve any factual questions which remain unresolved on the record. Appellants who do not submit such materials shall be considered to have conceded that the departmental records accurately reflect the facts regarding the issuance of notice in the contest proceedings and the determination will be made on the basis of the present record.

This decision is rendered and the action herein set forth is taken pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4) (a) ; 24 F.R. 1348).

FRANK J. BARRY,
Solicitor.

APPENDIX A

<i>Appeal No.</i>	<i>Appellant</i>	<i>Colorado Serial No.</i>	<i>Manager's Decision</i>
A-29560	Union Oil Co. of California	07667	Feb. 16, 1962.
		09072	Feb. 16, 1962.
	Pacific Oil Company	012327	Feb. 16, 1962.
	Weber Oil Company	014671	Feb. 16, 1962.
	Tell Ertl	016334	Feb. 16, 1962.
	Tell Ertl	016671	Feb. 16, 1962.
	Henry L. Price		
	Silmon Smith		
	Charles Holmes		
	Gabbs Exploration Company	018673	Feb. 23, 1962.
	Dwight S. Young	022459	Feb. 16, 1962.
	John W. Savage	022460	Feb. 16, 1962.
	Charles H. Prien	022461	Feb. 16, 1962.
	Barnette T. Napier	028751	Feb. 16, 1962.
	Grace A. Savage		
	Maude B. Farnum		

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APPENDIX A—Continued

<i>Appeal No.</i>	<i>Appellant</i>	<i>Colorado Serial No.</i>	<i>Manager's Decision</i>
A-29560	John W. Savage-----	-----	-----
	John R. Farnum, Jr-----	-----	-----
	St. Clair Napier Catlin-----	-----	-----
	William H. Farnum, Jr-----	-----	-----
	Joan L. Savage-----	-----	-----
	Neil S. Mincer-----	-----	-----
	Energy Resources Tech- nology Land, Inc.	029427	Feb. 16, 1962.
		029428	Feb. 16, 1962.
		031342	Feb. 16, 1962.
	Wasatch Development Com- pany.	-----	-----
	Joseph B. Umbleby-----	030979	Feb. 16, 1962.
	John W. Savage-----	034270	Feb. 16, 1962.
		034271	Feb. 16, 1962.
	Harlan H. Hugg-----	045092	Feb. 16, 1962.
	Dorothy D. Hugg-----	-----	-----

APPENDIX B

[Circular No. 460]

MANNER OF PROCEEDING IN CONTESTS INITIATED UPON A REPORT BY A
REPRESENTATIVE OF THE GENERAL LAND OFFICE

WASHINGTON, D.C., February 26, 1916.

To Special Agents, and Registers and Receivers, United States Land
Offices:

The following rules are prescribed for proceedings in contests initiated upon a report by a representative of the General Land Office. All existing instructions in conflict herewith are superseded:

1. The purpose hereof is to secure speedy action upon claims to the public lands, and to allow claimant, entryman, or other claimant of record, opportunity to file a denial of the charges against the entry or claim, and to be heard thereon if he so desires.

2. Upon receipt of a report this office will consider the same and determine therefrom whether the facts stated, if true, would warrant the rejection or cancellation of the entry or claim.

3. Should the charges, if not disputed, justify the rejection or cancellation of the entry or claim the local officers will be duly notified thereof and directed to issue notice of such charges in the manner and form hereinafter provided for, which notice must be served upon the entrymen and other parties in interest shown to be entitled to notice.

4. The notice must be written or printed and must refer to the letter from this office by initial and date, as authority for issuing the notice, and must state fully the charges as contained in said letter; also the number of the entry or claim, subdivision of land involved, name of entryman or claimant or other known parties in interest.

5. The notice must also state that the charges will be accepted as true, (a) unless the entryman or claimant files in the local office within thirty days from receipt of notice a written denial, under oath, of said charges, with an application for a hearing, (b) or submits a statement of facts rendering the charges immaterial, (c) or if he fails to appear at any hearing that may be ordered in the case.

6. Notice of the charges may in all cases be served personally upon the proper party by any officer or person or by registered letter mailed to the last address of the party to be notified, as shown by the record, and to the post office nearest to the land. When it is necessary to serve notice on the unknown heirs of a person in interest, the same must be addressed to that person at his address of record and also at the post office nearest the land. Proof of personal service shall be the written acknowledgement of the person served or the affidavit of the person who served the notice, attached thereto, stating the time, place, and manner of service. Proof of service of notice by registered letter shall consist of the report of the register and receiver who mailed the notices, accompanied by the post office registry return receipts, or the returned unclaimed registered letters.

7. If a hearing is asked for, the local officers will consider same and confer with the Chief of Field Division relative thereto and fix a date for the hearing, due notice of which must be given entryman or claimant. The above notice may be served by registered mail. By ordinary mail, a like notice will be sent to the Chief of Field Division.

8. The Chief of Field Division will duly submit, upon the form provided therefor, to this office, an estimate of the probable expense required on behalf of the Government. He will also cause to be served subpoenas upon the Government witnesses and take such other steps as are necessary to prepare the case for prosecution.

9. The Government must appear with its witnesses on the date and at the place fixed for said hearing, unless there is reason to believe that no appearance on behalf of the Government will be required. The officer in charge of hearings must, therefore, keep advised, as far as

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possible, as to whether the defendant intends to appear at the hearing. The Chief of Field Division may, when present, conduct the hearing on behalf of the Government.

10. If the entryman or claimant fails to deny the charges under oath and apply for a hearing, or to submit a statement of facts rendering the charges immaterial, or fails to appear at the hearing ordered without showing good cause therefor, such failure will be taken as an admission of the truth of the charges and will obviate the necessity for the Government submitting evidence in support thereof, and the register and receiver will forthwith forward the case with recommendation thereon to the General Land Office and notify the parties by registered mail of the action taken. In cases finally closed upon default of claimant if application to reopen any case is filed with the register and receiver they will forthwith forward same with recommendations to the General Land Office.

11. Upon the day set for the hearing and the day to which it may be continued the testimony of the witnesses for either party may be submitted, and both parties, if present, may examine and cross-examine the witnesses, under the rules, the Government to assume the burden of proving the charges, unless otherwise ordered.

12. If a hearing is had, as provided in paragraph 11, the local officers will render their decision upon the record, giving due notice thereof, in the usual manner. When decision is adverse to the Government, notice thereof must be sent to the Chief of Field Division.

13. Appeals or briefs, if filed, must be in accordance with the rules, but need not be served upon the Chief of Field Division or Government representative in charge of the hearing.

14. The above proceedings will be governed by the rules of practice. All notices served on claimants or entrymen must likewise be served upon transferees or mortgagees.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved:

ANDRIEUS A. JONES,
First Assistant Secretary.

APPENDIX C-1

July 29, 1935

REGISTER

Denver, Colorado.

SIR:

July 10, 1930, adverse proceedings were directed against the validity of the Liberty No. 1, Oil Shale Placer, SE., Sec. 22, T. 2 S., R. 95 W., 6th P.M. on the charge that annual assessment work was not performed on the claim for the year ending July 1, 1930, and that work has not been since resumed.

After notice issued and answer denying the charges was duly filed, hearing was duly before a United States Commissioner at Glenwood Springs, Colorado, on June 11, 1932, at which the Government appeared by attorney and no other appearances were noted. April 12, 1933, you transmitted the record to this office without decision.

On June 3, 1935, the Supreme Court decided in the case of Ickes vs. Virginia-Colorado Development Corporation, that the United States has no right to declare oil shale placers null and void because of failure on the part of the claimants to perform annual assessment work thereon, and on June 24, 1935, the Department in the case of the Shale Oil Company, Denver, mineral application 042552, recalled and vacated its decision in the Virginia-Colorado Development Corporation case, and overruled its previous decisions in conflict with the Supreme Court's decision.

From the foregoing it is clear that the adverse proceedings in this case are invalid for any purpose. Accordingly, contest No. 11823 is dismissed and the case is closed. Advise the parties hereof.

Several contest cases involving oil shale placers are now pending in your office. In view of the decisions referred to hereinabove, you are instructed to close out on your records and transmit to this office all contest cases involving solely the question of a failure to perform annual assessment work, and failure to resume work on oil shale placers prior to the date of a challenge by the United States to the valid existence of the claim, where no answer has been filed by the claimants. In all cases involving only the question of annual assessment work where answer has been filed by any of the contestees you will transmit the records to this office without action.

You will retain in your files, subject to further instructions from this office all contest cases involving oil shale placers wherein charges have been made involving other questions than that above stated, even if a charge has also been made in that regard.

April 17, 1964

In your response hereto refer to this letter by date and number.

Very respectfully,

(Sgd.) FRED W. JOHNSON,
Commissioner.

APPENDIX C-2

Box 477, GRAND VALLEY, COLORADO,
April 22, 1936.

COMMISSIONER GENERAL LAND OFFICE,
Washington, D.C.

Please advise the undersigned, Ida Dere, why Lucy Agness Oil Shale Claims Nos. 1 and 2 (being N $\frac{1}{2}$, N $\frac{1}{2}$ and S $\frac{1}{2}$ N $\frac{1}{2}$, Sec. 4, Township 5 South. R 95 West) should not be clear listed from the charge of failure to do and perform annual assessment work. Being contest No. 11750, in keeping with and per tenor of your letter dated 7/29/35, which ordered the clear listing of Liberty Oil Shale Claim No. 1, being contest No. 11823 addressed to Register of Denver Land Office. These two claims were valid existing claims on 2/25/20, with several years assessment work having since been done. The field Division Inspectors convinced me on or about the year 1927 or 28, that it would be useless to go to the expense of answering the Government contest, but the Supreme Court Decision of 6/3/35, seemingly has set at naught all of these former challenges, where the only question was lack of assessment work. Please clear list my said claims or advise me what must be done to get them clear listed.

Yours respectfully,

(Sgd.) IDA DERE.

APPENDIX C-3

May 4, 1936

IDA DERE,
Box 477, Grand Valley, Colorado.

MADAM:

Replying to your letter of April 22, 1936, you are advised the records of this office show that the Lucy Agnes Nos. 1 and 2 oil shale placers were declared null and void by this office on August 18, 1933, because of failure of the owners of the claims to file answer denying the charge that annual assessment work had not been performed on

the claims for the year ending July 1, 1929, and that work had not been since resumed.

On June 3, 1935, the Supreme Court of the United States held in the case of Ickes vs. Virginia-Colorado Development Corporation, that the oil shale placer claimant, a party in that case, lost no rights by failure to do annual assessment work on its claims and that such failure gave the Government no right to declare the claims null and void. It further held that proceedings brought by the Government based solely on such a charge went beyond the authority conferred by law and did not affect the validity of the claims. In view of this holding of the Supreme Court, this office considers that it would be unnecessary to revoke its previous decision holding the Lucy Agnes claims to be null and void. That decision being without authority of law is without any effect on the title arising from the location of the claims.

Very respectfully,

(Sgd.) FRED W. JOHNSON,
Commissioner.

APPENDIX C-4

July 4, 1944

MR. W. PORTER NELSON,
607 California Building, Denver 2, Colorado.

MY DEAR MR. NELSON:

I have your letter of June 15 asking for the present status of the contest No. 12478 directed against the Sid Nos. 1 to 22 oil shale placer locations by our letter No. 1069641 of July 16, 1930.

The letter referred to directed new adverse proceedings against the locations mentioned on the charge "That annual assessment work to the value of \$100 was not performed upon each or any one of the Sid Nos. 1 to 22 inclusive, oil shale placers for the year ending July 1, 1930, and that work has not been since resumed." The letter also directed service of notice of the charge on E. B. McNair and George W. Habberset, the record title holders of the locations.

On September 16, 1930, answer was filed in the Denver Land Office by E. B. McNair in which no denial is made of the allegations contained in the charge, but contestee contended that the Sid Nos. 1 to 22 claims having been located prior to the leasing act of February 25, 1920, constituted valid claims existent February 25, 1920, and maintained in compliance with the laws under which they were initiated, etc.

By our letter of June 24, 1931, to the Register it was stated that as the answer merely objected to the charge without denying the allega-

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tions therein, the contestees were allowed 30 days from notice in which to file a proper answer or appeal to the Secretary of the Interior and that if no action was taken within the time allowed the locations would be declared null and void without further notice. On August 25, 1931, the Register reported no action taken and transmitted evidence of service consisting of registry return receipt signed by E. B. McNair July 24, 1931. Accordingly, by our letter of October 12, 1931, to the Register, the locations were declared null and void as to the interest therein of E. B. McNair and the Register was directed to serve new notice of the decision of July 16, 1930, on George W. Habberset. The records show that such notice was served October 24, 1931, and in his letter of December 1, 1931, the Register reported that no answer was filed by Habberset within the time allowed. Accordingly by our letter of January 7, 1932, to the Register it was held that "The failure of the contestee to file answer denying the charge is taken as an admission by him of the truth thereof, in view of which the Sid Nos. 1 to 22, inclusive, oil shale placer locations are declared null and void in their entirety and the United States has taken possession of the land within the claims for its own uses and purposes." The case was also closed by that letter.

However, in the case of the Shale Oil Company (55 I.D. 287) the Department held, in view of the decision of the Supreme Court in the case of The Virginia-Colorado Development Corporation (295 U.S. 639) that the adverse proceedings in that case, based on charges of failure to do annual assessment work must be held as without authority of law and void.

Very truly yours,

(Sgd.) FRED W. JOHNSON,
Commissioner.

APPENDIX C-5

July 17, 1935

MR. EDWARD ALTENBERN
De Beque, Colorado.

MY DEAR SIR:

Replying to your letter of June 25, 1935, addressed to the Register of the United States land office, Denver, Colorado, and referred here for reply, you are advised that on June 3, 1935, the Supreme Court of the United States held in the case of Ickes, Secretary of the Interior, vs. Virginia-Colorado Development Corporation that the oil shale claimant lost no rights by failure to do the annual assessment work

on its claims, that such failure gave the Government no right to declare the claims null and void, and that the proceedings brought by the Government against the claims, based solely on that ground, went beyond the authority conferred by law and did not affect the validity of the claims.

In view of that decision the Department, on June 24, 1935, in the case of the Shale Oil Company, Denver mineral application 042552, recalled and vacated its decision in the Virginia-Colorado Development Corporation case and overruled all its previous decisions in conflict with the decision of the Supreme Court.

You are, therefore, advised that so far as the jurisdiction of this office is concerned, any declaration by it that an oil shale placer claim is null and void based solely on a charge that the claimant failed to perform annual assessment work or resume work on the claim is void and does not affect the right of the owner of the claim to maintain his possession thereof under the mining laws.

However, so far as this office is able to determine from its records, it has never declared null and void any oil shale placers covering the land embraced in your homestead entry, as to such entry which is now pending, should you make satisfactory final proof thereon you will be entitled to a patent if all be found regular, in the absence of any contest or protest by any other parties making claim of a right to the land superior to yours. Your entry is the only claim of record on the tract books of the land office and if any other persons claim the land it is incumbent on them to contest the entry, and should they do so the burden of proof that they have valid claims which have not been abandoned would be upon them.

In the event your homestead entry should be canceled after contest and hearing because of conflict with prior valid mining claims, you would have the right to apply for repayment of all fees and commissions paid by you in connection with your entry but no reimbursement will be made by the United States for any expenditures on improvements made for any purposes on the entry. So far as this office is concerned, no objection would be made by it to the removal of any such improvements by a homestead entryman after cancellation of his entry, but this should not be taken as authority for the removal of structures which are part of the realty in violation of state laws and of the rights of other parties.

Very respectfully,

(Sgd) FRED W. JOHNSON,
Commissioner.

April 17, 1964

APPENDIX C-6

October 31, 1935

The Honorable The SECRETARY OF THE NAVY.

MY DEAR MR. SECRETARY:

Reference is made to the letter of November 1, 1933, of Secretary Ickes, containing a list of oil shale placer mining claims, with descriptions of the land involved, situated within Naval Oil Shale Reserves Nos. 1 and 3 in Colorado and No. 2 in Utah, involved in adverse proceedings, and the status of each case.

The adverse proceedings involving all of the said claims were based upon a charge that annual assessment work had not been performed upon the claim or claims involved for a stated assessment year and that work had not been resumed thereon. You were informed in the above-mentioned letter that certain claims had been declared null and void in their entirety and others had been declared null and void to the extent of the interests of the parties served with notice, and that further action in all pending cases involving the question of assessment work on oil shale placers was suspended in this office pending a final decision in the courts upon the matter of the authority of this Department to attack the validity of oil shale placer claims upon the ground stated.

On June 3, 1935, the Supreme Court, in the case of *Ickes vs. Virginia-Colorado Development Corporation*, held that the United States is without authority to challenge the validity of an oil shale placer claim on account of failure to perform the annual assessment work, or to resume work, thereon. All previous action taken upon such charges in the cases referred to therefore is without effect and void. The status of the claims so far as this Department is concerned is that they are subsisting claims which, if located on valid discoveries of mineral by qualified locators, segregate the land against its subsequent withdrawal for Naval Oil Shale Reserves unless the claims have been abandoned.

Sincerely yours,

CHARLES WEST,

Acting Secretary of the Interior.

CLAIM OF LAWRENCE M. MONTGOMERY AND PACIFIC INDEMNITY COMPANY

TA-266

*Decided May 14, 1964***Torts: Generally**

The United States can be held liable under the Federal Tort Claims Act only if the individual whose alleged act or omission led to a claim against the Government is an employee of the United States. Hence, any question concerning that individual's employment is a threshold issue and must be considered at the outset.

Torts: Conflicts of Law—Torts: Scope of Employment

The fact of whether an individual is or is not an employee of the United States is a Federal question to be determined under Federal law. The scope of the individual's employment is a question to be determined under the law of the pertinent State.

Torts: Generally

The fact that the United States supplies materials, personnel, and funds for a project, carried out in cooperation with other organizations, does not make the project a joint adventure, unless there was either an express or implied contract by which the United States undertook to bind itself to the consequences of a joint adventure.

APPEAL FROM ADMINISTRATIVE DETERMINATION

Dr. Lawrence M. Montgomery, 20 Clarendon Avenue, San Francisco, California, and Pacific Indemnity Company, his subrogee-insurer, by and through their attorneys, Messrs. Richards, Haga & Eberle of Boise, Idaho, have timely appealed from the administrative determination (T-P-B-29) dated March 22, 1963, of the Field Solicitor, Boise, Idaho, denying their claims in the amount of \$100 and \$617.05, respectively. The claims arose out of damage sustained by an automobile owned by Dr. Lawrence M. Montgomery in an accident with a Government-owned vehicle on April 25, 1962.

At the time of the accident the Government-owned vehicle was being operated by an employee of the University of Idaho, on work incident to a gopher control project, which had been undertaken by the Gopher Control Board of Ada County, Idaho, in cooperation with the Bureau of Sport Fisheries and Wildlife of this Department.

The administrative determination denied these claims under the Federal Tort Claims Act¹ because "contributory negligence on the part of the claimant's driver was the proximate cause of the accident * * *."

The claimants except to the determination, in summary, for the following reasons:

¹ 28 U.S.C., 1958 ed., sec. 2671 *et seq.*

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1. The accident was proximately caused by the negligence of the driver of the Government-owned vehicle.
2. The driver of the claimant's car was not negligent in any manner.

The Federal Tort Claims Act states:²

The head of each federal agency, or his designee for the purpose, acting on behalf of the United States, may consider, ascertain, adjust, determine, and settle any claim for money damages of \$2,500 or less against the United States accruing on and after January 1, 1945, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of *any employee of the government* while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. (Italics added.)

The driver of the Government-owned vehicle was not an employee of the United States Government in the ordinary sense. Whether or not he could be considered an employee of the Government for purposes of the Federal Tort Claims Act was not decided in the original determination. In that determination the Field Solicitor stated:

The file accompanying the claim indicates that Mr. William R. Sproat, driver of the Government vehicle, was an employee of the University of Idaho who was engaged on a Cooperative Gopher Control Project with the Bureau of Sport Fisheries and Wildlife. In view of our determination of this claim on other grounds we do not comment further on the status of Mr. Sproat in relation to the Federal Tort Claims Act, but merely note this situation for the records.

Since the Government can be held liable, in any event, only if Mr. Sproat was, at the time of the accident, an employee of the Government for purposes of the Federal Tort Claims Act, the question of whether he was such an employee is a threshold question that should, and will, be considered at the outset of this determination. Moreover, it is a question that must be determined in accordance with Federal law.³

Mr. Sproat was, as has been stated, an employee of the University of Idaho, and not an employee of the United States in the ordinary sense. The particular job for which he had been employed by the University was that of crew leader for the gopher control project. While the Government furnished the automobile to transport the crew leader and his crew, this circumstance would not by itself be sufficient to make Mr. Sproat an employee of the Government.

² 28 U.S.C., 1958 ed., Supp. I, sec. 2672.

³ *Pattno v. United States*, 311 F. 2d 604 (10th Cir. 1962). This case distinguishes between the "fact of employment" which is a "federal" law question, and the "scope of employment" which is a "state" law question.

Hence, we have to examine whether there was a contract between the United States and Mr. Sproat's actual employer, the University, which contained provisions constituting the project a joint adventure in the legal sense. In *Glasgow v. United States*,⁴ the Court stated:

Not every person who accepts or is eligible to receive its bounty is an employee of the Government. In an era of subsidies and grants in aid, such a conclusion would be a complete non sequitur.

In *Fries v. United States*,⁵ the Court of Appeals for the Sixth Circuit refused to accept the contention that the negligence of the operator of a vehicle could be imputed to the United States, on the theory that a joint adventure existed, in a case where the vehicle, the operator, and some of the funds for the project had been furnished by the Government. The Court said:

We have cited to no authority holding the United States of America liable on a joint adventure. Certainly there was no express contract in the instant case by which the United States undertook to bind itself to the consequences of a joint venture * * *. The United States can be bound only by acts of an agent which are within the limitation of his authority; and this is true with respect, not only to express contracts, but to implied contracts as well. *Farm Security Administration v. Herren*, 8 Cir., 165 F. 2d 554, 564. An express or implied contract binding the United States can be created only if some officer of the government, with express or implied power to commit the government to the contract, must have intended that result. *Eastern Extension Tel. Co. v. United States*, 251 U.S. 355, 363, 366, 40 S. Ct. 168, 64 L. Ed. 305.

The fact that the United States supplied materials, personnel, and funds for the gopher control project does not make an undertaking a joint adventure. There was neither an express nor implied contract "by which the United States undertook to bind itself to the consequences of a joint venture,"⁶ between it and either the Ada County Gopher Control Board or the University of Idaho.

Accordingly, we find that the operator of the Government vehicle was an employee of the University of Idaho, and not an employee of the United States. For these reasons it is not necessary to determine the proximate cause of the accident.

Therefore, the determination (T-P-B-29) of the Field Solicitor, Boise, Idaho, dated March 22, 1963, denying the claims of Dr. Lawrence M. Montgomery and Pacific Indemnity Company, his sub-rogee-insurer, is sustained.

EDWARD WEINBERG,
Deputy Solicitor.

⁴ 95 F. Supp. 213, 214 (N.D. Ala. S.D. 1951).

⁵ 170 F. 2d 726, 730 (6th Cir. 1948).

⁶ *Ibid.*

**MANSELL O. LA FOX ET AL.
STATE OF CALIFORNIA**

A-29030

*Decided May 14, 1964***Small Tract Act: Classification**

Land embraced in unpatented mining claims which display no indications of abandonment is properly classified as not suitable for small tract purposes.

State Exchanges: Generally—Mining Claims: Generally—Mining Claims: Contests

Where after an application for a State exchange is filed it appears that the selected lands are covered by apparently valid mining claims, the State, if it denies the validity of the claims, is to be allowed a hearing on the issue of whether or not the claims are valid.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Mansell O. La Fox and 10 others¹ have appealed to the Secretary of the Interior from a decision dated April 4, 1961, by which the Appeals Officer of the Bureau of Land Management affirmed a decision of the land office at Los Angeles, California, rejecting their small tract applications for certain land in San Bernardino County, California. The State of California has also appealed from the same decision because of the rejection of its conflicting exchange application. The rejection of all the applications was predicated upon the existence of mining claims found by the Bureau to be valid and a classification of the land as mineral in character. The Bureau found the land to contain valuable deposits of limestone. The rejection of the State application was based upon the additional ground that the value of the land selected by the State is far in excess of that of the offered land.

On appeal, the appellants contend that the land is nonmineral and is not embraced in any valid mining claims. They complain that they have improperly been denied an opportunity to present evidence in support of their contention in a hearing afforded by the Bureau of Land Management. The State has submitted the affidavit of a geologist expressing doubts as to the commercial value of the deposits of limestone, from the standpoint of quantity and quality, and as to the feasibility of attempting to remove the alluvial overburden to reach the limestone preparatory to extraction of the limestone from the land.

¹ The names of the small tract applicants and the serial numbers of their applications are listed in the attached appendix.

The act of June 1, 1938, as amended (43 U.S.C., 1958 ed., sec. 682a *et seq.*), under which the small tract applications were filed, authorizes the Secretary of the Interior, in his discretion, to sell or lease small tracts of public land "which the Secretary may classify as chiefly valuable for residence, recreation, business, or community site purposes," and section 7 of the Taylor Grazing Act, as amended (43 U.S.C., 1958 ed., sec. 315f), authorizes the Secretary, in his discretion, to examine and classify land withdrawn by Executive Order No. 6910 (the land in question was so withdrawn) which is more valuable or suitable for some purpose other than grazing and to open it for disposal in accordance with such classification under the applicable public land law. Thus, as to the small tract applicants, the Secretary's delegate had ample authority to consider the purposes for which the land is suitable and to determine its relative suitability for different purposes. The existence of mining claims with no indications of abandonment was sufficient to support a determination that the land is not suitable for small tract purposes. See *Lawrence C. Roberts*, A-28167 (February 2, 1960); *Edward J. Rowley*, A-28146 (May 24, 1960). Therefore, the small tract applications were properly rejected.

The State filed its exchange application under section 8 of the Taylor Grazing Act, as amended (43 U.S.C., 1958 ed., sec. 315g(c)), offering surveyed school sections within the Twentynine Palms Artillery and Anti-Aircraft Weapons Training Area of the Marine Corps in exchange for selected land which it alleged to be of equal value and nonmineral. The language of the statute governing exchanges requires the Secretary to proceed with an exchange upon application of a State without the exercise of the classification authority bestowed upon him by section 7 of the Taylor Grazing Act, as amended, so that a rejection of the application may not rest upon suitability of the land for some other purpose but only upon the existence of prior rights in the land. Solicitor's opinion, 61 I.D. 270 (1954), as supplemented, 61 I.D. 277 (1954). The land office and the Appeals Officer found private rights in the land in the holders of valid mining claims.

The land office rejected the State's application as to 320 of the 2,169.70 acres of selected land on the ground that this land was covered by valid mining claims and was mineral in character, and held the application for rejection for the remaining lands because of a discrepancy in the value of the offered and selected lands. On appeal to the Director, the State confined itself to the contention that the mining claims were invalid and that none of the selected land was mineral in character and requested a hearing to present evidence on

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the questions of fact raised by the appeal. The Appeals Officer stated that an intensive field examination had established the fact that the lands covered by the mining claims were more valuable for minerals and mineral development and that in the circumstances a hearing was unnecessary. The State again on this appeal insists that there should be a hearing on this issue.

In letters dated September 23 and November 14, 1960, the State asked that the requirement that it equalize values be suspended until the question of the proper valuation of similar lands offered by the State in other exchange applications was settled. The Director on December 20, 1960, responded that the pendency of the appeal in this case suspended the requirement that the State equalize values until its appeal was disposed of.

The valuation problem was considered by the Department in *State of California*, 70 I.D. 234 (1963), in which it was held:

Where land offered by a State in exchange for public land pursuant to section 8 of the Taylor Grazing Act, as amended, has been used by the Department of the Navy for several years under leaseholds acquired through condemnation proceedings and the Navy's usage has depressed the value of the State's land, the value of the land for the purpose of determining whether the offered and selected lands are of equal value is to be the amount that would have to be paid for the land by the United States in proceedings brought to condemn the fee. (Syllabus.)

Because the offered lands here are in the same situation as those under consideration in the case just cited, their value for exchange purposes is to be determined in the same way.

There remains the issue to which the State's appeal is specifically directed, that is, the determination that the mining claims are valid, that these lands are mineral in character, and that the State was not entitled to a hearing on the validity of the mining claims and the mineral character of the lands they cover.

In view of the mandatory nature of the Secretary's obligation to carry out a State exchange, the State is not in the same position as an ordinary applicant for an interest in public lands. While the State does not have a vested right to the selected land prior to its compliance with all the requirements of the law and regulations, the filing and maintenance of its application does give it a "valid claim." *State of California*, 60 I.D. 322 (1949). The Department has held that in cases of conflict between an entry or a lease and a conflicting mining claim, the entry or lease cannot be canceled without a hearing if the entryman or lessee desires one, even though the Department may consider the mining claim valid. *Union Oil Company et al.*, 65 I.D. 245 (1958); *Union Oil Company v. Seaton*, 289 F. 2d 790 (D.C. Cir. 1960); *Walter*

G. Bryant, 53 I.D. 379 (1931); cf. *State of Louisiana, Thomas Connell*, A-27817 (January 30, 1959).

The State under its application for a section 8 exchange stands somewhere between an ordinary applicant for an interest in public land and an entryman or lessee who has a vested right in public land. In view of the statute's mandatory requirement directing the Secretary to carry out the exchange and the lack of any authority in the Secretary to classify the selected land as a prerequisite to allowing the exchange, the fact that the Secretary considers the land mineral in character or within a valid mining claim is not sufficient justification for rejecting the application if the State does not accept the Secretary's conclusion. The difference in opinion must be resolved on what is at least initially a matter of fact by holding a hearing.

Accordingly, a hearing will be directed at which the State will have the burden of establishing a prima facie case that the mining claims are invalid. If it does so, the mineral claimants will then be required to submit evidence to overcome the State's case and establish the validity of their claims.

Therefore, the decision of the Appeals Officer is affirmed as to the small tract applicants and vacated as to the State and the case is remanded for further proceedings consistent herewith.

JOHN A. CARVER, Jr.,
Assistant Secretary of the Interior.

APPENDIX

<i>Applicants</i>	<i>Serial Numbers</i>
Mansell O. La Fox-----	Los Angeles 0126547
William A. Spencer-----	0127619
Charles W. Mosier-----	0127655
William C. Leonard-----	0127895
Rile Henry Flinn-----	0127896
Louise T. Denton-----	0128377
Richard E. Shelton-----	0128731
Clarence E. Moore-----	0129121
Vance A. Hibbard-----	0131216
Connie A. Burrige-----	0131870
Virginia M. Hodde-----	0131874

ESTATE OF JACK FIGHTER

FORT PECK ALLOTTEE NO. 1309

IA-1346

Decided May 26, 1964

Indian Lands: Descent and Distribution: Wills—Rules of Practice: Generally

A petition for rehearing was properly denied for untimeliness under 25 CFR 15.17 by an Examiner of Inheritance when it was mailed by the petitioner's attorney on the last day of the 60-day period provided by the regulation but was not received by the Superintendent until after the expiration date.

APPEAL FROM AN ORDER BY AN EXAMINER OF INHERITANCE

This is an appeal by Rose Archdale from an order of an Examiner of Inheritance denying appellant's petition for rehearing for lack of timeliness.

On April 26, 1963, the Examiner entered an order approving the last will and testament of Jack Fighter, deceased Fort Peck allottee No. 1309. He also found that Rose Archdale, the decedent's half-sister, who contests the approval of the will, would have been entitled to all the estate, appraised at \$34,700.96, if Jack Fighter had died intestate.

The appellee is Emma Squires Beauchman, mother and guardian of Myrtle Margie Squires, whom decedent describes in his will as his daughter and who is the principal beneficiary and proponent of the will which was approved by the Examiner of Inheritance.

In the order denying appellant's petition for rehearing, the Examiner found that copies of the order approving the will were mailed to the various interested parties and their attorneys on April 26, 1963. He also determined that appellant's petition for rehearing was received by the Superintendent on June 26, 1963, and that the 60-day period allowed by 25 CFR 15.17 for filing a petition for rehearing expired at midnight June 25, 1963. Inasmuch as the petition for rehearing was not received by the Superintendent until after the 60-day period had expired, the Examiner held that it was not timely filed and therefore denied the petition.

The order denying the petition for rehearing recites as follows the advice which the Examiner gave appellant's attorney concerning the filing of a petition for rehearing:

On Friday, June 21, 1963, Mr. Hubert Massman, Attorney for the petitioner herein, contacted the examiner by long distance telephone with a request that he be allowed additional time in which to prepare and file a petition for rehearing. He had a copy of Part 15, Title 25, Code of Federal Regulations before him, and in conference by telephone the examiner and the attorney, each following the copy of said regulations at sec. 15.17 read together the following:

"REHEARING. (a) Any person aggrieved by the decision of the examiner of inheritance may, within 60 days after the date on which notice of the decision is mailed to the interested parties (or within such additional period as the Secretary, for good cause, may allow in any case), file with the Superintendent a written petition for rehearing."

At that time, Mr. Massman was advised by the examiner that the last day for filing such a petition was June 25, 1963, and that the filing must be made with the Superintendent of the appropriate Indian agency; that in the opinion of the examiner, no authority existed by which he might extend the time for filing. The attorney was instructed to make the filing on or before the end of the 60-day period, and, even though an amendment to perfect the same might later be submitted, it would be liberally considered providing the opposing counsel agreed. A space of two weeks was considered as a reasonable time for the filing, and Mr. Gallagher, attorney for the guardian ad litem did call by long distance telephone and did confirm the arrangement. (Italics added.)

On appeal, it is earnestly contended that because the petition for rehearing was mailed prior to the expiration of the 60-day period, it is timely filed within the meaning of 25 CFR 15.17 and "that facts exist showing justifiable excuse for the circumstances under which the Petition was filed."

In an affidavit in support of the appeal, appellant's attorney states that he placed the petition for rehearing in the mail prior to 5:00 p.m. on June 25, 1963, and that constitutes a timely filing under the applicable procedural statutes in both state and federal courts in Montana.

In so contending, appellant relies on certain filing provisions of the Montana Code and Montana decisions thereunder. These authorities have no applicability to the Department's procedural requirements for the determination of heirs and approval of wills under 25 CFR, Part 15. Likewise, the authorities cited by the appellant on Rule 5(b) of the Federal Rules of Civil Procedure concerning service by mail do not apply here. The procedure for determining the decedent's heirs or approving his will with respect to his restricted Indian property is governed by the regulations of the Secretary of the Interior made pursuant to sections 1 and 2 of the Act of June 25, 1910, 36 Stat. 855, 856, as amended, 25 U.S.C. §§ 372 and 373.

Although the precise problem of whether the filing specified in 25 CFR 15.17 is satisfied by mere mailing was not directly in issue in our earlier decisions on timeliness under that regulation, discussions in them clearly indicate that the filing date was considered to be the date the petition was received.¹ The direction "file with the superintendent" contained in 25 CFR 15.17 in our view means quite simply

¹ E.g., *Estate of Sam Pierre Alexander*, IA-918 (December 9, 1960); *Estate of Henry Amanty*, IA-879 (July 17, 1959). Cf., *Uranium Exploration Company of California*, 65 I.D. 365 (1958); *Estates of Alex (Boney) Dixon and Kenneth A. Dixon*, IA-1148 (April 28, 1961).

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what it says, and there is nothing in the regulation to even suggest that this filing is accomplished until a petition has been actually delivered to the Superintendent. That mailing a petition does not constitute filing it under 25 CFR 15.17 is further illustrated by the provision for the distribution of estates in 25 CFR 15.16.

Under the latter regulation (25 CFR 15.16) the distribution of an estate may be made by the Superintendent after 60 days have elapsed from the date upon which notice of the decision is mailed to the interested parties, unless within that period a petition for rehearing is filed. Obviously a petition which has been mailed within the required period but which for some reason does not reach the Superintendent within the required period would be ineffective to stay the distribution authorized by the regulation. Therefore, it must follow that filing a petition for rehearing with the Superintendent means its actual delivery to his office rather than the mere mailing of the petition to him. This is in accord with the clear import of the regulation's language itself, our previous opinions on timeliness, and the related regulation concerning distribution of an estate.

We therefore conclude that the Examiner of Inheritance was correct in his determination that the petition was untimely and, consequently, subject to dismissal. He was also correct in his statement to the appellant's attorney and in his order denying the petition for rehearing, that he has no authority to grant extensions of time in which to file a petition for rehearing.²

And this brings us to appellant's contention that justifiable excuse exists and to the question whether good cause exists for relief from the untimely filing.

At the outset we note that the appellant's attorney was fully and accurately advised by the Examiner of Inheritance that he could not grant the extension of time requested by the attorney, and of the consequent need for the attorney to make a timely filing. In the latter regard, appellant's attorney states in an affidavit that after the order approving the will was entered, his clients informed him for the first time of the possibility that former officials of the Fort Peck Agency might be used as witnesses. He then states that difficulty in contacting one of these witnesses and securing his affidavit was the reason for delaying the mailing of the petition for rehearing. However, in his own affidavit, the attorney concedes what the Examiner recites in the portions of his order quoted above—namely, that the attorney was advised to file his petition in some form prior to June 25, 1963, with an opportunity to perfect it later when the witnesses had been reached

² *Estate of Sam Pierre Alexander, supra* note 1; *Estate of Jeanette Halfmoon, IA-120* (May 5, 1954).

and their affidavits obtained. This the attorney failed to do, and we therefore find that good cause does not exist for relief.

Inasmuch as the petition for rehearing was not timely, and good cause does not exist to excuse its late filing, under the authority delegated to the Solicitor by the Secretary of the Interior (Sec. 210bM2.2A(3)(a), 24 F.R. 1348) and redelegated to the Associate Solicitor by the Solicitor (Solicitor's Regulation 19, 29 F.R. 6449), the appeal is hereby dismissed and the order of the Examiner of Inheritance denying the petition for rehearing is affirmed.

H. E. HYDEN,
Associate Solicitor.

SOUTHWESTERN PETROLEUM CORPORATION

A-29834

Decided May 26, 1964

Oil and Gas Leases: Generally—Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: First Qualified Applicant

Although a junior offeror may have been the first qualified applicant for an oil and gas lease, if a lease was mistakenly issued to the senior offeror and it is assigned to a bona fide purchaser and the assignment is filed before the land office records show any action taken against the lease, the interests of the bona fide purchaser will be protected in accordance with the 1959 and 1960 amendments of the Mineral Leasing Act and the junior offeror's offer must be rejected.

Notice—Oil and Gas Leases: Generally—Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Cancellation

In considering whether an assignee of an oil and gas lease was a bona fide purchaser and entitled to protection in accordance with the bona fide purchaser provisions of the Mineral Leasing Act, as amended, the basic question is whether he in good faith and for value acquired his interest without notice of a superior right to the lease; he will not be considered as having constructive or imputed notice that an offeror whose offer was junior to that for which the lease issued had a right to the lease superior to the lessee, if he acted prudently, even though an extremely cautious person might have ascertained that the junior offeror might have a right to have the voidable lease canceled.

Oil and Gas Leases: Generally—Oil and Gas Leases: Assignments or Transfers

An assignee of an oil and gas lease, if the assignment is otherwise valid, is entitled to protection in accordance with the bona fide purchaser provisions of the Mineral Leasing Act if his assignment is filed before any adverse action or protest has been made against the lease even though the assignment had not been approved before such action or protest is made.

May 26, 1964

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Southwestern Petroleum Corporation has appealed to the Secretary of the Interior from a decision by the Division of Appeals, Bureau of Land Management, affirming a New Mexico land office decision rejecting its oil and gas lease offer New Mexico 048299 for the reason that the lands applied for were not available for leasing as they are within oil and gas lease New Mexico 048273.

Appellant's lease offer was pending at the time the lease was issued to J. Penrod Toles. After the lease was issued to Toles, an assignment of the lease to Ralph Lowe was executed and filed for approval. The conflict between appellant's offer and Toles' lease was discussed in a previous decision in this matter, *J. Penrod Toles*, 68 I.D. 285 (1961), wherein it was held that Toles' offer was in violation of departmental regulation 43 CFR, 1964 rev., 192.42(d), now 43 CFR 3123.1(d), 29 F.R. 4517, because it described less than 640 acres which were available for leasing when the offer was filed and that the lease was subject to cancellation since appellant rather than Toles was the first qualified applicant. However, the cancellation of Toles' lease was declared to be premature in view of the provision relating to bona fide purchasers added by the act of September 21, 1959, 73 Stat. 571, to section 27 of the Mineral Leasing Act, 41 Stat. 448, as amended,¹ and amended by the act of September 2, 1960, 74 Stat. 785, 788; 30 U.S.C. § 184(h)(2)(i) (Supp. IV, 1963),² and the regulation promulgated pursuant to these amendatory acts, 43 CFR, 1961 Supp., 191.15(a). The decision noted that the regulation required notice of a proposed cancellation to the holder of a lease or an interest in a lease and that

¹ The September 21, 1959, act provided as pertinent here as follows:

"The right of cancellation or forfeiture for violation of the provisions of this Act shall not apply so as to affect adversely the title or interest of a bona fide purchaser in any lease, option for a lease, or interest in a lease acquired in conformity with the acreage limitations of this Act from any other person, association or corporation whose holdings, or the holdings of a predecessor in title, including the original lessee of the United States, may have been canceled or forfeited, or may be subject to cancellation or forfeiture for any such violation."

² The September 2, 1960, act provided in pertinent part as follows:

"The right to cancel or forfeit for violation of any of the provisions of this Act shall not apply so as to affect adversely the title or interest of a bona fide purchaser of any lease, interest in a lease, option to acquire a lease or an interest therein, or permit which lease, interest, option, or permit was acquired and is held by a qualified person, association, or corporation in conformity with those provisions, even though the holdings of the person, association, or corporation from which the lease, interest, option, or permit was acquired, or of his predecessor in title (including the original lessee of the United States) may have been canceled or forfeited or may be or may have been subject to cancellation or forfeiture for any such violation. If, in any such proceeding, an underlying lease, interest, option, or permit is canceled or forfeited to the Government and there are valid interests therein or valid options to acquire the lease or an interest therein which are not subject to cancellation, forfeiture, or compulsory disposition, the underlying lease, interest, option, or permit shall be sold by the Secretary to the highest responsible qualified bidder by competitive bidding under general regulations subject to all outstanding valid interests therein and valid options pertaining thereto."

he be given an opportunity to avail himself of the benefits of the statute. Therefore, it held that until the validity of the assignment had been determined and notice, if necessary, given to the assignee, the cancellation of the lease was premature. The case was remanded for appropriate action.

Upon reconsideration, the land office reviewed an affidavit and certain documents submitted by Lowe, the assignee, and held that he was a bona fide purchaser within the meaning of the act and that consequently the leasehold interest assigned to him need not be canceled. Accordingly, the land office approved the assignment. Because the lease need not be canceled as to the assignee's interest, the land office rejected appellant's offer on the ground that the lands were not available for leasing, being within the continuing lease. The Division of Appeals affirmed that action.

Appellant objects to this action by the Bureau, contending first that the original cancellation of the Toles' lease was correct because as a matter of law the bona fide purchaser provision is not applicable in these circumstances. Its rationale for this contention is that the 1960 act, the regulations thereunder, and the legislative history all refer to the bona fide purchaser rule, in effect, as applying only where there is a violation of a provision of the "Act," and nothing refers to a violation of a regulation. Therefore, since Toles' lease was subject to cancellation for violation of a regulation rather than any provision of the Mineral Leasing Act the bona fide purchaser provision is inapplicable. It admits that a valid regulation has the effect of law, but contends that this does not elevate a regulation to being a statutory provision and that there is definitely a distinction between a regulation and a provision of an act, citing *United States v. Mersky et al.*, 361 U.S. 431, 437 (1960).

The *Toles* decision, however, pointed out that as the lease was issued to Toles in violation of the departmental regulation, Toles was not the first qualified applicant and the lease was subject to cancellation under the statutory mandate imposed by section 17 of the Mineral Leasing Act, 41 Stat. 443 (1920), as amended, 30 U.S.C. § 226 (c) (Supp. IV, 1963), that if a lease is to issue it must be issued to the first qualified applicant. Therefore, appellant's claimed right to a lease here for the lands in conflict is based upon a provision of the "Act" and a violation of the "Act." The arguments appellant has made with respect to this first contention cannot be accepted and we find that the *Toles* decision is controlling insofar as the applicability of the bona fide purchaser provision in these circumstances is concerned. See also *Gulf Oil Corporation et al.*, 69 I.D. 30 (1962), *aff'd as to another issue sub nom. Southwestern Petroleum Corp. v. Udall*, 325 F. 2d 633 (D.C. Cir. 1963); *Boesche v. Udall*, 373 U.S. 472, 484 (1963), where the Court in

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upholding the Secretary's right to cancel a lease issued in violation of the 640-acre rule said:

In addition, exercise of the administrative power [to cancel] in cases of this type safeguards the *statutory* rights of conflicting claimants. (Italics added.)

Appellant contends that the Bureau was wrong in assuming that the statements by Lowe that he was a bona fide purchaser should be accepted without granting it, the adverse party, the right to advance its arguments. Its objects to the Bureau's citing the following provision of section 27 of the Mineral Leasing Act, as amended, *supra*, relating to the bona fide purchaser in support of its decision:

Effective September 21, 1959, any person, association, or corporation who is a party to any proceeding with respect to a violation of any provision of this Act, whether initiated prior to said date or thereafter, shall have the right to be dismissed promptly as such a party upon showing that he holds and acquired as a bona fide purchaser the interest involving him as such a party without violating any provisions of this Act. No hearing upon any such showing shall be required unless the Secretary presents prima facie evidence indicating a possible violation of the Mineral Leasing Act on the part of the alleged bona fide purchaser. 74 Stat. 789, 30 U.S.C. § 184(i) (Supp. IV, 1963).

This provision manifests the strong desire of Congress to protect the rights of bona fide purchasers. It is evident from reviewing the legislative history of the bona fide purchaser provisions that the immediate interest of Congress related to proceedings where the Government alone was contesting various leases because of infractions of the acreage limitations of the act by various lessees. See the *Toles* decision, *supra*. The result of that decision was that as Congress used comprehensive language and included "any violation" of the provisions of the act and as there was no evidence of statutory intent otherwise, the bona fide purchaser provision is applicable in situations, such as the present case, where a third adverse party is involved. We agree with appellant to the extent of its argument that the above-quoted provision does not deny it the right to challenge Lowe's assertion that he was a bona fide purchaser. The provision limits action taken by this Department alone against the interest of a bona fide purchaser, but it does not prevent this Department from ascertaining whether he is or is not a bona fide purchaser especially when another party who has an adverse interest claims that he is not. Although the appellant has had ample opportunity to submit whatever it desired to contradict Lowe's assertions that he was a bona fide purchaser, it has offered no countervailing evidence.

The appellant contends in the alternative that the bona fide purchaser provision is inapplicable here as the assignment to Lowe was not considered for approval until after action had been taken to cancel the lease and that the provision applies only to assignments which

have been approved. It refers to the statutory language regarding the right to "cancel or forfeit" as necessarily excluding unapproved interests by virtue of the meaning of those terms. It also states that the only type of "title" or "interest" in an oil and gas lease which is binding on the Bureau of Land Management is one that has been approved. Although this last statement is true, we do not find in the statutory language or in the legislative history the limitation which appellant would make. Indeed, the statute provides that the holdings of the person, association, or corporation from which the lease, interest, option, or permit was acquired "may have been canceled or forfeited *or may be* or may have been subject to cancellation or forfeiture" (italics added). The inclusion of the phrase "or may be" connotes a situation where the title or interest is still recognized as being held by the lessee. This is precisely the situation where an assignment of a lease has been made by a lessee and has been filed, but the Department still holds the assignor to the lease obligations and recognizes him as the lessee until approval of the assignment has been given. See 43 CFR 3128.2(e), 29 F.R. 4523. The *Toles* decision, *supra*, did not expressly rule on this point as it was not raised at that time, although it was implied by the holding that the action in canceling the lease was premature until there is a determination as to whether the assignment is valid and whether the assignee is a bona fide purchaser. Note also that the Supreme Court has held in the case of patents under timber entries that a bona fide purchaser would be protected even where his interests were acquired before the patent issued for the entry. *United States v. Detroit Lumber Co.*, 200 U.S. 321 (1906); *United States v. Clark*, 200 U.S. 601 (1906).

Appellant also raises other questions on this point which will be considered with its contentions that Lowe is not a bona fide purchaser. It objects to the Bureau's finding that as Lowe paid value for the assignment he was a bona fide purchaser, by claiming that Lowe cannot be a bona fide purchaser because he had either actual or constructive notice or both of appellant's prior right.

With respect to the term "bona fide purchaser," appellant states that in the absence of any limiting language it is to be presumed that Congress adopted the usual, settled and well-defined legal and equitable meaning of the term. We have no quarrel with this statement nor with its statement, insofar as it goes, that the bona fide purchaser rule requires that the purchaser

not only in good faith pay value for the thing purchased *but that such be done without notice in fact or law* that some third person has a right or interest or claim.

In making its contention it has cited a number of cases and also a discussion by Thomas J. Files, entitled "Recording of Instruments Affect-

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ing Oil and Gas Interests in Federal Lands," in the *Rocky Mountain Mineral Law Institute, Third Annual*, at page 553 *et seq.* None of the authorities cited by appellant involved factual circumstances which can be considered as comparable to those involved here, although they are informative of principles considered in other situations involving bona fide purchasers and also of several instances where parties have been held to have actual, implied, or constructive notice of land office records.

Each case to be considered under the bona fide purchaser provisions applicable here must, of course, be decided on its own merits. We do agree with a statement of appellant that in applying the bona fide purchaser provisions they must be viewed in their context with the entire system of leasing under the Mineral Leasing Act. It urges, in this connection, that unless there is held to be constructive notice of land office records, "the lessor could defeat the appeal by the offeror by making an assignment to a third person" and that the door would also be open to "dummy" and "secret *male fide* assignments" which could effectively destroy the right of appeal. This contention relates also to arguments made by appellant relative to its assertion that the assignment must be approved in order for the provision to be applicable as it raises the question as to what time the assignee should be considered as being a bona fide purchaser.

Hypothetical situations mentioned by appellant do pose some of the difficult problems which may arise in applying the bona fide purchaser rule. However, there are differences which suggest that a determination in one case does not necessarily mean that the same result must be attained in another case. Essentially the basic criterion is whether the person alleging to be a bona fide purchaser and who has shown that value has been paid for his interest has acted in good faith. It is this element of good faith to which doctrines regarding notice are relevant. This element was strongly lacking in the Supreme Court case which appellant cites, *Krueger v. United States*, 246 U.S. 69 (1918), where the alleged bona fide purchaser was the wife of the wrongdoer. In that case she was held to have constructive notice of another claimant's occupancy of a tract of land to which he had a statutory right to obtain title and also of certain facts shown on land office records of the documents used to acquire a patent from the Government by which she should have been aware that the patent was acquired fraudulently. With respect to constructive notice of land office records as affecting alleged innocent purchasers without notice, the Court at page 78 said:

* * * This doctrine, often asserted in this court, was summarized in *Ochoa v. Hernandez*, 230 U.S. 139, 164, in which it was said: "It is a familiar doctrine,

universally recognized where laws are in force for the registry or recording of instruments of conveyance, that every purchaser takes his title subject to any defects and infirmities that may be ascertained by reference to his chain of title as spread forth upon the public records."

Appellant has referred to regulation 43 CFR, 1964 rev., 240.1 *et seq.*, now 43 CFR 1813.1 *et seq.*, 29 F.R. 4513, as providing for notations on tract books and plats and serial registers of all applications and entries of public lands in order that the status of a tract may be readily ascertained by the officer or person examining them. It contends that Lowe knew of the existence of its pending offer because he received a title opinion about the lease from his attorneys and also examined the records, himself, and that the land office records will show that Lowe is no "neophyte" in Federal oil and gas leasing. It contends that Lowe knew or is charged with knowledge that Toles' offer had been rejected as to 400 acres leaving intact only 240 acres before the lease issued, and that there were certain lands adjoining those remaining lands applied for which were available for leasing when the offer was filed. It contends further that Lowe is charged with notice and knowledge of all the regulations, including the 640-acre rule, citing *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947). Therefore, it asserts than an "inquiry by Lowe reasonably pursued would have revealed the land status and the defect in the application filed by Toles." Lowe did not respond to appellant's appeal, but in his statement to the land office stated in part as follows:

4. That a title report was prepared for the undersigned by his Roswell, New Mexico attorneys, Hervey, Dów & Hinkle, and said attorneys pointed out that the Toles Offer to Lease was filed on July 7, 1958, at 10:00 A.M. and that the Offer to Lease NM 048299 was probably filed subsequent to this time and date, and if so, "the matter will probably be satisfactory." A check of the Land Office records was made and it appeared that Offer to Lease NM 048299 was filed on July 7, 1958, at 10:16 A.M., and covered approximately 2560 acres. Upon learning that the Offer NM 048299 was filed subsequent to the Toles Offer, NM 048273, the undersigned instructed his office staff to pay the draft for the Lease. Neither the Federal or the Eddy County, New Mexico abstracts examined by the attorneys reflected any actual adverse claim by Southwestern Petroleum Corporation, the company that filed Offer NM 048299.

5. Statements by Len Mayer and J. Penrod Toles corroborating the above facts are attached hereto and made a part hereof, as is a copy of a letter addressed to the Bureau of Land Management, Land Office, Santa Fe, New Mexico by Ralph Lowe's office, dated October 20, 1959, from which it appears that on or about this date, the staff in Ralph Lowe's office discovered that the Land Office had issued a lease to Southwestern Petroleum Corporation. The undersigned states that he relied upon the fact that a lease had been issued by the United States to J. Penrod Toles.

It is thus clear that Lowe did have actual knowledge of appellant's pending lease offer before he made his agreement with Toles and filed the assignment. However, whether or not such knowledge should be

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sufficient to impute a knowledge that appellant's right to a lease was superior to Toles is another question. Appellant, of course, contends that it should be, either because of imputed notice, a presumption of fact, or of constructive notice, a presumption of law. See the discussion regarding the types of notice and general effect of them in *Charles v. Roxana Petroleum Corporation*, 282 Fed. 983, 987 (8th Cir. 1922), *cert. denied*, 261 U.S. 614. We agree with appellant to the extent that land office records may in some circumstances be held to give constructive or imputed notice of certain facts to which a party will be held bound regardless of his actual notice. Generally, these will be facts which may be easily ascertained from those records available to the public reflecting the status of an application or claim, such as the serial register book and the plats, and which will show a chain of title or information apparent on the face of the instrument through which the claimant is making his claim. See the *Krueger* case, *supra*; *Gabbs Exploration Co.*, 67 I.D. 160 (1960), *aff'd Gabbs Exploration Co. v. Udall*, 315 F. 2d 37 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 822; also see *James C. Forsling*, 56 I.D. 281 (1938).

With respect to the hypothetical situations mentioned by appellant, it would be appropriate to hold a purchaser bound by what he could easily have ascertained from the land office records in those instances as any action by the land office against a lease or any protest by another party would be recorded on the serial register book and would evidence a cloud upon the title of the lease clearly apparent to anyone checking the land office records.³ It would be expected that a prospective purchaser of an oil and gas lease would check the land office records to ascertain that the lease had in fact issued and in doing so would easily see such a notation. Thus, it would be appropriate to hold a purchaser bound by what he could and should have ascertained from those records. *Cf. Gabbs Exploration Co., supra.*

However, in the circumstances of the present case with respect to the question of notice, the negligence of the purchaser is not so clearly evident. Here the serial register and the plat at the time the assignment was filed showed the lease in apparently good standing without any adverse action against it. Therefore, although the plat would show appellant's offer pending, the records would also show that it was filed after the lessee's offer. The lease instrument itself would show no defects. It would show that the lease issued for less acreage than applied for. In order for the purchaser to gain any notice that this made the lease defective, he would have to ascertain the land

³ It may be noted that a 1960 amendment of section 27 of the Mineral Leasing Act, *supra*, specifically provides that the commencement and conclusion of every proceeding (to cancel or forfeit a lease) "shall be promptly noted on the appropriate public records of the Bureau of Land Management." 30 U.S.C. § 184(h) (3) (Supp. IV, 1963).

status of adjoining lands from other records, including a master plat which would show the status of adjoining lands at the time the offer was filed, as the current plat would not reflect that. He would also have to inspect the appellant's offer and analyze it to see if it was defective in any way.

Any constructive or imputed notice here would go far beyond that in the *Krueger* case where the situation implied bad faith. Here the purchaser did request a title opinion from his attorneys who informed him of appellant's pending offer but indicated that it was apparently filed after the lessee's and that it would "probably be all right." The court in *Charles v. Rowana Petroleum Corp.*, *supra*, at page 984, stated that "action of parties in seeking legal opinion of reputable lawyers on the question of title is strong evidence of good faith." Since there was a reservation in the lawyer's opinion, the purchaser, himself, checked the records and found that the lessee's offer was filed before appellant's and, therefore, he states he ordered the completion of the transaction. Perhaps an extremely cautious person might have taken steps which appellant suggests in its appeal or might have made a much more thorough check of the records, carefully analyzing all possibilities, and might have decided not to take the assignment. However, the test for imputing notice of a superior right, as appellant's cited cases note also, is generally whether the facts are sufficient to put an ordinarily prudent man upon inquiry, an inquiry which, if followed with reasonable diligence, would lead to the discovery of defects in the title or of equitable rights of others affecting the property. As stated in *Charles v. Rowana Petroleum Corp.*, *supra*, at page 996, the test is "not what an extremely cautious person might do, but what a prudent one should do."

If appellant's contentions were entirely accepted here as to the application of imputed or constructive notice, there could never be a situation involving a lease which is voidable where a transferee could be considered a bona fide purchaser under the Mineral Leasing Act so long as there are other offers for the land noted on the land office records or, indeed, even if there were no adverse party other than the Government, where the defect in the lease could have been ascertained if an extensive search of the records was made and all knowledge of regulations and rulings was applied. We do not believe that a prospective assignee of an oil and gas lease which is shown on the serial register pages and the plats as issued and in apparent good standing is bound to presume that there was some irregularity in the issuance of the lease and that a searching examination of all the land office records must be made and an exhaustive legal opinion of all possible attacks be received in order to ascertain whether the land office employees may have made some mistake. *Cf. United States v. Detroit*

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Lumber Co., supra, at page 332. Mistakes in issuing leases to the first qualified applicant do occur, but they are the exception rather than the rule. The normal assumption for anyone to make who looks at land office records reflecting the status after a lease has issued is that it was issued to the first qualified applicant and that the land office did or will reject any conflicting offers which were filed subsequent to the offer for which the lease issued.

While the appellant would hold the assignee to a strict accountability for what an analysis of the land office records would have revealed, it apparently made no such examination itself. At least it permitted Toles' prior conflicting offer to remain on the record for over a half year without protesting it for the defects it contends Lowe should have uncovered. So far as the records show, the only obstacle to Toles' offer was a junior offer. The issuance of a lease to Toles is at least prima facie evidence that all preliminary requirements were satisfied and that the lease was properly issued. Solicitor's opinion, M-36539 (November 19, 1958).

The situation here is not comparable to that obtaining under State recording acts. In those cases not only are the statutory requirements for filing made clear but there are also specific statutory provisions specifying the effects of recordation and establishing the rights of first-recorded bona fide transferees or claimants. Also, the nature of the interests of the persons being protected is generally vested or otherwise different from that of an offeror under the Mineral Leasing Act, whose only right is that of a preference claimant.

The bona fide purchaser provisions have been considered in their context in the Mineral Leasing Act. As previously mentioned, by the broad terms of the provisions they preclude action by this Department to cancel leases issued in violation of another's statutory preference right where they have been assigned to a bona fide purchaser. Also, Congress intended by them to give great protection to the rights of bona fide purchasers. To apply an extremely strict rule of constructive or imputed notice in this case, where there has been no statutory or regulatory provision making such provision, does not appear to be warranted in the present circumstances. In the absence of any further facts which would suggest bad faith on the part of the assignee, we conclude that the Bureau's finding that Lowe was a bona fide purchaser for value is correct and that, consequently, appellant's offer was properly rejected.

Therefore, 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.

ERNEST F. HOM,
Assistant Solicitor.

APPEAL OF R & M CONTRACTORS, INC.

IBCA-325

*Decided May 28, 1964***Contracts: Delays of Contractor**

Where the date for completion of a contract falls on a Sunday or a legal holiday, the next succeeding working day is considered to be the required completion date, provided that the contract is completed on that date. If, however, the contract is not completed until a subsequent date, the Sunday or holiday on which the completion date falls, and succeeding Sundays and holidays, are included in the computation of the period of delay in completion, unless specifically excepted by the terms of the contract.

BOARD OF CONTRACT APPEALS

The Government has moved for partial reconsideration of the Board's decision of April 21, 1964, but only in so far as it has the effect of excluding a Sunday from the computation of the unexcused portion of the delay in completion of the contract. The contracting officer's decision stated that the date for completion, as a result of Change Order No. 2, fell on a Sunday, November 26, 1961, hence "November 27, 1961 was considered the new contract completion date."

However, the contract was not completed on November 27, 1961, but on December 13, 1961, and the contractor was charged with 17 days of delay, including the Sunday (November 26, 1961) which had previously been excluded in arriving at the required completion date.

After allowing an extension of nine days for excusable delays, the Board's decision stated that the remaining, or unexcused period of delay, amounted to seven days. This computation did not include the Sunday in question.

The computation of the unexcused portion should have included Sunday, November 26, 1961, since the contract was not completed on the next succeeding working day.¹

Accordingly, the motion for reconsideration is granted as to the period of unexcused delay, and our decision of April 21, 1964, is hereby modified by establishing the unexcused period of delay as being eight days, instead of seven days.

PAUL H. GANTT, *Chairman.*

I CONCUR:

THOMAS M. DURSTON, *Member.*

¹ 9 Comp. Gen. 336 (1930).

CLAIM OF PORT BLAKELY MILL COMPANY

T-P-320

*Decided May 1, 1964****Bonneville Power Administration—Torts: Trespass**

Electric transmission line easement which gives the grantee the right to maintain and keep parcel of land "at all times free and clear of trees and brush" includes right to spray small natural growth conifers which have not reached such height as to threaten physical or electrical contact with the conductor or which have not reached such density as to block maintenance access along the right-of-way.

Bonneville Power Administration—Torts: Trespass

The owner of an electric transmission line easement may fully use the right granted by the easement, including rights necessarily implied or incidental thereto.

Bonneville Power Administration—Torts: Trespass

The owner of electric transmission line easement is not limited in maintenance of the easement to those methods known or generally practiced at the time of acquisition but may use methods of maintenance reasonably necessary under existing conditions.

Conveyances: Interest Conveyed

In construing the scope of an easement acquired for electric transmission line the interpretation placed upon the instrument by the parties for many years is entitled to great weight.

ADMINISTRATIVE DETERMINATION

On May 17, 1963, the Port Blakely Mill Company submitted a written claim against the Bonneville Power Administration in the amount of \$2,500. This claim arises out of spraying activities performed by employees of the Administration in the maintenance of the Government's Longview-Chehalis Line No. 1. Claimant alleges damages for both present and future losses to Christmas trees which were growing upon the right-of-way. Claimant estimates a ten-year loss of productivity from long-range effects of the chemicals used in spraying.

The Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1958), as amended, 28 U.S.C. §§ 2672, 2679 and 2680(n) (Supp. IV 1959-62), and the authority delegated to me by the Solicitor of the Department of the Interior (§ 1(a) Solicitor's Reg. 5, Amendment 1, March 9, 1959, 24 F.R. 1877), authorize me to settle claims not over \$2,500 against the United States for property damage caused by a negligent or wrongful act or omission of an employee of the United States Department of the Interior while acting within the scope of his employment under circumstances where the United States, if a private person, would be liable under local law.¹

*Not in chronological order.

¹ The claim is in excess of that which may be considered under section 12(a) of the Bonneville Project Act, 59 Stat. 547-548 (1945), 16 U.S.C. § 832k(a) (1958).

The land involved in this case is legally described as the SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 6, E $\frac{1}{2}$ W $\frac{1}{2}$, Section 7, Township 12 North, Range 2 West, W.M., Lewis County, Washington.² The land was acquired by the claimant in July 1961. The original easements were purchased by the Administration from three separate owners in 1940. These tracts will be designated from south to north by legal description, and hereafter, as No. 1, No. 2, or No. 3 as follows:

Tract No. 1—The E $\frac{1}{2}$ SW $\frac{1}{4}$, Sec. 7, T. 12 N., R. 2 W., W.M., Lewis County, Wash. (Tract No. KR-108)³

Tract No. 2—The E $\frac{1}{2}$ NW $\frac{1}{4}$, Sec. 7, T. 12 N., R. 2 W., W.M., Lewis County, Wash. (Tract No. KR-110)

Tract No. 3—The SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 6, T. 12 N., R. 2 W., W.M., Lewis County, Wash. (Tract No. KR-115).

Maintenance spraying on the transmission right-of-way which crosses these tracts was first undertaken in the early 1950's by BPA. These first sprays had little or no effect upon conifers; however, the natural deciduous growth was almost entirely killed. This created favorable growing conditions for the conifers, and the growth of these trees quickly obliterated the initial boundaries of the right-of-way. At points on these tracts dense stands with individual trees ranging in height to 35 feet grew on the right-of-way. Prior to claimant's acquisition, these tracts were not used for growing Christmas trees. The trees affected by the spraying were not planted by claimant but were natural wild growth.

In February 1961 chemical treatment was undertaken by the Administration on the right-of-way to control the conifers. An experimental compound "Dybar Fenuron" was used on a test plot which lies within Tract No. 2. The right-of-way on the Longview-Chehalis Line No. 1, from towers 31/3 to 31/4, and approximately one-half of the span from towers 31/1 to 31/2 was treated.⁴ Inspection of this plot was made at 30-day intervals. A significant kill of the smaller growth⁵ on the right-of-way was obtained but there was no lasting effect on the larger growth.

In April 1961 a much smaller area near the boundary between Tract No. 1 and Tract No. 2 was treated with the same chemical with substantially the same results.

In August 1962 spraying with 2,4-D, 2,4,5-T and TCA (Sodium Trichloro Acetate) was undertaken on this transmission line right-of-way, including the right-of-way where it crosses above the described three tracts. In conjunction with this spray program, the Administration also undertook hand clearing, cutting, and limbing of the dense

² Claimant originally described the lands as T. 12 N., R. 7-W., W.M. This was corrected by letter of October 23, 1963, which is attached to the original claim.

³ Parenthetical references are the official BPA tract designations.

⁴ Original tower designations. They have subsequently been renumbered.

⁵ Trees up to approximately six to eight feet.

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stands. This was done to minimize the fire hazards which would result from allowing the dense stands to remain standing after spraying. It is the 1962 spraying which claimant alleges resulted in its damages. None of the damages complained of occurred outside the right-of-way boundaries.

Claimant has included in its claim the area upon which the 1961 chemical test was made. The 1961 chemical test covered 1,200 feet of the overall distance of 2,640 linear feet on Tract No. 2 and a lesser amount on Tract No. 1. Since this alleged damage occurred prior to the date claimant acquired ownership of the property, the portion of the claim attributable to this chemical treatment cannot be allowed. See *Caledonian Coal Co. v. Rocky Cliff Coal Mining Co.*, 16 N.M. 517, 120 Pac. 715, 718. (1911), where the court stated:

* * * If * * * the title to coal, before the plaintiff received a deed from the railroad company, was in the railroad company, a right to action to recover for the same was also in the railroad company, and such right did not pass by the deed.

See also *United States v. Loughrey*, 172 U.S. 206 (1898), and *W. T. Smith Lumber Co. v. McKenzie*, 256 Ala. 496, 55 So. 2d 919 (1952).

Claimant also has included as a part of its claim damages for loss of future productivity of the land. This amount, \$575, is predicated upon an alleged sterilization of the soil. The chemicals used by the Administration in the spraying on August 30, 1962, have little or no lasting effect. Laboratory and field tests indicate the residual effects are measured in months, not years. The estimate by claimant of a ten-year loss of productivity of the land is unsubstantiated by any evidence and this portion of the claim must be denied for this reason (see *Plant Growth Substances*, A. J. Audus, Leonard Hill Books Ltd., London, England, 1959) as well as the reasons hereafter discussed.

As a general rule the fee owner may make any use of the land covered by the easement which is consistent with the easement, or does not interfere with the exercise of the easement. Tiffany, *Real Property*, § 811, vol. 3 (3d ed. 1939). As a corollary to this rule, the owner of the easement may make full use of the easement, including rights necessarily implied or incidental thereto. *Pitsenberger v. Northern Natural Gas Co.*, 198 F.Supp. 665 (S.D., Iowa 1961); *United States v. 3.08 Acres of Land*, 209 F.Supp. 652 (D. Utah, N.D. 1962); *City of Portland v. Metzger*, 158 Ore. 276, 114 Pac. 106 (1911).

The methods of exercising the rights granted by the easement are not permanently limited to those which were known, used or contemplated at the time the easement was granted. This point is aptly illustrated in *United States v. 3.08 Acres of Land, supra*. There the court held that an easement for a canal included the right to construct an irrigation canal 100 feet wide and operate a boom 50 feet high upon the banks. Irrigation canals of this width with the need to maintain

booms of this height were undoubtedly not contemplated at the time of the original easement. The court stated:

* * * But if we must limit construction or *maintenance* within the protection of the easement to exactly what was well known or practiced [at the time of the reservation], the basically continuing purpose of the reservation would be frustrated.

The right reasonably to maintain such a canal, including the right to operate the fifty foot boom *if reasonably necessary under existing conditions*, must be considered to be included in the reserved easement. The general rule is that while an easement holder may not increase the servitude upon the grantor's property by enlarging on the easement itself, it is entitled to do what is reasonably necessary for full and proper enjoyment of the rights granted under the easement *in the normal development* of the use of the dominant tenement. 209 F. Supp. at 659. [Italics added.]

Since the early 1950's the Administration has been utilizing spray as a means to control natural growth over the more than 8,000 miles of transmission lines it operates. This practice is not confined to the Administration but is a general practice within the industry. The recent development of more effective spraying agents provides a better means to exercise the originally granted rights.

In determining whether spraying is "reasonably necessary under existing conditions," it is proper to consider the costs of different methods of controlling the natural growth. In terrain similar to that of the claimant, the difference between the cost of hand clearing and of spraying is approximately \$450 per acre. The cost can be more. Maintenance costs for hand clearing range from \$300 to \$1,000 per acre. This compares to a cost of approximately \$40 to \$50 per acre for spraying. In view of the greatly increased cost of clearing performed by hand, and the fact that spraying is the general practice in the industry for controlling natural growth on rights-of-way, it is my conclusion that spraying of the natural growth upon the easement was "reasonably necessary under existing conditions."

Analysis of the instruments by which these easements were obtained does not require a different conclusion.

The original easements obtained by the Administration on Tracts Nos. 1 and 3 provide in pertinent part:

* * * The said grantee shall be entitled to maintain and keep the said parcel of land *at all times free and clear of trees and brush* and of all structures or materials which interfere or create a hazard in connection with the said electric power transmission lines, and wires and appurtenances convenient thereto. * * * [Italics added.]

Under the easement granted for Tracts Nos. 1 and 3 the Administration obtained the right to keep the easement "free and clear" of all trees and brush. Under this grant the Administration would not have been liable for cutting the trees upon which claimant bases his loss and it therefore can have no claim for the loss of the trees by spraying.

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Accordingly, as to these two tracts which comprise approximately two-thirds of the claim, it must be denied.

The deed by which the easement for Tract No. 2 was obtained differs slightly in language from that which granted Nos. 1 and 3.⁶ This instrument states:

* * * and to have, hold, keep, maintain, and clear said right of way at all times free and clean of all trees, growth, structures, or materials which interfere with or create a hazard in connection with the construction, operation, or maintenance of any of said lines * * *

* * * * *
The said grantee shall be entitled to maintain and keep the said parcel of land at all times free and clear of trees and brush and of all structures or materials which interfere [sic] or create a hazard in connection with the said electric power transmission lines, and wires and appurtenances convenient thereto.

While easements are construed like deeds, the common law rule of hewing strictly to the language of the grant has been modified by modern authority. The shift is away from limiting the estate created to the exact words of the grant. Modernly, an attempt is made to determine the intent of the parties and the instrument will be construed to give effect to such intention. *Annot.*, 58 A.L.R. 2d 1380 (1958). A deed will be construed to give effect to every part. *In re Molke's Estate*, 198 Wash. 6, 86 P. 2d 763 (1939). It will be construed so that some meaning will be given to every word, if reasonably possible. *Fowler v. Tarbet*, 45 Wash. 2d 342, 274 P. 2d 341 (1954). The broadest statement of the rule is made in 16 Am. Jur. *Deeds* § 237 (1938), where it is stated that the intention of the parties, where apparent from the instrument, will be given effect although technical rules of construction are violated.

Claimant interprets the easements as giving the Government the right:

* * * to keep the easement free and clear of all such growth as interferes with or creates a hazard in connection with the maintenance of the transmission lines constructed within the easements. We fail to see how the young growth which was destroyed * * * interfered with or created a hazard to the maintenance of the lines * * *.

Apparently the claimant would not permit the natural growth to be cleared until it had reach such a height that it would threaten physical or electrical contact with the conductor or was so dense as to block access along the right-of-way. Under such a construction a tree 14' could be cut and removed but an adjacent tree 13'6'' would have to be left standing. It is not reasonable to construe the easements in such a restrictive fashion. Such a construction would result in extremely high maintenance costs and would be completely contrary to prevailing practices for maintaining rights-of-way in the electric utility industry and also in the maintenance of other types of rights-of-

⁶ The instrument conveying Tract No. 2 was prepared by the grantor.

way. Spraying of young, natural growth is accepted practice on railroad, telephone and ditch rights-of-way.

The experience upon this very right-of-way amply illustrates the problem which the construction urged by the claimant would pose to the Administration. During the interval between the first spraying in the early 1950's and that which gives rise to this claim, the conifers quickly became an actual hazard to the line. Extensive and expensive hand clearing, thinning and limbing was required to prevent the trees from coming into contact with the transmission line, to reestablish the location of the rights-of-way boundaries, and to reduce the fire hazard. This extraordinary expense can now be avoided by the use of new spraying agents when the natural growth is still young.

Moreover, if the construction which is urged by the claimant were to prevail, the right to clear the right-of-way would be no greater than the right to cut danger trees which is often acquired from the owners of property adjacent to a transmission line right-of-way. This right, known throughout the industry, allows the owner of the dominant estate to cut and remove trees adjacent to the right-of-way which actually imperil the line. The right to remove is restricted to those which constitute an immediate danger to the line, and the owner of the dominant estate who has acquired these additional rights makes the selection of those trees to be removed at his peril. Cutting or removing any tree or trees which are not then an actual danger would give rise to a claim. Comparing the two rights illustrates the striking difference. Within the right-of-way the easement owner has the right to clear and keep clear the right-of-way of all natural growth, trees or brush which, if uncontrolled, would interfere with or would become a hazard to the construction, operation, or maintenance of the line. Adjacent to the transmission line right-of-way the owner of danger tree rights may cut only those trees which are an actual and immediate danger to the line.

In my opinion it is not reasonable to construe the easements obtained by the Administration as granting only danger tree rights. From the very beginning the easements were construed as giving to the Administration the right to "clear and keep clear" the rights-of-way. At the time the line was constructed in 1940 the right-of-way was cleared to bare ground. No objections were interposed by the grantors of the easement to such clearing. Nor were objections interposed to the spraying of the right-of-way during the early 1950's, or the chemical treatments during February and April 1961. This is evidence that the original parties to the easement have construed the language of the easement from the very beginning as giving the Administration "the right to clear and keep clear" the right-of-way. This contemporary construction is entitled to great weight in determining the intention of the parties to the easements. See *Oneida Township v. Allen*, 137 Mich. 224, 100 N.W. 441, 442 (1904), where the court stated:

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* * * In determining whether such use as defendant has made is, or is not inconsistent with the dedication, it would seem clear that the court should consider what such dedication was, and the limitations placed upon it by the acts of the parties, as well as their interpretation of such dedication for these many years. * * *

See also 4 Williston, *Contracts* § 623 (3 ed. 1961)

The cases cited by claimant's attorney are distinguishable on their facts from the present situation. *Patterson Orchard Co. v. Southwest Ark. Util. Corp.*, 179 Ark. 1029, 18 S.W. 2d 1028 (1929), involved a power line right-of-way through an existing orchard. The company did not attempt to acquire the right to clear the orchard. It did not need to since these trees would not be expected to grow to a height that would interfere with the operation and maintenance of the line. And in 1929 chemical sprays were not the usual method for control of vegetation on rights-of-way. Under those circumstances, continuing the pre-existing use of a right-of-way for orchard cultivation is not comparable to a subsequently commenced use of a right-of-way for growing conifers which, unless subject to assured control, would in a few years become a very definite and costly interference to operation of the line. *Draker v. Iowa Elec. Co.*, 191 Iowa 1376, 182 N.W. 896 (1921), and *Collins v. Alabama Power Co.*, 214 Ala. 643, 108 So. 868 (1926), are likewise authority for no more than the proposition that the servient owner may cultivate the right-of-way in a manner that will not affect the right of the power company to full use of the easement for the operation and maintenance of the line. None of the cases cited by claimant involved the question of an easement holder's right to adopt maintenance practices intended to remove natural growth which, while not a hazard to the line at the time of removal, would in the natural course of events become a hazard unless removed.

Under these circumstances I conclude that the Administration had the right to clear and keep clear the right-of-way across these three tracts. The Administration did not exceed this right when it sprayed and killed the small conifers growing upon this right-of-way. Accordingly, the claim of the Port Blakely Mill Company is denied.

Any claimant who is dissatisfied with this determination may appeal to the Solicitor of the Department of the Interior within thirty (30) days after receiving this determination by filing a written notice of appeal with the undersigned. Such notice must set forth the basis for the appeal.

Note: Subsequent to this administrative determination claimant withdrew the claim from consideration by the Department of the Interior, 28 U.S.C., 1958 ed., 2675(b) and filed suit for the amount of \$2,500 in the United States District Court for the W.D. of Wash-

ington, Civil No. 6205 on June 5, 1964. *The Port Blakely Mill Company v. United States.*

JOHN L. BISHOP,
Regional Solicitor.

SOUTHERN PACIFIC COMPANY

A-29736 ET AL. *Decided May 27, 1964**

Railroad Grant Lands—Mineral Lands: Determination of Character of

The period for determination by the Department of the Interior whether public land included within the primary limits of a legislative grant-in-aid of the construction of a railroad which excepts mineral land is mineral in character extends to the time of issuance of patent to the railroad company.

Railroad Grant Lands

Land known to be mineral in character at the time of definite location of a railroad are excluded from the grant of place lands to the railroad even though the lands may later lose their mineral character.

Railroad Grant Lands

Pursuant to section 321(b) of the Transportation Act of 1940 patent may be issued for railroad grant lands sold by the railroad if it is determined either (1) that the land was not mineral in character at the time of the sale and the purchaser was an innocent purchaser for value, even though the land is subsequently determined to be mineral in character, or (2) that although the land was mineral in character at the time of the sale the purchaser was not chargeable with actual or constructive notice of that fact.

Railroad Grant Lands—Mineral Lands: Determination of Character of— Rules of Practice: Hearings

When the Department of the Interior finds that public land within the place limits of a legislative grant-in-aid of the construction of a railroad is mineral in character and the railroad company challenges such finding, a hearing should be granted at which the Department has the obligation of making a prima facie case of mineral character whereupon the company has the burden of establishing nonmineral character by a preponderance of the evidence.

Railroad Grant Lands—Mineral Lands: Determination of Character of— Rules of Practice: Evidence

To establish the mineral character of railroad grant land it must be shown that known conditions on the critical date are such as reasonably to engender the belief that the land contains mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

The Southern Pacific Company, as successor in interest to the Central Pacific Railroad Company of California and acting on behalf of the successors in interest of the railroad company's vendees, has

*Not in chronological order.

May 27, 1964

appealed to the Secretary of the Interior from five different decisions of the Division of Appeals, Bureau of Land Management, affirming decisions of the land office at Sacramento, California, rejecting its six applications for patent to certain tracts of public land in Nevada and Placer Counties in California.¹

The appeals all involve construction of the Railroad Land Grant Act of July 1, 1862, 12 Stat. 489, as amended by the act of July 2, 1864, 13 Stat. 356, and of section 321(b) of the Transportation Act of 1940, 54 Stat. 954, 49 U.S.C. § 65(b) (1958). For these reasons the appeals are being considered together.

The act of July 1, 1862, granted to appellant's predecessor, the Central Pacific Railroad Company, land described as follows in section 3 of the act:

* * * every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States * * * at the time the line of said road is definitely fixed: *Provided*, That all mineral lands shall be excepted from the operation of this act * * *. 12 Stat. 492.

Section 4 of the act of July 2, 1864, 13 Stat. 358, doubled the amount of land granted and provided additionally that

* * * any lands granted by this act, or the act to which this is an amendment, shall not * * * include any government reservation or mineral lands * * * or any lands returned and denominated as mineral lands * * *.

After the line of the railroad was definitely located, appellant's predecessor sold portions of the odd-numbered granted sections to purchasers who are the predecessors in interest of the real parties in interest in the pending appeals (see footnote 1). The lands have never been patented to the railroad.

When the Transportation Act of 1940 was enacted, it was provided in section 321(b) that if any land grant railroad wished to take advantage of charging higher rates for carrying Government traffic, it must file a release of any claim it might have against the United States to lands granted to the railroad. It was provided, however, that nothing in section 321(b) should be construed

* * * to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value * * *.

Southern Pacific and its predecessors filed releases which specifically excepted lands sold to innocent purchasers for value prior to enactment

¹ The Company filed the applications and has prosecuted the appeals, calling at each step of the process upon the real parties in interest to submit the fee and their reasons in support of the appeal. However, some of the real parties in interest have their own attorneys who have filed statements in their behalf or are prosecuting the appeals on their behalf and also on behalf of the Southern Pacific Company.

of the Transportation Act of 1940. The releases were accompanied by lists of lands said to have been sold to innocent purchasers for value.

Thereafter, Southern Pacific filed the six applications for patent involved in these appeals, stating that the applications were for lands sold to innocent purchasers for value. The lands can be identified on the lists filed with the releases. The land office rejected the applications on the ground that the tracts of land applied for are or were mineral in character and thus excluded from the grant made by the acts of July 1, 1862, and July 2, 1864. The Division of Appeals affirmed.

The salient facts in each case are as follows:

1. *A-29736*. Southern Pacific applied (Sac. 065031) for the E $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 27, T. 17 N., R. 9 E., M.D.M., containing 80 acres. It submitted an affidavit that an examination of the land on April 28, 1960, showed that at that time the land was nonmineral in character. It also submitted evidence that the land was sold by its predecessor, the Central Pacific Railroad Company, to Delovico Rossa on March 11, 1887, for \$1.25 per acre, and that the present claimants, William H. Zanocco *et al.*, acquired the land by deed dated August 15, 1941.

The land office rejected the application on the ground that an examination of the land disclosed that around 1900 an auriferous gravel channel crossing the land was considered to offer sufficient promise to warrant a determination that the land was mineral in character and, therefore, since the land was mineral at the time of the grant to the railroad it was excluded from the grant. The Division of Appeals affirmed on the same ground, observing that the land is not mineral in character at the present time.

2. *A-29748*. Southern Pacific applied (Sac. 060314) for the NE $\frac{1}{4}$ sec. 21 and lot 1, sec. 31, T. 15 N., R. 14 E., M.D.M., containing 197.26 acres. It submitted an affidavit of nonmineral character as of July 25, 1959. It also submitted evidence of sale of the land by Central Pacific to three joint purchasers on October 10, 1889, for \$5 per acre and of acquisition of the land by the present claimant, Frank V. Amaral, by deed dated April 9, 1959.

The land office rejected the application on the ground that the tracts contained known mineral deposits which were being actively explored in 1889, that the tracts have been subjected to mining locations, and that land formerly part of lot 1 was included in lode mining claims for which patent issued in 1908. The land office concluded that the lands were considered to have been mineral in character around 1900 and therefore mineral in character at the time of the grant. The Division of Appeals affirmed, saying that Southern Pacific had not proved that the lands were not mineral at the time of the grant.

3. *A-29753*. Southern Pacific applied (Sac. 056150) for lot 6, NE $\frac{1}{4}$ sec. 3, T. 17 N., R. 9 E., M.D.M., containing 38.20 acres. It sub-

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mitted an affidavit of nonmineral character as of October 30, 1957. It also submitted evidence of the sale of the land by Central Pacific to John Bonney on April 19, 1895, for \$122.19 and of the acquisition of the land by Willis E. Dudley, the present claimant, by deed dated March 11, 1953.

The land office rejected the application on the ground that the land was mineral in character until 1883 and therefore mineral in character at the time of the grant. The Division of Appeals affirmed on the ground that the land is covered by mining claims, one of which is being worked, and that there is sufficient evidence that the land is mineral in character.

4. *A-29754*. Southern Pacific applied (Sac. 060300) for the SE $\frac{1}{4}$ sec. 21, T. 18 N., R. 9 E., M.D.M., containing 160 acres. It submitted an affidavit of nonmineral character as of August 7, 1959. It also submitted evidence of the original sale of the land on April 26, 1889, to Fred Searls for \$2.50 per acre and of the acquisition of the land by Fred W. Anderson, the present claimant, by deed dated March 13, 1959.

The land office rejected the application on the ground that the land was mineral in character at the time of the grant, although some portions are nonmineral today. The Division of Appeals affirmed on the same ground.

5. *A-29888*. Southern Pacific filed two applications. One (Sac. 061438) was for portions of sec. 9, T. 17 N., R. 11 E., M.D.M., comprising 295.56 acres, and was supported by an affidavit of nonmineral character as of June 24 and 25, 1959. Evidence was submitted of the original sale of the land on July 16, 1888, and December 12, 1889, to Washington Mining Company for \$2.50 per acre and of the acquisition of the land by Frank V. and Gertrude L. Amaral, the present claimants, by deeds executed in 1958 and 1959.

The second application (Sac. 062964) was for lots 1, 2, and 3, sec. 7, T. 17 N., R. 8 E., M.D.M., containing 117.97 acres. It was supported by an affidavit of nonmineral character as of various dates in 1955 and 1957. Evidence was also submitted of the original sale of the land on November 4, 1891, to John Armstrong for \$2.50 per acre and of acquisition of the land by Arthur E. Connick, the present claimant, by deed dated March 15, 1960.

The land office rejected the first application on the ground that the land was mineral in character at the time of the grant, saying that this was established by the patenting of mining claims over most of sec. 9. It rejected the second application on the ground that the land was mineral in character during the placer mining era prior to 1900 and again during the period of lode mining from 1900 to 1940.

The Division of Appeals affirmed on the ground that the evidence shows that the lands "are" mineral in character and that Southern

Pacific had not shown that the lands were nonmineral at the time of the grant. It denied a request for a hearing on the ground that it would not develop facts decisive of the issue.

Southern Pacific has assigned various grounds of error in the decisions appealed from and requests a hearing in each case.

From this summary of the cases, it appears that the Bureau decisions rested the rejection of the applications on the ground that the lands applied for were mineral in character at the time of the grant to the railroad, i.e., the date on which the line of the railroad was definitely located. Southern Pacific, on the other hand, seems to assert that it is entitled to patents if the lands are determined to be nonmineral today. It contends, and the Bureau denies, that it is entitled to a hearing to prove the nonmineral character of the lands.

The 1862 and 1864 acts specifically excepted mineral lands from the operation of the grant to the railroad. The question early arose as of what date the mineral or nonmineral character of land in the primary limits of a railroad land grant was to be determined in order to ascertain whether the land passed under the grant. In *Barden v. Northern Pacific R.R.*, 154 U.S. 288 (1894), it was held that the determination could be made at any time prior to issuance of a patent to the railroad and that if it were determined prior to the issuance of a patent that the land was mineral in character the grant would fail as to that land. This rule has become firmly established. *Wyoming v. United States*, 255 U.S. 489, 507-508 (1921); *Anderson v. McKay*, 211 F. 2d 798, 807 (D.C. Cir. 1954), *cert. denied*, 348 U.S. 836 (1954), *rehearing denied*, 348 U.S. 890 (1954).

In *Barden v. Northern Pacific R.R.*, *supra*, the Court noted that the Department of the Interior had stated in *Central Pacific Railroad Company v. Valentine*, 11 L.D. 238, 246 (1890), that it had been the practice of the Department for many years to refuse to issue patents to railroad companies for land found to be mineral in character at any time before the date of the patent and that this practice had become, in effect, a rule of property.

The ruling cited applies to cases where, apparently, at the time the line of the railroad was definitely located the land in the grant was not known to be mineral land but it was found later to be mineral in character prior to issuance of a patent. No cases have been found where the reverse situation existed, that is, where land in the grant was known to be mineral at the time the railroad was definitely located but was subsequently determined to have lost its mineral character. Such cases apparently have not arisen because it probably has been assumed all along that any land known to be mineral in character when the railroad was definitely located was forever excluded from the grant, regardless of whether the land should later become nonmineral. This is plainly indicated by the Court's statement in the *Barden* case, *supra*, that

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It seems to us as plain as language can make it that the intention of Congress was to exclude from the grant actual mineral lands, whether known or unknown, and not merely such as were at the time known to be mineral. (P. 316.)

In other words, Congress said that the railroad should not have any land which was known to be mineral in character at the time the line of the railroad was definitely located and that it should not have any land not then known to be mineral but later ascertained to be mineral prior to issuance of a patent.

In the cases before us, then, if Southern Pacific had not filed a release under the Transportation Act and had not sold the lands in question but applied for patents on its own behalf, the applications would have to be rejected if (1) the lands were known to be mineral lands at the time when the railroad was definitely located, regardless of their character now, or (2) the lands were determined to be mineral in character now although they were not known to be such at the time the railroad was definitely located.

The question presented by the appeals is whether these principles are affected because the lands have in fact been sold to persons asserted to be innocent purchasers for value. The answer is not clear but is indicated by rulings of the Department in analogous situations.

By the act of March 3, 1887, 24 Stat. 556, 43 U.S.C. §§ 894-899 (1958), the Secretary of the Interior was directed to adjust each of the railroad land grants. Section 5 of the act, 24 Stat. 557, 43 U.S.C. § 898 (1958), provided

That where any said [railroad] company shall have sold to citizens of the United States * * * as a part of its grant, lands not conveyed to or for the use of such company * * * and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands * * * and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns * * *.

In *Hutton et al. v. Forbes*, 31 L.D. 325 (1902), the Department held that one was not a purchaser in good faith under section 5 of the 1887 act where the lands applied for were believed by him at the time of purchase to be mineral lands and there was physical evidence of the mineral character of the lands. Specifically recognizing that mineral lands were excluded from the grant to the railroad, the Department said that if the lands were not known at the time of purchase to be mineral lands, no subsequent discovery or development of minerals on them could affect the question of the good faith of the purchase, and no evidence of such subsequent changes in condition could be considered.

In *Clogston v. Palmer*, 32 L.D. 77 (1903), the Department held again that the bona fides of a purchase within the contemplation of the 1887 act was to be determined as of the date of purchase. In that

case, the original sale by the railroad was in 1889 and an application for purchase was made in 1898 by one who had succeeded to the interests of the original purchaser in 1895. A protest was filed against the purchase on the ground that in 1901 the land was known to be mineral in character. In dismissing the protest the Department noted that no charge had been made that the land was known to be mineral in character at the time of the original purchase (1889) or at the time of the purchase by the applicant under the 1887 act. The Department said:

* * * The known character of the land at the date of the purchase from the company is therefore the determining factor in any controversy involving the character of the land applied for under the provisions of said section [5 of the 1887 act]. To except land from purchase under its provisions for the reason that they contain minerals, it must appear that the lands were of known mineral character at the date of the sale by the land-grant company, and therefore were such that the purchaser should have known at the time of his purchase that they were excepted from the grant to the railroad company, and that he could obtain no title thereto from the company. (P. 82.)

Many years later, *Hutton v. Forbes* and *Clogston v. Palmer* were distinguished in *Buckholts v. Anderson*, 56 I.D. 44 (1936). In that case the railroad sold land in 1879 to Anderson's predecessor in interest. Anderson was conveyed the land in 1897. On July 20, 1936, Anderson applied to purchase the land under section 5 of the 1887 act. Meanwhile the act of July 17, 1914, 38 Stat. 509, as amended, 30 U.S.C. §§ 121-123 (1958), had been enacted. This act provides that lands withdrawn or classified or reported as valuable for certain minerals, including oil and gas, are open to disposal under the nonmineral land laws provided that the minerals in question are reserved to the United States. Buckholts had applied for an oil and gas lease on the land a few months before Anderson filed his application. The Commissioner of the General Land Office rejected Buckholts' application on the ground that since there was no evidence that the original purchaser from the railroad knew of the mineral character of the land at the time of purchase, Anderson as his successor would have a right to any oil and gas in the land. The Commissioner cited *Hutton v. Forbes* and *Clogston v. Palmer*.

The Department reversed, holding that since Anderson had no vested right or equitable title in the land but a mere privilege of purchasing, the privilege must be regarded as modified by the 1914 act so that he could purchase the land only with a waiver of right as to the oil and gas. The Department said:

* * * There may be justification for the *Clogston v. Palmer* decision, because then it was a question of all or nothing. Now the laws are modified. 56 I.D. at 48.

The Department's decision was sustained in *Anderson v. McKay*, *supra*. In so doing the court considered the status of the grant to

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the railroad as of several dates. One was the nature of the grant at the time of the original sale of the land to Anderson's predecessor, Warren, in 1879. Citing the *Barden* case, *supra*, the court stated that since the railroad could convey to Warren only what it had and since it could not convey mineral land, it did not convey to him in 1879 any mineral land. "Should the land eventually prove to be mineral land, it was not within the grant to the railroad * * * [citing *Barden*] and hence was not conveyed by it to Warren." 211 F. 2d at 802. The court then went on to say that because of the plight of purchasers in those circumstances Congress passed the 1887 act.

* * * It authorized the issuance of patents to such purchasers. The patent, if obtained, would convey to the patentee the title which he had not received by his deed from the railroad, and, moreover, the patent would erase flaws or omissions which inhered in the grant to and the conveyances from the railroad. (P. 802).

The court sustained the Department's view that the 1887 act did not give the purchaser an indefeasible right to an unrestricted fee simple title but an inchoate right to purchase which could be and was modified by the 1914 act, *supra*, so far as mineral lands covered by the 1914 act are concerned. Anderson argued that the Department had not administratively adhered to this view but, on the contrary, had continued to follow *Clogston v. Palmer* and to issue unrestricted patents to applicants under the 1887 act. The court answered that none of the cases cited by Anderson had concerned a 1914 act mineral.

Careful reading of the Department's and the court's decisions in the *Anderson* case leads to the conclusion that *Clogston v. Palmer* is still in effect as to grant lands determined to be mineral in character for minerals not covered by the 1914 act.

The next question is whether the same ruling is applicable to applications for patent under section 321(b) of the Transportation Act of 1940. The legislative history of the act sheds no light on the intent of Congress in enacting the particular provision under consideration but the language employed, "issuance of patents confirming the title to such lands as * * * have been heretofore sold by any such carrier to an innocent purchaser for value," strongly indicates an intent to permit the curing of what would otherwise be an imperfect title. This is the connotation suggested by the phrase "innocent purchaser for value." In the absence of any persuasive reason for construing section 321(b) of the Transportation Act differently from section 5 of the 1887 act, we conclude that the *Clogston v. Palmer* ruling is equally applicable to cases arising under section 321(b). This leads to the conclusion that section 321(b), like section 5, modifies the general rule in the *Barden* case that a determination of mineral character can be made at any time prior to the issuance of patent.

It is to be noted that the modification of the *Barden* rule obtains

only in cases where the grant lands were sold to an innocent purchaser for value. The Supreme Court considered the question of what constitutes an innocent purchaser in connection with a suit to cancel a patent issued to the Western Pacific Railroad Company which was predicated on the ground that the land was known to be mineral land when the patent was issued so that it was excepted from the grant and the patent was thus issued without authority of law. A purchaser two degrees removed from the company resisted the cancellation of the patent on the ground that he was an innocent purchaser. The Court denied that he was an innocent purchaser because it found that he knew that the land was mineral years before he, as agent for the railroad, applied for patent. *McLaughlin v. United States*, 107 U.S. 526, 528 (1882); *Western Pacific R.R. v. United States*, 108 U.S. 510, 513 (1882).

In *United States v. Central Pac. R. Co.*, 84 Fed. 218, 221 (Cir. Ct., N.D. Cal. 1898), the court also considered the rights of purchasers from a railroad grantee in a suit to cancel the patent to the grantee. The court said:

* * * The status of a bona fide purchaser is made up of three essential elements: (1) a valuable consideration; (2) absence of notice; and (3) the presence of good faith. * * * I am of the opinion that these defendants had notice, actual or constructive, of the character of the land in section 27 which they contracted to buy from the grantee company and its trustees. They were certainly chargeable with notice of the character of the land, for it had been occupied and known since 1850 as mineral land, and as being unfit for agricultural purposes. It was covered with evidences of mining claims and mining explorations. Notices of location affecting different portions of the section had been filed of record in the mining recorder's office of the Forks of the Butte mining district before the defendants entered into their contract to buy the land from the grantee company and its trustees, which was some time in 1885 and 1886. With respect to the defendants Jones and Gale, it appears further that the element of good faith is entirely wanting; for Jones had, before acquiring any interest in the land he contracted to purchase, owned and worked a claim in the same part of this section, while Gale had, with others, filed a mining location upon the same land which he contracted to buy.

* * * I am of the opinion, from the evidence, * * * that the defendants, other than the grantee company and its trustees, are not bona fide purchasers. * * *

To summarize at this point, to defeat the applications of Southern Pacific for the reason that the lands applied for are mineral, it must appear that the lands were of known mineral character at the date of the original sale by the railroad and that the purchasers should have known at the time of their purchase that the lands were excepted from the grant to the railroad and that they could obtain no title from the railroad. This rules out as irrelevant any consideration of the mineral character of the lands today or at the time when the line of the railroad was definitely located. The critical date is the date of sale by the railroad.

As to the procedure for making the determination, it has long been

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the practice of the Department, where it believed that railroad grant lands did not pass because of their mineral character, to bring charges against the railroad and to hold a hearing on the charges. *Central Pacific Railway Company*, 46 L.D. 435 (1918); *United States v. Central Pacific Railway Company*, 49 L.D. 250 (1922); *Southern Pacific Railroad Company*, 52 L.D. 419 (1928). At the hearing, the Department had the obligation of presenting a prima facie case that the lands were mineral in character whereupon the burden shifted to the railroad to show by a preponderance of the evidence that the lands, or any part thereof, were not mineral in character. *Central Pacific Railway Company, supra*; *United States v. Central Pacific Railway Company, supra*; see *United States v. Southern Pacific Co.*, 251 U.S. 1, 14 (1919).

The case last cited, *United States v. Southern Pacific Co.*, sets forth the criteria for determining whether land is mineral in character. It is not essential that there be an actual discovery of mineral on the land. It is sufficient to show only that known conditions are such as reasonably to engender the belief that the land contains mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end. Such belief may be predicated upon geological conditions, discoveries of minerals in adjacent land and other observable external conditions upon which prudent and experienced men are shown to be accustomed to act.

The bona fides of the original purchase from the railroad is also a matter to be determined at a hearing.

Since the decisions below invoked the wrong principles in rejecting Southern Pacific's applications and erroneously denied the right to a hearing, the decisions must be set aside and the cases remanded for further consideration and action as indicated in this decision.

Therefore, 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 decisions appealed from are set aside and the cases remanded for further consideration and action consistent with this decision.

ERNEST F. HOM,
Assistant Solicitor.

MURPHY CORPORATION

A-29849

Decided June 3, 1964

Oil and Gas Leases: Royalties—Oil and Gas Leases: Extensions—Oil and Gas Leases: Termination—Oil and Gas Leases: Rentals—Oil and Gas Leases: Unit and Cooperative Agreements

An oil and gas lease on land within the known geologic structure of a producing gas field which attains a minimum royalty status because of inclusion in the participating area of a producing gas unit but on which

there is no producing or producible well and which is subsequently extended as a consequence of the termination of the unit reverts to a rental status and is subject to the automatic termination provision of the act of July 29, 1954.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Murphy Corporation has appealed to the Secretary of the Interior from a decision dated October 8, 1962, by which the Division of Appeals of the Bureau of Land Management affirmed a decision of the land office at Denver, Colorado, requiring the payment of minimum royalty for the eleventh lease year of its noncompetitive oil and gas lease Colorado 02406, beginning May 1, 1961, and ending April 30, 1962.

The lease was issued for a 5-year term effective May 1, 1951, and was subsequently extended for a second 5-year term, at which time it became subject to the automatic termination provision added to section 31 of the Mineral Leasing Act by the act of July 29, 1954, 68 Stat. 585, as amended, 30 U.S.C. § 188 (b) (Supp. IV, 1963). On July 16, 1956, the land office approved a partial assignment of the lease effective August 1, 1956, the new segregated lease being designated as Colorado 02406-A. Between the date of approval and the effective date, a gas well was completed on July 26, 1956, on the assigned acreage included in 02406-A. The Geological Survey reported on August 23, 1956, that the discovery was deemed to be that of a new field and that effective July 26, 1956, all the land in 02406-A and part of the land retained in 02406 were believed to be within the known geologic structure of a producing field. Later other partial assignments were made out of the parent lease.

On March 1, 1958, the land in the parent lease and lease 02406-A was committed to the Gillam Draw unit agreement and was included in the participating area of the unit. Subsequently, the unit was terminated as of January 1, 1961. On March 9, 1961, the Denver land office, to which the lease records had been transferred from the Geological Survey, notified the lessees affected by the termination of the Gillam Draw Unit that, because of the termination of the unit, their leases had been extended for two years from October 13, 1960, the date on which production ceased in the unit,¹ and would be effective to October 13, 1962, unless relinquished.

Murphy Corporation paid the minimum royalty for the parent lease for the tenth lease year before the expiration of that lease year on April 30, 1961, but made or offered no payment of minimum royalty for the eleventh lease year. On March 27, 1962, the land office requested payment of \$1 per acre for the eleventh year of the parent lease on the ground that the lease had not terminated automatically on May

¹ The land office seems to have assumed that the unit was terminated immediately upon cessation of production despite the action of the Geological Survey indicating that the termination was effective as of January 1, 1961.

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1, 1961, for nonpayment of rental for the reason that it had retained its minimum royalty status. Murphy Corporation then paid the minimum royalty for the eleventh lease year, relinquished the lease, and appealed from the decision requiring the royalty payment for the eleventh year.

The Division of Appeals held that because the lease had become subject to payment of minimum royalty through inclusion in the participating area of the producing unit it was not subject to automatic termination for failure to pay annual rental in advance and that it did not revert to a rental status on termination of the unit because a minimum royalty status, having attached, continues so long as the lease remains in existence.

In its appeal to the Secretary, the appellant contends that the lease was automatically terminated by operation of law on May 1, 1961, for want of a rental payment because there was then no well capable of producing oil or gas in paying quantities on the leased premises, relying upon the language of the departmental decision in *United Manufacturing Co.*, 65 I.D. 106, 115 (1958), interpreting the act of July 29, 1954, *supra*.

The portion of the act of July 29, 1954, upon which the appellant relies provides that:

* * * upon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law * * *.

In *United Manufacturing Co.*, *supra*, the Department was not concerned with the situation presented here. The leases involved there had always been in a rental paying status and were not and had not been unitized. The lessees sought to escape application of the automatic termination provision upon their failure to pay the rental on the ground that the leased premises contained valuable deposits of oil or gas, although not a producing well or well capable of production. But in the case now under consideration, it is not disputed that there was no well on the leased premises capable of production which would save the lease from automatic termination for failure to pay rent if rental was required. Clearly, the lease was bound to terminate by operation of law for failure to pay rental if rental was owed. The question to be determined on this appeal is whether the lessee was liable for annual payments of minimum royalty after the unit was terminated or whether the termination of the producing unit caused this lease to revert from a minimum royalty status to a rental status.

Under the Mineral Leasing Act, as amended, all leases of land not within any known geologic structure of a producing oil or gas field are conditioned—

* * * upon payment by the lessee of a rental of not less than 50 cents per acre for each year of the lease. Each year's lease rental shall be paid in advance. A minimum royalty of \$1 per acre in lieu of rental shall be payable at the expiration of each lease year beginning on or after a discovery of oil or gas in paying quantities on the lands leased. § 17(d), 74 Stat. 782 (1960), 30 U.S.C. § 226(d) (Supp. IV, 1963).²

With respect to leases committed to unit agreements, the statute provides that—

* * * The minimum royalty * * * under any lease that has become subject to any cooperative or unit plan of development or operation, or other plan that contains a general provision for allocation of oil or gas, shall be payable only with respect to the lands subject to such lease to which oil or gas shall be allocated under such plan. * * * § 17(j), 74 Stat. 784, 30 U.S.C. § 226(j) (Supp. IV, 1963).

In the event of termination of the unit or the exclusion of any land therefrom, the Mineral Leasing Act, as amended, provides:

* * * Any lease which shall be eliminated from any such approved or prescribed plan, * * * and any lease which shall be in effect at the termination of any such approved or prescribed plan, * * * unless relinquished, shall continue in effect for the original term thereof, but for not less than two years, and so long thereafter as oil or gas is produced in paying quantities. § 17(j), 74 Stat. 785 (1960), 30 U.S.C. § 226(j) (Supp. IV, 1963).

It is thus apparent that the appellant's lease acquired a minimum royalty status when it was committed to the Gillam Draw Unit and was included in the participating area. And it was clearly entitled to the 2-year extension which the land office allowed on termination of the unit.

The conclusion that lease 02406 was bound by the minimum royalty provision after termination of the unit is based on the proposition that once a lease obtains production it becomes so obligated and remains so thereafter even though production ceases and it no longer has a well capable of production. *Solicitor's opinion* M-36405 (June 13, 1957); *Solicitor's opinion* M-36531 (Supp.) (July 20, 1959), overruled on other grounds, *Solicitor's opinion* M-36629, 69 I.D. 110 (1962). These opinions, however, were concerned only with the obligations of the lease on which the discovery was made. Here we must consider whether the same rule applies to a lease other than the discovery lease or to a part of the same lease which becomes separated from the part on which the discovery is made.

In the latter situation, which is the more common, it has been the practice that where because of discovery a lease has become obligated to pay a minimum royalty of \$1 per acre in lieu of rental lands on which there is no discovery well and which are assigned out of the lease become freed from the obligation to pay minimum royalty. See

²In 1958 when the Gillam Draw Unit was effected, the rental rates were different but, in other respects, the statute was the same.

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Roy M. Eidal, Kern County Land Company, A-29300 (February 19, 1962); VI Bureau of Land Management Manual 2.1.37A.

Somewhat akin to this situation is one in which a unitized lease on which there is no producing well is first included within a participating area and then excluded from it. While we have not found any ruling on the point, we believe that, following the precedent of the partial assignment situation, unitized lease acreage removed from a participating area would no longer be subject to the minimum royalty obligation. This view would seem to be required by the statute and the regulation which specifically provide that minimum royalty shall be paid only on participating acreage. Mineral Leasing Act, as amended, § 17(j), *supra*; 43 CFR, 1964 Supp., 3125.2. The statutory restriction would appear to apply as well to lands subsequently excluded from a participating area as to lands never included within it.

Thus, there are at least two situations in which lands at one time subject to the minimum royalty obligation are freed from it by subsequent events. The facts in this appeal, we believe, constitute a third exception from the general rule. The dissolution of a unit agreement, which, of course, terminates the participating area dependent on it, is a far more drastic action than either a partial assignment or a modification of a participating area and it severs the relationship of the lands as effectively as do the other procedures.

Accordingly, when the unit agreement was terminated, lease 02406 reverted to a rental status and the rental for the eleventh year became payable no later than May 1, 1961, the anniversary date of the lease. Upon the lessee's failure to make the required payment, the lease automatically terminated. Thus it is incorrect to hold that the lessee remained obligated to pay a minimum royalty.

Therefore, 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 reversed and the case remanded for further proceedings consistent herewith.

ERNEST F. HOM,
Assistant Solicitor.

CLAIM OF BILL POWERS

TA-271 (Ir.)

Decided June 8, 1964

Torts: Discretionary Functions

A decision not to place culverts under an irrigation lateral, made at the policy and planning level, when no danger from this method of construction is apparent or realized, and a contrary decision would affect the feasibility of the project, is a discretionary act within the meaning of the discretionary function exception of the Federal Tort Claims Act.

Irrigation Claims: Generally

Under the current Public Works Appropriation Act, as well as under its predecessors, awards may be made upon a showing that the damage was the direct result of nontortious activities of the Bureau of Reclamation.

Torts: Generally

The immunity granted to the United States by 33 U.S.C. 702c from liability of any kind for any damage from or by floods or flood waters at any place is available to the United States as a defense in suits brought under the Federal Tort Claims Act.

Irrigation Claims: Generally—Torts: Generally

The Flood Control Act, 33 U.S.C. 702c, is an immunity statute. Such a statute is necessary, and therefore applicable, only where there would be liability without it.

Irrigation Claims: Generally

The immunity granted to the United States by 33 U.S.C. 702c does not bar payment of claims under the Public Works Appropriation Act where floods or flood waters are involved because there is no legal liability upon the Government to pay claims under the Public Works Appropriation Act. Therefore, there exists no reason to have recourse to an immunity statute in order to avoid payment of such claims.

Irrigation Claims: Generally

The provisions of the Public Works Appropriation Act, concerning the activities of the Bureau of Reclamation, do not vest in anyone a statutory right to compensation. The payment of claims under these provisions is discretionary with, and not mandatory upon, the Secretary of the Interior.

APPEAL FROM ADMINISTRATIVE DETERMINATION

Mr. Bill Powers, of Othello, Washington, by and through his attorney, Mr. George R. Huff of Othello, Washington, has timely appealed from the administrative determination (T-P-254 (Ir.)), dated April 23, 1963, of the Regional Solicitor, Portland, Oregon, denying his claim in the amount of \$395 for loss of crops and erosion damage on farm unit 214, Irrigation Block 49 of the Columbia Basin Project of the Bureau of Reclamation.

In presenting his claim, Mr. Powers stated:

Flood waters washed out ditch destroying 2.1 acres of peas and caused extensive erosion which required repairs by heavy equipment.

* * * * *

Flash flood on hill above property came into bureau lateral and through my weir, washing out my ditches and eroding my field.

In the original determination, the Regional Solicitor denied the claim under the Federal Tort Claims Act¹ and stated: "It is settled law that the activities of the Bureau of Reclamation, in connection with the construction of irrigation structures, constitute discretionary acts within that [the discretionary function] exception to the Federal Tort Claims Act." He denies the claim under the Public Works

¹ 28 U.S.C., 1958 ed., sec. 2671 *et seq.*

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Appropriation Act, 1963,² stating: "This case is squarely in point" with *Hedrick v. United States*.³

The appellant, through his attorney, excepts to the original determination for the following reasons:

1. The damage was caused by water collecting and running into the lateral in numerous gullies, not in one gully as stated in the original determination. The danger from these gullies was "apparent at time of the planning and construction of the water delivery system * * *. Failure to make proper allowances for this situation was a failure to exercise ordinary care (negligence) and not * * * an exercise of a discretionary function."

2. The original determination did not "consider the fact that the Bureau of Reclamation originally planned to install concrete spillways to alleviate the uncontrolled waters, but, at the time of construction, such portion of the plan relating to the spillways was negligently omitted * * *."

3. "An error in the construction of the water system in failing to take reasonable precautions to prevent harm to Mr. Powers, when the Bureau of Reclamation knew, or should have known, that the manner in which said construction was accomplished, without remedial action concerning the uncontrolled waters, would cause damage to Mr. Powers. This type of error is not a discretionary act as excepted under the Federal Tort Claims Act."

The original determination states the following facts:

Farm Unit 214 is located approximately 10 miles southwest of Othello, Washington, on the slope of a low range of hills called the Saddle Mountains. Although rainfall only averages 7 inches a year, the slopes of these hills are eroded into numerous small gullies. One such gully, running down this hillside, borders the east side of Farm Unit 214. The PE16.4M lateral, a structure of the Bureau of Reclamation, flowing westward supplies water to claimant's farm. The lateral crosses a well defined gully a few feet from claimant's turnout. There is no culvert under the lateral at this gully crossing. In its natural state, prior to the construction of the lateral, storm waters flowing down this gully would completely bypass Farm Unit 214 to the east.

During the evening of June 4, 1961, there was a cloudburst in the hills above claimant's farm. These waters collected in this gully adjacent to claimant's turnout, flowed directly into the PE16.4M lateral, and were carried along with the irrigation water already in the lateral. This raised the lateral's water level, and a large volume of water passed through claimant's turnout into his head ditches and overflowed onto the farm—washing out 2.1 acres of peas and causing erosion damage.

* * * * *

As shown by the record, the problem of storm waters entering the lateral had been considered by Bureau of Reclamation design engineers prior to the original construction of this facility. In order to serve farm lands lying on the slope

² 76 Stat. 1216. This appeal will be decided under the Public Works Appropriation Act, 1964, 77 Stat. 844, which is the current Act.

³ 184 F. Supp. 927 (D.N.M. 1960).

of the Saddle Mountains, it was necessary that the lateral be laid out across the face of this hillside. Along its route, the lateral crossed numerous gullies including the one adjacent to claimant's unit. To provide for the storm waters that would flow down the hillside through the gullies into the lateral, this structure was designed with a large bank on the downhill side to give it additional freeboard.

* * * * *
As constructed, the lateral dead ends at the boundary between Farm Units 214 and 53. There is no channel to outlet emergency flows from the lateral; however, the owner of Farm Unit 53 has built an overflow device at his turnout which diverts increased lateral flows to an adjacent ravine. No culverts were built at the several gully crossings along this lateral in accordance with existing construction policy of the Bureau of Reclamation. * * *

The appellant's three exceptions will be considered in the order in which they were previously stated.

From the quoted portions of the original determination, it appears that the first exception is correct in that water from several gullies, not from just one gully, ran into the lateral and contributed to the damage to appellant's property. However, this in itself is not sufficient grounds to reverse the determination, since the fact that more than one gully was involved would not affect whether or not the damage arose from the exercise of a discretionary function. The part of this exception which states that the danger was "apparent at the time of planning and construction" is in error. The administrative record establishes that the danger was neither apparent nor realized at that time.

The administrative record establishes that the second exception is in error. The Bureau of Reclamation did not originally plan to install spillways in this facility. There is no evidence in the administrative record of such an original plan.

The third exception is based on the assumption that the Government "knew or should have known" at the time of planning and constructing that a lateral such as was constructed "would cause damage to Mr. Powers." The administrative record establishes that the Government did not know at the time of the planning and construction of the lateral that such a lateral would cause damage to anyone. Further, there is no evidence in the administrative record to lead to the conclusion that the Government should have known of the danger at that time.

There is nothing in the appellant's three exceptions, nor in the administrative record which provides sufficient grounds for reversing the conclusion in the original determination that the decision to build the lateral without placing culverts under the lateral "was a decision made at the policy and planning level and, as such, constitutes a discretionary act," within the meaning of the discretionary function exception of the Federal Tort Claims Act.⁴ The situation presented

⁴ 28 U.S.C., 1958 ed., sec. 2680(a).

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is analogous to the one presented in *United States v. Ure*.⁵ In *Ure* the court pointed out that a decision not to line an entire canal, but to line only part of it, fell within the discretionary function exception. Decisions of this type affect the feasibility of an entire project. No danger was apparent at the time of planning and construction.

Therefore, we sustain the denial of the claim by the Regional Solicitor, Portland Region, under the Federal Tort Claims Act.

Under the current Public Works Appropriation Act, as well as under its predecessors, awards may be made upon a showing that the damage was the direct result of nontortious activities of the Bureau of Reclamation. In denying the claim under the Public Works Appropriation Act, the original determination relied largely upon the *Hedrick* case, *supra*, two other Federal cases,⁶ and on *T. J. Savell*.⁷ However, *Savell* only stands for the proposition that a claim under the Public Works Appropriation Act must be denied when damage to a claimant's land does not result from activities of the Bureau of Reclamation.

The Federal court cases cited, including *Hedrick*, were suits brought under the Federal Tort Claims Act. These cases considered whether or not the immunity granted to the Government by 33 U.S.C., sec. 702c from "liability of any kind * * * for any damage from or by floods or flood waters at any place," is available to the United States as a defense in suits under the Federal Tort Claims Act. The Court held that the defense is available in such suits.

Another Federal court case decided under the Federal Tort Claims Act which discusses the extent of the applicability of the Flood Control Statute is *Stover v. United States*.⁸ In that case the United States Court of Appeals for the Ninth Circuit stated:

We hold that 33 U.S.C., sec. 702c is an immunity statute covering even ordinary negligent construction or maintenance of flood works and to hold otherwise would be a repudiation of our Clark case, *Clark v. United States*, 218 F. 2d 446. True, as appellants point out, sec. 702c was only one of the legs on which Clark stood, and one of the other legs was sufficient for the case. But we cannot call it pure dicta. If it was half dicta, we believe it good dicta. Also, the leading case, *National Manufacturing Co. v. United States*, 8 Cir., 210 F. 2d 263, holds sec. 702c to be an immunity statute. And it is a well reasoned case. We affirm on the ground, negligence or no negligence, sec. 702c precludes recovery here.

Appellants say the section applies to natural but not to man made floods. They rely heavily on the draft form of the 1928 Flood Control Bill out of which the present sec. 702c emerged. Also, they rely strongly on Congressional colloquy at the time of the adoption of the 1928 flood control bill. But all the colloquy just cannot overcome plain language. And there really would not be any reason to legislate on damage caused purely by nature.

⁵ 225 F. 2d 709 (9th Cir. 1955).

⁶ *National Manufacturing Co. v. United States*, 210 F. 2d 263 (8th Cir. 1954); *Guy F. Atkinson Co. v. Merritt-Chapman & Scott Corp.*, 126 F. Supp. 406 (N.D. Cal. 1954).

⁷ T-326 (Ir.) (April 3, 1951).

⁸ Civil No. 18,275, 9th Cir., April 7, 1964.

Stover, then, holds that the Flood Control Act is an immunity statute, and such a statute is necessary, and therefore applicable, only where there would be liability without it. The Public Works Appropriation Acts do not impose liability upon the Government to pay for damage caused by nontortious activities of employees of the Bureau of Reclamation. Rather, they provide for such payment within the policy of the Department of the Interior which is stated in Solicitor's Regulation 5, Amendment 1:⁹

Sec. 3. *Irrigation claims—Administrative Policy.* Neither the act of February 20, 1929 (25 U.S.C., sec. 388) [Indian Irrigation Act], nor the provision recurring in the annual Public Works Appropriation Acts respecting the activities of the Bureau of Reclamation vests in any person a statutory right to compensation.

With relation to the statutory provision regarding reclamation, the Solicitor has stated in pertinent part as follows:

* * * the payment of claims under this statutory provision is discretionary with, and not mandatory upon, the Secretary of the Interior. No claimant has a legal right to demand compensation for property damage arising out of nontortious activities of the Bureau of Reclamation. Congress has merely granted a permissive power to pay such claims if it seems desirable to do so as a matter of policy. * * * Sol's Op. M-36064, 60 I.D. 451, 454 (1950).

Since there is no legal liability upon the Government to pay claims for damage arising out of nontortious activities of the Bureau of Reclamation, there certainly is no need to have recourse to an immunity statute in order to avoid such payment, anymore than it is necessary to have recourse to such a statute in order to avoid paying for damages caused by nature. Therefore, it follows that this immunity statute does not bar the payment of claims under the Public Works Appropriation Acts.

In *Charles H. Reaves*,¹⁰ we held that the statutory defense under consideration barred recovery under the Federal Tort Claims Act. The statute was not mentioned in our consideration of the claim under the Public Works Appropriation Act. The claim was denied under that Act because:

In the case under consideration, the break in the Acequia was caused by an arroyo flow into the Acequia far in excess of the capacity of the Acequia. The heavy arroyo flow was caused by heavy rainfall. *The arroyo flow is not shown to have been diverted from its true natural course by any work performed by the Bureau of Reclamation.* In short, the damage to claimant's property was not directly caused by nontortious activities of employees of the Bureau of Reclamation but was caused by the forces of nature. (Italics added.)

The instant case presents the reverse of the *Reaves* case in that the administrative record as reflected in the quoted part of the original determination establishes that the storm waters flowing down the gully or gullies "would completely bypass Farm Unit 214," except for the construction. But for the lateral, the water would not have been

⁹ 24 F.R. 1877.

¹⁰ TA-234 (Ir.) (February 17, 1964).

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held back or diverted onto the appellant's land. The water would have continued down the hillside in the gullies as it had done prior to the construction of the lateral.

Therefore, we determine that 33 U.S.C., sec. 702c, does not bar recovery in the instant case, because the administrative record shows that the damage to Mr. Powers' property was the direct result of non-tortious activities of employees of the Bureau of Reclamation.

The appellant has alleged damages in the amount of \$395.00. We find that the actual damages were as follows:

Value of crop-----	\$299.25	
Less harvesting and hauling costs not incurred -----	26.50	
		\$272.75
Repair of land-----		97.50
		<hr/>
		370.25

Accordingly, the original determination is hereby reversed, and the sum of \$370.25 is awarded to Mr. Powers.

EDWARD WEINBERG,
Deputy Solicitor.

RICHFIELD OIL CORPORATION

A-29937

Decided June 9, 1964

Oil and Gas Leases: First Qualified Applicant

Where an oil and gas lease is issued which erroneously omits a part of the land applied for which is available for leasing, and the land office simultaneously issues a decision which indicates that the omitted land is included in the lease, the omission will not be construed as a rejection of the offer as to the omitted land from which the offeror must appeal in order to preserve the priority of his offer, but the lease may be amended to include the omitted land notwithstanding the filing of a conflicting offer for the same land subsequent to the issuance of the lease but prior to the discovery of the omission.

Jeanette L. Luse et al., 61 I.D. 103 (1953), distinguished.

APPEAL FROM BUREAU OF LAND MANAGEMENT

Richfield Oil Corporation has appealed to the Secretary of the Interior from a decision dated January 9, 1963, whereby the Division of Appeals, Bureau of Land Management, affirmed a decision of the Utah land office rejecting its noncompetitive oil and gas offer for lot 8, sec. 13, T. 23 S., R. 23 E., S.L.M., Utah, filed pursuant to section 17 of the Mineral Leasing Act, as amended, 74 Stat. 781 (1960), 30 U.S.C. § 226 (Supp. IV, 1963). The offer was rejected because the described land was embraced in oil and gas lease Utah 021095.

On February 4, 1957, R. A. Lutz filed oil and gas lease offer Utah 021095 for four sections of land. It described one section, in T. 23 S., R. 23 E., S.L.M., as "Section 13: All including River Bed." On March 25, 1957, a lease was issued to Lutz, effective April 1, 1957, which described the lands leased in section 13 as "Lots 1, 2, 3, 4, 5, 6, 7, NE $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$." This description included all of the legal subdivisions of section 13 except lot 8, which comprises 4.08 acres. By a decision of the same date the land office suspended the offer "as to the beds of the Green, Colorado, and Dolores Rivers, pending determination of the status of the riverbeds." The decision further stated that

The enclosed lease embraces the remainder of the land applied for. Upon the elimination of the conflict your offer will be further considered and a supplemental lease issued as to any land which may be available.

The appellant filed its lease offer on July 23, 1960. By a decision dated January 18, 1961, the land office corrected lease Utah 021095 to include the previously omitted lot 8 of section 13 and rejected the suspended part of the offer as to the river bed lands. The Lutz offer was rejected as to the river bed lands because those lands were unsurveyed and no metes and bounds description was furnished. The appellant's lease offer was thereafter rejected by the land office.

In its appeal to the Secretary, as in its appeal to the Director, Bureau of Land Management, Richfield contends that by his failure to appeal from the decision issuing the lease which omitted lot 8, Lutz abandoned his preferential right under section 17 of the Mineral Leasing Act as the "person first making application for the lease who is qualified to hold a lease." It further contends that Lutz' offer was effectively rejected as to lot 8, citing as authority for these arguments the Department's decisions in *C.A. Rose*, A-26354 (May 13, 1952), and *Jeanette L. Luse et al.*, 61 I.D. 103 (1953).

The Division of Appeals held that since lease offer Utah 021095 was not rejected as to lot 8, even though the offeror did not appeal on the basis that it should have been included in his lease, the offer remained intact as to that lot until action was taken by the land office to correct the lease. In making this determination, the Division of Appeals relied upon the statement in the land office decision of March 25, 1957, that "upon the elimination of the conflict your offer will be further considered and a supplemental lease issued as to *any land* which may be available" (italics added). As to other contentions of the appellant, the Division of Appeals held that the present case is distinguishable in fact from the cases cited by the appellant. It did not, however, set forth the distinguishing facts.

After careful review of the appellant's arguments and the cases cited as authority, I concur in the results of the Bureau's decisions.

The rule is well established by the decisions of this Department that an applicant for a noncompetitive oil and gas lease whose appli-

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ation is rejected and who fails to appeal within the time allowed for appeal will lose his preference right to a lease as against subsequent qualified applicants. *Charles D. Edmonson et al.*, 61 I.D. 355 (1954). The present case, however, is readily distinguishable from that case and other cases (except the *Luse* case) in which the same rule has been followed inasmuch as the land office did not in terms reject Lutz' offer as to lot 8. On the contrary, the land office decision specifically stated that the lease was issued for all of the offered lands except the river bed lands. The lease, as issued, did not agree entirely with the decision, but there was no stated rejection from which to appeal.

In the *Rose* and *Luse* cases, *supra*, the Department held that where an erroneous decision of the Bureau of Land Management fails to recognize the preferential right of the first qualified applicant to obtain a noncompetitive oil and gas lease on a tract of land, and where the error is as obvious to the applicant as to anyone else, the failure of the applicant to take an appeal from such a decision is considered to be an abandonment of the preferential right; and that right cannot be reestablished by administrative action to the prejudice of third persons whose rights have intervened. In the *Rose* case there was a specific rejection of the application of the first applicant from which he did not appeal.

In the *Luse* case, the one factually most resembling the present case, there was no stated rejection of the first application. There Mrs. Hornung applied for, among other lands, lot 14, section 6. She was sent lease forms on September 8, 1949, which omitted lot 14, section 6, but included lot 1, section 6, for which she had not applied. The lease forms, as transmitted, were signed by Mrs. Hornung, and a lease was issued effective December 1, 1949. On November 26, 1951, Mrs. Hornung requested that lot 14 be substituted for lot 1. Meanwhile, on March 1, 1950, lot 14 had been leased to Mrs. Luse. The Department held that since the error in omitting lot 14 from Mrs. Hornung's lease should have been more apparent to her as the applicant for the land than to anyone else, and since she failed to appeal from the manager's action in executing the lease without the inclusion of lot 14, she was deemed to have abandoned the preferential right which she initiated by applying for lot 14 and to have acquiesced in the lease as it was issued.

The present case is distinguishable from the foregoing both upon factual differences and upon substantive changes in the regulations since 1949.

At the time of the issuance of the lease to Mrs. Hornung in 1949, a person who desired a noncompetitive oil and gas lease on public lands was required to file an application describing the desired lands in the proper land office. The land office then mailed to the applicant

copies of a lease which described such of the lands applied for as were available for leasing. Only after the lease forms were signed by the applicant and returned to the land office was the lease issued. Under that procedure, if there were a discrepancy in the land descriptions in the application and the lease forms, it would or should be apparent to the applicant before he signed the lease.

At the present time, a person wishing to lease public lands files an offer describing the desired lands. The land office, after determining what lands are available for leasing, issues a lease for those lands on the same form which has been used as an offer without further action or opportunity for review on the part of the offeror.

Moreover, whereas in the *Luse* case it should have been readily apparent to Mrs. Hornung that the land description on the lease form was not the same as the description in her application, the discrepancy was not so apparent to the offeror in this instance.¹ It was not apparent on the face of the lease issued to Lutz that the lands described therein did not include all of the legal subdivisions of sec. 13, T. 23 S., R. 23 E. The omission of lot 8 could have been discerned only by reference to the official survey plat in the land office.²

Aside from these factors, the noncompetitive oil and gas leasing regulations were amended in 1950 to provide that:

If any of the land described in item 2 of the offer is open to oil and gas filing when the offer is filed but is omitted from the lease for any reason and thereafter becomes available for leasing to the offeror, the original lease will be amended to include the omitted land unless, before the issuance of the amendment, the land office receives a withdrawal of the offer with respect to such land or an election to receive a separate lease in lieu of an amendment. Such election shall consist of a signed statement by the offeror asking for a separate lease accompanied by a new offer on the required form describing the remaining lands in his original offer, executed pursuant to this section. The new offer will have the same priority as the old offer. * * * 43 CFR, 1964 Supp., 3123.5(c), formerly 43 CFR 192.42(j).³

Thus, it is clear that under the current regulations the acceptance of an offer for less land than that applied for does not, without more, necessarily mean that the offer is rejected as to the land not included. The land omitted may be included in a prior offer which has not been adjudicated or may be for some other reason not immediately available for inclusion in the lease. Thus the failure of the land office in this case to include lot 8 in Lutz' lease did not purport to be such a

¹ *R. J. McGrath*, A-27187 (November 29, 1955), a case somewhat similar to *Luse*, is distinguishable for the same reason.

² Where the lessee in a similar situation alleged she never received a copy of the lease which omitted several parcels of land she had applied for, the Department refused to follow *Luse*, holding its reasoning could not apply if the lessee is not put on notice that some of the land she applied for has been omitted from the lease. *Melvin A. Brown*, 62 I.D. 454 (1955).

³ The language of this regulation as it first appeared in the Federal Register on December 5, 1950 (15 F.R. 8583), was substantially the same as that contained in the current regulation.

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rejection of Lutz' offer for lot 8 as to require him to appeal in order to retain his preference right to lease lot 8. It is true that the land office decision said only that the offer was being suspended as to the river bed lands. On the other hand, it did not say that the offer was being rejected as to lot 8. On the contrary it said that the lease being issued included all the remaining land. I believe, therefore, that it would be improper to charge Lutz with notice that his offer was being rejected as to lot 8 and that he must appeal from the rejection to preserve his rights to that tract.

Accordingly, the land office acted properly in amending lease Utah 021095 to include lot 8 and in rejecting Richfield's offer for the same land.

It further appears that Richfield's lease offer may have been defective for failure to include the river bed adjacent to lot 8, since it described less than 640 acres, and other contiguous land may have been available for leasing. See *Emily K. Connell*, 70 I.D. 159 (1963). It is not clear from the record whether or not the adjacent river bed is available for leasing since Lutz' offer was rejected as to that land for failure to describe the land properly and not because it was unavailable for leasing. In view of the conclusion already reached, however, it is not necessary to resolve the question of the qualification of the appellant's offer.

Therefore, 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.

ERNEST F. HOM,
Assistant Solicitor.

CHESTER C. GIBBY

A-30048

Decided June 30, 1964

Contracts: Damages: Liquidated Damages—Timber Sales and Disposals

Where damages for default by a bidder in a timber sale have been liquidated by the parties in the amount of a deposit submitted with the bid, such liquidated damages are for assessment as measuring the extent of the bidder's obligation in the matter without the necessity of inquiring into the question of the actual damages incurred.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Chester C. Gibby has appealed to the Secretary of the Interior from a decision dated April 23, 1963, whereby the Division of Appeals, Bureau of Land Management, affirmed a decision of the Salem, Oregon, district office terminating his right to purchase certain timber in sec. 17, T. 8 S., R. 6 W., Will. Mer., Oregon, offered for sale pursuant

to the act of August 28, 1937, 50 Stat. 874, 43 U.S.C. § 1181a (1958), and retaining his bid deposit of \$1,300.

Gibby bid in response to a timber sale notice dated October 19, 1962, which invited written bids of not less than the advertised appraised price of \$12,830.50. The notice of sale required that each bid be accompanied by a deposit of \$1,300. The bid form contained a statement that:

IT IS AGREED That the bid deposit shall be retained by the United States as liquidated damages if the bid is accepted and the undersigned fails to execute the sale contract and furnish a satisfactory performance bond within 30 days after the bid is accepted. * * *

By a letter dated December 3, 1962, Gibby was informed that his bid of \$14,029.75, submitted on November 26, 1962, was accepted. He was requested to execute the proper contract forms for the sale of timber and the performance bond forms and to return all copies to the district office within 30 days after receipt of the letter. On January 3, 1963, Gibby requested and was granted a 30-day extension of time to complete execution of the contract, the record indicating that he had been unable to secure the necessary performance bond. On February 6, 1963, he requested an additional 10-day extension of time to complete the contract.

A decision dated February 12, 1963, advised Gibby that the contract and bond forms had not been received and all of his rights in and to the timber were thereby terminated. It further stated that in accordance with the timber sale regulations (43 CFR, 1964 rev., 285.11(b), formerly 43 CFR 115.25(b), 23 F.R. 1928, now 43 CFR, 1964 Supp., 5433.4(b)) and the language of the Bid for Timber the bid deposit would be retained as liquidated damages.

In affirming the district manager's decision, the Division of Appeals held that the second extension requested by Gibby could not be granted because Bureau personnel are not authorized to grant any extensions of time beyond the one 30-day period allowed by the Department's regulations (43 CFR 5433.4(b)) and the retention of the bid deposit as liquidated damages complies with departmental regulations and is consistent with the legal principles established by the courts.

In his appeal to the Secretary, the appellant does not question the denial of the request for a second extension of time for completing the contract. He contends, however, that the forfeiture of the bid deposit is a penalty rather than liquidated damages because there is no reasonable relationship between the damages sustained by the United States and the sum forfeited. He alleges that the Bureau of Land Management sustained actual damages of \$31 (the difference between the appellant's bid of \$14,029.75 and the \$13,998.75 bid of the second highest bidder, to whom the contract was awarded), that it would not be difficult for a court to ascertain the actual damages, and it is highly

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inequitable and unjust to permit the retention of \$1,300 in view of the actual damages of \$31.

Although difficulties frequently arise in the application of the principles distinguishing penalties from liquidated damages, and although the decisions of the courts are not entirely consistent in their conclusions or clear in their statements, the fundamental principles that govern are quite clear and understandable. A penalty is a sum named, which is disproportionate to the damage which could have been anticipated from breach of the contract, and which is agreed upon to enforce performance of the contract by the compulsion of this very disproportion. Liquidated damage, on the other hand, is a sum fixed as an estimate made by the parties at the time when the contract is entered into of the extent of the injury which a breach of the contract will cause. A provision for a penalty is invalid, but a provision for liquidated damages is enforceable. Williston on Contracts § 776 (3d ed. 1961) ; 25 C.J.S. Damages § 101c.

In general, provided it is in fact compensation for damages, a contract may fix the sum to be paid in the event of a breach, where the damages are uncertain in nature or amount or are difficult of ascertainment and the amount agreed on is not extravagant and unreasonably disproportionate to the damages that would actually result from a breach of the contract, or such as to imply fraud, mistake, circumvention or oppression, and the agreement for such amount does not violate some principle of law. 25 C.J.S. Damages § 101a.

It is sufficient if the sum named appears to bear some reasonable proportion to the damage contemplated. It is not necessary that the actual damages sustained exceed the amount stipulated, and the fact that no damages have actually resulted from the breach does not affect the right to recover the stipulated damages. 15 Am. Jur. Damages § 251.

The certainty or uncertainty of the actual damages which a breach of contract will occasion and the ease or difficulty of ascertaining or proving them are important matters to be considered in the determination of whether the sum named is liquidated damages or a penalty. Whether the damages are difficult of ascertainment is to be determined by a consideration of the status of the parties at the time the contract is entered into, and not at the time it is broken. 15 Am. Jur. Damages § 252.

An actual deposit by a party to a contract, pursuant to a provision therefor and a stipulation that the amount shall be paid to or retained by the other party in case of default, is held, as a rule, to import an intent to liquidate the damages, and will be so enforced. 25 C.J.S. Damages § 109.

Today the law does not look with disfavor upon "liquidated damages" provisions in contracts. When they are fair and reasonable

attempts to fix just compensation for anticipated loss caused by breach of contract, they are enforced. They serve a particularly useful function when damages are uncertain in nature or are unmeasurable, as in many Government contracts. And the fact that the damages suffered are shown to be less than the damages contracted for is not fatal. These provisions are to be judged as of the time of making the contract. *Sun Printing & Publishing Assn. v. Moore*, 183 U.S. 642, 672-674 (1902); *United States v. Bethlehem Steel Co.*, 205 U.S. 105, 121 (1907); *Wise v. United States*, 249 U.S. 361, 365 (1919); *Priebe & Sons v. United States*, 332 U.S. 407, 411 (1947).

Upon the basis of the foregoing principles, I find that the stipulation in this case is a valid and enforceable stipulation for liquidated damages rather than a penalty.

The wording of the stipulation leaves no question as to the expressed intention of the parties that the \$1,300 deposit was to be regarded as liquidated damages in the event of failure of the appellant to execute the sale contract and obtain a performance bond within the required time. When the parties to a contract, in which the damages to be ascertained, growing out of a breach, are uncertain in amount, mutually agree that a certain sum shall be the damages, in case of a failure to perform, in language plainly expressive of such agreement, I know of no sound principle or rule applicable to the construction of contracts that will enable a court of law to say that they intended something else. *Sun Printing & Publishing Assn. v. Moore, supra*, citing *Clement v. Cash*, 21 N.Y. 253, 257.

The only questions that remain are whether the amount of the probable damages could be reasonably ascertained at the time the agreement was made and whether the amount of the deposit bore some reasonable relationship to the probable damages.

Although the actual damages to the Government in this case may have been only \$31, it cannot be said that such amount or any other definite sum could have been ascertained at the time of submission of the appellant's bid. Upon the appellant's default, more than 60 days after the auction, neither the second highest bidder nor any other party was under any obligation to purchase the offered timber. It was, therefore, quite possible that the timber might be sold for a substantially smaller sum or not sold at all. Had it been sold at the appraised price (and the amount of the second highest bidder's original written offer), the difference in the price would have been \$1,199.25, a sum not wholly unrelated to the amount of the bid deposit. Moreover, the delay in the termination of the contract negotiations and the awarding of the contract to another party, although not subject to precise monetary evaluation, were administratively burdensome and were proper elements to be considered in stipulating liqui-

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dated damages. These are factors of the very nature that warrant the stipulation of liquidated damages in a contract.

The deposit was accepted in accordance with the conditions upon which it was made, and the record reasonably establishes that, at the time the appellant's bid was submitted, both parties to the transaction regarded the stipulation as measuring the extent of the bidder's obligation in the matter without inquiring into the question of actual damages, and no proof of actual damages is necessary. 29 Comp. Gen. 530 (1950); *Refer Construction Company*, 68 I.D. 140 (1961). Accordingly, the Bureau acted properly in retaining the appellant's deposit as liquidated damages.

The cases cited by the appellant, as well as numerous other cases in which liquidated damages clauses have been construed as penalties, have been carefully examined and compared. All of the cases examined are factually distinguishable from the present case.

Therefore, 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.

ERNEST F. HOM,
Assistant Solicitor.

MONTGOMERY-MACRI COMPANY AND WESTERN LINE CONSTRUCTION COMPANY, INC.

IBCA-59 and IBCA-72 *Decided June 30, 1964*

Contracts: Appeals—Contracts: Substantial Evidence

Motions for reconsideration of a decision of the Board of Contract Appeals will be denied if they are based on factual contentions that are contrary to the preponderance of the evidence, determined by evaluating the testimony and exhibits as a whole in accordance with accepted criteria of evaluation, or if they are based on legal contentions that are inapplicable to the factual situation revealed by the record.

Contracts: Breach—Bonneville Power Administration

The provisions of the Bonneville Project Act which authorizes settlement of claims against the Bonneville Power Administration are applicable to claims for breach of contract involved in appeals taken to the Board of Contract Appeals from decisions of contracting officers of the Bonneville Power Administration.

BOARD OF CONTRACT APPEALS

Motions for reconsideration of the decision¹ rendered by the Board upon these appeals have been filed by both parties. Appellants' motion asks for reconsideration of all parts of the decision that are adverse to appellants. The Government's motion asks for reconsideration of a number of the principal parts of the decision, in so far as those parts are adverse to the Government.

The Board has given detailed consideration to the many arguments urged by each party in support of or in opposition to the respective motions. The Board has also given consideration to a brief entitled "Amicus Curiae Brief" filed by a Regional Solicitor of the Department in support of the Government's motion.

Most of the contentions advanced by the parties, whether relating to law or to fact, are contentions that were thoroughly examined and fully evaluated by the Board in its decision. Many of them are expressly discussed in the opinion, and the remainder deal mainly with subsidiary points that were left out of the discussion merely in order to avoid making a very long opinion even longer. In the relatively few instances where new matter has been put forward, the Board has carefully studied the new matter, but has been unable to find in it any good reason for changing the decision.

¹ *Montgomery-Macri Company and Western Line Construction Company, Inc.*, IBCA-59 and IBCA-72 (June 28, 1963), 70 I.D. 242, 1963 BCA par. 3819, 5 Gov. Contr. 419.

With respect to questions of fact, counsel for appellants, in opposing the Government's motion for reconsideration, aptly say:

What, in effect, government counsel argues, is that the testimony of the contractor should be disregarded and only that of Bonneville witnesses considered. The testimony is conflicting in many respects and the decision can be picked to pieces by either side on various findings by citing particular references to the testimony and the exhibits. With a record so voluminous, this could go on indefinitely.

In other words, each party naturally wants us to give to its evidence the preponderating weight, and to draw from the record the inferences most favorable to its position. Hence, each party now seeks to overcome the findings that are adverse to it by calling the record for evidence helpful to it, and by disparaging or disregarding adverse evidence of equal or greater weight.

The Board sought in its decision to resolve the many controverted issues of fact through a critical evaluation of all the testimony and exhibits relevant to each such issue. In so doing, we applied accepted criteria of evaluation, such as demeanor of the witnesses on the stand, inherent credibility of the testimony, existence of circumstances that might cause testimony to be biased, consistency of statements made on direct examination with those made on cross-examination, verification of transactions by contemporary written records, initial acquiescence in conduct that later becomes a subject of controversy, failure of a party to adduce pertinent evidence within the control of that party, and incidence of the burden of proof. The presentations subsequently made by the parties in support of their respective notions for reconsideration contain nothing which would be sufficient to justify a conclusion that the findings of fact stated in our opinion are erroneous in any material particular.

With respect to questions of law, similar circumstances prevail. The pertinent principles of law are outlined and the pertinent authorities are cited in the opinion. True, the Board did not mention expressly certain legal doctrines that are invoked by one or the other of the parties, such as the rules relating to estoppel and constructive changes that are discussed by Department Counsel and by the Regional Solicitor. This, however, was not because the doctrines in question were overlooked by the Board, but because the circumstances requisite for their application simply do not exist in this case. The inoppositeness of the authorities cited to justify their application here is apparent when the facts established by the present record are compared with the facts to which key importance was attached in those authorities.

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Department Counsel have advanced the argument that the Board erred in appraising the weight of the evidence because the site of the work was not inspected by an engineer member of the Board. This argument is based upon a motion submitted to the Board under date of August 21, 1956, in which Department Counsel requested that "an alternate member of the Board of Contract Appeals who is an engineer be named to serve as a member of said Board when the above appeal is heard and decided." The motion included the statement that: "If this motion is granted, we suggest that the engineer member of the Board make a personal inspection of all right-of-way tracts involved in the controversy."

The Board did not grant the motion, and no engineer participated in the hearing and determination of the appeals. The questions presented by them involve practical construction procedures to a far greater degree than they involve technical engineering procedures. Obviously, one does not need to be an engineer in order to understand that bulldozing out an access road through cut-over land tends to create debris, and that debris tends to roll downhill; nor to understand that erosion is often a problem on steep slopes, and that disturbance of the soil often tends to create or aggravate erosion; nor to understand that logs left upon an assembly area may be a help or a hindrance in assembling steel, depending upon such factors as the number of the logs, their size, their location, their arrangement, and the types of equipment available for the assembly work. Even if the members of the Board who participated in the hearing and determination of the appeals had been initially unaware of these matters, the evidence presented at the hearing would have fully alerted them to the significance of the various clearing problems discussed in the Government briefs. Hence, a realistic evaluation was possible, and was made.

Neither party requested the member of the Board who conducted the hearing to inspect the tracts involved in the clearing controversy. On the contrary, he was informed by Department Counsel that, after consideration, it had been decided not to request him to visit the site of the work.

The Regional Solicitor has asked the Board to clarify the record with respect to the grounds upon which it accepted jurisdiction over certain of the claims decided in these appeals. The claims in question are those which ordinarily would be classified as claims for breach of

contract, within the meaning of the conventional distinction between claims *under* the contract and claims for breach of contract.²

The Board accepted jurisdiction over the claims in question under the authority of the provisions of the Bonneville Project Act which authorize settlement of claims against the Bonneville Power Administration. The pertinent part of the Act reads as follows:

Subject only to the provisions of this Act, the Administrator is authorized to enter into such contracts, agreements, and arrangements, including the amendment, modification, adjustment, or cancellation thereof and the compromise or final settlement of any claim arising thereunder, and to make such expenditures, upon such terms and conditions and in such manner as he may deem necessary.³

The applicability of the quoted legislation to claims for breach of contract involved in appeals taken to this Board from decisions of contracting officers of the Bonneville Power Administration was determined in the appeal of *Paul C. Helmick Company*.⁴ Because of the extended consideration given the subject in the opinion upon that appeal, the Board assumed there would be no need to mention it expressly in the opinion upon the instant appeals. In order, however, to avoid any possibility of misunderstanding, the Board now states that the ground upon which it accepted jurisdiction over the breach of contract claims here involved was the statutory settlement authority quoted above, and not some generalized theory applicable to claims against agencies other than the Bonneville Power Administration.

Appellant's motion for reconsideration is denied, and the Government's motion for reconsideration is also denied.

HERBERT J. SLAUGHTER, *Member*.

I concur:

JOHN J. HYNES, *Member*.

Chairman Paul H. Gantt disqualified himself from participation in the consideration of these appeals.

² See *Peter Kiewit Sons' Company*, IBCA-405 (March 16, 1964), 1964 BCA par. 4141, 6 Gov. Contr. 281(e); *Commonwealth Electric Company*, IBCA-347 (March 12, 1964), 71 I.D. 106, 1964 BCA par. 4136, 6 Gov. Contr. 262; *Promacs, Inc.*, IBCA-317 (January 31, 1964), 71 I.D. 11, 1964 BCA par. 4016, 6 Gov. Contr. 116(a); *Weardeco Construction Corporation*, IBCA-48 (September 30, 1957), 64 I.D. 376, 57-2 BCA par. 1440.

³ Act of August 20, 1937, section 2, 50 Stat. 732, as amended by Act of October 23, 1945, section 1, 59 Stat. 546, 16 U.S.C. sec. 832a(f) (1958). All functions of the Bonneville Power Administrator were transferred to the Secretary of the Interior, and the latter was vested with the power to authorize their performance by any officer, agency or employee of the Department of the Interior by Reorganization Plan No. 3 of 1950, 64 Stat. 1262, 5 U.S.C. sec. 481 note (1958).

⁴ IBCA-39 (July 31, 1956), 63 I.D. 209, 56-2 BCA par. 1027. See also Dec. Comp. Gen. B-124293 (October 15, 1958).

STANDARD OIL COMPANY OF TEXAS

A-30137

A-30221

*Decided July 1, 1964***Oil and Gas Leases: Extensions—Oil and Gas Leases: Drilling**

To qualify as actual drilling operations sufficient to extend an oil and gas lease pursuant to section 4(d) of the Mineral Leasing Act Revision of 1960, drilling must be conducted in such a way as to be a serious effort which one seriously looking for oil and gas could be expected to make in that particular area, given existing knowledge of geologic and other factors normally considered when drilling for oil and gas.

Oil and Gas Leases: Extensions—Oil and Gas Leases: Drilling

Where the purpose of drilling a well is only to test shallow formations 500 feet deep, known to be fresh water aquifers in the area surrounding the well, where gas has been found within several miles only in formations below 7,000 feet, and the nearest production from the shallow formations is about 25 miles away, the drilling does not serve to extend the life of a lease that would otherwise expire.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Standard Oil Company of Texas, a division of California Oil Company, has appealed to the Secretary of the Interior from two decisions dated August 14, 1963, and December 13, 1963, respectively, of the Division of Appeals, Bureau of Land Management, which affirmed decisions of the manager of the Santa Fe land office holding that its noncompetitive oil and gas leases Las Cruces 065300 and New Mexico 04881 had expired by operation of law on January 31, 1963, and February 28, 1963, respectively.

Since the appeals involve the same legal issue and are essentially alike factually, they may be considered in one opinion.

Lease L.C. 065300, which was originally issued for a 5-year term effective as of March 1, 1951, had been extended to January 31, 1963, pursuant to provisions of the Mineral Leasing Act, as amended, 74 Stat. 789, 30 U.S.C. § 226-1 (a), (b), (c) (Supp. IV, 1963); 68 Stat. 585, 30 U.S.C. § 187a (Supp. IV, 1963).

On January 29, 1963, the appellant filed a "Notice of Intention to Drill" with the District Engineer of the United States Geological Survey at Artesia, New Mexico, stating that it intended to drill a well in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 18, T. 21 S., R. 23 E., N.M.P.M., hereafter referred to as well 18-18. It described its plan as follows:

* * * Eight and one-half inch hole will be drilled from surface to the Lovington Sand member of the San Andres at approximately 500 feet with cable tools. Logs will be run at total depth. If commercial production is indicated, approximately 500 feet of 4½", 9.5#, J-55, new casing will be run and cemented. Prospective productive zones will be perforated and fracture treated for evaluation.

The District Engineer approved the request on the same day and notified the appellant of his action by letter dated the next day. The appellant began to drill at 4:00 p.m., January 30, 1963, and continued drilling until February 18, 1963. The well, having then been drilled to a depth of 500 feet without results, was abandoned as a dry hole.

On March 20, 1963, the land office notified the appellant that the lease had expired on January 31, 1963, by operation of law. Standard appealed, alleging that the lease had been extended for two years pursuant to section 4(d) of the act of September 2, 1960, amending the Mineral Leasing Act, *supra*, 74 Stat. 790, 30 U.S.C. § 226-1(d) (Supp. IV, 1963). From the affirmation of the land office decision, the appellant has taken this appeal.

Section 4(d) provides:

Any lease issued prior to the enactment of the Mineral Leasing Act Revision of 1960 which has been maintained in accordance with applicable statutory requirements and regulations and which pertains to land on which, or for which under an approved cooperative or unit plan of development or operation, actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time shall be extended for two years and so long thereafter as oil or gas is produced in paying quantities.

The appellant contends that it has met the statutory conditions and has earned a 2-year extension.

The decisions appealed from, however, held that the appellant had not met the standard set out in Associate Solicitor's opinion M-36657 (July 17, 1963), which requires that to qualify as actual drilling operations drilling must be conducted in such a way as to be an effort which one seriously looking for oil and gas could be expected to make in that particular area, given existing knowledge of geologic and other factors normally considered when drilling for oil and gas.

The Division of Appeals pointed out, as had the manager, that all the discoveries of oil or gas within the same township and range had been made at depths of more than 7,000 feet and that water had been tapped at 500 feet, that logs of eight wells drilled in the area showed no signs of oil at the depth of the San Andres formation, and that the San Andres is one of the established sources of fresh water in a delineated artesian water basin. Therefore the decision concluded that the drilling was not a reasonable attempt to find oil or gas.

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The appellant contends that the decision is erroneous for either of two reasons. First, it urges that it was making a serious and diligent effort to find oil and gas within the test set out by the Division of Appeals. Second, it argues that all that the statute demands of the lessee is that he commence and continue drilling operations through the time that the lease would otherwise have expired and that it has satisfied this requirement.

After careful consideration, we have concluded that the mere conducting of drilling operations is not enough but that, as was said in Associate Solicitor's opinion M-36657, *supra*, drilling operations to extend a lease must have a reasonable prospect of success. In somewhat similar circumstances it was held that the lessee must

* * * have the good faith intention to pursue * * * the drilling of * * * [a] well to such depth as an ordinarily prudent operator would have drilled under the same or similar circumstances in search of oil or gas in paying quantities. *Geier-Jackson, Inc. v. James*, 160 F. Supp. 524, 530 (E.D. Tex. 1958).

This test cannot be met by a lessee's assertion or demonstration that he acted in good faith, for, while good faith is essential to the validity of a lessee's actions, it does not relieve him of the necessity of meeting an objective standard. The disposition of the public lands cannot depend solely upon a lessee's or other claimant's state of mind. In determining the validity of mining claims, for example, the Department has explicitly held that an objective standard must be met, *i.e.*, that a claimant must show that he had found minerals of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. In deciding whether a reasonable man would proceed with further investment, the fact that the claimant in good faith is willing and eager to go ahead does not of itself prove that he has made a valuable discovery.¹

The final issue, then, is whether the appellant was proceeding as an ordinarily prudent operator would have under the same or similar circumstances in a search for oil or gas in paying quantities.

In its brief on appeal, Standard has offered what it says would be the testimony of a qualified expert geologist to explain the drilling of the test well. It points out that exploration has been slow and expensive in western Eddy County where the leased land is located,

¹ *United States v. J. S. Devenny*, A-30031 (June 19, 1964); *United States v. Richard L. and Nellie V. Effenbeck*, A-29113 (January 15, 1963); *United States v. Ben Fullingim and John Tinkle*, A-28850 (September 18, 1962); *United States v. Santiam Copper Mines, Inc.*, A-28272 (June 27, 1960).

that a discovery sufficient to stimulate exploration was only made recently, that it has drilled eight wells in the province and contributed to eight more without obtaining a return, that in December 1962 it had attempted to obtain economical production from an abandoned Pennsylvanian test drilled by Odessa Natural Gasoline Company in sec. 8, T. 21 S., R. 23 E., on a farmout from Standard, and that, although the original well had penetrated a massive Wolfcamp dolomite from 6,000-6,250 feet, mechanical difficulties prevented testing below 837 feet.

It continues with reference to the various types of exploration it has carried out in the area, and then says that it was faced with the expiration of lease L.C. 065300. The Permian Premier sand, it goes on, was among the multi-objectives in western Eddy County. It states that oil production from this member occurs in north central and northeastern Eddy County, that the nearest production from the Premier is the Atoka Field, about 25 miles away, but that a show of oil was recorded in a contribution well in sec. 36, T. 19 S., R. 24 E., in 1959. However, it continues, an Abo reef test in sec. 3, T. 20 S., R. 24 E., plugged back for completion in the Premier, was perforated from 340-375 feet and fractured with 10,000 gallons of lease crude and 15,000 pounds of sand with no success.

Referring specifically to lease L.C. 065300, Standard of Texas says the Premier sand was believed to be an objective, that, though the yield per well might be small, the areal extent could be large, that the Premier sand has not been thoroughly tested, that free oil has been reported from a shallow zone in a well some nine miles east of lease L.C. 065300. Appellant says it found a good oil stain, fluorescence and oil cut in the sand in the well drilled in sec. 18 from 410-425 feet.² Its first location for a well site, it continues, was in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 7, T. 21 S., R. 23 E., but it was immediately changed to the NW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 18 when it was discovered that there was a water well nearby and that damages would have to be paid to gain access.

In conclusion, the appellant contends that the well was drilled to extend a lease, that the Premier is a legitimate objective, and that the original location in section 7 was selected to obtain shallow structural control but was changed because it was inaccessible without payment of \$1,000 for land damages and because a water well was nearby.

² The Regional Oil and Gas Supervisor, Roswell, New Mexico, has obtained from Standard of Texas a description by a geologist employed by Standard of sample cuttings from the well. The description of the oil stain is as follows: "this is a good live oil stain but it appears to be due primarily to contamination."

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The Director of the Geological Survey has reviewed the appellant's arguments and has supplied the following comments:

The first discovery well in the Indian Basin area was the Williamson No. 1 well in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 19, T. 21 S., R. 23 E., completed in January 1962 for an initial potential of 21,000 m.c.f. of gas per day from the Upper Pennsylvanian 7,060-7,270 feet. This well is located only 1,980 feet from the south boundary of lease L.C. 065300. Two other gas wells have been completed in sections 22 and 23 at depths of over 7,000 feet. These wells and four other dry wells in the area of the well in L.C. 065300 penetrated the San Andres without encountering shows of oil and gas in the formation which well 18-18 tested. Furthermore, the San Andres is known to contain fresh water in the area and is one of the established sources of fresh water in a delineated artesian water basin. The original site for the well was only a quarter mile north of a water well 425 feet deep; the actual site is one-half mile south of it. In fact, water was encountered in well 18-18 at a depth of 410 to 415 feet and the water level could not be lowered at a bailing rate of 25 gallons per minute, which is a rate good enough for an average fresh water well.

The Director points out that if Standard of Texas had desired to test the Permian Premier sand it could have done so readily in December 1962 when it reentered the Odessa Natural Gasoline Company well in section 8 which is only 2,950 feet from well 18-18. At that time, he says, the hole was open to 837 feet and the casing was cemented below the base of the Premier so the appellant could have perforated and tested the Premier.

Upon due consideration of all these factors, we have concluded, as did the Director, that the potential oil and gas zones were reasonably indicated as underlying the leasehold by information available far enough in advance of the expiration date of L.C. 065300 to permit the planning of a Pennsylvanian test well. With the information available at the time of drilling of well 18-18, a prudent operator looking for oil and gas would have drilled a Pennsylvanian well on lease L.C. 065300 in the S $\frac{1}{2}$ of sec. 18 near the 21,000 m.c.f. Pennsylvanian gas well in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 19 rather than drilling near a windmill water well to test a formation which is producing fresh water at the windmill location and elsewhere in the area.

The well Standard drilled is 25 miles from the Atoka field which has the nearest Premier production. The nearest Pennsylvanian production is within a half mile of lease L.C. 065300. In view of these

facts, it is concluded that the drilling of well 18-18 to a depth of 500 feet in the Permian Premier sand was not a drilling operation which would have been conducted by one seriously looking for oil and gas in that area, given existing knowledge of geologic and other factors normally considered when drilling for oil and gas. Accordingly, it was proper to hold that lease L.C. 065300 had not been extended.

The facts as to lease N.M. 04881 are practically identical. It was issued on April 1, 1951, and, absent a further extension, expired on February 28, 1963. On February 18, 1963, the appellant filed a notice of intention to drill a well designated as 19-7 in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 7, T. 22 S., R. 23 E., N.M.P.M., into the San Andres formation to a depth of 500 feet, a site approximately five miles south of well 18-18. Drilling operations began on February 28, 1963, and continued to March 19, 1963, to a depth of 509 feet. On March 21, 1963, the well was plugged. The drilling reports show that the Premier sand was encountered at 342 feet, the San Andres at 407 feet, and the Lovington at 472 feet, with water being produced from the San Andres.

In its brief, the appellant offers essentially the same arguments in support of this well as it did for well 18-18. In addition, it states that the oil shows encountered in well 18-18 encouraged it to drill another well to evaluate the zone in western Eddy County. As we have stated above, the Geological Survey indicates that this staining was the result of contamination.

The Survey has also pointed out that there are four water wells within a distance of from 3 $\frac{1}{2}$ to 5 $\frac{1}{2}$ miles north, northwest, southwest, and southeast from well 19-7, which are producing from the San Andres formation. Two of the wells are abandoned oil tests plugged back and converted to water wells.

In addition, a well one mile north was completed as a Pennsylvanian gas well prior to the drilling of well 19-7. It had no shows of oil in the Premier. The Survey knows only one well in western Eddy County that has had an actual show of oil in the Premier sand and that well is 11 $\frac{1}{2}$ miles to the northeast. In a report dated July 10, 1963, the Regional Oil and Gas Supervisor listed 16 wells drilled through the San Andres formation in the vicinity of well 19-7 and completed prior to the date of drilling well 19-7 in which wells no commercial shows of oil and gas were found in the San Andres or overlying beds.

For the same reasons set out in the consideration of L.C. 065300, it is our conclusion that, under the criterion discussed above, the appellant could not reasonably have expected to find oil and gas

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by drilling into formations known to be fresh water aquifers in the area surrounding the well. Accordingly, under the criterion discussed above, the drilling operations it undertook did not serve to extend the lease.

Therefore, 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 decisions of the Division of Appeals, Bureau of Land Management, are affirmed.

EDWARD WEINBERG,
Deputy Solicitor.

MICHIGAN OIL COMPANY

A-29828

Decided July 10, 1964

Oil and Gas Leases: Extensions—Oil and Gas Leases: Drilling

An oil and gas lease is not entitled to a 2-year extension under section 4(d) of the Mineral Leasing Act Revision of 1960, which grants such an extension when the lessee has commenced "actual drilling operations" before the end of its term and is diligently prosecuting such operations at the end of the term, when prior to the expiration date of the lease the only acts undertaken by the lessee are acts preliminary to the actual drilling and the actual drilling is not commenced until after the lease has terminated.

Words and Phrases

Actual drilling operations. The term "actual drilling operations" as used in section 4(d) of the Mineral Leasing Act Revision of 1960 means the actual boring of a well with drilling equipment and does not include such preparatory work as grading roads and well sites and moving equipment on the lease.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Michigan Oil Company has appealed to the Secretary of the Interior from a decision of the Division of Appeals, Bureau of Land Management, dated October 11, 1962, which affirmed a decision of the Riverside, California, land office, dated May 10, 1962, declaring oil and gas lease Los Angeles 088643-E as having terminated at midnight April 30, 1962, because actual drilling operations were not commenced prior to the end of the primary term of the lease and were not being diligently prosecuted at that time in accordance with the provisions of regulation 43 CFR 192.120a, now 43 CFR, 1964 Supp., 3127.2.

Lease Los Angeles 088643-E was created by partial assignment out of lease Los Angeles 088643, which issued effective June 1, 1950, and was extended for five years from June 1, 1955. Both leases were further extended pursuant to section 30(a) of the Mineral Leasing Act, as amended, 68 Stat. 585 (1954), 30 U.S.C. § 187a (1958), for two years from May 1, 1960, and so long thereafter as oil or gas is produced in paying quantities.

The appellant contends that it has complied with the requirements of former regulation 43 CFR 192.120a that,

Any lease on which * * * actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time shall be extended for two years and so long thereafter as oil or gas is produced in paying quantities.

Its compliance, it alleges, is demonstrated by these acts done before the expiration date of the lease, April 30, 1962: its construction of access roads and grading of two well locations on the leasehold, its moving of a drilling rig upon the property with tools and equipment capable of performing the task, its engaging in drilling operations until stopped by notice from the Government, and its fulfilling of the various procedures required by the State and Federal Governments for drilling operations.

The Division of Appeals held that since it was not until May 2, 1962, after the lease expired, that a string of tools entered the well bore actual drilling operations did not commence, within the meaning of the regulation, *supra*, until that time because what had preceded the drilling was, in effect, only preparation for the drilling itself. The appellant contends that

actual drilling operations consist of all those operations made in good faith and diligently continued leading up to and necessary to the actual preparations for actual drilling in the ground.

The regulation referred to simply restates the provisions of section 4(d) of the Mineral Leasing Act Revision of 1960, 74 Stat. 789, 30 U.S.C. § 226-1(d) (Supp. IV, 1963). In fact, the regulation uses the exact words of the statute that a 2-year extension is granted a lease only where

* * * actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time * * *.

The question presented is whether the term "actual drilling operations" means the entering of the ground with a string of drill tools, as the Division of Appeals stated, or whether it includes also acts preparatory to such entry, as the appellant contends.

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In construing another provision of the Mineral Leasing Act, the second paragraph of section 17, as amended by the act of July 29, 1954, 68 Stat. 583,¹ which provided that no lease should terminate because of cessation of production if within 60 days thereafter "reworking or drilling operations are commenced * * * and are thereafter conducted with reasonable diligence," the Department stated:

* * * The common usage of the phrase "drilling operations" within the oil and gas industry is in reference to the actual digging or deepening of a hole with a string of drill tools * * *. *Morton Oil Company*, 63 I.D. 392, 396 (1956).

If the term "drilling operations" means the actual digging of a hole with drill tools, the term "actual drilling operations" would doubly have that meaning. The legislative history of section 4(d) shows that the term originally employed was simply "drilling operations," but it was then amended to read "actual drilling operations." See Associate Solicitor's opinion M-36657 (July 17, 1963). This change is certainly suggestive that Congress intended that a lessee should actually be drilling in the ground at the end of his lease term in order to be entitled to a 2-year extension.

Appellant cites 2 Summers, *Oil and Gas*, § 349 (perm. ed) for the proposition that the general rule in interpreting clauses in leases requiring the commencement or beginning of a well or drilling operations within a stated time is

* * * that actual drilling is unnecessary, but that the location of wells, hauling lumber on the premises, erection of derricks, providing a water supply, moving machinery on the premises and similar acts preliminary to the beginning of the actual work of drilling, when performed with the bona fide intention to proceed thereafter with diligence toward the completion of the well, constitute a commencement or beginning of a well or drilling operations * * *

It does not appear from the cases cited in support of this proposition that any of them involved leases containing the term "actual drilling operations." Rather, it is noted that Summers uses the terms "actual drilling" and "actual work of drilling" as denoting the drilling of a hole in the ground as distinguished from such acts as erecting derricks, moving machinery on the ground, etc., which the courts generally hold to constitute "the beginning or commencement of a well or of drilling or reworking operations."

Even if acts less than the drilling of a hole could be said to satisfy the requirement for "actual drilling operations," it does not appear that the acts performed by appellant would suffice. Appellant has

¹ The same substantive provision now appears in section 17(f) of the Mineral Leasing Act, as amended by the Mineral Leasing Act Revision of 1960, 74 Stat. 782, 30 U.S.C. § 226(f) (Supp. IV, 1963).

submitted work sheets showing that in December 1961 a road and well location or locations were graded. The next evidence of work is a work order showing that on April 30, 1962, two men spent two hours moving in a rig and tools. A subsequent work order shows that on May 2 drilling operations were commenced. Thus the grading work apparently completed in December 1961 and the moving on of the rig and tools on April 30, 1962, are the only acts that are supposed to meet the statutory requirement for "actual drilling operations * * * commenced prior to the end of * * * primary term and * * * being diligently prosecuted at that time * * * ." We cannot accept these limited and widely spaced acts as satisfying the statutory requirement.

Therefore, 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.

ERNEST F. HOM,
Assistant Solicitor.

CLAIM OF PALMER E. SCHRAG

T-1317-6-64

Decided July 13, 1964

Irrigation Claims: Generally

Under Public Works Appropriation Acts, an award may be made only upon a finding that the damage was the direct result of nontortious activities of the Bureau of Reclamation personnel.

ADMINISTRATIVE DETERMINATION

Palmer E. Schrag of Soap Lake, Washington, has filed a claim against the United States in the sum of \$8,021.56 for damage to a herd of feeder cattle. The claimant alleges that on July 15, 1963, Bureau of Reclamation personnel placed aromatic solvents in a project lateral adjoining his farm, and the cattle were poisoned as a result of contact with the treated water.

This claim has been submitted to us for determination under the Public Works Appropriation Act, 1964 (77 Stat. 844).¹ That act authorizes the payment of claims for damage to or loss of property arising out of activities of the Bureau of Reclamation. However, this authority is applicable only with respect to claims which are the

¹The claim cannot be considered administratively under the Federal Tort Claims Act (28 U.S.C., secs. 2671-2680 (1958) as amended, 28 U.S.C., secs. 2672, 2679, and 2680 (n) (Supp. IV) (1959-62), since it is in excess of that act's \$2,500 jurisdictional limitation for administrative determination.

July 13, 1964

direct result of some *nontortious* action by Bureau of Reclamation personnel. 39 Op. Atty. Gen. 425, 428 (1940); *Harold D. Jensen*, TA-227 (Ir.) (March 14, 1963), 70 I.D. 97; *Northern Pacific Railway Co.*, T-560 (Ir.) (May 10, 1954).

As shown by the report of the investigating officer, the claimant owned a herd of feeder cattle, pastured on Farm Unit 138, Irrigation Block 70, Columbia Basin Project, Washington. The W3F2 lateral, an irrigation canal of the Bureau of Reclamation, passes through the farm. On July 15, 1963, at about 11:10 a.m., Bureau of Reclamation personnel injected an aromatic solvent into the waters of the W3F2 lateral, about two and a half miles upstream from claimant's farm. Aromatic solvents are a herbicide used to kill water weeds in project waterways. At about 4:15 p.m., claimant notified the Bureau's Watermaster that his cattle had been poisoned from these aromatic solvents. By that evening, one calf had died and a second died on July 16 about noon. Twelve other feeder cattle and one Angus Heifer subsequently died.

In his claim, Mr. Schrag seeks to recover his loss of profit on the dead cattle, together with reimbursement for veterinary bills. He also seeks to recover loss of profit on the remainder of his herd—185 head—which claimant alleges came down with "secondary conditions of pneumonia" and failed to gain weight properly.

Aromatic solvents are a moderately volatile petroleum byproduct which has been in rather extensive use for the past fifteen years in irrigated areas as a means of controlling aquatic weeds. In this case, the solvent was injected into the lateral to form an initial concentration ranging between 185 to 742 parts per million. Allowing for evaporation and dilution, the investigating officer estimates the solvent treated water passed in the area of claimant's farm for a maximum of one hour and fifteen minutes at concentrations ranging from 0 to 370 parts per million. The lateral in this reach is readily accessible to claimant's cattle.

The investigating officer in his report concludes that the sickness and death of the cattle had no relation to the aromatic solvents, but rather was caused by a bacterial pneumonia which the cattle had previously contracted.² This conclusion is based on the following evidence appearing in the administrative record:

² On May 5, 1964, proposed findings to this effect were sent to the claimant for his comments by the Field Solicitor, Ephrata, Washington. No reply was received nor did claimant submit any evidence.

1. Mr. Schrag stated to the investigating officer that the feeder cattle were sick when purchased. The claimant planned to cure the cattle prior to ultimate sale.

2. On the death of the second animal on July 16, 1963, Dr. C. R. Wilson, a veterinarian, performed an autopsy on it. The autopsy, according to Dr. Wilson, showed the calf died not from aromatic solvents, but from a bacteria-caused pneumonia.³

3. Pneumonia in cattle is contagious and could readily spread through a herd already sick and in a weakened condition.

4. Subsequently, Dr. Wilson treated the herd with antibiotics for pneumonia, this therapy being successful except for the few head that died. At no time did Dr. Wilson treat the herd for poisoning.

5. The smell of the solvents is so disagreeable that animals avoid drinking treated water except under conditions of acute thirst. Since the lateral is only a foot deep adjacent to claimant's premises, the exposure by wading would be very small.

6. Even if the cattle did drink the treated water, medical reports in general indicate these solvents are nontoxic. This is supported by experiments of the Veterinary Science Department at Utah State College which indicated that animals under acute thirst, after consuming a concentration of 800 parts per million, showed no ill effects.

It is a reasonable conclusion from this evidence that the cattle, being sick and in a weakened condition, contracted a bacterial pneumonia at some time prior to the use of aromatic solvents in the lateral. This disease being contagious spread throughout the herd. Claimant's allegation that this loss was caused by aromatic solvents rests solely on conjecture and speculation, and is insufficient to establish causation.⁴

It is therefore our conclusion that the findings of the investigating officer are sound and based on evidence appearing in the record.

Accordingly, the claim of Palmer E. Schrag is denied under the Public Works Appropriation Act, 1964.

EDWARD WEINBERG

Deputy Solicitor.

³ Specimens taken from the dead animal were tested for the presence of aromatic solvents by the United States Public Health Testing Center in Wenatchee, Washington. Although no trace of solvent was found, the tests generally were inconclusive.

⁴ *Cambro Co. v. Snook*, 43 Wash. 2d 609, 262 P. 2d 767 (1953).

MARY ADELE MONSON

A-29952

*Decided July 14, 1964***Oil and Gas Leases: Applications—Applications and Entries: Generally**

Any name used by an individual, whether real or fictitious, by which she may be known or by which she may transact business or execute contracts, may constitute her signature if affixed by that individual without fraudulent intent and if there is no doubt as to the identity of the individual, and an oil and gas lease offer in which the signed name of the offeror differs from the typed name of the offeror in the first block of the lease form is acceptable if, in fact, the signature is that of the offeror and the offer is, in all other respects, acceptable.

Oil and Gas Leases: Applications

Where only one copy of an oil and gas lease offer is initially filed bearing as a signature a name which differs from the name of the offeror typed in the first block of the lease form, within 30 days four additional copies of the offer are filed bearing the same typed name and signature as the typed name on the original form, and after more than 30 days from the initial filing five additional copies are filed bearing typed name and signature consistent with the original form, the offer should not be rejected if all of the copies of the offer were signed by the offeror, but the offer will earn priority only from the time that the last copies were filed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Mary Adele Monson has appealed to the Secretary of the Interior from a decision dated January 22, 1963, whereby the Division of Appeals, Bureau of Land Management, affirmed a decision of the Utah land office rejecting her noncompetitive oil and gas lease offer for the S $\frac{1}{2}$ NW $\frac{1}{4}$ and the SW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 5, T. 27 S., R. 22 E., S.L.M., Utah.

On July 23, 1962, Mrs. Monson filed a single copy of her offer on Form 4-1158. The lease offer was a carbon copy except for the typed name of the offeror at the top of the form and the offeror's signature at the bottom. The word "original" appeared in the upper left corner of the form. The typed name of the offeror was "Mary Adele Monson," but the signature was "Mary Adele Gibbs."

On August 7, 1962, four additional copies of the lease offer, signed by "Mary Adele Monson," were filed in the land office. On September 4, 1962, five more copies of the offer, bearing the signature of "Mary Adele Gibbs," were filed in the land office.

The land office rejected the appellant's offer on August 2, 1962, because the "lease form designated the name 'Mary Adele Monson' as offeror in Block 1, but was signed 'Mary Godbe Gibbs.'" That decision was vacated on August 15, 1962, and on September 27, 1962,

the offer was rejected by the land office because "the offer did not comply with 43 CFR 192.42 (b) and (d)."

In appealing to the Director of the Bureau of Land Management from the rejection of her offer, Mrs. Monson submitted an affidavit certifying that Mary Adele Gibbs was her maiden name and that Mary Adele Monson and Mary Adele Gibbs are the same person. She further stated that she signed the original lease offer and the additional copies that were subsequently filed.

The Division of Appeals, in affirming the rejection of the appellant's offer, held that the burden cannot be placed upon the Department to assume or determine that Mary Adele Monson and Mary Adele Gibbs are the same person, and, in view of the variation in the names on the lease offer, the offer did not comply with the requirements of the applicable regulation.

The appellant contends that the Bureau erred in construing the regulation as requiring that the signature must be identical to the typed name of the offeror. She contends that any signature, even the letter "X", would be valid if signed by the offeror with the intent to be bound thereby.

The regulations in effect when the appellant's offer was filed provided in part that:

Five copies of Form 4-1158, or valid reproduction thereof, for each offer to lease shall be filed in the proper land office * * *. If less than five copies are filed, the offer will not be rejected, if not otherwise subject to rejection, until 30 days from filing have elapsed and if during that period the remaining required copies are filed, the offeror's priority will date from the date of the first filing. If the additional copies are not filed within the 30-day period, the offer will be rejected and returned and will afford no priority to the offeror. Should the additional copies be filed after the 30-day period but before the offer has been rejected, the offeror will have a priority as of the later filing date. * * * 43 CFR, 1964 rev., 192.42(b).¹

Each offer must be * * * signed in ink by the offeror or the offeror's duly authorized attorney in fact or agent. * * * 43 CFR, 1964 Supp., 3123.1(d), formerly 43 CFR, 1964 rev., 192.42(d).

The appellant's contention as to the validity of her signature appears to be correct as a general statement of law.

In general, in the absence of statutory prohibition, a person, without abandoning his real name, may adopt or assume any name, wholly or partly different from his own name, by which he may become known, and by which he may transact business, execute contracts, and carry on his affairs, unless he does so in order to defraud others * * *. Contracts, obligations, and transactions entered into under an assumed or fictitious name are valid and binding, if unaffected by fraud, and if there is no doubt with respect to the identity of the person acting under the assumed or fictitious name. 65 C.J.S. Names § 9a.

¹ The regulation has since been amended to eliminate the 30-day period for filing copies of an oil and gas lease offer. See 43 CFR, 1964 Supp., 3123.1(b).

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Thus, the courts have held that: an insurance policy taken by W. E. Canady upon his own life in the name of A. S. Canady, a name under which he did business, was a valid and binding contract with the insurance company (*North American Accident Insurance Co. v. Canady*, 163 P. 2d 221 (Okla. 1945)); a deed is valid even though a person is designated by his proper name in the body of the deed but signs by a wrong name (*Middleton v. Findla*, 25 Calif. 76 (1864)); where a witness to a will signed the name of the decedent rather than his own, he had signed his name as witness under the statute (*In re Jacob's Will*, 132 N.Y. Supp. 481 (1911); *contra*, *In re Walker*, 42 Pac. 815 (Calif. 1895) (three judges dissenting)).

The Department's regulations provide only that the offer must be signed in ink by the offeror.² In the absence of a specific regulation to the contrary, there is no basis for departing from the generally accepted standard as to what constitutes a signature. Thus, there appears to be no question as to the acceptability of Mrs. Monson's signature of either her maiden name or her married name on the lease offer if, in fact, she signed the forms as she has certified that she did.³

It does not necessarily follow, however, that copies of a lease offer in which some copies of the lease form bear one signature and some bear another are acceptable as "copies" under the Department's regulations.

Some courts have held that the word "copy" implies that the instrument so labeled is identical with another instrument. *In re Janes' Estate*, 116 P. 2d 438, 441 (Calif. 1941); *Blatz v. Travelers Ins. Co.*, 68 N.Y.S. 801, 806 (1947). While the Department has not adapted such a rigid interpretation of the word "copy" and has permitted some minor deviations in the copies of oil and gas lease offers and has held that a document may qualify as a copy of a lease offer even though partially illegible (see *A. M. Culver, John F. Partridge, Jr., and Duncan Miller*, 70 I.D. 484 (1963)), it would seem that a document varying from another in such a substantial matter as the signature cannot be termed a "copy."

There is, however, a further basis which is dispositive of the case for

² In construing that requirement, the Department has held that the regulation does not require that each of the five required copies be individually signed in ink, but it is sufficient if only one copy was directly signed in ink and the signature was impressed on the other four copies through the use of carbon paper. *Duncan Miller, Robert A. Priester*, A-28621 etc. (May 10, 1961).

³ It is by no means clear that all of the copies of the lease offer in this case were, in fact, signed by Mrs. Monson. Although she has stated in her affidavit of October 22, 1962, that she signed the original offer and all of the copies subsequently filed, a study of the signature causes serious doubt as to whether the copies filed on August 7, 1962, were signed by the same person who signed the initial offer filed on July 23, 1962, and the copies filed on September 4, 1962. There are marked differences in the handwriting. However, in view of the conclusions to be reached in this decision, it is unnecessary at this time to determine the truthfulness of Mrs. Monson's statement.

finding that the appellant's offer was not entitled to priority from the date of the initial filing. As has been noted above, after filing the four copies signed "Mary Adele Monson" and while the lease offer was still pending in the land office,⁴ the appellant filed additional copies signed "Mary Adele Gibbs" in conformity with the original lease offer form. The last filing, apparently, was to correct the discrepancy in the signatures and to cure a possible defect in the offer as it then stood. If the offer was defective by virtue of the variation in signatures in the original and the four copies filed on August 7, 1962, the defect was not cured until more than 30 days had elapsed after the initial filing. Priority was, therefore, to be determined from the date on which the defect was cured. *James E. Menor*, A-29006 (November 15, 1961); *M. J. Stansbury*, A-29699 (September 25, 1963). If, on the other hand, the discrepancy in signatures was not a defect in the offer, the copies filed on September 4, 1962, must still be construed as an amendment to the offer since they vary from the copies previously filed in such a manner as to indicate an intent to change a material item of the offer. In such case, priority of the offer will be determined from the date of filing of the amended offer rather than from the initial filing. See *Samuel A. Wanner*, 67 I.D. 407 (1960). In either event, the priority of the appellant's offer is to be determined from September 4, 1962, rather than from July 23, 1962, the date of the initial filing.

Accordingly, I find that the discrepancies in the signature having been corrected prior to action on the offer, did not require the rejection of the offer but that the offer should be considered as a pending offer with priority, at most, from September 4, 1962, until a lease is issued on an offer having higher priority.

Therefore, 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 of the Division of Appeals is modified and the case remanded for action consistent with this decision.

ERNEST F. HOM,
Assistant Solicitor.

⁴ As noted above, the appellant's offer was initially rejected by the land office on August 2, 1962. The decision of that date, however, was vacated on August 15, 1962. Thus, the offer had not been acted upon by the land office when the appellant filed her last set of copies of her lease offer on September 4, 1962.

UNITED STATES

v.

ALASKA EMPIRE GOLD MINING COMPANY

A-30082

Decided July 16, 1964

Mining Claims: Location—Mining Claims: Lode Claims—Mining Claims: Mineral Surveys

Because Revised Statute 2320 provides that no lode mining claim shall extend more than 300 feet on each side of the middle of the vein at the surface, a patent applicant should indicate the direction of the vein and adjust his survey accordingly if the course of the vein diverges from a line through the center of the claim and one of the side lines is more than 300 feet from the center of the vein.

Mining Claims: Lode Claims—Mining Claims: Patent

The Department has no power to issue a mineral patent to any surface ground exceeding 300 feet in width on each side of the middle of the vein or lode, and a patent so issued is void as to the excess over 300 feet and is subject to collateral attack.

Star Gold Mining Co., 47 L.D. 38 (1919), distinguished.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Forest Service, United States Department of Agriculture, has appealed from a decision of the Assistant Director, Bureau of Land Management, dated June 4, 1963, vacating a decision issued by the Anchorage land office requiring the Alaska Empire Gold Mining Company to amend its locations and resurvey four of its mining claims¹ so that the side lines of the claims do not extend beyond 300 feet from the middle of the vein found at the surface of each claim. The land office decision stated that the company's patent application for the four claims would be rejected and the cases closed for failure to proceed with diligence unless it acted within 30 days from the day it received that decision.

The record shows that on June 16 and 17, 1959, a hearing was held to determine the validity of a number of the company's mining claims, including the four claims identified above. In a decision dated October 26, 1959, the hearing examiner, who conducted that hearing, made the following findings of fact:

The evidence at the hearing submitted by both parties regarding the Batella

¹ The four mining claims, Batella No. 1, Williams Nos. 4 and 7, and Golden Bear No. 1, are lode mining claims situated on the Mansfield Peninsula of Admiralty Island, Harris Mining District, Juneau Recording Precinct, Alaska, and within the boundaries of the Tongass National Forest.

No. 1, Williams No. 4 and Williams No. 7 was to the effect that the Williams Vein with a strike of approximately South 10° West had been identified on each of the three claims, that the vein contained considerable mineral value, that if the vein were extended it would cross the South end line and East side line of the Batella No. 1, the North end line and the West side line of the Williams No. 4 and side lines of the Williams No. 7. In regard to the Golden Bear No. 1, the evidence was that the Iron Swamp Vein with the same strike of approximately South 10° West was within the boundaries of the claim, that this vein contained considerable mineral values, and that if the vein were extended it would cross the side lines of the Golden Bear No. 1. There was no evidence by either party that any of the four claims contained valuable mineral deposits in veins other than the Williams Vein or the Iron Swamp Vein.

Upon the basis of these findings of fact and Rev. Stat. § 2320 (1875), 30 U.S.C. § 23 (1958), the examiner made the following conclusions of law:

Accordingly, I find that the Batella No. 1, Williams No. 4 and Williams No. 7 are valid claims to the extent of 300 feet on each side of the Williams Vein and that Golden Bear No. 1 is valid to the extent of 300 feet on each side of the Iron Swamp Vein. Therefore, the patent Contestee is required to amend [*sic*] the locations and patent application to embrace only the valid portions of the four claims as established herein.

An attempted appeal to the Director, Bureau of Land Management, from this decision was summarily dismissed on procedural grounds,² and the Director's decision was subsequently affirmed by the Department.³

Pursuant to the conclusions in the examiner's October 26, 1959, decision, the company was advised by the land office by a letter dated March 1, 1962, of the necessity of prosecuting its patent application to completion. The company replied on March 7, 1962, to the effect that it would take no action to amend its locations. Subsequently, the land office declared, in a decision dated September 24, 1962, that, because over two years had elapsed since the Department's May 11, 1960, decision, the company had demonstrated a lack of diligence in complying with the requirement of the examiner's decision regarding the resurvey of the four claims involved in this case. It allowed the company 30 days from the receipt of the land office decision within which to initiate action toward the relocation and resurvey of the claims. It stated that the company's mineral patent application would be closed without further notice if it failed to comply with the decision. An appeal from that decision resulted in the Assistant Director's decision of June 4, 1963.

Relying on the decision in *Star Gold Mining Co.*, 47 L.D. 38 (1919), the Assistant Director concluded that a mining claimant who has in

² *Alaska Empire Gold Mining Co.*, Contest Nos. J-4, J-5, J-6 (Alaska) (March 1, 1960).

³ *United States v. Alaska Empire Gold Mining Company*, A-28419 (May 11, 1960).

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good faith staked and marked a mining claim should not be required to relocate and resurvey his claim as a prerequisite to obtaining a patent even if it is demonstrated that the discovery vein materially deviates from a central course through the claim. In its appeal, the Forest Service contends that the facts of the *Star Gold* case, *supra*, are distinguishable from those of the instant case and that it is not controlling here.

In the *Star Gold* case, *supra*, a mining claimant had filed a patent application for a group of six lode mining claims. As a result of adverse proceedings, part of one of the claims upon which the discovery had been made was lost to the adverse claimant. Subsequently, the mining claimant established a discovery on the remainder of the claim. However, although the newly discovered vein crossed both end lines of the shortened claim, it was not exactly in the center of the claim. The Commissioner of the General Land Office decided, for this reason, that the north side line of the claim would have to be drawn in to within 300 feet of the vein, which would render the claim noncontiguous to the remainder of the group of claims included in the patent application and would lead to the rejection of the claim. The Department reversed the Commissioner's decision, stating that the adverse consequences flowing from that decision should not be pressed to such an extreme in view of "the facts and circumstances here disclosed."

It is clear, therefore, that the facts of the *Star Gold* case are significantly different from those of the instant case where the hearing examiner found that the discovery veins cross from end line to side line on two of the claims and from side line to side line on two claims.

Moreover, at page 42, the *Star Gold* decision reads as follows:

* * * Even where it may be demonstrated that the discovery vein deviates materially from a central course through the claim, the location as originally staked and marked in good faith will stand. * * *

The Assistant Director interpreted this to mean that such a claim may be patented without an amendatory survey. That this is not its intent is demonstrated by the following excerpt from the case of *Harper v. Hill*, 113 Pac. 162, 164, 165 (Calif. 1911), cited in the *Star Gold* decision in support of the above-quoted statement:

* * * That the location, as made, may not be binding on the United States, and that in making the survey for a patent the Surveyor General may ascertain and locate the true line of the apex to fix the boundaries, may be conceded. * * * But it is the clear intent of the statute that in the meantime, and as against all others, the locator who has in good faith made the discovery and marked the boundaries with regard to the position of the apex as he then finds and believes it to be shall be protected in the possession of the surface thus

ascertained, and that the monuments he then sets shall control the location of the claim. * * *

The law regulating the width of a lode mining claim is clear. Section 2320 of the Revised Statutes of the United States, *supra*, reads in part as follows:

* * * A mining claim located after the 10th day of May, 1872, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; * * * No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface * * *.

Accordingly, the Department has held that a patent applicant should, if the course of the vein on the mining claim for which he seeks a patent diverges, at the surface, from a straight line, indicate the direction of the vein and adjust his survey accordingly. *Bi-Metallic Mining Company*, 15 L.D. 309 (1892).

In accord is 2 Lindley on Mines §§ 362 and 366 (3d ed. 1914). Section 362 reads in part:

* * * Where the locator mistakes the course of his vein and locates across instead of along it, an excess of lateral side-line surface results and should be cast off. His surface rights resting on location would properly be defined by lines drawn three hundred feet on each side of the center of the vein as it actually ran.

The validity of such a location is not affected, however, and it has been held that a relocater is not permitted to determine for himself the excess in width and relocate it. The original locator is entitled to possession of the claim as located until he readjusts his lines voluntarily or is called upon to do so by the land department in a patent proceeding.

A portion of section 366 reads:

It must be presumed for executive purposes that the lode proceeds in a straight line in the center of the plat of patent survey, unless evidence be submitted showing a different direction. If the course of the vein (at the surface) diverges from a straight line, the applicant for patent should indicate the direction and adjust his survey accordingly.

The Department has, moreover, held that it has no power to issue a mineral patent to any surface ground exceeding 300 feet in width on each side of the middle of the vein or lode, and a patent so issued is void as to the excess over 300 feet and is subject to collateral attack. *United States v. Arthur Curlee*, A-22301 (December 22, 1939). Cited as authority for this conclusion was the case of *Lakin v. Dolly*, 53 Fed. 333 (C.C.N.D. Cal. 1891), *aff'd*, *Lakin v. Roberts*, 54 Fed. 461 (9th Cir. 1893), *cert. denied*, 154 U.S. 507 (1893). At page 337 of *Lakin v. Dolly*, *supra*, the court made the following observations:

This entire section [Rev. Stat. § 2320] seems to be clear, definite, and certain. It provides that all mining claims upon quartz lodes * * * located after May 10,

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1872, "may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode." So far the section relates solely to the question of the length of the lode that may be located. It next takes up the question as to how much surface ground will be allowed to the locator of a quartz lode, and says that "no claim" * * * "shall extend more than three hundred feet on each side of the middle of the vein at the surface." * * * After the passage of the act of which this section forms a part, it seems very clear, to my mind, that the land department had no jurisdiction, power, or authority to issue a patent for a quartz lode to any surface ground exceeding 300 feet in width on each side of the middle of the vein or lode, and that any patent which is issued for more than that amount of surface ground is absolutely null and void as to the excess over 300 feet, and can be collaterally attacked in a court of law.

It must, therefore, be concluded that the Assistant Director's decision is incorrect.

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 Assistant Director's decision is reversed and the case is remanded for further appropriate action consistent with this decision.

ERNEST F. HOM,
Assistant Solicitor.

TIDEWATER OIL COMPANY

A-30087

Decided July 22, 1964

Oil and Gas Leases: Applications

A protest against a noncompetitive oil and gas lease offer for acquired land is properly sustained where the offer is signed by an attorney in fact for a corporate offeror and is accompanied only by a statement of the attorney in fact as to the nonexistence of an agreement between the attorney in fact and the offeror whereby the attorney in fact will acquire an interest in any lease to be issued and by a statement by the offeror that a third party will have an interest in the lease and there is not filed any statement by the offeror as to whether the attorney in fact will acquire any interest in the lease.

Oil and Gas Leases: Applications—Oil and Gas Leases: Description of Land

Where only one copy of an oil and gas offer for acquired lands is filed and thereafter within the time allowed the additional copies required are filed but such additional copies vary from the first copy in a portion of the land description, the offer is not fatally defective and the first copy filed is deemed to be controlling despite the fact that it was not marked as the "original" copy by either the offeror or the Bureau of Land Management.

Oil and Gas Leases: Acquired Lands Leases—Oil and Gas Leases: Description of Land

An oil and gas offer for acquired land is not defective because it is not accompanied by a map or plat showing the location of the land within the administrative unit or project of which it is a part, but the offeror may be required to submit a satisfactory showing of such a map or plat.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Tidewater Oil Company has appealed to the Secretary of the Interior from a decision of the Division of Appeals of the Bureau of Land Management, dated June 6, 1963, which reversed a decision of the Division of Field Services land office dismissing the protest of Arthur E. Meinhart against the issuance of nine oil and gas leases on acquired land of the United States located in Highland and Bath Counties of Virginia within the George Washington National Forest on the ground that Tidewater's offers, which were in conflict with Meinhart's subsequent offers,¹ were not in conformity with departmental regulations because they were not accompanied by the required statements of the interest of the corporate offeror and its attorney in fact who submitted the offers for the corporation.

Tidewater's offers were filed on March 30, 1961, and April 11, 1961, respectively. Meinhart's were filed on April 21, 1961, and May 17, 1961, respectively. All of Tidewater's offers were signed by Thomas T. Grady as attorney in fact. On the dates on which all the offers were filed there was in effect the following departmental regulation:

(e) Each offer, when first filed, shall be accompanied by :

* * * * *

(4) If the offer is signed by an attorney in fact or agent, * * * separate statements over the signatures of the attorney in fact or agent and the offeror stating whether or not there is any agreement or understanding between them, or with any other person, either verbal or written by which the attorney in fact or agent or such other person has received, or is to receive, any interest in the lease when issued, including royalty interest or interest in an operating agreement under the lease giving full details of the agreement or understanding, if it is a verbal one; the statement must be accompanied by a copy of any such written agreement or understanding; * * *.

* * * * *

(g) (1) * * * an offer will be rejected and returned to the offeror and will afford the applicant no priority if:

* * * * *

(iv) The offer is signed by an agent in behalf of the offeror and the offer is not accompanied * * * by the statements and evidence required by paragraph (e) (4) of this section. 43 CFR, 1954 rev., 200.8.

¹ Tidewater's offers and Meinhart's conflicting offers and their dates of filing are listed in the attached appendix.

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As stated, Tidewater's offers were signed by Grady as attorney in fact. With each offer there was filed a statement in the name of Tidewater Oil Company, but signed by Grady as "Agent," which recited, in addition to other matters, the following:

2. That there is no agreement or understanding between Tidewater Oil Company and said attorney in fact, either verbal or written, by which that attorney in fact is to receive any interest in the lease when issued, including any royalty interest.

3. That in the event the lease is granted pursuant to the lease offer to which this statement is attached, South Penn Oil Company will have a quasi-equitable interest therein, inasmuch as South Penn will be entitled to the assignment of the legal title to an undivided one-half interest therein, should the contingencies and provisions set forth in an agreement bearing date the 1st day of July, 1958, between Tidewater Oil Company and South Penn Oil Company occur and become effective, a copy of which is filed with the offer to lease identified by the Bureau of Land Management as BLM-A 050393 (Virginia) and made a part thereof and to which reference is made for all the terms and provisions thereof, the copy of said agreement so filed being incorporated herein by reference.

Tidewater's offers were all filed on Form 4-1196 (February 1961). Item 6 on the form certified that

Offerer is is not the sole party in interest in this offer and lease, if issued. (If not the sole party in interest, a statement should be filed as prescribed in 43 CFR 192.42(e)(3)(iii).)²

In each offer the box stating that Tidewater was not the sole party in interest was checked.

On April 11 and 12, 1961, there were filed for each offer separate statements by Tidewater and South Penn Oil Company, signed by officers of the respective companies, that, in the event a lease was issued, each company would have a quasi-equitable interest in the lease as provided by their agreement of July 1, 1958. The statements were the same as paragraph 3 of Grady's statement.

Thereafter, on June 2, 1961, Tidewater filed with respect to each offer a statement signed by one of its officers that there was no agreement or understanding between it and Grady by which Grady was to receive any interest in the lease, when issued. Each statement was submitted with a letter declaring that it was filed for record purposes

² 43 CFR 192.42(e)(3)(iii) was one of the regulations governing oil and gas leasing on public lands as distinguished from acquired lands. It required each offeror to make a statement with his offer that he was the sole party in the interest in the offer. If he was not, he was required to name the other interested parties, and all were required to file within 15 days a signed statement setting forth the interest of each and the nature of the agreement between them.

This regulation was in addition to another regulation, 43 CFR, 1954 rev., 192.42(e)(4), which was identical with 43 CFR, 1954 rev., 200.8, quoted above.

In *Bert Wheeler*, 67 I.D. 203 (1960), the Department held that 192.42(e)(3)(iii), requiring the sole party in interest statement, was not applicable to acquired lands offers.

only, that it was deemed to be unnecessary and redundant since the required statement of interest was already on file.

On January 9, 1962, Meinhart filed a protest against Tidewater's offers. He contended that the offers did not meet the requirements of 43 CFR 200.8(e)(4) when filed in that no statement over the signature of an officer of Tidewater as to any agreement with Grady was filed with the offers and no such statement was filed until June 2, 1961, after Meinhart's offers had been filed.

The protest was dismissed by the Division of Field Services land office. On Meinhart's appeal to the Director, Bureau of Land Management, the land office was reversed. The present appeal by Tidewater followed.

The basic questions raised by the appeal are (1) what statements were required to be filed by 43 CFR, 1954 rev., 200.8(e)(4) and (2) whether the required statements were filed. Tidewater also raises a new issue which will be considered later.

43 CFR, 1954 rev., 200.8(e)(4) provides that, if an offer is filed by an attorney in fact, there must be filed *separate* statements of interest signed by the attorney in fact *and* by the offeror, respectively. Tidewater does not dispute this. Tidewater contends, however, that, regardless of the number of persons who may have an interest in the offer beside the offeror, the regulation requires only one set of separate statements to be filed, that is, with respect to any agreement between the offeror and the attorney in fact *or* between the offeror and some other person. It bases its contention on the use of the word "or" in the regulation:

* * * separate statements * * * stating whether or not there is any agreement or understanding between them [offeror and attorney in fact], *or* with any other person, * * * by which the attorney in fact or agent *or* such other person * * *. (Italics added.)

has acquired, or is to acquire, an interest in the lease when issued. Tidewater asserts that the word "or" is used in the disjunctive sense although it concedes that "or" is often used to mean "and."

I believe that this interpretation is wholly at a variance with a normal reading of the regulation and would result in defeating the purpose of the regulation to a substantial extent. The word "or" seems clearly to be used in the conjunctive-disjunctive sense which is often conveyed by the use of the contrived expression "and/or." Tidewater's argument is that if the attorney in fact and a third person will derive an interest in the lease the offeror may elect to disclose either the agreement between him and the attorney in fact or between him and the third person, and need not disclose both. There is no rational basis for giving the regulation such a strained interpretation.

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The regulation is obviously designed to unearth all interests held in an offer by persons other than the offeror. This purpose would be almost completely frustrated if, where there are multiple interests, only one be disclosed. I conclude therefore that where an offer is signed by an attorney in fact there must be submitted with the offer separate statements signed by the attorney in fact and the offeror as to whether or not there is any understanding not only between them but with any other person whereby the attorney in fact or such other person has received or will receive an interest in the lease when issued.

The next question is whether the required separate statements signed by Tidewater and Grady were in fact filed with the offers. The statement by Grady was in the name of Tidewater but was signed only by Grady as agent. It therefore cannot suffice as the statement required to be signed by the offeror. On the other hand, although the statement was signed by Grady as agent, it may be questioned whether it suffices as the required statement of the attorney in fact since Grady purported to speak only for the offeror in the statement. However this may be, assuming that it was sufficient to constitute the statement of the attorney in fact, there is still missing the required statement by the offeror.

Tidewater contends that the statements furnished by its officers as to the agreement of July 1, 1958, with South Penn and that the agreement itself, which had previously been filed in another case, satisfy the requirement for a signed statement of the offeror. Tidewater, however, does not assert that the statements or the agreement contain any express provision showing or negating any interest by Grady in the offer or lease. Rather, Tidewater contends that because the agreement provides for the complete disposition of interests in the offers and leases to be issued it by necessary implication negates any interest in Grady.

The statements filed by Tidewater on April 11 and 12, 1961, over its officers' signatures say nothing about the existence of any understanding with Grady. The agreement between Tidewater and South Penn also says nothing about the existence or nonexistence of any understanding between Tidewater and Grady whereby Grady would acquire an interest in any lease to be issued. The agreement in fact was executed on July 1, 1958, and amended on April 8, 1960, before the filing of Tidewater's offers. A reading of the agreement reveals no provision which would necessarily prevent Tidewater from entering into an agreement with Grady whereby the latter would acquire an interest in the leases issued to Tidewater. Merely because the agreement provides that Tidewater and South Penn shall each have a 50 percent interest in leases issued after the effective date of the

agreement does not prevent Tidewater from creating an interest in Grady, like an overriding royalty interest, so far as its 50 percent interest is concerned.

It seems plain then that Tidewater did not timely comply with the requirement of regulation 43 CFR 200.8(e) (4) that a statement be furnished over the signature of the offeror as to whether or not it had an agreement or understanding with its attorney in fact whereby the latter had received or would receive an interest in the lease when issued. It did not comply until June 2, 1961; therefore its offers can have priority only from that date.

At this point it should be noted that Tidewater's arguments relative to the sole party in interest statement and the instruction on the lease form (Item 6) governing such statement are not relevant since the sole party in interest requirement springs from another regulation (see footnote 2).

The final point remaining for consideration is Tidewater's contention that Meinhart's offer BLM-A 057149 is fatally defective because it contains an error in the description of the land applied for and that that offer and also Meinhart's offer BLM-A 057151 are defective because no map was filed with them. Tidewater's argument on the defective description rests upon the following regulations:

(a) Each offer or application for a lease or permit must contain * * * (2) a complete and accurate description of the lands for which a lease or permit is desired. * * * 43 CFR 1964 rev., 200.5, now 43 CFR, 1964 Supp., 3212.1.

(b) Seven copies of Form 4-1196 * * * for each offer to lease shall be filed * * *. * * * If less than seven copies are filed, the offer will not be rejected * * * until 30 days from filing have elapsed and if during that period the remaining required copies are filed, the offeror's priority will date from the date of the first filing. * * *

(c) One of the copies of the offer first filed should be prominently marked as the "original" by the offeror. If not so marked by the offeror one copy of the offer will be marked "original" by the Bureau of Land Management. The copy marked "original" will govern as to the lands to be covered by the lease. * * * 43 CFR, 1954 rev., 200.8.

Meinhart filed a single copy of offer BLM-A 057149 on May 17, 1961, in which he gave a description of one call of his metes and bounds description to "corner 87." Within 30 days thereafter he filed six additional copies in which the same call was described as being to "corner 97." None of the copies was marked as "original" by either Meinhart or by the land office.

Tidewater asserts that, since no copy was marked "original" and none can be so marked at this late date and since there is a variance among the copies in the land description, the offer must be rejected as not giving a complete and accurate description of the land applied for.

The short answer is that the applicable regulation states only that

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"One of the copies of the offer *first filed*" (italics added) should be marked as "original." Meinhart filed only one copy on May 17, 1961. Obviously that was the original and need not be marked as such. The description in it controlled over the description in the copies later filed within the 30-day period.

As for Tidewater's contention that the offer and offer BLM-A 057151 are defective because they were not accompanied by a map or plat showing the location of the lands applied for, the Department has held that the applicable regulation, 43 CFR, 1964 rev., 200.5(a), now 43 CFR, 1964 Supp., 3212.1, does not require an offeror to accompany his offer with a map or plat. *Hope Natural Gas Company*, 70 I.D. 228 (1963); *Merwin E. Liss et al.*, 70 I.D. 231 (1963). In the *Hope* case, however, it was stated that an offeror who does not furnish a map or plat

* * * may properly be required to prove that the land for which he has applied is adequately shown on a plat or map so as to permit its location within the administrative unit or project of which it is a part (70 I.D. at 230).

Accordingly, Meinhart should be required to establish that the lands applied for are adequately shown on a plat or map.

It is noted that Tidewater has singled out only two of Meinhart's offers for criticism on the ground that he did not file map or plat. An examination of Meinhart's seven other offers also shows that no map or plat was filed with those offers. Accordingly, Meinhart should be required to make the same showing with respect to these offers.

By the same token it is noted that, except for Tidewater's two offers in conflict with the two Meinhart offers singled out for criticism and a third Tidewater offer (BLM-A 056390), Tidewater, too, did not furnish a map or plat showing the location of the lands applied for. Six of Tidewater's offers are therefore subject to the same criticism as it has leveled against Meinhart's two offers. However, since the Tidewater offers are defective for the primary reason discussed earlier, no showing need be required of Tidewater so far as a map or plat is concerned unless Meinhart's offer or any other prior offer in good standing is rejected. Tidewater's offers should not, of course, be rejected, barring other fatal defects, until prior offers in conflict are accepted.

Therefore, 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 the case is remanded for further proceedings in conformity with this decision.

ERNEST F. HOM,
Assistant Solicitor.

APPENDIX

<i>Tidewater's Offers</i>		<i>Meinhart's Conflicting Offers</i>	
<i>BLM-A Serial No.</i>	<i>Date filed</i>	<i>BLM-A Serial No</i>	<i>Date filed</i>
056386	3-30-61	056512	4-21-61
056387	3-30-61	056513	4-21-61
056388	3-30-61	056514	4-21-61
056389	3-30-61	056515	4-21-61
056390	3-30-61	056516	4-21-61
056391	3-30-61	056517	4-21-61
056392	3-30-61	056518	4-21-61
056443	4-11-61	057149	5-17-61
056444	4-11-61	057151	5-17-61

COLORADO OIL AND GAS CORPORATION

A-30003

Decided July 27, 1964

Oil and Gas Leases: Extensions—Oil and Gas Leases: Rentals—Alaska: Oil and Gas Leases

The annual rental due for the sixth and succeeding years on noncompetitive oil and gas leases in Alaska issued prior to July 3, 1958, and extended thereafter is at the rate of 50 cents per acre per annum.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On March 1, 1961, Colorado Oil and Gas Corporation, hereinafter referred to as Colorado, as operator of the Icy Bay-Cape Fairweather development contract area in Alaska, submitted applications for the extension of certain oil and gas leases, issued on April 1, 1956, under the terms of section 17 of the Mineral Leasing Act as amended by the act of August 8, 1946, 60 Stat. 951, and the act of July 29, 1954, 68 Stat. 583. Rental at the rate of 50 cents per acre for the sixth year of the leases was paid under protest.¹ Colorado argued that the rental for the sixth year under the extended leases should be at the rate of 25 cents per acre, as provided in the leases, notwithstanding the fact that the so-called Alaska Oil Proviso, contained in section 22 of the Mineral Leasing Act of February 25, 1920, 41 Stat. 446, which provided that leases in Alaska "shall be upon such rental and royalties as shall be fixed by the Secretary of the Interior and specified in the lease," had been amended by section 10 of the act of July 3, 1958, 72 Stat. 324; 30 U.S.C. § 251 (1958), to provide that the annual lease rentals for land in Alaska not within any known geological structure

¹ At various dates thereafter, Colorado submitted applications for the extension of other leases issued during 1956 and submitted rentals for the sixth year of those leases on the basis of 50 cents per acre under protest, stating that it had no objection to the consolidation of its protests.

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of a producing oil or gas field shall be identical with those prescribed for such leases covering similar lands in the other States.

By decision dated March 12, 1962, the land office at Anchorage, Alaska, dismissed the protest on the basis of the legislative history of the act of July 3, 1958, as set forth in *J. W. Bauler, Walter P. Sharpe*, 66 I.D. 377 (1959).

On appeal, the Division of Appeals, Bureau of Land Management, in a decision dated February 21, 1963, affirmed the dismissal of the protest, pointing out that under section 4 of the Mineral Leasing Act Revision of 1960, 74 Stat. 789; 30 U.S.C. § 226-1 (Supp. V, 1964), any noncompetitive oil and gas lease extended thereunder shall be subject to the rules and regulations in force at the expiration of the initial 5-year term of the lease. The decision referred to the fact that, when the applications for the 5-year extensions were filed, the rental rates for leases in Alaska had been increased and that, while the regulation in effect when those terms expired may appear to have been inconsistent with the statute, it is the statute which must prevail.

In this appeal to the Secretary, Colorado continues to question the rate of 50 cents per acre for the sixth and succeeding years of leases on lands in Alaska held under noncompetitive leases issued prior to July 3, 1958, but extended thereafter.

It argues that, having granted valid leases with the right to extension for five years and having specified in the leases what the rate for the sixth and succeeding years would be, the Government would be abrogating its contract with the lessees if the rate of rental were changed. In other words, it argues that the leases, for all practical purposes, were for 10 years and that the rate of rental covering those leases issued prior to July 3, 1958, cannot be increased.

In the view of the Department, the charging of the higher rental on extended terms of leases in Alaska is not in violation of a valid contractual term. On the contrary, it is in accordance with the mandate of the Mineral Leasing Act.

The source of the Secretary's authority to issue oil and gas leases on the public domain is entirely statutory. Any provision in a lease inconsistent with the terms of the act is necessarily invalid. At the time the leases here in question were issued, the Secretary had no authority to issue a noncompetitive lease on land in Alaska for a fixed term of more than five years. Section 17 of the Mineral Leasing Act as amended by the act of August 8, 1946, *supra*, specifically provided that:

* * * Leases issued under this section shall be for a primary term of five years and shall continue so long thereafter as oil or gas is produced in paying quantities.

The provision in the Mineral Leasing Act relating to extensions of non-competitive leases in effect when the leases here in question were issued in 1956 is to be found in the third paragraph of section 17, as amended by the act of July 29, 1954, *supra*, which stated :

Upon the expiration of the initial five-year term of any noncompetitive lease maintained in accordance with applicable statutory requirements and regulations, the record titleholder thereof shall be entitled to a single extension of the lease, unless than otherwise provided by law, for such lands covered by it as are not on the expiration date of the lease withdrawn from leasing under this section. * * * Any noncompetitive lease extended under this paragraph shall be subject to the rules and regulations in force at the expiration of the initial five-year term of the lease. * * *

Thus the Secretary had no authority to bind the Government to a contract extending beyond five years, except where production had been obtained. Furthermore, at the time the leases here in question were issued, there was no absolute, unqualified commitment on the part of the Congress to give the lessees an extension. The extension was to be given "unless then otherwise provided by law" at the expiration of the initial 5-year term and "subject to the rules and regulations in force at the expiration of the initial five-year term of the lease." One of the rules in force at the end of the initial term of the leases here in question was the new statutory provision on rentals.

The Secretary is bound by the terms of the statute. He could not at the time of granting these leases have agreed to any lease term inconsistent with the statute. He could not bind the United States to grant an extension of that lease except to the extent that the statute authorized such extension and the statute states unequivocally that the extension shall be "subject to the rules and regulations in force at the expiration of the initial five-year term of the lease." With the rental rates for the sixth and succeeding years changed by statute, the earlier agreement in the original leases as to the rental rates for the extended period became a nullity.²

The Department's position in this matter is supported by the legislative history of section 10 of the 1958 act. That section was initiated by the Senate Committee on Interior and Insular Affairs. In its report on the legislation (S. Rep. No. 1720, 85th Cong., 2d sess. 6-8 (1958)) the Committee said:

² A logical extension of appellant's argument that the Government made a binding contract as to the rental for the sixth and succeeding years by providing the rental rates for those years in the lease would be that since the lease specified the rental rates for those years the Government bound itself to extend the lease for five years after expiration of the initial 5-year term. As we have seen, the statute did not permit a binding commitment to extend a lease for five years. Consequently the rental provisions in the lease for the sixth and succeeding years must be read simply as a statement of the rental rates for those years *if* the lease should be extended and *unless* the rates should be changed from what they were at time of issuance of the original lease.

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The committee amendment, which is section 10, amends the Alaska oil proviso which now grants the Secretary the authority to charge a lesser rental and royalty on Alaska lands than on similar lands within the States, revoking such authority. The amendment also specifically requires that the Secretary charge equal rents and royalties for similar lands in the Territory and in the States.

An exception is made for those who are entitled to leases under offers or applications to lease which were filed prior to May 3, 1958, and pending on that date. * * * This exception to the lease rental rate will not apply to any extended terms of such leases. The amendment requires that all leases hereafter issued on noncompetitive Alaska lands will require the payment of the same royalty as is required on similar lands within the States of the United States. No reduction of this royalty figure is allowed for leases issued pursuant to offers or applications filed prior to May 3, 1958. *Those who have leases in effect as of the date of the act would be entitled to maintain their leases at the previous rental and royalty figure during the original term of the lease. However, the amendment causes a change in the rules and regulations; so any extended term hereafter granted on such existing leases will be subject to the increased rental and royalty figure.* (Italics supplied.)

That the regulations issued by the Department with respect to rentals on noncompetitive oil and gas leases in Alaska did not immediately reflect the change in the law is immaterial because regulations in conflict with specific statutory provisions are nullities. The statute itself changed the rate of rental for the sixth and succeeding years of noncompetitive oil and gas leases in Alaska which had been issued prior to July 3, 1958, but for which applications for extensions were filed thereafter.

Accordingly, it must be held that it was proper to have dismissed the protest of Colorado.

Therefore, 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 of the Division of Appeals, Bureau of Land Management, is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

UNION OIL COMPANY OF CALIFORNIA

A-30035

Decided July 27, 1964

Oil and Gas Leases: Applications

An oil and gas lease offer signed by an attorney in fact is not to be rejected for failure to accompany it with evidence of his authority to sign the offer and lease if the offer contains a reference to a land office record in which the pertinent information has been filed.

Oil and Gas Leases: Applications

An oil and gas lease offer signed by an attorney in fact for the offeror is properly rejected where it is not accompanied by a statement of the attorney's possible interest in the offer and the lease, if issued, and, if there is such interest, the further statements as to the attorney's qualifications to hold an oil and gas lease as required by departmental regulation.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Union Oil Company of California has appealed to the Secretary of the Interior from a decision of the Division of Appeals of the Bureau of Land Management, dated April 2, 1963, which affirmed a decision of the land office at Riverside, California, rejecting its noncompetitive oil and gas lease offer on the ground that the offer was defective.

The appellant is a corporation. Its offer, filed on November 28, 1961, was prepared in the corporate name and contained a certification of the corporate status with a reference: "See Sac-057898."¹ The signature of the offeror was typed in the proper place, and below in the space labeled "By-----" was written, in ink, "A. F. Woodward," and directly below, typed, "LA-0125424." Although the decision of the land office does not disclose the reason for the conclusion that the offer was not entitled to priority, there is a notation, to which the decision referred, in red pencil on the offer form which reads:

Attorney-in-fact can not use the Reference to serial number method to show Authority and qualifications (43 CFR 192.43(e) (4))

Reference to Serial Number For Person signing Offer For corporation is For an officer of the corporation (43 CFR 192.42(f))

The appellant appealed on the grounds that an attorney in fact may sign an offer, that the special power of the attorney in fact was on file in the land office, that a corporate offeror may use a reference to certain materials previously filed, and that the attorney in fact was a quasi-officer of the corporation so that no other documentation was necessary under the pertinent regulation, 43 CFR, 1964 rev., 192.42(f), now 43 CFR, 1964 Supp., 3123.2(g).

The Division of Appeals affirmed on the grounds that an attorney in fact is not an officer of the corporation; that the applicable regulation requires evidence of the authority of an attorney in fact to sign an oil and gas lease offer to be filed with the offer and that compliance with this requirement cannot be effected by reference to a record in the land office containing such evidence; and that, when

¹The record does not indicate the significance of the Sacramento file thus referred to, but it is assumed that it contains the information about Union Oil Company of California which satisfies the requirements of the regulation specifying the qualifying information a corporate offeror must furnish with an oil and gas lease offer. 43 CFR, 1964 rev., 192.42(f), now 43 CFR, 1964 Supp., 3123.2(g).

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an offer is filed by an attorney in fact, separate statements must be filed with the offer by the offeror and the attorney in fact stating whether or not there is any agreement or understanding between them or any other person involving an interest in the lease when issued. 43 CFR, 1964 rev., 192.42(e) (4), now 43 CFR, 1964 Supp., 3123.2(d).

The regulation on disclosure of the authority of an attorney in fact which was applicable to the lease offer in question provided that

Each offer, when first filed, shall be accompanied by:

* * * * *

(3) (i) Except in a case where an officer of a corporation signs an offer on behalf of the corporation (as to which see paragraph (f) of this section), evidence of the authority of the attorney in fact or agent to sign the offer and lease, if the offer is signed by such attorney or agent on behalf of the offeror. 43 CFR, 1961 Supp., 192.42(e) (3) (i).

Additional requirements necessary to qualify an offer filed by an attorney in fact then specified that

If the offer is signed by an attorney in fact or agent, or if any attorney in fact or agent has been authorized to act on behalf of the offeror with respect to the offer or lease, separate statements over the signatures of the attorney in fact or agent and the offeror stating whether or not there is any agreement or understanding between them, or with any other person, either verbal or written by which the attorney in fact or agent or such other person has received, or is to receive, any interest in the lease when issued, including royalty interest or interest in any operating agreement under the lease giving full details of the agreement or understanding, if it is a verbal one; the statement must be accompanied by a copy of any such written agreement or understanding; and if such an agreement or understanding exists, the statement of the attorney in fact or agent should set forth the citizenship of the attorney in fact or the agent or other person and whether his direct and indirect interests in oil and gas leases, applications, and offers including options for such leases or interests therein exceed 246,080 acres in any one State, of which no more than 200,000 acres may be held under option * * *. The statement by the principal (offeror) may be filed within 15 days after the filing of the offer. * * * 43 CFR, 1964 rev., 192.42(e) (4) (i), now 43 CFR, 1964 Supp., 3123.d(1).

An exception to these requirements provides that

If the power of attorney specifically limits the authority of the attorney in fact to file offers to lease for the sole and exclusive benefit of the principal and not in behalf of any other person in whole or in part, and grants specific authority to the attorney in fact to execute all statements of interest and of holdings in behalf of the principal and to execute all other statements required, or which may be required, by the Acts and the regulations, and the principal agrees therein to be bound by such representations of the attorney in fact and waives any and all defenses which may be available to the principal to contest, negate or disaffirm the actions of the attorney in fact under the power of attorney, then the requirement that statements must be executed by the offeror will be dispensed with and such statements executed by the attorney in fact will be acceptable as com-

pliance with the provisions of the regulations. 43 CFR, 1964 rev., 192.42(e) (4) (ii), now 43 CFR, 1964 Supp., 3123.2(d) (2).

The penalty for failure to file such qualifying statements was prescribed as follows:

Except as provided in subparagraph (2) of this paragraph, an offer will be rejected and returned to the offeror and will afford the applicant no priority if: [43 CFR, 1954 rev., 192.42 (g) (1).]

* * * * *

Except if the power of attorney is within the purview of paragraph (e) (4) (ii) of this section, the offer is signed by an attorney in fact or agent in behalf of the offeror and the offer is not accompanied by a statement over the offeror's own signature with respect to holdings and citizenship and by the statements and evidence required by paragraph (e) (4) of this section, and such statement by the principal (offeror) is not filed within 15 days after the filing of the offer. 43 CFR, 1961 Supp., 192.42 (g) (1) (iv).²

The appellant contends its offer was not in violation of 192.42(e) (3) (i), *supra*, for failure to accompany the offer with evidence of the authority of the attorney in fact to sign the offer because it made reference to a land office³ file in which the required power of attorney had been placed. It says that this practice has been sanctioned by several offices of the Bureau of Land Management and quotes from letters and decisions of these offices statements that support its position.⁴

In several recent decisions the Department has considered some aspects of the general problem of using a reference to a previously filed document in lieu of filing the document again in connection with another filing. See *George N. Keyston, Jr., Ltd.*, 70 I.D. 156 (1963); *Charlotte E. Brown et al.*, 70 I.D. 491 (1963); *William S. Kilroy et al.*, 70 I.D. 520 (1963).

While each decision depended upon the particular regulation involved, together they offer some guidelines for interpreting the regulation involved in this appeal. *Keyston* held that a reference is not sufficient if the regulation requires that a "copy" of documents "and showings as to the qualifications * * * accompany * * *" the later filing,

² The existing regulations are not materially different from those in effect on November 28, 1961, on the matters discussed in this decision. Subparagraphs (e) (4) (i) and (g) (1) of section 192.42 were further amended in the form published February 15, 1964 (29 F.R. 2502), to be effective on the 60th calendar day following the publication date but without any change in their effect on the matters discussed in this decision (now 43 CFR, 1964 Supp., 3123.2(d) (1) and 3123.3(b)).

³ While the power of attorney had been filed in the Los Angeles land office and the oil and gas lease offer with the Riverside land office, this difference, if otherwise pertinent, is not material here because the Los Angeles office has been closed and its duties were transferred to the Riverside office. 26 F.R. 10368 (1961).

⁴ For example, a letter dated June 30, 1961, from the Chief, Division of Minerals, Bureau of Land Management, to appellant said:

"This requirement for filing such power of attorney with each offer will be dispensed with where the power of attorney was previously filed with the respective land office having jurisdiction over the offered lands and the subsequently filed offer makes reference thereto."

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particularly when the following paragraph controlling a related situation specifically provides for the use of a reference to an earlier filing. *Brown*, however, pointed out that "furnish" does not mean "accompany," but that a prior filing cannot be used, even if otherwise permissible, if the later filing makes no reference to it. *Kilroy*, which, like *Brown*, dealt with partial assignments of oil and gas leases by attorneys in fact, agreed that "furnish" does not mean "accompany" and also held that "evidence" meant "any document tending to establish the truth of the point at issue," and that a reference to a prior case record in which a document was filed was evidence of that document.

192.42(e) (3), as we have seen, demands that "evidence" of the authority of the attorney in fact "accompany" an oil and gas offer signed by an attorney in fact. Under the cases cited, it appears that the reference to the prior file is evidence and if it made in the offer itself the reference "accompanies" the offer.

Thus, the appellant having made a reference to a prior filing in its offer must be held to have satisfied the regulation so far as furnishing evidence of the authority of Woodward to sign the offer is concerned. Thus, it was improper to reject its offer for failure to have submitted evidence of the authority of Woodward to sign the offer.

There remains the question of whether appellant complied with 192.42(e) (4), *supra*, which requires an attorney in fact who signs an offer to file the statement described in the regulation. The appellant has furnished a copy of the document which shows the authority of A. F. Woodward to act as attorney in fact for the appellant and such document indicates that Woodward's authority falls within the exception described in 192.42(e) (4) (ii), so that a statement by the offeror as to the interest of the attorney in fact, or of another person, in the offer and the lease, if issued, is not required in this case. However, it is clear that the attorney in fact, quite apart from the method by which evidence of his authority so to act may have been presented to the land office, was required in this case to file with the offer the statement described in 192.42(e) (4) (i) as to his interest in the offer and his possible interest in the lease sought and, if he had or was to have any interest, to file the required information showing his qualification to hold a lease. That obligation was immediate and the penalty for failure to perform it was clearly stated in 192.42(g) (1) (iv) as rejection of the offer. The fact that 192.42(e) (4) (ii) exempts the offeror in this case from the obligation to file the statement called for by 192.42(e) (4) (i) does not absolve the attorney in fact from either the obligation to file the statements required of him or the consequences of his failure to do so.

In any event, even if the effect of the failure of an attorney in fact to file a statement concerning his interest in the offer or lease is not covered by 192.43(g) (1) (iv), the requirement of 192.43(e) (4) (i) that he file one is mandatory and an offer that does not satisfy a mandatory requirement of the regulation must be rejected whether or not the regulation specifically provides for such action. *Celia R. Kammerman et al.*, 66 I.D. 255 (1959); see 43 CFR, 1964 Supp., 3123.3(b).

The appellant contends that the filing of a statement of interest by an attorney in fact is not required, even though such attorney signs and files an oil and gas lease offer, because the effect is to require the attorney to declare that he truly means the statement made on behalf of the offeror under pain of criminal penalty in the lease offer form when he indicates therein that the offeror is the sole party in interest in the offer and the lease, if issued. This contention, in effect, is that 192.42(e) (4) (i) has been repealed or superseded by 43 CFR, 1964 rev., 192.42(e) (3) (iii), now 43 CFR, 1964 Supp., 3123.2(c) (3), which requires an offeror to state that he is the sole party in interest in the offer and lease, if issued, and, if he is not, to set forth the names of the other interested parties, who are required to sign with the offeror a statement setting forth their interest. The answer is that 192.42(e) (4) (i) has not been superseded and that it and the lease form require the statement by the attorney in fact and impose a penalty for failure to comply. It is true that an offeror's statement that it is the sole party in interest in the offer and lease, if issued, would be indicated by an attorney in fact's statement that neither he nor any other person has a present interest in the offer or a present agreement or understanding to acquire an interest in the lease issued in response to the offer. But this does not mean that the sole party in interest statement satisfies the necessity for the attorney's statement that there is no agreement or understanding which will permit him or another person to acquire an interest in the offer or the lease, if issued, or in royalties or an operating agreement at some time in the future.

Aside from the requirement for a sole party in interest statement, it will be noted that 192.42(e) (4) (i) requires both the attorney in fact and the offeror to submit separate statements over the signature of each as to whether there is an agreement or understanding between them.⁵ It could be argued that, if the offeror states that there is no agreement, any statement by the attorney in fact to the same effect would merely be duplicative. But the regulation nonetheless requires both to submit statements so as to insure as far as possible that a full and truthful disclosure will be made, and it does not permit the offeror

⁵ The only exception stated is where the power of attorney is in the form set out in 192.42(e) (4) (ii), *supra*.

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to answer for the attorney in fact. By the same token, when the attorney in fact speaks for the offeror in making the sole party in interest statement, he cannot by that act speak for himself in satisfying the requirement of 192.42(e) (4) (i).

The appellant's alternative contention that its reference by serial number embraces both evidence of the authorization of an attorney in fact and his statement of interest is also unacceptable. First, the evidence filed by the appellant on appeal does no more than to show the extent of Woodward's authority to act in oil and gas leasing matters as attorney in fact for the appellant. There is nothing in this document which indicates a current agreement that Woodward was, or was not, to have an interest in any particular lease offers or leases or that the appellant did, or did not, intend to bind itself to refrain from any future action granting or denying to him or to any other person, such interests. Second, the authority of an attorney in fact, once given, may continue unchanged for any length of time and may thus empower the attorney in fact to file many oil and gas lease offers. But it is obvious that the attorney's interest or want of interest in offers and leases of his principal and his lease holdings and the interests and holding of other persons may vary greatly from time to time so that repeated filings of statements which reflect the precise situation which prevails at the time a particular offer is filed may actually be necessary to insure orderly proceedings in a land office. Thus, the appellant did not, in fact, furnish in the evidence of the authority of the attorney in fact the information required in the statements as to interests to be filed by the attorney with the offer, and, even if it had done so in this case, this would not afford a proper predicate for the establishment of a general rule that the information as to interests contained in a document evidencing a grant of authority to an attorney in fact will meet the requirements of 192.42(e) (4) (i) while such document remains on file.

Accordingly, I find that the appellant's offer was properly rejected because the attorney in fact did not file the required statements reflecting his own interest or want of interest in the lease offer and the lease, if issued, and, if necessary, his qualifications to hold a lease. *Charles B. Gonsales*, 69 I.D. 236 (1962); *Evelyn R. Robertson et al.*, A-29251 (March 21, 1963); *United States Smelting Refining and Mining Company*, A-29201 (April 23, 1963).

Therefore, 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.

ERNEST F. HOM,
Assistant Solicitor.

**RICHFIELD OIL CORPORATION
SHELL OIL COMPANY**

A-30154

A-30223

Decided July 30, 1964

Alaska: Oil and Gas Leases—Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Extensions—Oil and Gas Leases: Rentals

Section 10 of the act of July 3, 1958, amending the Alaska Oil Proviso of the Mineral Leasing Act of 1920 to require rentals for noncompetitive oil and gas leases in Alaska to be the same as similar leases for lands elsewhere in the United States, is not applicable to leases which had been granted 5-year extensions prior to the act as to the remainder of their extended term, including a 2-year extension resulting from segregation of the lease by partial assignment under section 30(a) of the Mineral Leasing Act, as amended.

Accounts: Refunds—Oil and Gas Leases: Rentals

If there are applicable funds available, refund may be made of oil and gas lease rentals paid in excess of that required under the lease and applicable statutes and regulations.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

The Richfield Oil Corporation and the Shell Oil Company (hereafter referred to as "Richfield" and "Shell," respectively) have filed separate appeals to the Secretary of the Interior from separate decisions by the Division of Appeals, Bureau of Land Management, dated September 16, 1963, and December 2, 1963, respectively, affirming Anchorage land office decisions which denied their applications for repayment of rentals allegedly paid in excess for noncompetitive oil and gas leases in Alaska and dismissed their protests against the rental rate for the 11th and 12th years of the leases.

From the Bureau decisions and information given by Richfield, it appears that the oil and gas leases in question in its appeal all originally issued for 5-year terms in 1950 or 1951.¹ The leases with which Shell is concerned in its appeal all issued originally for 5-year terms in 1951 or 1952.²

¹ Richfield's appeal comes to this office without any of the lease records. The statements made in this decision and conclusions reached are premised upon the facts as given in the Bureau decision and by Richfield. Richfield lists the Anchorage serial number and effective date of the leases as follows: 011257, 011260, 011293, and 011294 (July 1, 1950); 011259 (September 1, 1950); 011258 and 011295 (November 1, 1950); 011261 (March 1, 1951); 011262, 011288, 011290, 011291, 011292, 011302, and 011303 (June 1, 1951); 011287 (November 1, 1951). The leases when segregated by partial assignment bore as to the segregated portion the same serial number with the addition of the letter "A" following it.

² These leases by their Anchorage serial number and effective date are: 03821 and 03999 (December 1, 1951); 018364 (January 1, 1952); 018365-A, segregated from 018365 (January 1, 1952).

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At the end of the primary 5-year term of the leases, they were all extended for another 5-year term. During the 10th year of the leases partial assignments were approved by the Bureau of Land Management and the leases were segregated as to the lands which had been assigned. With the approval of the assignments, the Bureau of Land Management recognized that all the leases were extended for an additional two years pursuant to section 30(a) of the Mineral Leasing Act, as amended by the act of July 29, 1954, 68 Stat. 585, which provided in pertinent part as follows:

Assignments under this section may also be made of parts of leases which are in their extended term because of any provision of this Act. The segregated lease of any undeveloped lands shall continue in full force and effect for two years and so long thereafter as oil or gas is produced in paying quantities.³

Both Richfield and Shell raised the question in the land office as to the proper rental for the 11th and 12th years of the leases, the additional 2-year extension provided by the above-quoted statutory provision. During the 5-year extended terms of the leases, the 6th through the 10th years, rental had been paid at the rate of 25 cents per acre a year. For the 11th and 12th years, however, rental was paid, apparently under protest, at the rate of 50 cents per acre a year. Richfield and Shell request a refund for rentals paid in excess, alleging that a rental of only 25 cents per acre was required for the 11th and 12th years and that there is no provision of the law or regulations which requires or which can be validly construed as requiring a greater rental for those two years than for the 6th through the 10th years.

The authority to issue leases for oil and gas in Alaska and to establish rentals and royalties for such leases was granted to the Secretary of the Interior by the so-called "Alaska Oil Proviso," section 22 of the Mineral Leasing Act of February 25, 1920, 41 Stat. 446. This section provided that rental and royalties for leases in Alaska under that act "shall be fixed by the Secretary of the Interior and specified in the lease." The Secretary was authorized in his discretion to waive the payment of any rental or royalty not exceeding the first five years of any lease for the purpose of encouraging production of petroleum products in Alaska. Under the authority of this act, the Secretary had provided in the requisite lease forms of the Department and by departmental regulation (43 CFR, 1954 rev., 192.80(a)) an annual rental rate of 25 cents per acre for the sixth and succeeding years of a

³ This section was further amended by section 6 of the act of September 2, 1960, 74 Stat. 790; 30 U.S.C. § 187a (Supp. V, 1964), expressly making the 2-year extension resulting from segregation by partial assignment inapplicable to leases issued after September 2, 1960, unless the lease was held beyond its primary term by production or the payment of compensatory royalty. The 1960 amendment is not applicable, therefore, to the leases involved here as they were issued prior to the date of that act.

noncompetitive lease outside of a known geologic structure in Alaska, although the prescribed annual rental rate elsewhere in the United States as to such leases for the sixth and succeeding years was 50 cents per acre.

In concluding that 50 cents per acre was the proper rental rate for the 11th and 12th years of the leases, the Bureau decisions held that these leases were subject to the same rental rates as leases elsewhere for those two years because of an amendment to section 22 of the Mineral Leasing Act. This amendment, made by section 10 of the act of July 3, 1958, 72 Stat. 324; 30 U.S.C. § 251 (1958), provides in pertinent part as follows:

* * * *Provided*, That the annual lease rentals for lands in the Territory of Alaska not within any known geological structure of a producing oil or gas field and the royalty payments from production of oil or gas sold or removed from such lands shall be identical with those prescribed for such leases covering similar lands in the States of the United States, except that leases which may issue pursuant to applications or offers to lease such lands, which applications or offers were filed prior to and were pending on May 3, 1958, shall require the payment of 25 cents per acre as lease rental for the first year of such leases; but the aforesaid exception shall not apply in any way to royalties to be required under leases which may issue pursuant to offers or applications filed prior to May 3, 1958.

The Secretary of the Interior shall neither prescribe nor approve any cooperative or unit plan of development or operation nor any operating, drilling, or development contract establishing different royalty or rental rates for Alaska lands than for similar lands within the States of the United States.

In applying this provision requiring rentals to be identical with those prescribed for leases in the "States of the United States," the Bureau relied upon the following statement from the Senate Committee on Interior and Insular Affairs' report on the bill which was subsequently enacted as the July 3, 1958, act (S. Rep. No. 1720, 85th Cong., 2d sess. 7 (1958)):

Those who have leases in effect as of the date of the act would be entitled to maintain their leases at the previous rental and royalty figure during the original term of the lease. However, the amendment causes a change in the rules and regulations; so *any extended term hereafter granted* on such existing leases will be subject to the increased rental and royalty figure. (Italics supplied.)

Both appellants object to the Bureau's reliance on the quotation from the Senate report, especially the italicized phrase, but for varying reasons. Shell contends that the report should not be considered at all because the general rule is that reports and other matters of legislative history used as aids in construing a statute should not be considered where the language of the statute is plain and unambiguous. It contends that there is no ambiguity or uncertainty in the statutory language here. It points out that the statute uses the word "shall" and asserts that the common and ordinary usage of that word always

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refers to the future. It contends that there is nothing in the statute to indicate an intent that it should be applied retroactively to leases issued prior to its enactment, and that retrospective construction of the 1958 act is inconsistent with the general policy of Congress in its various amendments of the Mineral Leasing Act to protect rights previously granted lessees under existing leases. It contends that the act of July 3, 1958, would be unconstitutional if interpreted to apply retrospectively to leases issued prior to its enactment and, therefore, should be construed to sustain its constitutionality.

Richfield does not object to consideration of the Senate report but seeks to make a distinction between the type of extension it contends was contemplated in the italicized phrase of the quotation above and that resulting from the partial assignment of the lease in its extended term pursuant to section 30(a) of the Mineral Leasing Act, as provided in the act of July 29, 1954. It contends that the 2-year period following the 10th year of the leases involved here was not an extended term which was "granted" in the sense that the language of the committee report uses that term. It states that under the July 29, 1954, amendment of section 30(a) the leases were automatically "continued" by the partial assignments in the 10th year by the mere act of the lessee's making the assignments. It notes that under that provision there is no language making the continuation of the lease for the 2-year period subject to existing rules and regulations. It contrasts this with the statutory provisions authorizing 5-year extensions beyond the original 5-year lease terms, where there is express statutory language to the effect that the renewed or extended leases will be subject to rules and regulations in effect at the end of the 5-year primary term of the lease, section 17 of the Mineral Leasing Act of 1920, as amended by the act of August 8, 1946, 60 Stat. 951, and the act of July 29, 1954, 68 Stat. 584; 30 U.S.C. § 226 (1958). It states that the quotation from the Senate committee report refers to these 5-year extensions where leases are subject to changes in the rules and regulations under these acts and not to other extensions or continuations where there is no such express statutory language.

Richfield has submitted copies of two letters by the Associate Solicitor for Public Lands and the Acting Associate Solicitor for Public Lands, respectively, making a similar distinction between the 5-year extension under section 17 and certain other extensions, which need not be mentioned here, and concluding that the rental rates in effect when the lease issued governed rather than those necessary under the 1958 act amending the Alaska Oil Proviso. The same rationale was given in the letters as that made by Richfield, that there were no

provisions making the continuations or extensions subject to rules and regulations in force at the expiration of the primary term of the lease.

Shell, however, would not make the distinction to which Richfield accedes between the 5-year extensions under section 17 and the partial assignment extension under section 30(a). It contends that the section 17 reference to rules and regulations has been interpreted as relating only to routine, procedural matters as distinguished from substantive matters, and that the July 3, 1958, act cannot be retroactively applied to leases issued prior to its enactment "under the guise of considering it as constituting a rule or regulation."

Both appellants refer to a provision in the leases that they are: subject to the terms and provisions of the Act of February 25, 1920 (41 Stat. 437, 30 U.S.C. 181, et seq.), as amended, * * * and to all reasonable regulations of the Secretary of the Interior now or hereafter in force when not inconsistent with any express and specific provisions herein, which are made a part hereof.

Richfield argues that this provision means that the express rental provision as contained in the leases cannot be changed except in accordance with the Mineral Leasing Act as it existed on the effective date of each of the leases or at the time when each of the leases was granted a 5-year extension, or by virtue of any regulation in force on the above-mentioned dates when not inconsistent with the express rental provisions. It contends that the Bureau ignored the fact that the regulations in effect when the extensions were granted provided for only a 25 cents per acre rental for leases in Alaska in their sixth year and thereafter. It states that 43 CFR 192.80(a)(1), as amended and in effect from April 21, 1961, to October 16, 1962, provided:

The lease rentals for the primary and extended terms of all oil and gas leases which issued prior to September 2, 1960, shall be payable at the rates in effect at that time and prescribed in the lease.

It contends that this applies to the leases for lands in Alaska as well as leases for lands elsewhere in the United States and makes it clear that the increase in rentals on Alaska leases should only affect those leases which are issued after the date of the 1958 amendment to the Alaska Oil Proviso. It notes that the regulation has now been changed so that it reads as follows:

For the sixth and each succeeding year of a lease which issued prior to September 2, 1960, and in the State of Alaska of any lease whose initial term expired on or after July 3, 1958, rental shall be payable at the rate of 50 cents per acre or fraction thereof. 43 CFR, 1964 Supp., 3125.1(a)(1), formerly 43 CFR, 1964 rev., 192.80(a)(1).

Richfield contends that this regulation is applicable only to the 5-year extensions and is not applicable to other types of extensions or continuations, even though it may have been in effect when the partial assignments of these leases were filed.

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Shell, however, in referring to the lease provision quoted above, states that any change in a rule or regulation must be consistent with the terms of the lease when it issued, and, therefore, if the act of July 3, 1958, can be considered as constituting a rule it is inconsistent with the lease terms provided for rentals and thus cannot be validly applied to the leases here in question.

Thus, although both appellants are concerned only with the rentals for the 11th and 12th years of the leases, they suggest two different views in applying the act of July 3, 1958, as to what and when leases may be affected by it.

In *Colorado Oil and Gas Corporation*, 71 I.D. 284 (A-30003, July 27, 1964), the Department held that the increased rental rate required by the act of July 3, 1958, applies to the extended 5-year term of leases which were issued prior to that date and extended after that date. To that extent, then, Shell's position has been rejected and Richfield's accepted.

This, however, does not decide the issue involved in the present appeals. In considering that issue, it is apparent that there are substantial differences between the statutory provisions authorizing the 5-year extensions, to which the increased rentals apply, and those providing for the 2-year extension resulting from a partial assignment. Section 17 specifically provides that a lease extended for five years shall be subject to the rules and regulations in force at the expiration of the initial 5-year term of the lease. Section 30(a) has no such provision as to leases extended for two years. Although a lessee has to file a partial assignment of a lease which has to be approved by this Department in order to bring into operation the 2-year extension under section 30(a), the statutory and lease terms make this extension automatic without any limiting language. Under section 30(a) Congress has provided that the Secretary of the Interior shall disapprove an assignment only for lack of qualification of the assignee or sublessee or for lack of sufficient bond. Therefore, there is a statutory duty upon the Secretary to approve such an assignment if the lease is in good standing and all requirements have been satisfied. There are no statutory or regulatory provisions which would authorize this Department to condition the approval of a partial assignment upon an agreement to a higher rental. The only provision which might be deemed to require such a change is the 1958 act. However, without some prior reservation of such authority in the statutory and lease terms, as is true in the case of the 5-year extension, there is lacking authority to impose a higher rental rate.

Five-year extensions under section 17 are "granted" by the Department. Two-year extensions under section 30(a) are considered to be granted by the statute without the necessity for administrative action. It seems reasonable then to read the language previously quoted from the Senate committee report, that "any extended term hereafter *granted* on such existing leases" (italics added) will be subject to increased rental rates, as indicating that the increased rental provision was intended to apply to 5-year extensions and not to section 30(a) extensions.

Therefore, we hold that if the 5-year extension of a lease were granted prior to July 3, 1958, the rental rates in the lease remained unchanged for the succeeding years after the act, including the extended term provided for by section 30(a) where a partial assignment segregates the lease. It follows that payments of lease rentals for the 11th and 12th years of the leases under consideration in amounts greater than 25 cents per acre were in excess of that required under the applicable law and regulations.

It appears then that the appellants are entitled to refunds under section 204 of the Public Land Administration Act of July 14, 1960, 74 Stat. 507, 43 U.S.C. § 1374 (Supp. V, 1964), which repealed previous acts authorizing repayments and consolidated the authority under one provision. The act provides:

In any case where it shall appear to the satisfaction of the Secretary of the Interior that any person has made a payment under any statute relating to the sale, entry, lease, use, or other disposition of the public lands which is not required, or is in excess of the amount required, by applicable law and the regulations issued by the Secretary, the Secretary, upon application or otherwise, may cause a refund to be made from applicable funds.

When these cases are returned to the Bureau of Land Management, the facts constituting the basis for repayment as set forth in this decision, especially with respect to those leases involved in Richfield's appeal, should be verified. If they are, a refund should be made from available applicable funds.

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 decisions appealed from are reversed and the cases are remanded to the Bureau of Land Management for appropriate action consistent with this decision.

ERNEST F. HOM,
Assistant Solicitor.

APPEAL OF VITRO CORPORATION OF AMERICA

IBCA-376

*Decided August 6, 1964***Contracts: Appeals—Public Records**

Final determinations concerning the disclosure to contractors of records that the custodian of the records is unwilling to produce are, as a matter of general practice, made by the Solicitor where the disclosure sought is not connected with any pending contract appeal, and by the Board of Contract Appeals where the records are sought in connection with a pending contract appeal.

Public Records

The phrase "prejudicial to the interests of the Government," as used in the statutes and regulations pertaining to disclosure of records of the Department of the Interior, ordinarily comprehends those documents as to which the Government possesses a privilege against disclosure under the law of evidence.

Contracts: Appeals—Rules of Practice: Evidence—Public Records

The question of whether particular documents, sought by a contractor for use in connection with a contract appeal, are within or without the scope of the Government's privilege against disclosure is a question that calls for the evaluation of such factors as: (1) the relevancy of the documents to the subject matter involved in the appeal; (2) the necessity of the documents for the proving of the appellant's case; (3) the seriousness of the danger to the public interests which disclosure of the documents would involve; (4) the presence in the documents of factual data, on the one hand, or of policy opinions, on the other; (5) the existence of confidential relationships which disclosure of the documents might unduly impair; and (6) the normal desirability of full disclosure of all facts in the possession of either party to the appeal.

BOARD OF CONTRACT APPEALS

The instant decision is necessitated by disagreement between the parties concerning the extent to which appellant is entitled to inspect Government records that involve the contract under which the appeal arises. The contract was for construction of the Southside Canal of the Collbran Project in Colorado, and the documents in dispute are contained in the files of the offices of the Bureau of Reclamation at Denver and Grand Junction, Colorado.

On February 24, 1964, a motion for the production of documents was filed with the Board by appellant. This motion was discussed at a conference held before the Chairman of the Board, pursuant to 43 CFR 4.9, on February 26, 1964. The Chairman stated, in substance, that it was the policy of the Department to make available to contractors, without technicality, all documents material to appeals taken

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by them that "can be made available."¹ He also indicated that the Board would not be in a position to determine the issues presented by the then pending motion until those issues had been narrowed through such means as the submission of contested documents for examination by the Board.² Counsel for appellant thereupon withdrew the motion to produce.³

In a letter dated March 26, 1964, counsel for appellant asked the Department Counsel to make available for inspection all documents in sixteen broadly described categories. Virtually every document that had any connection at all with the construction of the Southside Canal of the Collbran Project could be said to come within the scope of this request.

Department Counsel responded by a letter dated April 23, 1964, in which he expressed a willingness to make available all documents pertaining to the Southside Canal, with certain exceptions. He stated the following exceptions:

- (1) Inter-office or intra-office communications.
- (2) Opinions, deductions or conclusions made by engineers, designers or geologists in the design of the Southside Canal.
- (3) Personal notes or diaries of individual members of the Bureau of Reclamation staff.
- (4) Supporting calculations to feasibility of pre-bid engineer's estimates.

Counsel for appellant opposed recognition of these exceptions in a letter to the Department Counsel dated May 1, 1964, and in a letter to the Board dated May 6, 1964.

Department Counsel, in a letter to counsel for appellant dated May 12, 1964, cited and quoted various authorities relating to the scope of the privilege of the Government to withhold information possessed by it from disclosure. He concluded as follows:

It is submitted that the rules of law set out in these cases support the position expressed in my letter of April 23, 1964 to you. We are willing to produce all geologic logs, soil tests, quantity computations, and all factual data of any nature which may have been made during the investigation of the Southside Canal. We are willing in this case to produce the inspector's reports. We are willing to show you any basic engineering data which was produced during or before construction. All project photographs will be made available. In brief, all factual information will be made available to you.

The foregoing represent my views as to items which the Government should be required to make available. However, if the Board should disagree with the above views, and should consider that additional material should be made available, I will strongly recommend to the custodians of the sundry records in question that they produce any material that the Board believes should be subject

¹ Tr. pp. 43-45.

² *Ibid.*

³ *Ibid.*

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to your inspections. Should a dispute arise as to whether any particular documents should be produced, I am also willing to agree to recommend to the record custodians that they forward the same to the Board for their inspection and decision as to whether they should be made available to you. I am confident that the custodians of the records will comply with these recommendations promptly.

Counsel for appellant in a letter received by the Board on June 10, 1964, disagreed with the Department Counsel's view of the law, and requested that "the Board direct the full production of documents sought by the appellant and as agreed at the pre-hearing conference." We regard this request as being, in substance, a motion for production of all of the documents described in the letter of March 26, 1964.

The disclosure of records of the Department of the Interior is the subject of specific statutory provisions. Section 1 of the Act of August 24, 1912, 37 Stat. 497, as amended, 5 U.S.C. sec. 488, states, in pertinent part:

The Secretary of the Interior, or any of the officers of that Department may, when not prejudicial to the interests of the Government, furnish authenticated or unauthenticated copies of any official books, records, papers, documents, maps, plats, or diagrams within his custody, * * *⁴

Section 2 of the same Act, 5 U.S.C. sec. 489, states:

Nothing in this Act shall be construed to limit or restrict in any manner the authority of the Secretary of the Interior to prescribe such rules and regulations as he may deem proper governing the inspection of the records of said department and its various bureaus by the general public, and any person having any particular interest in any of such records may be permitted to take copies of such records under such rules and regulations as may be prescribed by the Secretary of the Interior.

These statutory provisions have been implemented by regulations, 43 CFR 2.1-2.20, adopted by the Secretary of the Interior. The key substantive section, 43 CFR 2.1, reads as follows:

Unless the disclosure of matters of official record would be prejudicial to the interests of the Government, they shall be made available for inspection or copying, and copies may be furnished, during regular business hours at the request of persons properly and directly concerned with such matters. Requests for permission to inspect official records or for copies will be handled with due regard for the dispatch of other public business.

The procedural system prescribed by the regulations contemplates that the initial determination as to whether a record should be disclosed will be made by the custodian of the record or, in certain situations, by the head of the bureau or office concerned.⁵ The initial de-

⁴ The omitted portion of the section relates to the fees to be charged for copies so furnished.

⁵ 43 CFR 2.2, 2.6, 2.20.

termination may be appealed to, or, in certain situations, reviewed on his own motion by, the Secretary of the Interior.⁶

The regulations further provide that the Solicitor of the Department of the Interior "may exercise all the authority of the Secretary" in making final determinations as to whether particular records should be disclosed.⁷ Other regulations adopted by the Secretary, those relating to the Board of Contract Appeals, provide that the "Board may, in its discretion, decide questions which are deemed necessary for the complete decision on the issue or issues involved in the appeal, including questions of law."⁸ Complete decision of the issue or issues involved in an appeal may well necessitate the decision of questions relating to the disclosure of records that are alleged by one party or the other to be pertinent to such issue or issues.

Neither of the delegations mentioned in the preceding paragraph purports to be exclusive. The general practice followed under them is for the Solicitor to act in those cases where the disclosure sought is not connected with any pending contract appeal, and for the Board to act in those cases where the records are sought, for purposes of discovery or for use as evidence, in connection with a pending contract appeal. Hence, no problem of jurisdiction exists.

The basic issue presented for our decision is whether the documents that counsel for appellant wants to see, but that are not within the classes of documents Department Counsel is willing to produce, are documents whose disclosure would be "prejudicial to the interests of the Government," within the meaning of the statutory and regulatory provisions quoted above. The regulations impose specific limitations upon the disclosure of documents classified as "Top Secret," "Secret," "Security Confidential," "Restricted" or "Confidential,"⁹ but none of the documents here in question are alleged to be so designated. As the Chairman of the Board noted at the conference, the policy of the Department has been to favor substance over technicalities, disclosure over non-disclosure.¹⁰ Nevertheless, as he also pointed out, this does not mean that everything the appellant wants to see must be furnished irrespective of its legal availability.¹¹ Broadly expressed, the policy followed by the Department is that "restrictions on the public's right to know how the public business is conducted should be held to a minimum."¹²

⁶ *Ibid.*

⁷ *Ibid.* A supplemental delegation to the same effect is contained in 24 F.R. 1348, 210 DM 2.2A(9).

⁸ 25 F.R. 2115, 211 DM 2.1. This delegation is repeated in 43 CFR 4.4.

⁹ 43 CFR 2.2(c).

¹⁰ Tr. pp. 43-45.

¹¹ *Ibid.*

¹² Solicitor's Opinion, 64 I.D. 463 (1957).

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For the purposes of this appeal it is unnecessary to attempt to define all the situations that reasonably might be comprehended within the phrase "prejudicial to the interests of the Government." It is enough to say that documents against the disclosure of which the Government possesses a privilege, as that term is used in the law of evidence, would ordinarily be comprehended within the phrase. This is because the existence and scope of the Government's privilege against disclosure, as fashioned by the decisions of the Federal Courts applying the law of evidence, are founded upon and measured by the prejudice to the public interests that would result if the particular document or class of documents in issue were to be divulged.¹³

Our conclusion that documents as to which the Government possesses a privilege ordinarily may be withheld from disclosure in proceedings before the Board is further buttressed by the fact that the Rules of Civil Procedure for the United States District Courts—which are noteworthy for their liberality in matters of discovery¹⁴—expressly exempt privileged documents from their compulsory production requirements.¹⁵ So do the rules of the Court of Claims.¹⁶

In the landmark decision of *United States v. Reynolds*¹⁷ the Supreme Court upheld the Government's refusal to produce, in a suit brought under the Federal Tort Claims Act, the official accident investigation report of the crash of an Air Force plane in which three civilian observers were killed, for whose death the suit had been brought. Excerpts from the opinion that express principles pertinent to the disposition of the instant motion are set out below:

* * * The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect. * * *

* * * On the record before the trial court it appeared that this accident occurred to a military plane which had gone aloft to test secret electronic equipment. Certainly there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission.

* * * Thereafter, when the formal claim of privilege was filed by the Secretary of the Air Force, under circumstances indicating a reasonable possibility that military secrets were involved, there was certainly a sufficient showing of privilege to cut off further demand for the documents on the showing of necessity for its compulsion that had then been made.

¹³ See *United States v. Reynolds*, 345 U.S. 1 (1953); *Machin v. Zuckert*, 316 F. 2d 336 (1963), cert. denied 375 U.S. 896 (1963); *Kaiser Aluminum & Chemical Corporation v. United States*, 141 Ct. Cl. 38 (1958); cf. *Duncan v. Cammell, Laird & Co.* (1942), A.C. 624.

¹⁴ See *Hickman v. Taylor*, 329 U.S. 495 (1947).

¹⁵ Fed. R. Civ. P. 34.

¹⁶ Ct. Cl. R. 39 (b), 40 (a).

¹⁷ *Supra* note 13.

In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. A *fortiori*, where necessity is dubious, a formal claim of privilege, made under the circumstances of this case, will have to prevail. Here, necessity was greatly minimized by an available alternative, which might have given respondents [the claimants] the evidence to make out their case without forcing a showdown on the claim of privilege. By their failure to pursue that alternative, respondents have posed the privilege question for decision with the formal claim of privilege set against a dubious showing of necessity.

There is nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident. Therefore, it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets. Respondents were given a reasonable opportunity to do just that, when petitioner [the Government] formally offered to make the surviving crew members available for examination. We think that offer should have been accepted.

Another leading decision is *Kaiser Aluminum & Chemical Corporation v. United States*.¹⁸ There the Court of Claims upheld the Government's refusal to produce, in a suit for breach of contract, a written opinion submitted to the contracting officer by one of his subordinates. The opinion consisted of, and was confined to, recommendations and advice on program policy in connection with a proposed sale of aluminum plants. Some of these plants were ultimately sold to plaintiff under a contract which contained a most favored purchaser clause, and others were ultimately sold to Reynolds Aluminum Company on terms alleged by plaintiff to contravene that clause. The portions of the opinion which are pertinent to the instant motion read as follows:

* * * When the United States consents to be sued, *simpliciter*, full disclosure of all facts in possession of either party to the litigation is normally desirable. There are recognized exceptions when the production of the evidence would be contrary to the interests of the public. Disclosures that would impair national security or diplomatic relations are not required by the courts. It is accepted that the identity of informers, as such, in the interests of the State, may be protected even in civil cases.

* * * Here the document sought was intra-office advice on policy, the kind that a banker gets from economists and accountants on a borrower corporation, and in the Federal government the kind that every head of an agency or department must rely upon for aid in determining a course of action or a summary of an assistant's research. * * * Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled

¹⁸ *Supra* note 13.

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by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act. Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen. It is true that it now submits itself to suit but it must retain privileges for the good of all.

There is a public policy involved in this claim of privilege for this advisory opinion—the policy of open, frank discussion between subordinate and chief concerning administrative action.

When this Administrator came to make a decision on this \$36,000,000 contract, with intricate problems of accounting and balancing of interests, he needed advice as free from bias or pressure as possible. It was wisely put into writing instead of being left to misinterpretation but the purchaser, plaintiff here, was entitled to see only the final contracts, not the advisory opinion.

That is not to say that every file of government papers is closed to discovery. Here, however, there was an administrator reaching a decision. * * * The document sought here was a part of the administrative reasoning process that reached the conclusion embodied in the contracts with Kaiser and Reynolds. The objective facts, such as the cost, condition, efficiency, terms and suitability are otherwise available. So far as the disclosure of confidential intra-agency advisory opinions is concerned, we conclude that they belong to that class of governmental documents that are privileged from inspection as against public interest but not absolutely. It is necessary therefore to consider the circumstances around the demand for this document in order to determine whether or not its production is injurious to the consultative functions of government that the privilege of non-disclosure protects.

We have spoken of the broad coverage of the plaintiff's request. While this is not the attorney-client privilege, the demand for this document seeks to lay bare the discussion and methods of reasoning of public officials. The fact that the author is dead is immaterial here. It is not a privilege to protect the official but one to protect free discussion of prospective operations and policy. This goes beyond the disclosure of primary facts upon which conclusions are based. It is akin to the request for "production of written statements and mental impressions contained in the files and the mind of the attorney," which are unprotected by the attorney-client privilege. Cf. *Hickman v. Taylor*, *supra* at 509. Nothing is alleged by Kaiser, through the affidavit of its negotiating Vice President, Mr. Calhoun, or otherwise, to suggest any need for production of the document to establish facts.

Viewing this claim of privilege for the intra-agency advisory opinion in its entirety, we determine that the Government's claim of privilege for the document is well founded. * * *

Among the authorities relied upon in *Kaiser* were the *Morgan* decisions of the Supreme Court.¹⁹ The holdings in *Morgan*, so far as they are pertinent to the question of privilege, are summarized in the following quotation from the last of the four opinions:

¹⁹ *Morgan v. United States*, 298 U.S. 468 (1936); *Morgan v. United States*, 304 U.S. 1 (1938); *United States v. Morgan*, 307 U.S. 183 (1939); *United States v. Morgan*, 313 U.S. 409 (1941).

* * * Over the Government's objection the district court authorized the market agencies to take the deposition of the Secretary. The Secretary thereupon appeared in person at the trial. He was questioned at length regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates. His testimony shows that he dealt with the enormous record in a manner not unlike the practice of judges in similar situations, and that he held various conferences with the examiner who heard the evidence. Much was made of his disregard of a memorandum from one of his officials who, on reading the proposed order, urged considerations favorable to the market agencies. But the short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding." *Morgan v. United States*, 298 U.S. 468, 480. Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that "it was not the function of the court to probe the mental processes of the Secretary." 304 U.S. 1, 18. Just as a judge cannot be subjected to such a scrutiny, compare *Fayerweather v. Ritch*, 195 U.S. 276, 306-07, so the integrity of the administrative process must be equally respected. See *Chicago, B. & Q. Ry. Co. v. Babcock*, 204 U.S. 585, 593. It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other. *United States v. Morgan*, 307 U.S. 183, 191.²⁰

A like conclusion is expressed in *North American Airlines v. Civil Aeronautics Board*.²¹ That decision states, with respect to the Civil Aeronautics Board, that "staff studies, internal departmental memoranda, and recommendations of Board experts to its members ordinarily are not subject to discovery."

In *Machin v. Zuckert*²² a member of the crew of an Air Force plane who had been injured in a crash of the plane sought to compel by subpoena the production of the official accident investigation report, for use in an action which he had brought against the manufacturer of the propeller assemblies of the plane. The Secretary of the Air Force offered to identify the witnesses who had testified during the course of the investigation, to permit them to testify concerning all matters relating to the cause of the crash except classified matters, and to authorize them to refresh their memories from the statements made by them in the course of the investigation or from other pertinent Air Force records. The Court sustained in part, and denied in part, the Government's claim that the report itself was privileged, saying:

We agree with the Government that when disclosure of investigative reports obtained in large part through promises of confidentiality would hamper the ef-

²⁰ 313 U.S. at 421.

²¹ 240 F. 2d 867, 874 (D.C. Cir. 1956), cert. denied 353 U.S. 941 (1957).

²² *Supra* note 13.

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ficient operation of an important Government program and perhaps even, as the Secretary here claims, impair the national security by weakening a branch of the military, the reports should be considered privileged. Especially is that so when they are sought in connection with a litigation to which the Government is not a party and when the responsible executive official has been as cooperative as the record in this case reveals the Secretary to have been.

Insofar, therefore, as the subpoena sought to obtain testimony of private parties who participated in the investigation, we agree with the District Court that such information in the hands of the Government is privileged. The privilege extends to any conclusions that might be based in any fashion on such privileged information. Also, a recognized privilege attaches to any portions of the report reflecting Air Force deliberations or recommendations as to policies that should be pursued. * * *

The parties, in argument before us, have treated the investigative report as a unit that should either be entirely disclosed or entirely suppressed. From our review of the case, however, it appears to us that certain portions of the report could be revealed without in any way jeopardizing the future success of Air Force accident investigations. We refer to the factual findings of Air Force mechanics who examined the wreckage. Their investigations and reports would not be inhibited by knowledge that their conclusions might be made available for use in future litigation, and their findings may well be of utmost relevance to the litigation now pending between appellant and United Aircraft. * * * Since the reasons given by the Government for holding the investigative report privileged do not, on their face, apply to information of this sort, we consider that, to this limited extent, the subpoena should have been enforced. [Citations omitted.]

In a supplemental opinion²³ the Court clarified the last portion of the foregoing comments by stating that the phrase "factual findings of the mechanics" was intended to mean "anything in their reports that did not fall within any of the areas of privilege recognized in the opinion." It went on to observe:

If the mechanics expressed any "opinions" or "conclusions" as to possible defects in the propellers or propeller governors that might have been due to the negligence of United Aircraft, we do not consider that such expressions would come within the privileges enunciated in our opinion. Where the line is properly drawn between privileged and unprivileged statements appearing in the mechanics reports is impossible to ascertain without viewing the reports themselves in their entirety.

The decisions from which we have quoted set out guidelines that are applicable to the instant motion. The Department Counsel's letter of May 12, 1964, as we read it, is an offer to produce all factual information relating to the Southside Canal, even though contained in documents of the types which the Department Counsel objected to producing in his letter of April 23, 1964. The Board considers that

²³ 316 F. 2d at 340.

the offer to produce, so far as it goes, is consistent with the applicable precedents.

Whether the guidelines set out above would require or justify the inclusion of additional material in the offer to produce is a question that ought to be determined in the first instance by the custodians of the records relating to the Southside Canal, in collaboration with the Department Counsel. If appellant should be dissatisfied with any determination of theirs, whether past or future, an appropriate means for obtaining a remedy would be the submission by appellant of a properly justified request that the Board decide the question.

The information that has been submitted by the parties up to now is insufficient to enable the Board to make determinations with respect to the production of specific documents or classes thereof. As the cited authorities show, determinations upon such matters call for the evaluation of a number of factors. Among them are (1) the relevancy of the documents to the subject matter involved in the pending appeal; (2) the necessity of the documents for the proving of the appellant's case; (3) the seriousness of the danger to the public interests which disclosure of the documents would involve; (4) the presence in the documents of factual data, on the one hand, or of policy opinions, on the other; (5) the existence of confidential relationships which disclosure of the documents might unduly impair; and (6) the normal desirability of full disclosure of all facts in the possession of either party to the appeal. Since the Board lacks any reasonably specific information as to the content and significance of the documents that have been excluded from the offer to produce, it is obviously in no position to decide now whether that offer falls short of meeting the applicable guidelines.

In the circumstances, we believe that a fair and expeditious procedure would be for the Department Counsel to make available, and for counsel for appellant to inspect, those documents that fall within the scope of the offer to produce, together with any additional documents that are determined by their respective custodians to be documents which properly might be disclosed under the guidelines set out in this decision. If, following such inspection, counsel for appellant desires to have other documents produced, these contested documents should be identified and segregated in a manner that will reasonably apprise counsel for appellant of their general nature, and of the reasons why their disclosure is deemed "prejudicial to the interests of the Government," but without disclosing their contents or any other confidential information. Immediately prior to the hearing upon the appeal, a conference will be held pursuant to 43 CFR 4.9, at which

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counsel for appellant may present a motion for production of the contested documents, at which the Department Counsel will make such documents available for examination by the hearing official, and at which the latter will determine, subject to review by the Board, whether any of such documents should be disclosed to counsel for appellant for purposes of discovery or for use as evidence.

The motion to produce, therefore, is denied without prejudice. Further proceedings for the production of Government records in connection with the instant appeal shall conform, as near as may be, to the procedure outlined in the next to the last paragraph of this opinion.

HERBERT J. SLAUGHTER, *Deputy Chairman.*

I CONCUR:

THOMAS M. DURSTON, *Member.*

Paul H. Gantt, *Chairman*, disqualified himself pursuant to 43 CFR 4.2(a).

**PROPOSED ESTABLISHMENT OF A REFUGE FOR MIGRATORY BIRDS
AT GRAYS LAKE, IDAHO**

Migratory Bird Conservation Act: Generally

Section 6 of the Migratory Bird Conservation Act requires approval of title by the Attorney General only when the refuge land is being purchased or rented for a monetary consideration.

M-36664 (Supp.)

August 10, 1964

To: ASSISTANT SECRETARY FOR FISH AND WILDLIFE

Subject: SUPPLEMENT TO SOLICITOR'S OPINION M-36664 OF DECEMBER 19, 1963

You were advised by Solicitor's Opinion M-36664 of December 19, 1963, that the Palisades Act of September 30, 1950, 64 Stat. 1083 (1950), was not intended by Congress to prevent the establishment of a wildlife refuge at Gray's Lake, Idaho, by the Secretary of the Interior under the general authority of the Migratory Bird Conservation Act, 45 Stat. 1222 (1929), as amended, 16 U.S.C. 715 *et seq.* (1958). Accordingly, we stated that a refuge could be established at Gray's Lake pursuant to the provisions of the Migratory Bird Conservation Act *supra*. However, we indicated further that since it was our understanding that a lease arrangement was to be used for the

establishment of the refuge, and that the lease called for the passing of a monetary consideration, title to the land covered by the lease would have to be approved by the Attorney General.

You have now requested that we consider additional facts with respect to the proposed establishment of a refuge at Gray's Lake. In particular, we note that a form of "use agreement" is under consideration in the place of a lease. The use agreement will be between the owners of land adjacent to Gray's Lake and the Government, and will provide for the utilization by the Bureau of Sport Fisheries and Wildlife of approximately 13,000 acres of land within the meander line of the lake for the purpose of establishing a refuge. Although title to this land has been in dispute for many years, the landowners at Gray's Lake, who claim title to this land, have indicated that they are willing to enter into a use agreement covering a specified area for a period of 99 years. This agreement provides to the Government all of the advantages of a lease and preserves to the landowners and the Government their respective long-standing claims to the lands, but does not require the passing of a monetary consideration.

The contemplated use agreement recites the fact that there has been no judicial determination of the extent of the rights of the parties in the land necessary to establish the refuge. It further provides that the owners of land adjacent to the proposed refuge area and the Government will cooperate to promote the utilization of the controverted lands for grazing, for other beneficial uses, and as a wildlife refuge, without either party waiving any of its respective rights to the land in controversy. Under the new agreement the Department of the Interior would be required to pay no money for clarification of its right to the use of the 13,000 acres for 99 years. The Department would agree only that the landowners could continue to utilize certain areas within the Gray's Lake meander line that do not lie within the proposed refuge boundaries.

The landowners for the term of the agreement would specifically assent to the utilization of the proposed refuge area by the Government for construction, operation, and maintenance of a wildlife refuge for migratory birds and other wildlife. This utilization would include the exclusive right to maintain a body of water and to manage that body of water by dams, dikes, fills, ditches, water-control structures, roads, fences, and other construction activities. Execution of the agreement and creation of the refuge would be under the general authority of the Secretary of the Interior under the Migratory Bird Conservation Act, *supra*, and the statute authorizing cooperative agreements involving the improvement, management, use and pro-

August 10, 1964

tection of public lands, 74 Stat. 506 (1960); 43 U.S.C. sec. 1363 (supp. 1959-62). You advise that it also is contemplated that a public land withdrawal will be effected with respect to the interest of the United States in the 13,000 plus acres that are to be included in the wildlife refuge and for certain public lands which are outside the meander line established for Gray's Lake and have frontage upon said meander line. This withdrawal will be secondary to previous withdrawals for the Bureau of Indian Affairs and will be subject to all prior existing rights, including those of owners of land adjoining the Gray's Lake meander line.

In our opinion of December 19, 1963, we advised that in certain circumstances titles to tracts of land should be submitted to the Attorney General for his opinion with reference to the validity of the titles. Under the proposal which is outlined above, no payment is to be made to the landowners for their assent to utilization by the United States of the 13,000 plus acres. Thus, a long-standing controversy with respect to this land will be settled on a favorable basis so as to allow its use for an extremely valuable departmental objective. It is our opinion that there is now no necessity to obtain opinions by the Attorney General as to the title of the 13,000 plus acres within the meander line that will be developed for refuge use. This opinion is founded on the theory that the Department will be proceeding under its own claim of right to the lands and also will be safeguarded by the "use agreement" with the owners of lands around the perimeter of the lake, against claims to the lake area that will be within the refuge boundaries. The agreement should be recordable and care should be taken in obtaining accurate ownership data as to these bordering lands to assure that agreements are made with all necessary parties.

Section 6 of the Migratory Bird Conservation Act, 45 Stat. 1223 (1929), as amended, 16 U.S.C. 715e (1958), requires approval of title by the Attorney General when conveyances of interests in property require the passing of a monetary consideration. The act states, "no payment shall be made for any such area until title thereto shall be satisfactory to the Attorney General, * * *." We read this section of the act as only requiring title approval by the Attorney General where there is "payment" for an interest in land with a monetary consideration. Such is not the case for the proposed use agreement. Section 355 of the Revised Statutes, 40 U.S.C. 255 (1958), likewise has no application in regard to the proposals which you have set out. Since there is no monetary consideration passing, there is not a

"purchase" of land as contemplated by the Statute; thus, an opinion of the Attorney General is not required. 28 Op. A.G. 413.

Accordingly, we see no legal obstacles to the establishment of a refuge at Gray's Lake, Idaho, through the use of the agreement which your office has described. In addition, there is no need to send files to the Attorney General for title opinions on the land which is to be used for the refuge.

EDWARD WEINBERG,

Acting Solicitor.

August 14, 1964

The Honorable
The Secretary of the Interior
Washington 25, D.C.

My Dear Mr. Secretary:

This is in response to the Acting Secretary's letter of July 20, 1964, asking for the Opinion of the Attorney General as to the authority of the United States to enter into certain agreements for exchanges of electrical capacity and energy. The letter states that the agreements will be executed in substantially the form of the Canadian Entitlement Exchange Agreement, Draft No. 6, July 2, 1964, of which the letter attaches a copy. The United States would be a party thereto through the Bonneville Power Administrator, who would be acting both in his capacity as such Administrator and as a representative of the United States entity designated under the Treaty with Canada relating to international cooperation in water resource development of the Columbia River Basin, signed on January 17, 1961.¹

The Acting Secretary's letter enclosed a memorandum of your Solicitor explaining the purpose and effect of the Canadian Entitlement Exchange Agreements and the obligations of the United States thereunder. The memorandum analyzes the scope of the statutory authority of the Secretary to enter into exchange agreements and points out that his authority with respect to the Columbia River Power System has been delegated to the Administrator. Your Solicitor also states that he assumes that the United States entity, when it is designated pursuant to the Treaty, will authorize the Administrator to act for it with respect to the performance of its obligations under the Canadian Entitlement Exchange Agreements.

¹For the Treaty, see 107 Cong. Rec. 4131 (1961) *et seq.* For the exchange of notes on sale of the Canadian entitlement, see 50 Dep't State Bull, 203-206 (1964).

July 20, 1964

Upon the basis of the above-mentioned analysis and of the stated assumption, your law officer concludes that in his opinion

***** each of the Canadian Entitlement Exchange Agreements, if executed by the Administrator in the form referred to above, and when delivered *****, will be a valid and binding agreement of the United States enforceable in accordance with its terms.

Subject to the same assumption, I concur in that conclusion.

Sincerely,

ROBERT F. KENNEDY,
Attorney General.

CANADIAN ENTITLEMENT EXCHANGE AGREEMENTS

Power: Generally

An agreement providing for the delivery by one party of a quantity of power which cannot, with certainty, be determined in return for the delivery by the other party of stated amounts of power over the same period constitutes a power-for-power exchange agreement.

The advantages at federal hydroelectric projects to be realized from implementing the "Treaty between Canada and the United States of America relating to cooperative development of the water resources of the Columbia River basin," through the execution of exchange agreements support, as a matter of law, the Bonneville Power Administrator's determination of "economical operation" as required by Section 14 of the Reclamation Project Act of 1939 (53 Stat. 1197, 43 U.S.C. 389) and Section 5(b) of the Bonneville Project Act (50 Stat. 734, 16 U.S.C. 832d (b)).

Contracts: Authority to Make

Section 14 of the Reclamation Project Act of 1939 (53 Stat. 1197; 43 U.S.C. 389) and section 5(b) of the Bonneville Project Act (50 Stat. 734, 16 U.S.C. 832d (b)) authorize the Bonneville Power Administrator to enter into exchange agreements, subject only to his determination that such agreements are in the interest of the United States and economical operation.

Contracts: Comptroller General

The opinion of the Comptroller General (Dec. Comp. Gen. B-149016, B-149083, July 16, 1962) affirming the authority of the Administrator to execute exchange agreements pertaining to the output of the generation to be constructed in connection with the Hanford NPR is applicable as affirmation of such authority to execute Canadian Entitlement Exchange Agreements.

Statutory Construction: Legislative History

The legislative history of section 2(f) of the Bonneville Project Act as amended on October 23, 1945 (59 Stat. 546; 16 U.S.C. 832a(f)), expresses an intent on the part of Congress to authorize the Bonneville Power Administrator to conduct his affairs in a manner which equates his authority with that of private business enterprises.

Water Compacts and Treaties

The Bonneville Power Administrator, acting for and on behalf of the United States Entity designated pursuant to the Canadian Treaty, is carrying out the directives of Article VIII of the Treaty and the Exchange of Notes made pursuant thereto in executing the Canadian Entitlement Exchange Agreements.

Bonneville Power Administration

The Bonneville Power Administrator, acting as such and for and on behalf of the United States Entity designated pursuant to the Canadian Treaty, is authorized to execute appropriate exchange agreements to effect the unconditional assurance of the delivery of power agreed to be equivalent to Canada's entitlement to downstream power benefits in order to implement the exchange of ratifications of the Canadian Treaty and thereby acquire for the benefit of the United States the advantages flowing therefrom.

See Attorney General Opinion August 14, 1964, p. 314.

M-36669

July 20, 1964

To: THE SECRETARY OF THE INTERIOR

Subject: CANADIAN ENTITLEMENT EXCHANGE AGREEMENTS

You have furnished me with a form (Draft No. 6, dated July 2, 1964) of the Canadian Entitlement Exchange Agreements and requested my opinion regarding the authority of the Administrator of the Bonneville Power Administration to execute such agreements on behalf of the United States.

It is proposed that the Administrator would execute the agreements in his capacity as Administrator and for and on behalf of the United States Entity designated pursuant to the Treaty between the United States of America and Canada relating to the cooperative development of water resources of the Columbia River Basin (the "Treaty"), signed at Washington, D.C., January 17, 1961. The other parties to each of the agreements are to be Columbia Storage Power Exchange ("CSPE"), a nonprofit corporation organized in the State of Washington, and one of the many publicly and privately owned utilities of the Pacific Northwest participating with CSPE in the purchase and disposition in the United States of the downstream power benefits to which Canada is entitled pursuant to the Treaty.

July 20, 1964

Background of Treaty Negotiations

Upon its entry into force, the Treaty will represent the culmination of more than 20 years of effort on the part of the United States and Canada to arrive at a basis for joint development of the water of the Columbia River Basin to their mutual advantage.

In March of 1944, the governments of the United States and Canada referred to the International Joint Commission the problem of determining if a greater use of the Columbia River would be feasible and advantageous to the two countries.¹ The International Joint Commission established the International Columbia River Engineering Board to assist in carrying out this responsibility, and extensive studies and analyses of the problems of development of the river basin and the sharing of resulting benefits were made.² Following completion of these studies, the two countries appointed negotiating teams to work out the terms of a Treaty. The negotiators³ first met on February 11, 1960. Following almost a year of intensive negotiations, the Treaty was signed on January 17, 1961, by President Eisenhower for the United States and by Prime Minister Diefenbaker for Canada. (See: Executive C, 87th Cong., 1st Sess.)

The Columbia River

The Columbia River has its origin at Lake Columbia in British Columbia and flows some 480 miles in Canada—northerly for slightly less than 200 miles then turning sharply and flowing southerly approximately 300 miles—before crossing the international border into the United States. It then continues for about 740 miles to the Pacific Ocean. The river falls 2,650 feet; 1,360 feet being on the Canadian

¹ The International Joint Commission was established in accordance with Article VII of the Boundary Waters Treaty of 1909 between the United States and Canada. The Commission, among other things, is authorized "to examine into and report upon the facts and circumstances of the particular questions and matters referred" and to make reports to both Governments.

² See "Principles for Determining and Apportioning Benefits from Cooperative Use of Storage of Waters and Electrical Interconnection within the Columbia River System" submitted to the United States and Canada by the International Joint Commission on December 30, 1959.

³ The Canadian negotiators were:

Hon. E. D. Fulton, M.P., P.C., Q.C., Minister of Justice, Chairman;

Mr. Gordon Robertson, Deputy Minister, Department of Northern Affairs and Natural Resources;

Mr. A. E. Ritchie, Assistant Under Secretary, Department of External Affairs; and

Mr. E. W. Bassett, Deputy Minister of Lands and Forests, Province of British Columbia.

The United States negotiators were:

Mr. E. F. Bennett, Under Secretary of the Interior, Chairman;

Lt. Gen. E. C. Itschner, Chief, United States Army Corps of Engineers; and

Mr. I. B. White, Deputy Assistant Secretary, Department of State.

side of the border and 1,290 feet being in the United States. Approximately 30 percent of the flow of the river at its mouth originates in Canada.

The portion of the Columbia River within the United States has been developed by existing or licensed projects to the extent that 93 percent of the total available head has been used. With the potential development of the Ben Franklin project, referred to in Article IX of the Treaty, all available hydroelectric sites will have been developed. On the other hand, the river flows wholly unregulated in Canada. Wide fluctuations in seasonal streamflows are characteristic of the Columbia River. The highest streamflow recorded at Revelstoke in British Columbia (located above Arrow Lake) was 99 times the lowest streamflow. For purposes of comparison, the St. Lawrence River has a fluctuation between high and low streamflows of approximately two to one.

The wide range of fluctuation makes apparent the benefits to be realized for flood control and hydroelectric power through storage facilities in Canada. In the United States, eleven dams on the main stem of the Columbia River have been, or are being, constructed to serve the needs of flood control, navigation, reclamation, recreation and hydroelectric power generation. Five of the dams are owned by public utility districts of the state of Washington,⁴ and six are owned by the United States.⁵ The federally owned dams have an installed capacity of 6,665,000 kilowatts, with an ultimate estimated capability of 12,133,000 kilowatts. The nonfederal projects have an installed capacity of approximately 3,000,000 kilowatts with an ultimate estimated capability of over 4,500,000 kilowatts. The federal investment in these multipurpose projects is in excess of \$1,790,000,000 and the nonfederal investment exceeds \$850,000,000.

The Treaty

The Treaty was designed so that through cooperative action, the two countries could share in realizing the potential benefits of development of the Columbia River Basin and could eliminate the disadvantages inherent in the lack of such cooperation. Generally, the Treaty provides that:

- (1) Canada will, at its own expense, construct three large storage

⁴ Grant County P.U.D. owns the Priest Rapids and Wanapum projects, Chelan County P.U.D. owns the Rock Island and Rocky Reach projects, and Douglas County P.U.D. is constructing the Wells project.

⁵ The federal dams on the Columbia River are: Grand Coulee, Chief Joseph, McNary, John Day, The Dalles, Bonneville.

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dams in British Columbia so as to provide 15,500,000 acre-feet of storage⁶ for use at hydroelectric projects in the United States.

(2) The Canadian storage projects will be operated for power generation, and 8,450,000 acre-feet thereof will be operated for purposes of flood control in the United States, as required by the United States Entity.⁷

(3) Canada will provide the necessary reservoir area in British Columbia to enable the construction of the Libby project in the United States.⁸

(4) Neither country will divert any water from its natural channel within the Columbia River Basin so as to alter the flow across the international border, except as specifically provided in Article XIII.⁹

(5) The downstream power benefits resulting from the Treaty (the increase in hydroelectric generation in the United States attributable to the Canadian storage) will be shared fifty-fifty with Canada. Except for sales of Canada's share (the Canadian entitlement) in the United States under Article VIII, the United States will deliver the Canadian entitlement to Canada at the border.¹⁰

(6) The United States will pay to Canada a total of \$64,400,000 for flood control benefits.¹¹

The United States share of the downstream power benefits accruing at existing or licensed projects by the creation of the 15,500,000 acre-feet of storage in the upper Columbia River Basin will be the equivalent of the output of another Grand Coulee Dam plus almost two additional Bonneville Dams. Approximately 75 percent of these benefits will be realized at the federal projects on the Columbia River and will accrue directly to the federal government. The remainder will be realized at the projects owned by public utility districts of the

⁶ Mica Creek storage—7,000,000 acre-feet; Arrow Lakes storage—7,100,000 acre-feet; Duncan Lake storage—1,400,000 acre-feet (Article II).

⁷ Mica Creek storage will provide 80,000 acre-feet of flood control storage; Arrow Lakes storage will provide 7,100,000 acre-feet of flood control storage; and Duncan Lake storage will provide 1,250,000 acre-feet of flood control storage (Article IV of the Treaty). This storage is to be operated for flood control for a period of 60 years from the exchange of instruments of ratification. The United States entity may call upon additional storage which may exist in Canada for flood control operation upon payment of compensation as specified in the Treaty. (See Article IV (2) and Article VI (3).)

⁸ Article XII provides that the United States has the option to commence construction of the Libby project within five years from the ratification date. The project must be completed within seven years of commencement of construction. Canada agrees to make available for flooding the land in Canada necessary for the storage reservoir associated with the Libby project.

⁹ Article XIII (1) permits no diversions, other than for consumptive use, that would alter the flow at the international boundary without the consent of the two countries evidenced by an exchange of notes. The remaining paragraphs of Article XIII authorize certain specific diversions commencing at designated times after the ratification date.

¹⁰ See Article V and Article VII.

¹¹ See Article VI.

State of Washington and will accrue to the parties having interests therein.

The availability of 8,450,000 acre-feet of storage for flood control purposes will enable the realization of the primary objective of the flood control program of the Corps of Engineers as established in its 1958 Report on Water Resource Development in the Columbia River Basin.¹² The annual benefit in the United States of this additional flood control, when evaluated by the method set out in that report, is \$5,700,000.

By the Flood Control Act of 1950 (P.L. 81-516, 64 Stat. 170), Congress authorized the construction of Libby Dam on the Kootenai River in northern Montana. This project will add over 500,000 kilowatts of firm power to base system projects listed in the Treaty. However, the reservoir of the Libby project will back water some 42 miles into Canada and, by reason of Article IV of the 1909 Boundary Waters Treaty, special agreement with Canada is required for its construction. The Treaty provides that agreement.¹³

Negotiations Subsequent to Signing of Treaty

Within less than two months after the signing of the Treaty, the United States was prepared to exchange ratifications, the Senate promptly having given its advice and consent to ratification thereof by a vote of 95 to 1. (See: Executive Report No. 2, 87th Cong., 1st Sess.; 107 Cong. Rec. 4131-45, March 16, 1961.) However, Canada was not then prepared to take the steps necessary and preliminary to ratification. Issues had arisen in that country relative to certain aspects of the Treaty, including the policy question of whether the Canadian entitlement would be utilized initially to meet power needs in British Columbia or disposed of on a long-term basis in the United States.

Following the May 10-11, 1962, Hyannis Port talks between President Kennedy and Prime Minister Pearson¹⁴ negotiations were re-

¹² Report by the Division Engineer, U.S. Army Engineer Division, North Pacific, to the Chief of Engineers, dated June 1958, published as Volume II, Appendix A, H.R. Doc. No. 403, 87th Cong., 1st Sess. 1962).

¹³ See Article XII.

¹⁴ The joint communique issued by the White House Press Secretary and the Office of the Prime Minister said in part:

9. "While it is essential that there should be respect for the common border which symbolizes the independence and national identity of two countries, it is also important that this border should not be a barrier to cooperation which would benefit both of them. Wise cooperation across the border can enhance rather than diminish the sovereignty of each country by making it stronger and more prosperous than before."

10. "In this connection the President and the Prime Minister noted especially the desirability of early progress on the cooperative development of the Columbia River. The Prime Minister indicated that if certain clarifications and adjustments in arrangements proposed

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sumed between the two Governments looking toward the completion of arrangements to facilitate the Treaty's ratification.¹⁵

Discussions between the Government of Canada and the Province of British Columbia had resulted in a policy decision within Canada that disposal of the Canadian entitlement in the United States on a long-term basis was essential to Canadian ratification. Therefore central to these arrangements was agreement upon a basis for such a long-term disposition.

Exchange of Notes of January 22, 1964

In the light of these circumstances and armed with the results of studies and investigations relating to the feasibility of simultaneous disposition of the block of power comprising both the Canadian and the United States portions of the power benefits from Canadian storage, the negotiating teams of the two countries met in Ottawa in December of 1963 to complete agreement on the terms of a sale. The Canadian representatives had declared that they desired to effect the sale of the entire Canadian entitlement to a single purchaser, and the United States had determined that this could best be accomplished through private financing, secured by contracts with the various utilities of the Pacific Northwest. As a result, nonfederal parties interested in the purchase of the Canadian entitlement participated in these international negotiations. Their successful conclusion was announced jointly at the White House by President Johnson and Prime Minister Pearson on January 22, 1964.

A major problem posed in considering a sale for a term of years related to the uncertain quantity of power represented by the Canadian entitlement. The entire purchase price was to be paid in advance in a lump sum. The purchasing utilities therefore required certainty

earlier could be agreed on, to be included in a protocol to the treaty, the Canadian Government would consult at once with the provincial Government of British Columbia, the province in which the Canadian portion of the river is located, with a view to proceeding promptly with the further detailed negotiations required with the United States and with the necessary action for approval within Canada. The President agreed that both Governments should immediately undertake discussions on this subject looking to an early agreement."

¹⁵ The United States, negotiators were:

Mr. I. B. White, United States Minister to Canada, Chairman; Mr. C. F. Luce, Bonneville Power Administrator; and Maj. Gen. W. W. Lapsley, Division Engineer, North Pacific Division, Corps of Engineers.

The Canadian negotiators were:

Hon. Paul Martin, P.C., Q. C., Secretary of State for External Affairs, Chairman; Mr. Gordon Robertson, Secretary to the Cabinet; Mr. A. E. Ritchie, Assistant Under Secretary, Department of External Affairs; and Dr. Hugh L. Keenleyside, Chairman, British Columbia Hydro and Power Authority.

as to the amount of power that would be delivered over the term of the sale. However, the Treaty provides, in Annex B, for a determination of the power benefits attributable to the Canadian storage for each year, calculated five years in advance. Such calculation must take into account load forecasts, new resources, and similar judgment factors to be exercised by the United States and Canadian entities. To permit the requisite degree of certainty in these circumstances it was agreed in the exchange of notes of January 22, 1964, relating to the sale of Canada's entitlement to downstream power benefits, between the United States and Canada that one of the general conditions of the sale to be specified under Article VIII of the Treaty would be the assurance, if deemed necessary by the United States, of the delivery of a specific amount of power over the period of the sale. The exchange of notes provides, therefore, that:

If necessary to accomplish the sale of Canada's entitlement to downstream power benefits in accordance with this Attachment, the United States entity shall assure unconditionally the delivery to or for the account of the Purchaser, by appropriate exchange contracts, of an amount of power agreed between the United States entity and the Purchaser to be the equivalent of the entitlement during the period of the sale. (Paragraph B.5)

On the basis of the understanding expressed in the exchange of notes, the United States has agreed to use its best efforts to find a single purchaser for the Canadian entitlement for a term of 30 years from the date upon which each of the three storage dams was scheduled to be fully operative (April 1, 1968 for Duncan Lake; April 1, 1969 for Arrow Lakes; and April 1, 1975 for Mica Creek). Such purchaser is to pay to Canada, in full payment for the power benefits to which Canada is entitled under the Treaty for the period of the sale, the sum of \$254,400,000 in United States funds on October 1, 1964. In return, Canada has agreed to use its best efforts to accomplish the things necessary to ratification of the Treaty as soon as possible. The January 22, 1964, exchange of notes more fully sets forth the terms upon which Canada is to sell and a single purchaser in the United States is to purchase the Canadian entitlement as a condition to the exchange of instruments of ratification of the Treaty.

The Canadian government has agreed that British Columbia Hydro and Power Authority will be designated as the Canadian Entity pursuant to Article XIII of the Treaty. It is my understanding that the United States will designate the Division Engineer, North Pacific Division, Corps of Engineers, Department of the Army, and the Administrator, Bonneville Power Administration, as the United States Entity.

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Financing the Purchase

Columbia Storage Power Exchange (CSPE), a nonprofit corporation organized under the laws of the State of Washington, has been organized for the sole purpose of purchasing the Canadian entitlement for disposition within the United States. The members of the board of directors of CSPE are individuals versed in the field of hydroelectric operations in the Pacific Northwest. Each individual member has been nominated by a Pacific Northwest public utility district, municipality, or private utility owning, or having an interest in one or more of the nonfederal projects on the main stem of the Columbia River which will receive direct benefits from the operation of the Canadian storage projects.

It is proposed that upon purchase by CSPE of the Canadian entitlement for a 30-year term, the right to that entitlement will be immediately transferred to publicly and privately owned utilities in the Pacific Northwest. Each of these participating utilities will succeed to that portion of CSPE's right to which it has subscribed. In consideration of that transfer and of the exchange to be made with the Administrator, each participating utility will agree to pay to CSPE over the 30-year period of the sale an amount equal to its share of CSPE's costs and expenses in acquiring the Canadian entitlement. These agreements are the basic security for the payment of the revenue bonds to be sold to finance the lump-sum purchase price to be paid Canada. As a part of this transaction, each of the participating utilities will exchange with the United States the utility's proportionate right to Canadian entitlement in return for stipulated amounts of capacity and energy to be made available from the Columbia River Federal Power System. By this means, the Bonneville Power Administrator, acting for the United States, will receive the entire Canadian entitlement for the term of the sale in exchange for stipulated amounts of capacity and energy.

The Exchange Agreements

The arrangements described in the preceding paragraph are embraced in the Canadian Entitlement Exchange Agreements.

Each of the participating utilities will execute a separate tri-partite contract with CSPE and the Bonneville Power Administrator; each agreement being identical except for the percentage of participation by the particular signatory utility and the points at which capacity and energy are to be delivered. Each contract will impose upon the

signing utility an obligation to "back-stop" the other participating utilities to the extent of increasing its percentage up to 25 percent of its original obligation if any other participating utility should default.

Provision is made that in the event the Bonneville Power Administrator should fail in whole or in part to perform his obligations to deliver power, the payments to be made to CSPE by the participating utility suffering thereby will be reduced in proportion to the Administrator's default, and that the Administrator will pay to such participating utility the amount by which its payments were reduced. Any payment so made by the Administrator to a participating utility is to be immediately paid by such utility to CSPE. The amount to be paid by the Administrator in these circumstances constitutes the limit of the liability of the United States to CSPE arising out of any such default.

A discount rate of 4½ percent was used in computing the present worth, as of October 1, 1964, of the lump-sum payment to be made to Canada.¹⁶ The agreements provide that in the event the net interest cost actually achieved on the sale of the revenue bonds is below that discount rate, the benefits from the resulting reduction in annual costs to the participants will be reflected in a reduction, to the extent set forth in the agreements, in the amount of capacity and energy to be delivered by the United States. The power benefits that would accrue to the federal government as a result of obtaining a more favorable net interest cost could amount to as much as \$14,000,000.

The agreements further provide that the participating utilities may, upon five years' notice, readjust the ratio between capacity and energy to be made available by the Administrator within the limits expressed in the agreement. The Treaty (Article VIII(2)) expressly authorizes the United States and Canadian Entities to arrange and carry out such readjustments, and the "Attachment Relating to Terms of Sale" included in the January 22, 1964 exchange of notes, provides in paragraph A 5 that CSPE "shall have and may exercise the rights of the British Columbia Hydro and Power Authority [Canadian Entity] relating to the negotiation and conclusion with the United States entity, of proposals relating to exchanges authorized by Article VIII(2) of the Treaty with respect to any portion of Canada's entitlement to downstream power benefits sold to the Purchaser [CSPE]."

I am advised that the exchange agreements will be placed in escrow after having been signed by all the parties, and that they will only

¹⁶ The discount rate for purposes of computing the payment to Canada was 4½ percent, however, a net interest cost of 4.59 percent will equate the assumed quantities of power times the agreed costs of power to the purchase price required to be paid to Canada.

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be delivered after the exchange of instruments of ratification of the Treaty has been accomplished.

Legal Basis for Authority to Execute Agreements

a. *Agreement provides for an exchange of power.*

The Canadian Entitlement Exchange Agreements are clearly agreements providing for an exchange of power between the participating utilities and the United States. The word "exchange" as used in the law of personal property is defined in Black's Law Dictionary (3d ed.), p. 713, as follows:

Exchange is a contract by which the parties give, or agree to give, one thing for another, neither thing, or both things, being money only [citations] * * *.

The clear purpose of the Canadian Entitlement Exchange Agreements is to provide for the delivery to the Administrator of the power benefits to which Canada is entitled pursuant to the Treaty and to return, in exchange therefor, a stipulated amount of capacity and energy for each of the years during the term of the agreements. The thing to be delivered to the Administrator is a quantity of power which cannot, with certainty, be determined for the period of the agreement but which constitutes a valuable power resource to the Administrator. The amount of power to be exchanged therefor is determined for each of the years with precision. A power-for-power exchange is the result.

b. *Exchange Authority under the Reclamation Project Act of 1939 and the Bonneville Project Act.*

Section 14 of the Reclamation Project Act of 1939 (53 Stat. 1197; 43 U.S.C. 389) provides in part as follows:

The Secretary [of the Interior] is further authorized, for the purpose of orderly and economical construction or operation and maintenance of any project, to enter into such contracts for exchange or replacement of water, water rights, or electric energy or for the adjustment of water rights, as in his judgment are necessary and in the interests of the United States and the project.

This section vests in the Secretary of the Interior¹⁷ the express authority to enter into agreements for the exchange of electric energy, subject only to his determination that such agreements are "for the purpose of orderly and economical construction or opera-

¹⁷ Order No. 2860, as amended (27 F.R. 591), delegated this authority to the Bonneville Power Administrator for Pacific Northwest projects.

tion and maintenance of any project * * * as in his judgment are necessary and in the interests of the United States and the project."

Section 5(b) of the Bonneville Project Act (50 Stat. 734, 16 U.S.C. 832d(b)) provides:

The administrator is authorized to enter into contracts with public or private power systems for the mutual exchange of unused excess power upon suitable exchange terms for the purpose of economical operation or of providing emergency or break-down relief.

Section 2(f) of the Act provides:

Subject only to the provisions of this chapter, the Administrator is authorized to enter into such contracts, agreements, and arrangements, including the amendment, modification, adjustment, or cancellation thereof and the compromise or final settlement of any claim arising thereunder, and to make such expenditures, upon such terms and conditions and in such manner as he may deem necessary.

The authority conferred upon the Administrator¹⁸ by these two sections, subject only to the requisite administrative determinations, can leave no doubt as to the intent of Congress to vest the Administrator with authority to enter into contracts such as the Canadian Entitlement Exchange Agreements.

The broad authority conferred upon the Administrator by Section 2(f) of the Bonneville Project Act contains only the restriction that such authority is "subject only to the provisions of this chapter." The clear intent of the section is to give to the Administrator the freedom to conduct his affairs in a manner which equates his authority with that of the private business enterprises with which he must transact his affairs.¹⁹

Central to the authority to enter into exchange agreements conferred by the Reclamation Project Act of 1939 and the Bonneville Project Act is the requirement for a finding of "economical operation." Under both Acts the determination is committed to the discretion of the Secretary.²⁰ In the exercise of that discretion the

¹⁸ By Reorg. Plan No. 3 of 1950, effective May 24, 1950 (15 F.R. 3174, 64 Stat. 1262) the functions of the Administrator were transferred to the Secretary of the Interior. Orders No. 2563 (15 F.R. 3193), and 2860, as amended (27 F.R. 591), delegated this authority to the Administrator.

¹⁹ The House Committee report on the amendment of October 23, 1945, of Section 2(f) (59 Stat. 546, 547) contains the following:

"The purpose of this bill is to permit the Bonneville Power Administrator to use better methods of administration in carrying out his present functions. * * * They would enable the Administrator to employ business principles and methods in the operation of a business enterprise and would eliminate some hampering procedures designed primarily for agencies conducting governmental regulatory programs." H.R. Rep. No. 777, 79th Cong., 1st Sess., (1945) p. 3.

²⁰ Dec. Comp. Gen. B-105397 (September 21, 1951).

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Secretary must look to the impact the proposed exchange will have upon the comparative costs of existing and future power producing projects, the power benefits to be realized at the complex of projects for which he has marketing responsibility, the additional flexibility in operations which may be achieved, and to other similar factors.

It has been established that Canada has made the sale of its entitlement to downstream power benefits a necessary adjunct to the ratification of the Treaty. The substantial Treaty benefits that will accrue directly to the federal generating projects in the northwest have already been described. Their realization is, of course, dependent upon the Treaty's coming into force. It has further been established that the sale of the Canadian entitlement cannot be effected unless the purchasers are assured of the delivery of power in a specific amount agreed as the equivalent of the Canadian entitlement during the term of the sale. I am advised that it has been determined that it is necessary to give such assurance in order to accomplish the sale within the United States in accordance with the January 22, 1964, exchange of notes. The Secretary may also take into consideration, in making his determination of economical operation, not only the benefits to be derived directly at the federal projects by the implementation of the Treaty but those additional benefits that intrinsically arise under the exchange by reason of the exchange process.

c. Determination of Economical Operation.

The Canadian Entitlement Exchange Agreements recite that the Bonneville Power Administrator has determined that the execution of the agreements will make available to the United States large quantities of electric energy to meet actual and prospective needs for such energy in the Pacific Northwest, that, as a result of such exchange, the Administrator will be enabled to increase the net revenues to be received in the marketing of power from the Columbia River Power System (as defined in the exchange agreements), and that such exchange will result in more economical operation of the Columbia River Power System.

The necessity for such determinations, in accordance with Section 5(b) of the Bonneville Project Act and Section 14 of the Reclamation Project Act of 1939, was commented upon in the opinion of the Comptroller General of July 16, 1962, relating to the Hanford Exchange Agreements.²¹

²¹ "It may be noted that both provisions contain the requirement, so far as here material, that exchange agreements be for the purpose of 'economical operation.' It is thus a prerequisite to execution of the proposed agreement that the Administrator determine it to be

In support of a determination that the Canadian Entitlement Agreements will contribute to "economical operation" the following factors are of particular significance:

1. The United States share of the prime power benefits to be realized from ratification of the Treaty at Grand Coulee and all other Columbia River projects for which the Administrator has marketing responsibility.
2. The power that will be generated in the United States as a result of the Libby Project 544,000 kilowatts).
3. A comparison of the cost of alternative sources of power to meet the power requirements on the Columbia River Federal Power System. I am advised that on the "next added" basis which underlies the Treaty, the United States share of Treaty power is substantially lower in cost than power from alternative sources.
4. The economics associated with the flexibility of operation afforded by incorporation of the Canadian entitlement into the federal system.
5. The net power gains to be realized over the term of the exchange by retention in the federal system of the benefits from the Canadian storage minus the average energy and capacity to be delivered in exchange.
6. The surplus secondary energy on the federal system which can be converted to firm energy.
7. In addition to the foregoing, there are, of course, the substantial flood control benefits that can be realized only if the Treaty becomes effective.

It is not intended that the foregoing factors should limit the matters to be taken into account in determining that the execution of the Canadian Entitlement Exchange Agreements will contribute to economical operation, but the obvious conclusion to be drawn is that such factors support that determination as a matter of law.

d. Authority of the United States Entity.

In the execution of the Canadian Entitlement Exchange Agreements, the Administrator will be acting for and on behalf of the United States Entity. It has previously been noted that the Administrator and the Division Engineer, North Pacific Division, Corp of Engineers, Department of the Army, are to be designated as the United States

in the interest of economical operation. We assume that such a determination has been or will be made. The General Accounting Office does not have sufficient information to be able to express an opinion whether the agreement would or would not promote economical operation of BPA's functions. It seems to us that any such opinion must be based on assumptions concerning future operations of the NPR and future costs of new power producing projects." Dec. Comp. Gen. B-149016, B-149083, July 16, 1962, p. 2.

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Entity. I am advised that the Entity will authorize the Administrator to act for it in the execution and performance of these exchange agreements relating particularly to the marketing aspects of the implementation of the Treaty.

Article VIII of the Treaty provides in effect that disposals of the Canadian entitlement within the United States shall be in accordance with general conditions agreed upon between the two governments.

The Treaty further vests the United States Entity with authority to approve the use of the improvement in stream flow in the United States for hydroelectric power purposes upon "such conditions, consistent with the Treaty, as the entity or authority considers appropriate" (Article XI), to carry out the disposition of the Canadian power entitlement in the United States (Article XIV(2)(i)), and "to formulate and carry out the operating arrangements necessary to implement the Treaty" (Article XIV(1)).

The January 22, 1964, exchange of notes states that "it would be in the public interest of both countries if Canada's entitlement to downstream power benefits could be disposed of, as contemplated by Article VIII of the Treaty, in accordance with general conditions and limits similar to those set out in detail in the attachment hereto, * * *." The parameters within which the United States Entity is directed to arrange for the initial disposition of the Canadian entitlement were, therefore, set forth in the "Attachment" to the exchange of notes. In the execution of the Canadian Entitlement Exchange Agreements, the United States Entity is therefore acting under and by reason of the authority of Article VIII of the Treaty.

e. Hanford Exchange Agreements.

In 1963 the Bonneville Power Administrator entered into a number of contracts providing for the exchange of the output of the generating facilities to be constructed by nonfederal interests²² in conjunction with the Hanford New Production Reactor for capacity and energy from the federal system. The Hanford agreements provide that the total output of the generation at the Hanford plant will be exchanged with the Administrator for amounts of capacity and energy from the federal system computed by applying the Bonneville rate schedules to the financing expenses paid by each participating utility. A close analogy can be drawn between those agreements and the Canadian Entitlement Exchange Agreements.

²² Authorized by Sec. 112(b), P.L. 87-701. 76 Stat. 599, 604 (1962).

The financing of the generating facilities at Hanford was to be done through the issuance of revenue bonds, secured by contracts of sale of portions of the output of the project to 76 utilities in the Pacific Northwest. Because the operation of the generating facilities was dependent upon the operation of the Government's atomic reactor to furnish steam for the generators, the purchasers of the output were insistent upon obtaining, in exchange for their share of the output, a dependable source of supply. The uncertain nature of the availability of power from the generating facilities prompted the necessity for the Hanford exchange agreements. Such agreements enabled the financing of the project. So it is with the Canadian Entitlement Exchange Agreements. The participating utilities are unwilling to finance the purchase of a block of power, when the availability or size of the block is beyond their control. In both instances, the flexibility and magnitude of the Columbia River Federal Power System, with its existing reservoirs for the storage and release of water, puts it in position to make the maximum use of such power, thereby enabling a mutually beneficial exchange.

The authority of the Administrator on behalf of the United States to execute the Hanford exchange agreements was reviewed by the Comptroller General at the request of the Joint Committee on Atomic Energy. The Comptroller General held that:

The proposed agreement is clearly a contract for the exchange of power and comes, therefore, within the general authority granted under the two provisions of law [Section 5(b) of the Bonneville Project Act and Section 14 of the Reclamation Project Act of 1939] quoted above. (Dec. Comp. Gen. B-149016. B-149083 (July 16, 1962))

The distinction between the intent and purpose of the Hanford agreements and the Canadian Entitlement Exchange Agreements is found only in the impact which the Canadian Entitlement Exchange Agreements have upon the implementation of the Treaty. However, in carrying out the common purposes of both agreements, some distinctions are noted.

The amount of power to be made available by the Administrator to the Hanford participants is to be determined from year to year as measured by the expenses of construction and operation of the project. The Canadian Entitlement Exchange Agreements specify the amount of power to be made available each year by the Administrator. The latter method would more nearly follow the "normal" concept of an exchange.

Provision is made in the Canadian Entitlement Exchange Agreements for the payment of liquidated damages to CSPE in the event the

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Administrator shall default in the delivery of all or a portion of the exchange power. While no such provision is contained in the Hanford agreements, they do expressly require the United States, in the event the NPR is discontinued prior to commencement of commercial power generation, to meet certain costs and obligations incurred by the nonfederal interests. And, of course, the obligation of the United States to respond in damages in the event of default is otherwise existent in both cases. However, in the Canadian exchange agreements the Administrator has limited the Government's liability to CSPE to a portion of the debt service to be paid by CSPE equal to the extent of the default. Such provision in the agreements, in the light of all the circumstances, is a "suitable exchange term," as contemplated in Section 5(b), constitutes a "compromise or final settlement of any claim arising thereunder," as contemplated in Section 2(f) of the Bonneville Project Act,²³ and is one of the provisions "as in his judgment are necessary," as provided in Section 14 of the Reclamation Project Act of 1939.

The other distinguishing characteristics of the two sets of agreements do not appear to be material to this opinion.

In response to your request, therefore, I am pleased to advise you that, in my opinion, each of the Canadian Entitlement Exchange Agreements, if executed by the Administrator in the form referred to above, and when delivered pursuant to the escrow arrangement, will be a valid and binding agreement of the United States enforceable in accordance with its terms. I assume, of course, that such Agreements will be duly authorized, executed and delivered by the other parties thereto.

FRANK J. BARRY,
Solicitor.

UNITED STATES v. KENNETH McCLARTY

A-29821

Decided August 27, 1964

Mining Claims: Common Varieties of Minerals

A deposit of building stone fractured to a large extent into regular rectangular shapes and sizes which are suitable for use in construction without further cutting or splitting and which exist in a greater proportion in the deposit than in other deposits of the same stone in the vicinity is not an uncommon variety of building stone which is locatable under the mining laws because

²³ Dec. Comp. Gen. B-149016, B-149083 (July 16, 1962).

it has a special and distinct value where it appears that the regularly shaped stone is usually, by customer preference, mixed with irregularly shaped stone from the claim in construction usage and that the regularly shaped stone is not shown to have any uses over and above those of deposits of ordinary building stone in the locality.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Forest Service, Department of Agriculture, has appealed to the Secretary of the Interior from a decision dated September 24, 1962, by the Director of the Bureau of Land Management vacating a decision of a hearing examiner holding null and void Kenneth McClarty's Snoqueen placer mining claim within the Snoqualmie National Forest, Washington, on the ground that the claim, located after July 23, 1955, is for a common variety of stone which is not locatable under the mining laws within the meaning of section 3 of the act of July 23, 1955, 69 Stat. 368 (1955), 30 U.S.C. § 611 (Supp. IV, 1963).

Section 3 of the act of July 23, 1955, amended the mining law by the provision that:

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

Section 1 of the Materials Act of July 31, 1947, as amended, 69 Stat. 367 (1955), 30 U.S.C. § 601 (1958), authorizes the Secretary of Agriculture to dispose of mineral materials, including but not limited to common varieties of sand, stone, gravel, clay, etc., on public lands of the United States administered by him for national forest purposes under such rules and regulations as he may prescribe upon payment of adequate compensation therefor.

On June 23, 1960, a forest supervisor, acting as the delegate of the Secretary of Agriculture, issued a special use permit to John W. Pope entitling him to remove 50 tons of selected rock for building stone, common variety, for 50 cents per ton from a 2-acre site to be chosen by the permittee and the district ranger between White Pass Lake and Dog Lake within sec. 36, T. 14 N., R. 11 E., or sec. 1, T. 13 N., R. 11 E., Willamette Meridian, which site might include a portion of the pit site under permit to the State Department of Highways for the removal of highway surfacing materials, known as pit site E-137. On August 1, 1960, the ranger and Pope chose a 2-acre site within sec. 36, which was found later to be included in the placer mining claim which McClarty located on the same day.

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On April 1, 1961, the Bureau of Land Management, at the request of the Forest Service, initiated a contest against the mining claim by the filing of a complaint charging that:

1. The building stone for which the claim was located is a common variety not locatable under the mining law;
2. The land embraced within the claim is nonmineral in character;¹
3. A portion of the land embraced in the claim was on the date of its location appropriated to other uses through the issuance of a special use permit by the Forest Service so that this portion of the claim was not locatable at the time the claim was located regardless of the character of the mineral deposit therein.

McClarty controverted the charges, and a hearing was subsequently held at which the Forest Service presented evidence on behalf of the contestant and McClarty submitted his own testimony and that of other witnesses and pictures and samples of the building stone found on the claim.

The hearing examiner found that the claim was located on August 1, 1960, for building stone composed of andesite country rock common to much of the Cascade Range. He observed that in the immediate vicinity of the claim this stone extends along the highway for several miles on both sides and that it has been fractured both horizontally and vertically in such manner that it can be used in its native state with a minimum of processing as veneer on walls, for chimneys, patios, and general rubble construction. There was testimony at the hearing that there is an exposure extending four miles along the highway and two or three miles on each side of the highway (Tr. 13). Similar outcrops of lava have been found in the Mt. Hood area (Tr. 34-41), near Mt. Baker (Tr. 42), and in other parts of Oregon and Washington (Tr. 75-76). The examiner noted that the contestee predicated the validity of his claim upon a higher percentage of usable fractured stone in it than in any other known deposit. He held that, assuming a greater concentration of usable pieces of stone on the claim than elsewhere, the concentration does not distinguish the material from all other fractured andesite in the area and concluded that an economic advantage over other deposits does not give this deposit a special and distinct economic value or use over and above the general run of such material. On this basis, he declared the claim null and void.

On appeal, the Director reviewed the evidence and concluded that

¹ This charge was withdrawn during the course of the hearing as shown in the transcript at page 98 (Tr. 98).

it does not warrant a finding that the building stone on the claim is in the common variety category and that the charges against the claim had not been sustained. The Director did not disagree with the facts found by the examiner but seemed to base his decision on the ground that the deposit of stone on the claim is not a common variety because the stone having the unique fracturing property exists on the claim "*in commercial quantities*" (italics in Director's decision).

In its appeal to the Secretary, the Forest Service contends that the fact that commercial quantities of building stone of a particular type are found on the contestee's claim and not in other deposits in the area cannot make this deposit one of uncommon stone. The contestee reiterates his previous contentions that the unusual jointing or fracturing in nature of the stone into shapes ideally suited for masonry, the varied coloration, and the concentration in merchantable quantity on his claim are the characteristics or properties which give the stone on his claim distinct and special value so that it is not a common variety of stone within the meaning of the act of July 23, 1955.

A review of the testimony reveals that extensive deposits of stone of the same composition as the stone on the claim are exposed in the vicinity and that there are other similar deposits in other areas in the same State. The deposits are the result of lava flows which, in the process of cooling and because of the pressures exerted upon them, were fractured into small pieces. On the Snoqueen claim, there is a higher percentage of rectangular pieces than in the other exposed deposits in the vicinity. The contestee introduced into evidence as Exhibits B and C two pieces of stone which the hearing examiner described as having flat parallel sides. Exhibit B, he said, is approximately two feet long, five inches wide, and two inches thick. Exhibit C is also approximately two feet long, three and one-half inches wide, and three inches thick. The contestee testified that these exhibits are truly representative of 70 percent of the stone that is observable on his claim (Tr. 113). He based his case for an uncommon variety of stone upon the suitability of the elongated rectangular pieces of stone for construction work.

However, his Exhibit A shows 30 pictures of buildings and portions of buildings constructed in whole or in part of stone, which, he said, came "every inch of it from the Snoqueen claim" (Tr. 100). These pictures show a hodge-podge of all shapes: elongated rectangles, long, slender wedges, irregular flagstones, and small polygonal interstitial pieces mortared together into a nonuniform mass of masonry. There is only a general parallel pattern of pieces of stone, no attempt to

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maintain a uniform mortar thickness and no striving for any uniform or repetitive symmetry in the finished design such as exists in an ordinary brick wall. In the walls, a single stone that is wider than others is often allowed to protrude outward several inches and the same is true of longer pieces of stone used in fireplaces and chimneys which are allowed to extend several inches beyond the finish line. The result is the creation of a rustic effect which is clearly apparent in all of the pictures.

The contestee testified that the trade does not demand or want all of one conformation as in the samples C and B but some, not the average demand by any means, want a monotonous type like B and C (Tr. 197-198). One witness testified that 30 to 40 percent of the stone in one picture seems to be wedge-shaped instead of rectangular; in another, 15 or 20 percent (Tr. 193). Another witness said about half of the stone in another picture is like B and C (Tr. 181). Of another picture, he said the percentage of stone similar to B and C appears to be "fifty per cent or more, fifty to seventy per cent" (Tr. 182). Another witness observed that, for the flagstone type of masonry built of rubble stone as shown in the pictures comprising Exhibit A, in which the beauty of the finished product is based on irregular shapes and a clear intent to avoid any suggestion of sequence or symmetry, stone of uniform width and dimension like Exhibits B and C are of no value (Tr. 184-186).

Thus, it is necessary to conclude that, although the contestee asserted that the slabs of stone exposed on his claim are unique because of the regularity of the size and shape of 70 percent of them which makes them ideally suited for construction use, his own evidence of the actual use made of the stone removed and sold from the claim shows that no substantial value has been recognized in actual usage because of regularity of size and shape. The stone taken from his claim and used in the construction of houses is of heterogeneous sizes and shapes incorporated in walls and floors in a manner intended to emphasize their heterogeneity so that the fact that there are proportionately more slabs of regular size and shape on his claim than in other deposits of the same stone in the vicinity is not of real significance. The fact is that the regularly shaped stone on the claim is used for the same purpose as the irregularly shaped stone on the claim and for no other purpose. The fact, too, is that the stone from the claim is used for the same purpose as stone found in other deposits in the locality. Although the regularly shaped pieces do not require

as much cutting or shaping,² this factor does not endow the stone with the character of an uncommon variety. *United States v. Duwall & Russell*, 65 I.D. 458, 462 (1958); *United States v. J. R. Henderson*, 68 I.D. 26, 28-29 (1961); *United States v. D. G. Ligier et al.*, A-29011 (October 8, 1962).

The contestee also testified that the stone from his claim avoids the monotonous grays because it has browns, reds, and pinks—a soft blending of various colors in it (Tr: 198). This may well be true. But there is a complete absence of any evidence as to the colors of other stone suitable for construction purposes found in the vicinity of, but not on, this claim. Hence, it is not established that the stone from the Snoqueen claim is more varied in color or that its colors are more desirable for construction purposes and that the stone in this respect has an attribute which gives it special and distinct value. *United States v. J. R. Henderson, supra*; *United States v. D. G. Ligier et al., supra*; *United States v. Kelly Shannon et al.*, 70 I.D. 136, 141 (1963); *United States v. Frank Melluzzo et al.*, 70 I.D. 184, 186 (1963).

As in these other cases in which special and distinct properties were claimed, the stone in this case has been used only for the same purposes for which other deposits in the vicinity which are widely and readily available are also suitable.

It follows that the fact that the regularly shaped stone exists in commercial quantities on the Snoqueen claim does not have the effect of making it an uncommon variety of stone. The Director's decision was consequently in error as it was based on that premise.

Since the mining claim is invalid because the mineral deposit for which a location was attempted is not a locatable mineral, it is very clear that McClarty never had any rights which he could advance as superior to those of Pope who has had at all times since the issuance of his permit a legal right to remove common building stone under the terms of his permit. Evidently Pope did not regard the stone as an uncommon variety because he applied for and obtained his permit under section 1 of the Materials Act, *supra*, which authorizes the disposal under that act only of—

* * * mineral materials (including but not limited to common varieties of the following: sand, stone * * * if the disposal of such mineral * * * materials (1) is not otherwise expressly authorized by law, including * * * the United States mining laws. * * *

Only minerals not subject to location under the mining laws can be disposed of under the Materials Act.

²It would appear that much of the advantage gained in laying up the regularly shaped pieces of stone disappears when the stone is mixed with irregularly shaped pieces.

September 17, 1964

Therefore, 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 reversed and the case is remanded for reinstatement of the decision of the hearing examiner.

EDWARD WEINBERG,
Deputy Solicitor.

CHARGEABILITY OF ACREAGE EMBRACED IN OIL AND GAS LEASE OFFERS

Oil and Gas Leases: Acreage Limitations

Acreage embraced in a lease offer which is subject to drawing to determine priority will not be charged against the offeror until the offer has been successfully drawn.

M-36670

September 17, 1964

To: Regional Solicitor, Anchorage

Subject: Chargeability of Acreage Embraced in Oil and Gas Lease
Offers

This is in reply to your memorandum of July 29, 1964, enclosing a memorandum of July 24, 1964, from the Acting Manager of the Fairbanks Land Office concerning the Umiat lease sale. As we understand the situation, during the Umiat simultaneous filing period three companies, Atlantic Refining Company, Sun Oil Company, and Pan American Petroleum Corporation, filed 264 joint offers covering 659,923 acres. The three companies were successful in the case of 42 offers which total less than 300,000 acres. A protest has been filed against the issuance of leases to these three companies on the grounds that their filing on 659,923 acres was a violation of the acreage limitations and that thus all their offers were void and not eligible to be drawn.

Many questions on different aspects of this problem, involving the interpretation of various provisions of the statute and the regulations, have been raised by interested parties. However, the central question is whether the acreage limitations which are imposed by statute and regulation apply to all acreage embraced in offers for oil and gas leases. Section 27 (d) (1) of the Mineral Leasing Act (30 U.S.C., sec. 184 (d) (1)) states that "No person, association, or corporation * * *

shall take, hold, own or control at one time * * * oil or gas leases (including options for such leases or interests therein) on land held under the provisions of this Act exceeding in * * * the case of the State of Alaska * * * three hundred thousand acres in the northern district * * *." The pertinent regulation is 43 CFR 3120.1-2 which generally follows the statutory language, but which also specifically refers to the inclusion of offers for oil and gas leases in the computed acreage of land held, owned, or controlled.

The statute speaks very explicitly in terms of the holding, owning, and controlling of acreage. Even though the regulation refers to offers, it does so in terms which make it clear that the acreage to be charged against the offeror is acreage which the offeror may "take, hold, own, or control * * * through * * * offers * * *." For acreage to be charged against a party, it is essential that it be held, owned, or controlled in some manner. It is appropriate that land embraced in an offer for a noncompetitive oil and gas lease should be charged against the offeror when the lease is to be issued on a first come, first served basis. Although no lease has been issued, in such a case the offeror does have a control over the acreage embraced in his offer since by filing his application he has obtained priority and has precluded anyone else from obtaining a lease until there has been some disposition of his own application. In other words, such an offeror does have a certain measure of control over the land even if he has no actual ownership. However, it is a different matter when we consider an offer for a lease which is required to undergo the simultaneous filing procedure. In such a situation all citizens are afforded an equal opportunity to file offers for oil and gas leases during the simultaneous filing period. No one of the offerors can be said to have any control over the acreage. Any other person may file on that acreage and has an equally good opportunity of obtaining it. Control comes only after priority has been established when the winning offeror is in as good a position as an applicant who will obtain a lease on a first come, first served basis. Until that drawing, however, we do not find any holding, ownership, or control of acreage by an applicant within the meaning of either the statute or the regulation implementing it.

The provision in the regulation which expressly states that acreage held, owned, or controlled through offers will be chargeable was added by Circular 2009 (24 F.R. 281) which was published on January 13, 1959. In proposing this amendment the Department stated that it was long-standing departmental policy to hold acreage embraced in offers chargeable. This was true, but the rulings cited are dated 1925 and 1926, long before the simultaneous filing procedure was instituted.

September 17, 1964

Therefore, they do not properly have any bearing on the matter now before us, a case concerned strictly with the drawing of one amongst many simultaneously filed offers.

In the past the Department, without actually considering the difference between lease offers filed on a first come, first served basis and lease offers subject to drawing to determine priority, has accepted an interpretation of the regulation which held chargeable all acreage embraced in offers whether or not subject to drawing. *Melvin A. Brown*, 69 I.D. 131 (1962); *Edwin G. Gibbs*, 68 I.D. 325 (1961). In each of those cases the offeror was charged with acreage embraced in an offer which was subject to the simultaneous filing procedure. After another party had been successful in obtaining first priority in the drawing, the other offerors remained charged with the acreage embraced in their offers. Not until his unsuccessful offer was officially withdrawn or the appeal period ended was an offeror relieved from chargeability. The Department's holding in the *Brown* case was challenged in the courts. In *Brown v. Udall*, No. 18,274, C.A.D.C. Cir. (June 18, 1964), the court held that the Department had erred in its decision and that, under the proper interpretation of the regulation, Mr. Brown was chargeable only with the acreage which he actually held under lease and the acreage for which he was the first qualified applicant. It is true that the court did not expressly state that acreage included in an offer was not chargeable before the drawing, but instead actually held only that such acreage is not chargeable after the drawing unless the offer has been given first priority. Nevertheless the decision clearly casts doubt upon the assumption that acreage included in an offer subject to drawing is chargeable prior to the drawing. The court expressly stated that it did not consider the question of whether the regulation holding acreage embraced in offers chargeable went beyond the statute. We do not regard the regulation as going beyond the statute, but in order that regulation and statute may be consistent it is essential that the regulation be interpreted as holding chargeable acreage in an offer only when the offeror has, through the offer, obtained some holding, ownership, or control over the acreage.

In summary, it is our opinion that the acreage embraced in the offers filed by these three companies jointly was not chargeable against the companies until after there had been a drawing and then only that acreage embraced in their successful offers was chargeable. The basis for this opinion is that acreage must be subject to some form of holding, ownership, or control before it becomes chargeable. Because of

our opinion on this point, all the questions raised in the Acting Manager's memo and the various materials which have come to us from the interested companies do not have to be answered. In our opinion the problem immediately before us may be settled on the basis that acreage embraced in an offer which is required to undergo the simultaneous filing procedure is not chargeable until after the offer has been successfully drawn.

EDWARD WEINBERG,
Acting Solicitor.

ALLOTMENT OF LAND TO ALASKA NATIVES

Alaska: Indian and Native Affairs

Solicitor's opinion M-36352, June 27, 1956, holding that the allotment right of an Alaskan native under the Alaska Allotment Act, 34 Stat. 197, prior to the 1956 amendment, was limited to a single entry and that the allotment could not embrace a grant of incontiguous tracts of land is correct, where the proposed allotment is of tracts which are not related in any sense, or where, his allotment having once been determined, an additional grant to the same applicant is being considered.

Alaska: Indian and Native Affairs—Words and Phrases

Congress has frequently used the word "homestead" in connection with the allotment of land to Indians to indicate merely that the land allotted was to be subject to special status and the use of the word "homestead" in the Alaska Allotment Act, 34 Stat. 197, as amended, 70 Stat. 954, is not necessarily indicative of an intention to superimpose the requirements of the general homestead laws on the express requirements of the Alaska statute.

Alaska: Indian and Native Affairs—Indian Allotments on Public Domain: Generally—Statutory Construction: Generally

While both the Indian Allotment Act of 1887, 24 Stat. 388, and the Alaska Allotment Act, 34 Stat. 197, as amended, 70 Stat. 954, are representative of the method which was used to grant land to "uncivilized" persons in the late nineteenth and early twentieth centuries, the specific requirements of the numerous allotment statutes enacted during that time vary according to the particular situations which they were intended to meet and the two acts should not be read *in pari materia* to impose identical requirements on applicants under each statute.

Alaska: Indian and Native Affairs

The historical and legislative materials out of which the Alaska Allotment Act, 34 Stat. 197, as amended, 70 Stat. 954, emerged impel the conclusion that the Secretary is authorized to make single allotments of incontiguous tracts of land which, taken as a whole, compose the single unit which is the actual home of the applicant.

September 21, 1964

Alaska: Indian and Native Affairs—Statutory Construction: Generally

The effect of the enactment of Departmental regulations in the 1956 amendment to the Alaska Allotment Act, 70 Stat. 954, was to make mandatory under the statute the determination of use and occupancy which, prior to the 1956 amendment, had been discretionary except where the claim of a preference right was involved, but the amendment did not bind the Department to the exclusive consideration of the specific elements of proof which, though listed in the regulations, were not made a part of the amendment.

Alaska: Indian and Native Affairs

Both *Frank St. Clair*, 52 L.D. 597 (1929), and *Frank St. Clair (On Petition)*, 53 L.D. 194 (1930), affirm the rule that occupancy of the land sufficient to establish a preference right under the Alaska Allotment Act, 34 Stat. 197, prior to amendment in 1956 did not need to be continuous and that residence on the land was not required to the exclusion of a home elsewhere.

Alaska: Indian and Native Affairs

The reference to residence and cultivation in *Herbert Hilscher*, 67 L.D. 410 (1960), if that reference was intended to imply that other instances of occupancy expended by the native according to his natural culture and environment would be inadequate to show substantial actual possession and use of the land, must be restricted to the interpretation of existing regulations and, in view of the history of the Alaska Allotment Act, 34 Stat. 197, as amended, 70 Stat. 954, there is no justification for treating the reference to residence and cultivation as disclosing a limitation on the authority of the Secretary which would prevent him from promulgating regulations that evidence a broader policy.

Alaska: Indian and Native Affairs

The Secretary of the Interior is authorized by the Alaska Allotment Act, 34 Stat. 197, as amended, 70 Stat. 954, to promulgate regulations which provide for a determination of "use and occupancy" of the land according to the native's mode of life and the climate and character of the land; taking these factors into consideration, such use and occupancy require a showing of substantial actual possession and use of the land, at least potentially exclusive of others which is substantially continuous for the period required.

Alaska: Indian and Native Affairs

The Alaska Allotment Act, 34 Stat. 197, as amended, 70 Stat. 954, authorizes the Secretary of the Interior, "in his discretion" to promulgate a rule that allotments will not be made in units smaller than forty acres in size and conformed to the regular rectangular survey pattern and to prescribe by regulation in advance that a determination of the applicant's use and occupancy of a significant portion of any conforming forty-acre tract shall normally entitle the applicant to an allotment of the full tract where no conflicting claim is involved.

(2000) FILED WITH SECRETARY OF THE INTERIOR, DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C.

SEP 21 1964

ALASKA NATIVES

ALASKA NATIVES (2000) FILED WITH SECRETARY OF THE INTERIOR, DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C.

(2000) FILED WITH SECRETARY OF THE INTERIOR, DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C.

M-36662

September 21, 1964

To: ASSISTANT SECRETARY—PUBLIC LAND MANAGEMENT

Subject: ALLOTMENT OF LAND TO ALASKAN NATIVES UNDER THE 1906 ACT AS AMENDED

This memorandum is in response to your request for a determination of the authority of the Department of the Interior to issue certain regulations governing the allotment of lands to natives of Alaska under the act of May 17, 1906, as amended by the act of August 2, 1956 (hereinafter referred to as the Alaska Allotment Act).¹

Present Departmental regulations state that an applicant's proof of "substantially continuous use and occupancy," as required by the statute for an allotment, should show, among other indices, residence, cultivation and improvements on the land in question "and the use, if any, to which the land has been put for fishing or trapping."² An allotment of incontiguous tracts of land is expressly prohibited by the regulations.³

The proposed changes in the existing Departmental regulations would expressly permit consideration of (1) native custom and mode of living; (2) climate and character of the land applied for; and (3) customary seasonability of occupancy in determining whether an applicant for an allotment has shown substantially continuous use and occupancy of the land for a period of five years. The proposed regulations would also allow an applicant for an allotment to obtain in a single allotment more than one tract of land which would be no smaller than forty acres in size and conformed to the regular rectangular survey pattern.

The proposed regulations represent a change of existing policy concerning the allotment of land to Alaskan natives. In addition to occupancy according to the standards of the white settler, the proposed regulations recognize occupancy according to the standards of the native in his present culture and environment. Similarly, the allotment of incontiguous tracts of land to a native applicant would recognize the fact that several different locations, taken as a whole, may compose the single unit which is his actual home. Today, the home of an Alaskan native may include a fishing site, a hunting and trapping site, reindeer headquarters and corrals, and tracts regularly used for other purposes.⁴

¹ 34 Stat. 197, as amended, 70 Stat. 954; 48 U.S.C. 357, 357a, 357b (1958).

² 43 CFR 67.7.

³ 43 CFR 67.4.

⁴ Dep't Interior, Report to the Secretary of the Interior by the Task Force on Alaska Native Affairs, 59 (1962).

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The Alaska Allotment Act provides in part that:

That the Secretary of the Interior is hereby authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of vacant, unappropriated and unreserved non-mineral land in the district of Alaska, or, subject to the provisions of the Act of March 8, 1922 (42 Stat. 415; 48 U.S.C. 376-377), vacant, unappropriated, and unreserved land in Alaska, that may be valuable for coal, oil or gas deposits, to any Indian, Aleut or Eskimo of full or mixed blood, who resides in and is a native of Alaska, and who is the head of a family, or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress * * *⁵

The 1906 act gave a preference in the case of occupancy. It provided that:

* * * Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred and sixty acres.

By the 1956 amendment, occupancy was made a prerequisite for all allotments under the act in connection with an amendment which permitted natives to sell the land allotted to them with the approval of the Secretary. As to occupancy, the 1956 amendment stipulated that:

No allotment shall be made to any person under this Act until said person has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years.⁶

On its face the Alaska Allotment Act vests authority in the Secretary to make allotments "in his discretion and under such rules as he may prescribe." This broad delegation suggests that Congress intended that the primary responsibility for developing a program of allotments to Alaskan natives within the specific limitations of the statute should fall to the Secretary. Although a number of specific limitations are set forth in the statute, there is no language which expressly prohibits the Secretary from giving consideration to the culture and environment of Alaskan natives in setting a standard of use and occupancy under the statute. Similarly there is no express prohibition against granting incontiguous forty-acre tracts of land in a single allotment so long as the total area of the allotment does not exceed one hundred and sixty acres. These limitations, if they exist, must be inferred from the language of the statute by reason of the relevant circumstances which preceded its enactment.

⁵ 34 Stat. 197, as amended, 70 Stat. 954; 48 U.S.C. 357, 357a, 357b (1958).

⁶ 70 Stat. 954; 48 U.S.C. 357b (1958).

I

Allotment of Incontiguous Tracts

In 1956, the Associate Solicitor for Public Lands held that the allotment right of an Alaskan native under the Alaska Allotment Act was limited to a single entry and that the allotment could not embrace a grant of incontiguous tracts of land.⁷ In reaching this conclusion the opinion relies on three basic points. First, that the Alaska Allotment Act provides that land allotted, "shall be deemed the homestead of the allottee," and that homestead laws applicable to white settlers in Alaska in 1906 required the land on which a homestead entry was made to be located "in a body in conformity to the legal subdivisions of the public lands." Second, that a similar conclusion had been reached under the Indian Allotment Act of 1887 (applicable to Indians within the territory now occupied by the contiguous forty-eight States) with respect to the allotment of incontiguous tracts of public domain land and that "nothing in the 1906 Act appears to require a different interpretation." Third, that the legislative history of the Alaska Allotment Act appeared to contemplate that Indians would be allotted only one entry and that "Congress apparently sought to grant a homestead in its ordinary meaning as a single tract and not a series of disconnected tracts."

Where the proposed allotment is of tracts which are not related in any sense, or where, his allotment having once been determined, an additional grant to the same applicant is being considered, there can be no quarrel with the 1956 memorandum. However, a different case is presented by the single allotment of several tracts of land which, although not physically connected, are related to each other by the culture and environment of the native applicant. With respect to this situation, the arguments of the 1956 memorandum are not, in my opinion, germane.

The use of the word "homestead" in the Alaska statute is not necessarily indicative of an intention to superimpose the requirements of the general homestead laws on the express requirements of the Alaska Allotment Act. Congress has frequently used the word "homestead" in connection with the allotment of land to Indians to indicate merely that the land allotted was to be subject to special status.⁸

The case of *U.S. v. Thurston County, Nebraska*,⁹ concerned the

⁷ Solicitor's Opinion, M-36352 (June 27, 1956).

⁸ For example, Indian allotment acts passed in 1898, 1906, 1919, and 1920 provided that homestead allotments should be inalienable and nontaxable. 30 Stat. 495, 505-513. (1898); 34 Stat. 539 (1906); 41 Stat. 16 (1919); 41 Stat. 751, 756 (1920).

⁹ 54 F. Supp. 201 (D.C.D. Neb. 1944), *aff'd* 149 F. 2d 485 (8th Cir. 1945).

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exemption from local taxation of homesteads acquired under the act of June 20, 1936, as amended by the act of May 19, 1937.¹⁰ Among other points, the defendant contended that many of the tracts involved in the litigation were taxable by the county in which they were located because they could not be regarded as "homesteads" by reason of various alleged defects. Although the express requirements of the statute had been met in designating the tracts, it was stipulated that in one instance the exemption was claimed for separate noncontiguous tracts and that some of the claimants did not reside on the land involved. Other defects urged were nonresidency on some tracts, more than one claimant for some tracts, and that some of the tracts were unimproved.

The defendant argued that, in addition to express requirements for the "homesteads" specified in the Act, there were certain other characteristics, such as contiguity, necessarily required by the term "homestead." In disposing of this contention the court stated:

Homesteads, as they are understood in our modern American law, were unknown to the common law. They are creatures of statute and of the statutes of the several governmental entities creating them. As such, subject only to controlling constitutional limitations, they may be identified and defined as the legislature may determine. * * * Congress may, for its purpose, give the term its own definition, and it has done that in this instance. [Listing the express requirements of the amendment.]¹¹

Evidence that Congress, at the turn of the century, did not view the use of the word "homestead" as incompatible with allotment of incon-
tiguous tracts appears in an Indian allotment statute passed in 1904. The act of April 21, 1904 provided, in part, that certain land should be reserved for the use of the Turtle Mountain Chippewas and that,

* * * it is agreed that the United States shall, as soon as it can conveniently be done, cause the land hereby reserved * * * to be surveyed as public lands are surveyed, for the purpose of enabling such Indians as desire to take *homesteads*, and the selection shall be made so as to include in each case, as far as possible, the residence and improvements of the Indian making selections, giving to each an equitable proportion of natural advantages, *and when it is not practicable to so apportion the entire homestead of land in one body it may be set apart in separate tracts, not less than 40 acres in one tract*, unless the same shall abut a lake; but all assignments of land in severalty are to conform to the Government's survey * * *. [Italics supplied]¹²

¹⁰ 49 Stat. 1542, as amended, 50 Stat. 188; 25 U.S.C. 412a (1958).

¹¹ 54 F. Supp. 201, 210 (D.C.D. Neb. 1944), *aff'd* 149 F. 2d 485 (8th Cir. 1945).

¹² 33 Stat. 224 (1904). In addition to the Turtle Mountain Chippewa statute, several other statutes enacted during the first decade of the twentieth century suggest a single allotment of inconiguous tracts of land. The act of March 1, 1907, provided that members of the Blackfeet Tribe were to be allotted 40 acres of irrigable land and 280 acres of additional land valuable only for grazing. (34 Stat. 1041-42 (1907)). The act of June 28,

As its second point, the 1956 opinion relies on an analogy drawn between the Indian Allotment Act of 1887 and the Alaska Allotment Act.

However, the conclusion that the Indian in the continental United States was restricted to allotments of contiguous tracts of land under the Indian Allotment Act of 1887,¹³ turned on the construction given to an express condition in the statute that, an Indian was entitled to an allotment of land on which he had made "settlement."^{13a} By way of contrast, "settlement" is not specified as a requirement of the Alaska Allotment Act.

There is no reason why the two acts should be read *in pari materia* to impose identical requirements on applicants under each statute. While both are representative of the method which was used to grant lands to "uncivilized" persons in the late nineteenth and early twentieth centuries, the specific requirements of the numerous allotment statutes enacted during that time vary according to the particular situations which they were intended to meet.¹⁴

A thorough analysis of the policy behind the use of the method of allotment for distribution of land to Indians in the United States

1906, provided that all lands belonging to the Osage tribes was to be divided among the members of the tribe, on the basis of three rounds in which each member was to select 160 acres of land in each round. (34 Stat. 539 (1906).) A proviso adds "that all selections herein provided for shall conform to the existing public surveys in tracts of not less than forty acres, or a legal subdivision of a less amount, designated a 'lot.'" The remainder of the land was to be assigned "as equally as practicable" to each member.

¹³ "Where any Indian not residing upon a reservation * * * shall make *settlement* upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled * * * to have the same allotted to him or her * * *." [Italics added.] 24 Stat. 388 (1887).

^{13a} * * * it must be remembered that settlement, by the very terms of the act, is a prerequisite to allotment under section 4 of the act of February 8, 1887. It is held that said act is, in its essential elements, a settlement law; and that "to make such act effective to accomplish the purpose in view, it was doubtless intended it should be administered, so far as practicable, like any other law based upon settlement." Indian Lands—Allotments (8 L.D. 647). Where the evident purpose of the act is considered, the term "settlement" therein, must inevitably be construed to mean practically the same as it does under the homestead law, where the essential requirement is actual inhabitation of the land to the exclusion of a home elsewhere. (Instructions Relative to Indian Allotments, 32 L.D. 17, 18-19 (1903)).

¹⁴ For example, according to one source, between 1900 and 1910 over fifty allotment acts were enacted by Congress for the benefit of Indians in the United States. Kinney, A Continent Lost—A Civilization Won 245-46 n. 47. (1937).

Some statutes merely directed the Secretary of the Interior to make allotments in severalty to Indians in particular tribes, 32 Stat. 744 (1903), 35 Stat. 448 (1908). Others set out a specific limitation on the amount of land to be allotted, 31 Stat. 766 (1901), 32 Stat. 795 (1903), 33 Stat. 224 (1904), 33 Stat. 225 (1904), sometimes dependent on the kind of land involved in each allotment, 36 Stat. 863 (1910). Qualified recipients were sometimes the heads of families, 32 Stat. 263 (1902), sometimes every man, woman, and child, 34 Stat. 335 (1906), and, in one statute, an individual Indian, 36 Stat. 533, 534 (1910). Some of the statutes provided for selection of the land by the Indian, 31 Stat. 766 (1901), 32 Stat. 795 (1903). Others provided that, if no selection was made by the Indian, a mandatory assignment was to be made by the Secretary, 31 Stat. 672, 676-80 (1900).

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demonstrates that this policy had no necessary or automatic application to the allotment of land to natives of Alaska.

A basic consideration underlying the allocation of land to Indians in the United States was the belief that private, individual ownership was an instrument of civilization.¹⁵ The desire of white citizens in the United States to settle and use the land held by the Indian tribes also played a great part in the adoption of the Indian allotment system in the United States.¹⁶ An accurate, if harsh, measure of these forces was presented in testimony before Congress in 1934 by Professor D. S. Otis, of Columbia University:

¹⁵ In 1876, Commissioner of Indian Affairs Smith wrote: "It is doubtful whether any high degree of civilization is possible without individual ownership of land * * *. No general law exists which provides that Indians shall select allotments in severalty, and it seems to me a matter of great moment that provision should be made not only for permitting, but requiring, the head of each Indian family, to accept, the allotment of a reasonable amount of land, to be the property of himself and his lawful heirs, in lieu of any interest in any common tribal possession. Such allotments should be inalienable for at least twenty, perhaps fifty years, and if situated in a permanent Indian reservation, should be transferable only among Indians." (Dep't Interior, Report of the Commissioner of Indian Affairs in (1876)).

In 1877 the agent for the Yankton Sioux wrote: "As long as Indians live in villages they will retain many of their old and injurious habits. Frequent feasts, community in food, heathen ceremonies, and dances, constant visiting—these will continue as long as the people live together in close neighborhoods and villages * * *. I trust that before another year is ended, they will generally be located upon individual lands of farms. From that date will begin their real and permanent progress." (Dep't Interior, Report of the Commissioner of Indian Affairs 75-76 (1877)).

In 1882, another agent wrote: "The allotment of land in severalty will go a long way, in my judgment toward making these more advanced tribes still nearer the happy goal. I do not think that the results of labor ought to be evenly distributed irrespective of the merits of individuals, for that would discourage effort; but under the present communistic state of affairs, such would appear to be the result of the labor of many." (Dep't Interior, Report of the Commissioner of Indian Affairs 36 (1882)).

¹⁶ In 1880, Secretary of the Interior Schurz wrote: "[Allotment] will eventually open to settlement by white men the large tracts of land now belonging to the reservations, but not used by the Indians. It will thus put the relations between the Indians and their white neighbors in the western country upon a new basis, by gradually doing away with the system of large reservations, which has so frequently provoked those encroachments which in the past have led to so much cruel injustice and so many disastrous collisions." (Dep't Interior, Report of the Secretary of the Interior 12 (1880)).

Again in 1881, Secretary Schurz wrote: "It must be kept in mind that the settlement of the Indians in severalty is one of these things for which the Indians and the Government are not always permitted to choose their own time * * *. The question is, whether the Indians are to be exposed to the danger of hostile collisions, and of being robbed of their lands in consequence, or whether they are to be induced by proper and fair means to sell that which, as long as they keep it, is of no advantage to anybody, but which, as soon as they part with it for a just compensation, will be a great advantage to themselves and their white neighbors alike." (The Speeches, Correspondence, and Political Papers of Carl Schurz 126 (Bancroft ed. 1913)).

And, still more bluntly, "There is nothing more dangerous to an Indian reservation than a rich mine. But the repeated invasions of the Indian Territory, as well as many other similar occurrences, have shown clearly enough that the attraction of good agricultural lands is apt to have the same effect, especially when great railroad enterprises are pushing in the same direction." (I.D. at 142.)

In conclusion, let it be said that allotment was first of all a method of destroying the reservation and opening up Indian lands; it was secondly a method of bringing security and civilization to the Indian. Philanthropists and landseekers alike agreed on the first purpose, while the philanthropists were alone in espousing the second. Considering the power of these landseeking interests and their support by the friends of the Indian, one finds inescapable the conclusion that the allotment system was established as a humane and progressive method of making way for "westward movement."¹⁷

It cannot be assumed that these same forces combined in the same way in Alaska at the turn of the century to produce an Alaska Allotment Act which should be interpreted by analogy with the Indian Allotment Act of 1887.

First, there were, at that time, no large reservations which, with definite boundaries, blocked the development of the railroads.¹⁸ Second, the lands utilized by the natives were not in great demand by white settlers as agricultural lands.¹⁹ Third, perhaps as a consequence of the other two factors, there was relatively little concern in the nineteenth century with encouraging the Alaska native to adopt a civilized way of life.²⁰

Section 8 of the act of May 17, 1884, by which Congress first provided a civil government for the District of Alaska, stipulated,

* * * That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use and occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress. * * *²¹

In reporting on the bill the Senate Committee noted the state of flux which surrounded land development in Alaska and recommended

¹⁷ Hearing on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess. 439-40 (1934).

¹⁸ "With the exception of the act of March 3, 1891 (26 Stat. 1095, 1101), which set apart the Annette Islands as a reservation for the use of the Metlakahtians, a band of British Columbian natives who immigrated into Alaska in a body, and also except the authorization given to the Secretary of the Interior to make reservations for landing places for the canoes and boats of the natives, Congress has not created or directly authorized the creation of reservations of any other character for them." (Solicitor's Opinion, 49 L.D. 592, 594 (1923).)

¹⁹ *Written Report of Alaska*, 5-16 (1903).

²⁰ Article III of the Treaty under which Alaska was ceded to the United States [in 1867] (15 Stat. 539), conferred citizenship on all the inhabitants of the ceded territory "with the exception of the uncivilized tribes" therein, and declared that they "will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to the aboriginal tribes of that country."

"In the beginning, and for a long time after the session of this Territory, Congress took no particular notice of these natives; has never undertaken to hamper their individual movements; confine them to a locality or reservation, or to place them under the immediate control of its officers, as has been the case with the American Indians; and no special provision was made for their support and education until comparatively recently. And in the earlier days it was repeatedly held by the courts and the Attorney General that these natives did not bear the same relation to our Government, in many respects, that was borne by the American Indians." [Citation omitted.] (Solicitor's Opinion, 49 L.D. 592, 593-94 (1923).)

²¹ 23 Stat. 24, 26 (1884).

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that the general land laws not be made applicable to the Territory of Alaska. In support of this decision the Committee stated:

Another reason against present action upon this subject is found in the fact that the rights of the Indians to the land, or some necessary part of it, have not yet been the subject of negotiation or inquiry. It would be obviously unjust to throw the whole district open to settlement under our land laws until we are advised what just claim the Indians may have upon the land, or, if such a claim is not allowed, upon the beneficence of the Government.²²

In 1891 Congress extended the townsite laws to the Territory of Alaska while continuing to protect, with language similar to that of the 1884 act, the lands used and occupied by Alaska natives.²³ This same language was repeated in 1900 in an act making further provision for the civil government of Alaska.²⁴

Departmental decisions prior to 1900 had maintained that the land preserved for the natives was not restricted to that on which they actually resided. Access to water supplies, river harbors and the use of trails was also protected.²⁵

In 1902, the breadth of the prohibition received judicial recognition from the Circuit Court of Appeals, Ninth Circuit:

The prohibition contained in the Act of 1884 against the disturbance of the use or possession of any Indian or other person of any land in Alaska claimed by them is sufficiently general and comprehensive to include tide lands as well as lands above high-water mark. Nor is it surprising that Congress, in first dealing with the then sparsely settled country, was disposed to protect its few inhabitants in the possession of lands, of whatever character, by means of which they eked out their hard and precarious existence. The fact that at that time the Indians and other occupants of the country largely made their living by fishing was no doubt well known to the legislative branch of the government, as well as the fact that that business, if conducted on any substantial scale, necessitated the use of parts of the tide flats in the putting out and hauling in of the necessary seines. Congress saw proper to protect by its Act of 1884 the possession and use by these Indians and other persons of any and all lands in Alaska against intrusion by third persons, and so far has never deemed it wise to otherwise provide.²⁶

In 1904, the District Court in Alaska also stressed the importance of interpreting the 1884 statute according to the natives' normal way of life.

²² S. Rep. No. 3 48th Cong. 2d Sess. 2 (1883).

²³ 26 Stat. 1095, 1110 (1891).

²⁴ 31 Stat. 321, 330 (1900).

²⁵ Fort Alexander Fishing Station, 23 L.D. 335, 337 (1896) (only available water supply); Benjamin Arnold, 24 L.D. 312, 313-14 (1897) (water supply necessary for domestic use and consumption); Louis Greenbaum, 26 L.D. 512, 513-15 (1898) (free and unrestricted access to a river harbor by means of a trail or narrow roadway which led from the village); Point Roberts Canning Co., 26 L.D. 517, 519 (1898) (fresh water privileges).

²⁶ *Heckman v. Sutter*, 119 Fed. 83, 85-89 (8th Cir. 1902).

It is well known that the native Indians of this country by their particular habits live in villages here and there, in some of which they remain most of the year and in others during certain summer months; that while their habits are somewhat migratory, they have well-settled places of abode, and these usually are not abandoned, though they may vacate them for a few months at a time. The history of the habits of these people is well understood.²⁷

As a consequence of the legislation and decisions noted above, the position of the Alaskan native with regard to his use and occupancy of the land may be thus summarized: subject to the further action of Congress, the Alaskan native was protected in his possession of the land within the territory. The courts and the Department of the Interior had placed a broad construction on these terms. Protection of "occupancy" in the sense that it was made applicable to uncivilized native groups included, not only village lands, but, as well, the lands utilized for fishing, hunting, and like purposes.

It is this special and particular context of philosophy, policy and law, rather than that reflected in the enactment of allotment statutes applicable to the United States, which should govern the interpretation of the Alaskan statute.

The third point made in the 1956 opinion of the Associate Solicitor is that the legislative history of the Alaska Allotment Act demonstrates an intent to confine allotments of land to single tracts of land. The opinion relies solely on language from the report of the House Committee in favor of the proposed legislation.

The necessity for this legislation arises from the fact that Indians in Alaska are not confined to reservations as they are in the several States and Territories of the United States, but they live in villages and small settlements along the streams where they have their little homes upon the land to which they have no title, nor can they obtain a title under existing laws. It does not signify that because an Alaskan Indian has lived for many years in the same hut and reared a family there that he is to continue in peaceable possession of what he has always regarded his home. Some one who regards that particular spot as a desirable location for a home can file upon it for a homestead, and the Indian or Eskimo, as the case may be, is forced to move and give way to his white brother.²⁸

While this report indicated a concern with the protection of the homes of the Alaskan Indians in the sense of protecting the particular houses in which they live, it does not follow from this conclusion that Congress chose a means to remedy this situation which limited the Secretary to the allotment of land on which the applicant had constructed his permanent house. By its terms, the 1906 act was clearly broader than this in scope. Not until 1956 was "occupancy" of any

²⁷ *Johnson v. Pacific Coast S.S. Co.*, 2 Alaska 224, 239 (1904).

²⁸ H.R. Rep. No. 3295, 59th Cong., 1st Sess. (1906).

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kind made a condition of the statute for the granting of an allotment by the Secretary.

In addition, a full exploration of the legislative history of the Alaska Allotment Act discloses that the Committee report represented only a fragment of the material which was before Congress when it enacted the Alaska statute. The scope of this additional material suggests that the Committee report should be understood to have provided merely a dramatic sample of the evil which the legislation was intended to cure, rather than a definitive and limiting explanation of its purpose.

In January of 1905 President Roosevelt transmitted to the Senate and the House of Representatives a report on the conditions and needs of the natives of Alaska made by a retired Navy Lieutenant, G. T. Emmons, and requested legislation along the lines advocated in the report.²⁹ The report was referred to the Senate Committee on Public Lands and, several months later, Senator Nelson, Chairman of the Committee, submitted the report to the Department of the Interior along with a request for a "code of laws" to include, particularly, a provision permitting Alaskan natives to secure allotments or title to the small tracts of land which they occupied and needed.³⁰

In the Department, proposed legislation and a report to the Secretary of the Interior was prepared by the General Land Office and transmitted to the Committee in January, 1906.³¹ The proposed legislation was apparently designed to extend to the natives of Alaska the rights, privileges and benefits conferred by the public land laws upon citizens of the United States,³² rather than to provide the Alaskan natives with a system of allotment, but the material submitted bore directly on both forms of land disposition.

The basic point made by the General Land Office was that the Alaskan native's right to acquire and hold property was severely and inequitably limited. Except for qualification under the townsite law, there was no means by which he could acquire title to land because he was not eligible for citizenship under existing law and was not an "Indian" in the sense required by the Indian Allotment Act of 1887. His property right was, except for the townsite law, limited to undisturbed possession.

²⁹ S. Doc. No. 106, 58th Cong., 3d Sess. (1905).

³⁰ Letter from Senator Nelson to Secretary of the Interior, quoted in S. Doc. No. 101, 59th Cong., 1st Sess. (1906).

³¹ S. Doc. No. 101, 59th Cong., 1st Sess. (1906).

³² A copy of the proposed bill is not available. However, the letter which transmitted the proposed bill from the Department of the Interior to Senator Nelson, refers to the bill as "extending to the natives of Alaska the rights, privileges, and benefits conferred by the public land laws upon citizens of the United States." S. Doc. No. 101, 59th Cong., 1st Sess. (1906).

In addition to referring to the Emmons report, the General Land Office included a report on the condition of the Alaskan natives by J. W. Witten, a law clerk in the General Land Office who had been detailed on a tour of inspection in Alaska in 1903.³³ The Witten report was transmitted to Congress as a part of the departmental response to Senator Nelson. These reports apparently formed the basic core of information before Chairman Nelson and the Senate Committee at the time that the Senator introduced S. 5537, the Alaska Allotment Act, which was amended in the Senate Committee, passed as amended by the Senate, and enacted into law four months after the original bill had been submitted by the General Land Office.

On examination of the Witten and Emmons reports three points are clear. First, it was recognized by both reports that the condition of Alaskan natives and Indians differed greatly according to their cultural group and the area of Alaska in which they lived. The ability of the natives to adapt to the new civilization ranged from that of the Thlingits, Haidas and Tsimshians of southeastern Alaska who were, according to Emmons, "an independent, self-supporting population, fully capable of rendering such labor as the conditions of the country demanded,"³⁴ to that of the Copper River Indians who were scattered, disease-ridden and near starvation as a consequence of the invasion of the new civilization.³⁵

Second, it was recognized by both reports that many of the Indians and natives lived semi-nomadic lives or had more than one homesite which they considered their own. To the north of Bristol Bay, Emmons reported that the natives "lived in small communities at many points, and might be said to be semi-nomadic, as they have to change their homes to keep pace with the movements of their food supply."³⁶ Speaking of other groups of natives, Witten stated that:

They all live in villages along the rivers or coasts, usually each home fronting upon the water to afford convenient canoe landings. Many of them also have additional homes at their fishing and hunting grounds, to which they move their families during the hunting and fishing seasons. A native village may have several hundred inhabitants at Christmas and be entirely deserted in May. When the fishing season arrives they lock their permanent homes and are off for the temporary ones. It is curious but not uncommon to see these entirely deserted villages, and so little do they fear theft that nearly all their household goods are left behind when they go on these trips.³⁷

³³ Witten, *Report of Alaska* (1903).

³⁴ S. Doc. No. 106, 58th Cong., 3d Sess., 3 (1906).

³⁵ *Id.* at 9.

³⁶ *Id.* at 7.

³⁷ Witten, *Report of Alaska* 24-25 (1903).

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Speaking of the Metlakahtla, Witten continued:

* * * It is the custom of these people—in fact, of all native Alaskans, as we have seen—to lock up their winter or permanent homes, and go abroad with their families to their fishing grounds, or to any other locality in which they may be employed, for the summer * * *³⁸

Third, both reports indicated expressly that there was no single plan for giving land to the Alaskan natives which would provide a satisfactory means of meeting the differing needs of each group. The Emmons report opened with the point that:

* * * the native people of Alaska, comprising four ethnic stocks, living under varied conditions of country, climate, pursuits, and food supply, differ essentially from one another, and consequently demand somewhat different treatment, according to their several needs * * *³⁹

The Witten report included a number of plans put forward by notable residents of Alaska for the disposition of land to Alaskan natives. The Hon. M. C. Brown, Judge of the first division of the United States District Court of Alaska, commented:

In my opinion extending the rights now enjoyed by white citizens, under the public-land laws, would not be the best policy. The experience of Father Duncan upon Metlakahtla Island seems to indicate that the only way of benefiting these Indians is to sever them as much as possible from connection with the white population of the country, and to set aside certain portions of the country, or certain lands or islands, where they may take their lands in severalty and have absolute ownership of the same * * *. The Indians of Alaska are prone to live in villages, and while they can go out from these villages and hunt and fish during certain seasons of the year they return to them again for their recreation and such comforts of home as they enjoy or appreciate. For this reason I would suggest that lands be set apart to them where they may have their villages and homes with absolute property rights therein; where they may take such homesteads and land outside of their village as they may desire, having them accurately surveyed and set apart in severalty to each of them or each of the males.⁴⁰

Reverend Harry P. Corser, a missionary at Wrangell, commented:

* * * It is the desire of each family to have a home of their own, but they know little of the Anglo-Saxon's idea of home life. Most of them have fishing and hunting houses where they pass about three months of the year. * * *. The granting of 320 acres of land to each Indian, not to be sold by them under ten years, would help them. Their rights on their hunting and fishing ground should be protected. They should be given the same rights to locate land and mineral claims that are now enjoyed by the whites.⁴¹

Read in the context of these reports it is apparent that the legislation proposed by Senator Nelson and examined by his committee was designed to authorize the Secretary to develop a program for the

³⁸ *Id.* at 40.

³⁹ S. Doc. No. 106, 58th Cong. 3d Sess. 2 (1906).

⁴⁰ Witten, *Report of Alaska* 46-47 (1903).

⁴¹ *Id.* at 49.

allotment of land to the natives of Alaska according to the particular needs of each group.

The express limitations of the statute fall into two classes: first, the kind and amount of land to be allotted, and, second, the class of recipients who may become eligible to receive it. No limitation, except for the protection of the preference right, relates to the utilization of the land by the applicant as a precondition to the allotment.

Essentially, a prohibition against the allotment of incontiguous tracts, if it were read into the statute through an examination of the legislative history, would be based on the assumption that applicants were required to build their "little homes" on the land for which they applied as a precondition to the allotment. This is a precondition of land utilization by the applicant which is entirely foreign to the express limitations in the statute and is not warranted by the legislative history. Rather, the historical and legislative materials out of which the statute emerged impel the conclusion that the Secretary is authorized to make single allotments of incontiguous tracts of land which, taken as a whole, compose the single unit which is the actual home of the applicant.

II

Native Custom, Climate and Character of the Land, and Seasonability of Occupancy

Under the 1906 Act, consideration of the meaning of the term "occupied" was limited to situations where an Alaskan native claimed a preference right to an allotment of land "occupied" by him. It can hardly be disputed that the Secretary was authorized to consider native custom and mode of living, climate and character of the land applied for and customary seasonability of occupancy in allotting land under this act where no claim of a preference right was involved. The statute is silent with respect to any precondition of land use. The Secretary was expressly authorized to allot lands "under such rules as he may prescribe." The many specific plans before Congress as part of the legislative history of the act show that this was no empty delegation, but an authorization to develop and implement a program for the allotment of land to Alaskan natives that would meet the multiple needs of that group.

The limitation on this authority occurred, if at all, as a result of the 1956 amendment to the act which expressly required the applicant to make proof satisfactory to the Secretary of the Interior of substan-

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tially continuous use and occupancy of the land for a period of five years in order to obtain an allotment. A primary purpose of the 1956 amendment was to permit the allottees to alienate their lands.⁴² To prevent natives from obtaining allotments for the purpose of selling the allotted land, Congress enacted into law "the substance of the Department's present regulations on the subject," of use and occupancy.⁴³ In addition to other portions of the regulations relating to the allotment of lands in national forests, this legislative enactment included the first sentence of that portion of the then existing regulations which stated that:

An allotment application will not be approved until the applicant has made satisfactory proof of five years' use and occupancy of the land as an allotment. Such proof must be made in triplicate, corroborated by the statements of two persons having knowledge of the facts, and it should be filed in the land office. It must be signed by the applicant but need not be sworn to. The showing of 5 years' use and occupancy may be submitted with the application for allotment if the applicant has then used or occupied the land for 5 years, or at any time after the filing of the application when the required showing can be made. The proof should give the name of the applicant, identify the application on which it is based, and appropriately describe the land involved. It should show the periods each year applicant has resided on the land; the amount of the land cultivated each year to garden or other crops; the amount of crops harvested each year; the number and kinds of domestic animals kept on the land by the applicant and the years they were kept there; the character and value of the improvements made by the applicant and when they were made, and the use if any to which the land has been put for fishing or trapping.⁴⁴

To the first sentence of this section Congress added the modification that the use and occupancy should be "substantially continuous." The letter of transmittal from the Assistant Secretary of the Interior suggests this modification with the comment that: "The 5-year occupancy provision should indicate that the occupancy must be substantially continuous and does not include only intermittent use."⁴⁵ In addition, the term "satisfactory proof" in the regulations was changed to the term "proof satisfactory to the Secretary" in the amendment.

The effect of this enactment of Departmental regulations was to make mandatory under the statute the determination of use and occupancy which, prior to the 1956 amendment, had been discretionary under the statute except where the claim of a preference right was in-

⁴² S. Rep. No. 2693, 84th Cong., 2d Sess. 1, 4 (1956).

⁴³ H.R. Rep. No. 2534, 84th Cong., 2d Sess. 4 (1956).

⁴⁴ 19 Fed. Reg. 8860 (1954) (superseded December 6, 1958).

⁴⁵ H.R. Rep. No. 2534, 84th Cong. 2d Sess. 5 (1956).

volved. The amendment did not bind the Department to the exclusive consideration of the specific elements of proof which were listed in the current regulation but which were not made a part of the amendment. Not only did the amendment provide that proof should be satisfactory to the Secretary, but the Secretary retained his basic responsibility under the statute for developing and implementing a program for the allotment of land to the qualified applicant.

A determination of use and occupancy which is based on the applicant's reasonable and substantially continuous use of the land for which he applies, consistent with his mode of life and the character of the land and climate furthers the basic purpose of the 1906 act. At the same time, this interpretation affords the protection against speculative attempts to obtain allotments of land for the purpose of sale which was the reason for the insertion of the language in the 1956 amendment.

Previous Departmental decisions support an interpretation of use and occupancy which permits the Secretary to consider the applicant's mode of life and the character of the land and climate while setting out other limitations on the meaning of this term which are applicable to the 1956 amendments.

Historically, the phrase "use and occupancy" has its roots in the recurring reservation of lands in the "use and occupation" of the Alaskan natives for their peaceful possession under the various "civil government" acts, *supra*. Early Departmental and judicial decisions, *supra*, construed the phrase broadly to protect the natives in their existing way of life.

In *Frank St. Clair*⁴⁶ and *Frank St. Clair (on petition)*,⁴⁷ decided in 1929 and 1930, the Department made its first formal determination of the meaning of "occupancy" as used in the Alaska Allotment Act. The *St. Clair* cases involved an Alaskan Indian who made application for a one-hundred and sixty acre allotment, claiming that he had established a preference right to land which had subsequently been withdrawn as part of a national forest. An inspection of the land showed that the Indian had used it as a homesite and as a base for fishing operations at certain times during the year. The General Land Office recommended approval of the allotment but sought to restrict it to an area of 9.3 acres because this amount appeared sufficient for the use to which the applicant intended to put the land.

⁴⁶ 52 L.D. 597 (1929).

⁴⁷ 53 I.D. 194 (1930).

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On appeal, the Department first approved the full one-hundred and sixty acres and then, in a second opinion, *Frank St. Clair (on petition)*, ruled that the smaller allotment was sufficient where the land was to be used solely for fishing purposes. Both opinions affirmed the rule that occupancy of the land need not be continuous and that residence on the land was not required to the exclusion of a home elsewhere.

The first opinion declared its holding in these terms⁴⁸ and the second opinion noted specifically that the applicant had used the land exclusively for fishing purposes at certain times during the year and that none of the land had been cultivated.⁴⁹

The first of the *St. Clair* opinions also drew attention to the permissibility of interpreting "occupancy" under the 1906 act according to the culture and environment of the native applicant by referring to an analogous instance of interpretation under the Indian Allotment Act of 1887.⁵⁰ Although the requirement of "settlement" under that act differed on the side of strictness from the requirement of "occupancy" under the Alaska Allotment Act, early departmental regulations, quoted in the *St. Clair* opinion, demonstrated the possibility of this interpretation:

The nature, character, and extent of the settlement, as well as the manner in which performed, must be fully set forth in the allotment application. In examining the acts of settlement and determining the intention and good faith on an Indian applicant, due and reasonable consideration should be given to the habits, customs, and nomadic instincts of the race, as well as to the character of the land taken in allotment.

While the act contains no specific requirements as to what shall constitute settlement, it is evident that the Indian must definitely assert a claim to the land based upon the reasonable use or occupation thereof consistent with his mode of life and the character of the land and climate.⁵¹

The *St. Clair* opinions invested the term "occupancy" with the historical standard of protection for Alaskan natives in their use and occupancy of land which was afforded them under the laws and decisions effective prior to the passage of the Allotment Act in 1906. But the practical effect of the second decision was also to narrow an allotment of 160 acres to an allotment of a much smaller tract. Plainly, the second decision warned that the actual use and occupancy of a portion of the tract did not automatically create a preference

⁴⁸ 52 L.D. 597, 601 (1929).

⁴⁹ 53 L.D. 194 (1930).

⁵⁰ 52 L.D. 597, 601 (1929).

⁵¹ 52 L.D. 383, 386 (1929).

right to the allotment of the full 160 acres, at least where a lesser amount was, in the opinion of the Secretary, sufficient for the use to which the applicant was putting the land.

In 1960, in *Herbert H. Hilscher*,⁵² the Department considered the meaning of the word "occupancy" as it has been used in the Alaska Allotment Act and in section 67.11 of regulations in existence under the statute prior to the 1956 amendment: "lands occupied by Indians or Eskimos in good faith are not subject to entry or appropriation by others."⁵³ The opinion concluded that:

Occupancy implies some substantial actual possession and use of land, at least potentially exclusive of others, such as necessarily results from residence on or cultivation of land. [Footnote omitted] Such slight and sporadic use of land as shown by the allotment applicant's storing a boat thereon is neither exclusive nor substantial, and, by itself, amounts to actual occupancy of no larger an area than is required for depositing a boat (about 15 feet long) on the ground.⁵⁴

The requirement of substantial actual possession and use of land, at least potentially exclusive of others, has been established by judicial authority in the lower courts with respect to other legislation applicable to Alaska. In addition to *United States v. 10.95 Acres of Land in Juneau*,⁵⁵ cited in the *Hilscher* opinion, this interpretation of "occupancy" is supported by two later District Court cases.⁵⁶ However, the reference to residence and cultivation in the *Hilscher* opinion, if that reference was intended to imply that other instances of occupancy engendered by the native according to his natural culture and environment would be inadequate to show substantial actual possession and use of the land, must be restricted to the interpretation of existing regulations. In view of the history of the Alaska Allotment Act and the interpretation of the term "occupancy" made in earlier decisions, *supra*, there is no justification for treating the reference to residence and cultivation in the *Hilscher* opinion as disclosing a limitation on the authority of the Secretary which would prevent him from promulgating regulations, such as those considered in this memorandum, that evidence a broader policy.

In summary, the Secretary is authorized to promulgate regulations which provide for a determination of "use and occupancy" of the land

⁵² 67 I.D. 410 (1960).

⁵³ 43 CFR 67.11.

⁵⁴ 67 I.D. 410, 416 (1960).

⁵⁵ 75 F. Supp. 841 (3d Div. Alaska 1948).

⁵⁶ *United States v. Libby, McNeil & Libby*, 107 F. Supp. 697, 701 (1st Div. Alaska, 1952); *United States v. Alaska*, 201 F. Supp. 796, 799-800 (Alaska, 1962).

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according to the natives' mode of life and the climate and character of the land. Taking these factors into consideration, such use and occupancy requires a showing of substantial actual possession and use of the land, at least potentially exclusive of others. In addition, the 1956 amendment requires that such use and occupancy be substantially continuous for the period required. Mere intermittent use, by itself, is not sufficient.

III

Tracts No Smaller Than Forty Acres In Size and Conformed to the Regular Rectangular Survey Pattern

The Alaska Allotment Act authorizes the Secretary to conduct a program for the allotment of land "in his discretion" and "under such rules as he may prescribe." The introduction of a rule that allotments will not be made in units smaller than forty acres in size and conformed to the regular rectangular survey pattern is clearly within this authorization. The burdens which would attend a contrary conclusion have proved to be substantial, both with respect to the practical administration of the program for Alaska allotments and with respect to the coordination of this program with other programs for the disposition of land in Alaska. Absent a reference to the regular rectangular survey, each allotment of land requires a special and detailed survey of the tract for which application is made. After the land is allotted, special steps must be taken to maintain records which relate the nonconforming grant of land to the regular rectangular survey of lands under which the ownership of other lands in Alaska is identified. Notwithstanding the careful maintenance of special records, the different systems of land identification appreciably increase the likelihood of boundary disputes and conflicting claims under Federal programs for the disposition of land in Alaska. These burdens appear to amply justify the rule as a reasonable one under the circumstances.

It also appears proper for the Secretary to proscribe by regulation in advance that a determination of the applicant's use and occupancy of a significant portion of any conforming forty-acre tract shall normally entitle the applicant to an allotment of the full tract, where no conflicting claim is involved.⁵⁷ The requirement of substantially con-

⁵⁷ Presumably, such regulations would also provide that the tract must be reasonably compact in form.

tinuous use and occupancy of the land for which application is made, imposed by the 1956 amendment, should not be construed to restrict his discretion in this respect.

The general purpose of the act as it now stands is to enable the native to obtain title to the land which he uses and occupies. If the compelling administrative need for the disposition of tracts of a minimum area which conform to the regular rectangular survey is also recognized as administratively necessary for the reasons just stated, the Secretary is within his authorized discretion if he determines that use and occupancy of a significant portion of a conforming forty-acre tract is use and occupancy of the entire tract within the meaning of the act.⁵⁸

However, where two or more native occupants, otherwise qualified, are shown to have enjoyed use and occupancy of significant portions of the same forty-acre tract, protection of the status of each would require an exception to the general practice of minimum forty-acre grants in favor of an equitable allocation of the forty-acre tract. Similarly when the claim of a native occupant and the claim of another applicant under some other statute authorizing the disposition of land overlap as to a given forty-acre tract, exception to the general rule would be required. A rule for the allotment of smaller conforming tracts would be appropriate in both cases.

IV

Guidelines for Proposed Regulations

In conclusion, the answer to the specific questions posed by your memorandum follows:

1. The Secretary is authorized under the Alaska Allotment Act to make a single allotment of incontiguous tracts of land.
2. The Secretary is authorized to consider (a) native custom and mode of living, (b) climate and character of the land applied for and (c) customary seasonability of occupancy in determining whether

⁵⁸ It should be noted that this conclusion is not inconsistent with the result reached in either the *St. Clair* case or the *Hilscher* case. Not only did both cases involve the assertion of the statutory preference right by the applicant rather than the limits of the Secretary's rule making authority under the statute, but the second *St. Clair* opinion relies heavily on the fact that the grant of the lesser amount of land (9.3 acres instead of 160 acres) appeared in the judgment of the departmental officials involved to be sufficient where it was to be used solely for fishing purposes. Neither opinion precludes the Secretary from adopting a policy of conforming native allotments to the rectangular survey pattern with a minimum grant of a quarter-quarter section (forty acres).

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an applicant for an allotment has shown substantially continuous use and occupancy of the land for a period of five years. However, the statute requires a showing of use and occupancy which, taking the factors listed into consideration, is based on more than merely intermittent use and indicates some substantial actual possession and use of the land, at least potentially exclusive of others.

3. The Secretary may provide that allotments should be no smaller than forty acres in size and conformed to the regular rectangular survey pattern. He may also prescribe that a determination of the applicant's use and occupancy of a significant portion of any conforming forty-acre tract shall be deemed to be use and occupancy of the full forty-acre tract, except where a conflicting occupancy is involved. Where conflicting occupancies are involved, the Secretary must make an equitable allocation of the forty-acre tract. A rule for the allotment of smaller conforming tracts would be appropriate in these cases.

EDWARD WEINBERG,
Acting Solicitor

ELLIOTT, INC.

A-29816

Decided September 28, 1964

Oil and Gas Leases: Rentals—Oil and Gas Leases: Royalties

An oil and gas lease which converts to a minimum royalty basis during its primary term because of the discovery on it of oil and gas in paying quantities remains in a minimum royalty status even though production ceases and the part of it which had been put in a known geologic structure is reclassified as not within a known geologic structure, but it reverts back to a rental basis if the lease is extended for a five-year period.

Oil and Gas Leases: Rentals—Oil and Gas Leases: Royalties

Where an office of the General Accounting Office, after an audit, requests the local land office to demand minimum royalty payments from a lessee for seven years of an extended oil and gas lease term and, upon appeal, the Comptroller General decides that only annual rentals paid by the lessee were due, the Department will not require the lessee to make any additional payments for the extended term.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Elliott, Inc. has appealed to the Secretary of the Interior from a decision dated September 10, 1962, of the Division of Appeals, Bureau

of Land Management, which affirmed a decision of the Santa Fe land office demanding payment of \$6,579.42 due the United States for oil and gas lease Las Cruces 069053. The amount represents the difference between the rental paid for seven years of the extended term of the lease and the minimum royalty claimed as due for those years, plus minimum royalty for the last year of the primary five-year term for which neither rental nor royalty was paid.

The lease was issued as of August 1, 1949, for 1,458.23 acres. A productive oil and gas well was completed on the lease on May 5, 1952. By memorandum of June 18, 1952, the Geological Survey determined that the 40-acre tract on which the well was located was within the known geologic structure of a producing oil and gas field. The lessee thereafter paid a minimum royalty of \$1 per acre per year on the leased premises for the following fourth lease year extending from August 1, 1952 to July 31, 1953. Subsequently, the flow of oil and gas ceased and efforts to induce a renewed flow were unsuccessful. Accordingly, on June 15, 1954, after the well had been plugged and abandoned, the Geological Survey changed its determination of the existence of a known geologic structure and notified the manager of the Santa Fe land office of this action.

On June 28, 1954, after he was notified by the Geological Survey of this action, the lessee filed a request for a five-year extension of the lease accompanied by an advance payment of rental for the sixth lease year in the amount of fifty cents per acre. The application was filed pursuant to section 17 of the Mineral Leasing Act, as then amended, 60 Stat. 951 (1946), which gave the holder of a noncompetitive oil and gas lease the right to obtain a five-year extension as to land not situated within the known geologic structure of a producing oil and gas field at the end of the primary term of the lease. The land office extended the lease in its entirety from August 1, 1954 to July 31, 1959.

On February 1, 1956, L. E. Elliott and his wife assigned the lease to Elliott, Inc., and the assignment was approved as of March 1, 1956. On June 3, 1959, one tract of the leased premises was assigned to Arnold S. Bunte and this assignment was approved effective as of July 1, 1959, with a consequent extension of both the parent and the new segregated lease for a period of two years to June 30, 1961. Both leases expired on June 30, 1961. The rental of fifty cents per acre per year

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was paid through the seventh, eighth, ninth, tenth, eleventh, and twelfth years.

On August 25, 1961, the Santa Fe land office received a letter from the Dallas office of the General Accounting Office dated August 23, 1961, recommending that the land office collect \$6,579.42, an amount sufficient to cause the payments made under the lease to equal minimum royalties due for the lease years commencing August 1, 1953, and ending June 30, 1961. The letter stated that the Geological Survey records disclosed that under former departmental regulation 43 CFR 192.81, now 43 CFR, 1964 Supp., 3125.2, the minimum royalty obligation of the lease became effective for the lease year beginning August 1, 1952, and added:

* * * It is our understanding that once the minimum royalty provision attaches it continues in effect for the life of the lease.

We noted that the Director of Geological Survey in his memorandum of June 15, 1954, determined that the lands in the lease were not within a known geological structure. We found no evidence which shows that this determination disturbs or could disturb the minimum royalty status of the lease.

We recommend that your office take action to collect amounts from the lessees which will bring their payments to equal minimum royalties due for the lease years ended July 31, 1954, 1955, 1956, 1957, 1958, 1959, 1960 and June 30, 1961 (or \$6,579.42). * * *

The land office thereupon demanded that sum of the lessee and, upon appeal, the Division of Appeals affirmed its action.

Upon Elliott, Inc.'s further appeal, the Secretary requested the opinion of the Comptroller General of the United States as to the correctness of the demand made upon the appellant.

In a letter dated August 31, 1964, numbered B-154709, the Acting Comptroller General first stated, that a lease which goes on a minimum royalty basis after production in paying quantities is obtained remains on a minimum royalty basis so long as the lease subsists, regardless of whether it is thereafter possible to continue production.

He then held:

* * * it is our opinion that a reclassification of the leased lands in this case to exclude them from "a known geologic structure" would have been necessary to permit an extension of the lease for an additional period of five years, and that such reclassification would be controlling on the question as to whether royalties instead of minimum rentals were to be paid during the entire extended term of the lease if no discovery of oil or gas in paying quantities was made after the primary term of the lease.

The reclassification of June 15, 1954, appears to have been based upon a reasonable determination that the discovery made by the lessee was of such minor significance as to require the conclusion that the Department was not required to continue in effect the original determination that the lands covered by the lease were within the known geologic structure of a producing oil or gas field when the original term of the lease had expired. Otherwise, and depending upon whether the lease could qualify for an indefinite extension of the lease period upon a showing that drilling operations were being diligently prosecuted on the expiration date of the primary lease period, any further leasing of the lands could not have been made except on a competitive bidding basis as required under the first paragraph of the amended section 17 of the Mineral Leasing Act of 1920. We doubt that it would have been possible to obtain reasonable offers if the bidders in that event were fully informed of the results of drilling operations made by the previous noncompetitive lessee, or that the Congress ever intended to restrict your Department in the matter of making reasonable classifications or reclassifications of lands available for oil and gas exploration purposes.

Ordinarily, where a lessee exercises a right to obtain an extension of his lease, it is to be presumed that rental or other consideration payable under the primary term of the lease would continue in effect during the extended period. Thus, it might be argued that the noncompetitive leasing statute here involved contemplated the continuance of minimum royalty payments regardless of any change made in the classification of the leased lands before the end of the initial five-year period of the lease. However, in our opinion, such construction of the statute would accomplish in this case an unreasonable and improbable result such as may not properly be assumed to have been the intention of the Congress.

Accordingly, we do not consider the extensions of the lease granted in this case to have been invalid in any respect, although made with the apparent understanding that minimum royalties would not be charged unless and until a new discovery of oil or gas in paying quantities was made. It appears that the lessee is indebted to the United States only for the minimum royalty payment due for the fifth lease year. * * *¹

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), Departmental Manual; in accordance with the Comptroller General's opinion, the decision of the Division of Appeals is affirmed insofar as it demands payment of \$1,459 as minimum royalty for the fifth lease year and is reversed insofar as it required the payment of any sums for the extended years of the lease, and the case is remanded for further proceedings consistent herewith.

ERNEST F. HOM,
Assistant Solicitor.

¹ See: *Murphy Corporation*, 71 I.D. 233 (1964), for a discussion of other situations in which a lease may revert to a rental status after having been subject to minimum royalty.

**APPEALS OF COMMONWEALTH ELECTRIC COMPANY AND
A. S. SCHULMAN ELECTRIC COMPANY**

IBCA-410
IBCA-417

Decided October 12, 1964

Contracts: Appeals

An appeal from findings of a contracting officer granting an extension of time which is taken solely on the ground that the findings state an erroneous reason for granting the extension will be dismissed where it appears that the challenged statement will have no relevancy or effect in the adjudication of any ungranted claim of the appellant.

BOARD OF CONTRACT APPEALS

These appeals relate to extensions of time under a contract of the Bureau of Reclamation for the construction of transmission lines forming part of the Trinity River Division of the Central Valley Project in California. The contract, which was dated January 16, 1962, was on Standard Form 23 (January 1961 edition) and incorporated the General Provisions of Standard Form 23A (April 1961 edition) for construction contracts.

The work to be done was divided into two schedules. The completion date for Schedule No. 1 was October 4, 1963, but the work was not accepted as substantially complete until December 31, 1963, a delay of 88 days. The completion date for Schedule No. 2 was July 6, 1963, but the work was not accepted as substantially complete until October 9, 1963, a delay of 95 days. The contract provided for the imposition of liquidated damages on account of inexcusable delays at the rate of \$1,000 per day for Schedule No. 1 and \$500 per day for Schedule No. 2.

The contracting officer in findings of fact dated October 17, 1963, found that excusable delays aggregating 100 days had occurred with respect to each schedule. He particularized the loss of time as consisting of 71 days caused by a strike and 29 days caused by unusually severe weather. The contractor timely appealed from this decision, the appeal being docketed as IBCA-410.

Subsequent to the taking of the appeal, the contracting officer rescinded his findings of fact and issued new ones, dated November 26, 1963. The new findings were the same as the original ones except for the addition of statements to the effect that the 100 days of delay had projected the work under Schedule No. 1 into the rainy season, and that the extent to which such projection might call for an extension of time beyond 100 days would be determined later. The contractor

71 I.D. No. 10

timely appealed from this decision, the appeal being docketed as IBCA-417.

The Government has filed a motion to dismiss which is predicated on the view that the appeals are moot since both schedules were actually completed in a lesser time (88 days for Schedule No. 1; 95 days for Schedule No. 2) than the 100 days allowed by the extensions granted by the contracting officer (without taking into account his concession that an additional extension might be granted later for Schedule No. 1).

Appellant contends, however, that the appeals are not moot. In support of this contention appellant points out that its requests for time extensions were based upon a study made for it by a firm of consulting engineers. The study concluded that the work on Schedule No. 1 had been delayed for 30 days by the strike, 30 days by the weather, 2 days by changes in the plans, and 118 days by delays of the Government in furnishing right-of-way for the transmission lines; and that the work on Schedule No. 2 had been delayed for 30 days by the strike, 15 days by the weather, and 49 days by delays of the Government in furnishing right-of-way for the transmission lines. The contracting officer, on the other hand, evaluated only the strike and the weather in his findings, and did not mention the alleged changes in the plans or the alleged delays in furnishing right-of-way. Appellant asserts that the contracting officer erred in allowing more time for the strike and the weather than had been requested, and, conversely, in allowing no time at all for the alleged delays in furnishing right-of-way. It says that these errors might effect its "claim for an equitable adjustment because of acceleration of the work" or its "claim for the Government's delay in furnishing right-of-way." Neither of the claims just mentioned are the subject of any appeal now pending before this Board, but appellant evidently fears that were they to be brought before the Board or to be sued upon in the courts, the findings that form the subject of the present appeals might be accorded binding effect if left unchallenged.

The problem thus presented is essentially the same as one which the Board had occasion to consider in *Utah Construction Company*.¹ The pertinent portions of that decision read as follows:

The statements of appellant's counsel make it apparent that this appeal [IBCA-140] was taken solely because of appellant's fear that its claim for additional compensation might be prejudiced unless it challenged the contracting officer's findings that the delay in the completion of the job was caused by a flood. This fear is not well grounded. The findings in question have to do solely with the question of whether the delay in completion was excusable under

¹ IBCA-133 and IBCA-140 (June 10, 1960), 67 I.D. 248, 60-1 BCA par. 2649, 2 Gov. Contr. 397.

A. S. SCHULMAN ELEC. CO.

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Clause 5, "Termination for Default—Damages for Delay—Time Extensions," of the General Provisions of the contract. They have nothing to do with the question of whether the delay was one for which additional compensation would be allowable. Prior to the making of such findings, the contracting officer, in his latter decision of August 30, 1957, had disclaimed any jurisdiction to consider appellant's claim for additional compensation. Hence, it is obvious that he could not have intended that the findings with respect to the cause of the delay in completion should apply to the latter claim.

In view of the foregoing the Board holds that the findings challenged in IBCA-140 will have no relevancy and no effect in such further proceedings as may be had before the contracting officer or the Board for the adjudication of those additional compensation items that are subject to administrative determination,² as provided for in the portion of this opinion dealing with IBCA-133. With respect to those additional compensation items that are not subject to administrative determination, the following statement of the Court of Claims would seem to be pertinent:

On the question of the assessment of liquidated damages the findings of the contracting officer as to the facts and the extent of the delay were made final and conclusive, subject to appeal to the head of the department; but on the question of whether or not the defendant had caused a delay for which it should be mulcted in damages, they have not agreed that his findings of fact should be final and conclusive.³

It must be concluded that the appeal in IBCA-140 presents no justifiable issue of law or fact. The only relief asked for by appellant is a declaration that the contracting officer should have granted the 365-day extension of time for a reason other than the one he assigned for granting such extension. As appellant does not want us to shorten, lengthen, or otherwise alter the extension of time, it is evident that the asking of the requested declaration would involve the determination of a purely hypothetical question insofar as the extension itself is concerned. Furthermore, since the various parts of appellant's claim for additional compensation must be adjudicated on the basis of their own merits, and not on the basis of the reason assigned by the contracting officer for granting the time extension, the requested declaration would also involve the determination of a purely hypothetical question insofar as the matters that form the subject of the appeal in IBCA-133 are concerned.

Accordingly, IBCA-140 is dismissed.

It is true that in suits by contractors for damages on account of alleged Government delays, findings by contracting officers that the delays alleged had in fact been caused by the Government have sometimes been accorded evidentiary weight, as being in the nature of

² *Accord: Electrical Builders, Inc., IBCA-406 (August 12, 1964), 1964 BCA par. 4377.*

³ Quoted from *Langevin v. United States*, 100 Ct. Cl. 15, 30 (1943). *Accord: Continental Illinois Nat. Bank & Trust Co. v. United States*, 126 Ct. Cl. 631, 640-41 (1953); *Anthony P. Miller, Inc. v. United States*, 111 St. Cl. 252, 330 (1948); *Schmoll v. United States*, 105 Ct. Cl. 415, 458 (1946); *Silberblatt & Lasker, Inc. v. United States*, 101 Ct. Cl. 54, 80-81 (1944).

admissions against interest.⁴ Such a qualification of the *Langevin* principle, however, obviously could have no application to a situation, like the one here in question, where the contracting officer has made no finding to the effect that delays were caused by the Government. The Court of Claims in a recent decision not only recognized that there is no reason to depart from the *Langevin* principle in a situation of the present type, but also reaffirmed the soundness of that principle as a matter of public policy, saying:

We think it decidedly unwise to give almost-conclusive weight to the contracting officer's decision to grant extra time, for such a rule would tend to foster a policy which will ultimately work to the detriment of all contractors. In doubtful cases, contracting officers would be quite wary of granting additional time for fear that their decisions may later become the foundation for a breach of contract action.⁵

We believe that the line of reasoning developed in *Utah Construction Company* is both sound and applicable to the matters now in dispute. The fact that there the contracting officer had disclaimed any jurisdiction to consider the claim for additional compensation was not so material to the decision as to necessitate the reaching of a different result here. Accordingly, we held that the present appeals present no justiciable issue of law or fact.

The appeals are dismissed.

HERBERT J. SLAUGHTER, *Deputy Chairman.*

I CONCUR:

PAUL H. GANTT, *Chairman.*

I CONCUR:

THOMAS M. DURSTON, *Member.*

UNITED STATES v. GILBERT C. WEDERTZ

A-30126

Decided October 15, 1964

Mining Claims: Mill Sites

A mill site claim is properly declared invalid where the claim is not occupied or used for mining or milling purposes.

Mining Claims: Mill Sites

The use of a rehabilitated structure on land embraced in a mill site claim as a base for occasional prospecting activities on nearby patented lode

⁴ *George A. Fuller Co. v. United States*, 108 Ct. Cl. 70, 93-94 (1947); *James Stewart & Co. v. United States*, 105 Ct. Cl. 284, 329-30 (1946); *Irvin & Leighton v. United States*, 101 Ct. Cl. 455, 475-76 (1944).

⁵ *Robert N. Lee & Co. v. United States*, Ct. Cl. No. 252-60 (January 24, 1964).

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claims and the intention to use the land in the future for workmen's housing and an assay office presumably when the claims are developed are not sufficient to comply with the requirements of section 2337 of the Revised Statutes for obtaining a mill site.

Administrative Procedure Act: Adjudication—Administrative Procedure Act: Hearings

Where a hearing has been held in a contest, the record made at the hearing shall be the sole basis for a decision and evidence submitted at a later date cannot be considered in deciding the case on the merits.

Rules of Practice: Appeals: Generally

The oral argument which is authorized on an appeal to the Secretary is not a hearing at which evidence may be submitted but an opportunity to present argument orally on the case record as previously made.

Rules of Practice: Evidence—Rules of Practice: Hearings

Evidence submitted outside a hearing in a contest case cannot be considered in deciding the case on the merits but can be considered to determine whether or not a further hearing is warranted.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Gilbert C. Wedertz has appealed to the Secretary of the Interior from a decision of the Assistant Director, Bureau of Land Management, dated August 12, 1963, vacating a hearing examiner's decision and declaring null and void the Bokee mill site, situated in sec. 19, T. 1 N., R. 25 E., M.D.M., Mono County, California, a part of the Inyo National Forest.

At the request of the Forest Service, Department of Agriculture, a contest was brought by the United States against the mill site on the grounds that the mill site is null and void because there is no quartz mill or reduction works on it, and it is not used or occupied for mining or milling purposes. In a decision dated March 9, 1962, the hearing examiner held that, as the Bokee mill site is located in a remote area, miles from any habitation, the rehabilitation on it of a dwelling house is a substantial use and improvement of the land, and that, as the house was rehabilitated for workmen employed in connection with a mine, the mill site is used for mining purposes. For this reason, he dismissed the contestant's complaint.

A subsequent decision by the Assistant Director, Bureau of Land Management, vacated the hearing examiner's decision, declared the mill site to be null and void, and rejected the patent application Wedertz had filed for the mill site. The Assistant Director held that

the evidence of record does not support a finding that the mill site claimant is entitled to a patent at this time because he has not shown a present occupation or use of the tract as would satisfy the requirements of section 2337 of the Revised Statutes (1875), 30 U.S.C. § 42 (1958). Specifically, the Assistant Director found that the evidence compiled at the hearing does not show that the mill site is being used as the present living quarters for a crew engaged in operating the Wedertz mining property or an office or storage place in connection with the operation of a mine as alleged in the patent application. He found that the only present use being made of the mill site is as a storage place for material to repair two cabins which were on the land when Wedertz acquired it, and as a place for a consulting geologist to spend three to five nights a year while exploring a tunnel leading to a mine, but not operating a mine.

In his appeal to the Secretary, Wedertz has expressed general disagreement with the Assistant Director's decision.

The record compiled at the hearing conducted in the instant case has been carefully reviewed. That record does not support a finding that the appellant is entitled to a patent to the Bokee mill site at the present time.

Section 2337 of the Revised Statutes, *supra*, permitting entry of mill sites, reads as follows:

Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such nonadjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith may also receive a patent for his mill site, as provided in this section.

This section provides for two classes of claims. The second class is not pertinent in the instant case as it makes the right to patent a mill site dependent upon the existence on the land of a quartz-mill or reduction works, of which there is none. In the first class, however, the use or occupation of the land "for mining or milling purposes" is the only prerequisite to a patent. It is under this class that the appellant seeks a patent for the Bokee mill site.

The use or occupancy contemplated by the Revised Statute section 2337, *supra*, was discussed in *Alaska Copper Company*, 32 L.D. 128 (1903). At page 131 of that decision the Department said:

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* * * A mill site is required to be used or occupied distinctly and explicitly for *mining* or *milling* purposes in connection with the lode claim with which it is associated. This express requirement plainly contemplates a function or utility intimately associated with the removal, handling, or treatment of the ore from the vein or lode. Some step in or directly connected with the process of *mining* or some feature of *milling* must be performed upon, or some recognized agency of operative *mining* or *milling* must occupy, the mill site at the time patent thereto is applied for to come within the purview of the statute. * * *

There is no contention by the appellant that the mill site is being used for milling purposes. The only question is whether it is being used for mining purposes. A careful reading of the transcript of the hearing reveals the following:

In 1954 Wedertz bought at a tax sale 5 lode claims which had been patented in the early 1880's (Tr. 22-23, 34). The claims are located high on a ridge and a tunnel was driven into the claims at a level several hundred feet lower. The tunnel was driven in a distance of 2300 feet (Tr. 37), apparently the last 750-800 feet in the period 1932-1937 (Tr. 40) and the first portion in the 1880's (Tr. 34). The Bokee mill site is located on a bench a short distance beyond the tunnel portal. The mill site was the site of the town of Bennettville which was constructed in order to drive the tunnel in the 1880's (Tr. 34).

Located on the mill site are two wood buildings. The Government's sole witness, a mining engineer, testified that they were of considerable age, the smaller one being in a poor state of repair. The larger one, a 2-story structure, approximately 25 by 30 feet, was also weather-beaten but had been repaired. It was locked so he could not see inside but at the time of his visit he observed no use being made of the mill site. (Tr. 10-12, 14.)

Wertz testified that after he purchased the claims, he wanted to examine, explore, and develop the mines so he engaged a geologist, Elmo W. Adams, to check the property (Tr. 23). He had Adams prospect the surface of the claims and Adams and another person entered the tunnel, using oxygen equipment (Tr. 27-28). Adams' reports on mineral content seemed promising (Tr. 29), and Wertz intended to develop and explore the property (Tr. 30). However, money was the factor and he hoped that once he had a patent to the mill site Adams would be able to help find people who would be interested in developing the property. Also the current prices of gold and silver had a bearing and he anticipated there might be a change in the situation. (Tr. 30.) He thought the mine was last actively worked in the 1930's, that only nominal amounts of materials had

been removed since, and that the mine had not actually produced any mineral in quantity (Tr. 32).

Adams testified that there is a lot of mineralization on the claims but that he could not see millions of dollars of ore in sight, "nor thousands of dollars, even" (Tr. 36). His opinion was that the claims should be explored through the tunnel, that samples should be taken from the tunnel "with the point in mind that we want to sample to find further prospecting and that will be a long laborious job" (Tr. 37). He said that the property could not be explored without the mill site, that "it would multiply the costs of exploring this mine and developing the mine tremendously without a mill site—without a place in which to stay, and so on" (Tr. 39).

As for the two buildings on the mill site, Wedertz said he had strengthened the smaller one "which originally is believed to have been the assay office, and which I intended to use as an assay office" (Tr. 26). He said he had equipped the larger building with a wood stove for cooking and heating, and that there are cooking utensils, a bed and mattress there "and everything" (Tr. 30-31). He stored shingles in it for further repair of the buildings and tools—shovels, picks, hammer, saw (Tr. 31-32).

Adams testified that since 1955 he had probably spent 3 to 5 nights a year in the larger building (Tr. 39).

Wedertz testified that he had cut a trench to drain water from the mine entrance, rebuilt the framework around the mine, and bought 3 ore cars one of which was in the tunnel. (Tr. 27-28).

This summary of the evidence shows that there has been no mining of any ore from the claims since Wedertz acquired them and located the mill site in 1954. Only the larger building on the mill site has been used in any way and that has been insubstantial—as very infrequent overnight accommodations for Adams and as a storage place for some hand tools and some supplies. The use of the tools was not specified; they may have been used to cut the drainage trench and rebuild the tunnel framework but may have been used as much or more to repair the two buildings.

All the work done on the claims has been in the nature of exploration, to find substantial mineralization; no work has been done in the way of developing any production. Apparently production will have to wait upon interesting others to invest and possibly upon increases in the prices of gold and silver.

The testimony at the hearing therefore falls considerably short of substantiating the statements in the amended application for patent of the mill site that it and the buildings on it have been used as

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necessary facilities in connection with "mining operations" on the patented claims and that the larger building "is used for living quarters for crew engaged in these operations."

The use made of the mill site also falls far short of the test laid down in the *Alaska Copper Company* case, *supra*. To hold that Wedertz is entitled to a patent in face of the evidence adduced would mean that any prospector could claim as a mill site his base of operations when he is merely prospecting in the vicinity for a discovery. The result could well be the anomalous one of the propector obtaining a patent for a mill site although he is unable to make a discovery which will sustain a valid mining claim. The fact that the claims here have been patented is not a critical distinction since all the indications are that at the time when Wedertz acquired the claims there was no longer any valid discovery exposed on the claims.¹ Of course, since the claims have been patented, this would have no bearing on the title to the land. The point is, however, that, merely because a mineral patent has been issued for a tract of land, all operations undertaken thereon at a later time are not necessarily mining operations so far as the mill site law is concerned.

To repeat, the only activities shown by the record to have been engaged in by Wedertz on the claims are prospecting activities aimed at determining what mineral values exist on the claims. They are indistinguishable from the activities of any prospector who is exploring ground that seems to hold some promise. The prospector too has need of a place to live and to keep supplies and equipment. But clearly a prospector is not entitled to claim a mill site; neither is Wedertz.

Accordingly, the Assistant Director was correct in holding that the evidence compiled at the hearing does not permit the granting of a patent for the Bokee mill site claim at the present time. As this conclusion is dispositive of the case, we need not consider the contention of the Forest Service that an application for a mill site cannot be filed independently of an application for patent to the lode claims for which the mill site is required.

One procedural point remains for consideration. In his statement of reasons for his present appeal Wedertz made a number of assertions as to use of the mill site which do not appear in the transcript of hearing. He also submitted an additional statement of reasons, attaching

¹ See *United States v. Alvis F. Denison et al.*, 71 I.D. 144 (1964), and the cases there cited, for the various circumstances under which a valid discovery may be lost with the passage of time.

an affidavit by Adams making additional statements as to work that had been done on the mill site and the claims.

The Forest Service filed a motion to strike the statements of reasons on the grounds that the factual assertions made in them were unsworn, not subject to cross-examination, and not subject to rebuttal. In reply Wedertz requested an oral argument at which cross-examination could be had.

In accordance with section 7 of the Administrative Procedure Act, 60 Stat. 241 (1946), 5 U.S.C. § 1006 (1958), the Department's rules of practice provide that where a hearing has been held in a contest the record made at the hearing shall be the sole basis for a decision. 43 CFR, 1964 Supp., 1840.0-8. Therefore any evidentiary matter submitted by Wedertz after the close of the hearing cannot be the basis of any decision in the case.

In this connection it may be noted that the oral argument authorized in the discretion of the Secretary on an appeal to him (43 CFR, 1964 Supp., 1844.6) is not a hearing for the reception of testimony and other evidence. It is simply an opportunity afforded for the presentation of argument orally on the basis of the record already made. It is essentially the same as the opportunity afforded for the presentation of argument to an appellate court.

The additional factual assertions made by Wedertz on his present appeal cannot, therefore, be considered in deciding this case on the merits. They can, however, be considered to determine whether they afford a basis for ordering a further hearing in the case. They have been examined for that purpose. Although they consist of more assertions as to use made of the larger structure on the mill site for storage purposes and work done on the mining claims, there is still no contention that anything more than prospecting or preparations for future mining operations has been done. There is no claim of actual mining operations in the sense of removing ore. Accordingly, the ordering of a further hearing would not appear to be productive of any significant facts which might be pertinent to a decision on the merits.

Therefore, 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 motion of the Forest Service to dismiss the statements of reasons is denied, the request for oral argument is denied, and the decision of the Assistant Director is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

APPEAL OF RICHARD J. NEUTRA AND ROBERT E. ALEXANDER

IBCA-408

Decided October 16, 1964

Rules of Practice: Appeals: Dismissals

In situations where the certifying officer submits to the Comptroller General a question of law for a decision pursuant to 31 U.S.C. 82d, since he doubts the legality of a payment, the Board will not dismiss the appeal for lack of jurisdiction under circumstances such as present here. The Board is bound by a decision of the Comptroller General, pursuant to 31 U.S.C. 82d, that a specific change order is null and void. However, this does not deprive the contractor-appellant of his contractual right to be heard by the Board concerning changes and extras which have not been disposed of with finality by the Comptroller General.

BOARD OF CONTRACT APPEALS

On April 27, 1959, the National Park Service entered into the above-identified contract with Richard J. Neutra and Robert E. Alexander, Architects, of Los Angeles, California, under which the Architects were to perform all professional architect-engineering services necessary for the preparation of complete contract working drawings for a Visitor Center-Cyclorama at Gettysburg National Military Park, Gettysburg, Pennsylvania.

Under Article 8 of the above-identified contract the Government obtained an option to require the contractor also to perform all supervisory services with respect to the construction involved for a fee amounting to 2 percent of the total amount of the construction work.

On October 20, 1959, the contract was amended by Change Order No. 1. This change order was accepted by the Architects on October 22, 1959. The Architects were to provide complete supervision of the construction. Paragraph 2(a) of the change order stated in part:

Supervision shall commence with the starting date of construction and continue through the length of the entire job until final completion and acceptance of the work by the Government.

Paragraph 3 of the change order provided for payment in accordance with Article VIII of the contract, plus additional amounts for travel and contingencies related thereto.

At the time Change Order No. 1 was entered into, the parties contemplated that the work under the construction contract would last about 360 days, and be completed by about November 11, 1960. However, due to unanticipated problems which arose, the completion time of the construction work was extended an additional 425 days, or until January 10, 1962.

As a result of the delay in completion of the construction contracts, the Architects had to provide professional services for a period of 168 days beyond that contemplated at the time the original contract and Change Order No. 1 were entered into.

In view of the circumstances described above, the Architects wrote to the contracting officer on January 17, 1962, in which they pointed out that they had "added expenses" which they specified in five categories as follows:

CATEGORY No. 1:	<i>Hours</i>	<i>Dollars</i>
Recurrent costs—insp. & Reports-----		7, 915
CATEGORY No. 2:		
Foundation and grade adjustment-----	258	3, 225
CATEGORY No. 3:		
Extra reimbursements (long distance communi- cations)-----		857
CATEGORY No. 4:		
Contractor's errors or changes-----	148½	1, 856
CATEGORY No. 5:		
Owner changes or requests-----	299	3, 738
	<hr/>	<hr/>
Total-----	705½	17, 591

On October 30, 1962, the Chief, Eastern Office, Design and Construction, who was the contracting officer, wrote to the Assistant Director, Design and Construction,¹ and stated:

It is our belief that the architects have been penalized by the delays, and while we are not legally obligated for payments beyond the contractual amount, we do feel that we have a moral obligation to compensate architectural firms adequately for services rendered to the National Park Service.

In analyzing Mr. Alexander's request for added compensation, we find it difficult to justify the amount of \$12.50 hourly rate for supervision; however, we are reminded that Mr. Thaddeus Longstreth, consultant architect, was evidently employed by Neutra and Alexander not only to supervise technical matters but also to preserve the integrity of the design.

The architects have listed five categories in their outline of the expenses incurred. We are impressed only with those expenses incurred under categories 1 and 2 which primarily involve payments to Mr. Longstreth for supervision. Therefore, we are suggesting an arbitrary figure of \$8,500 to be paid to Neutra and Alexander as being fair compensation for additional professional services.

On November 26, 1962, the Assistant Director of the National Park Service wrote a memorandum to the Chief, EODC, in which in its pertinent part he stated:

We believe the basis under which you analyzed the situation and reached a conclusion is fair and reasonable, therefore, we concur in the conclusions you have

¹ Government Exhibit No. 18, Transcript, p. 15.

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reached and believe that any suggestions or further ideas from us would be extraneous.

Subsequently, the contracting officer issued Change Order No. 3 on February 7, 1963, which, in its pertinent part, states as follows:²

1. *SCOPE OF SERVICES*: Due to unforeseen construction problems, time extensions granted the contractor totaled an additional 425 days. It has been determined that the Architect rendered professional services for a period of 168 days for which he (the Architect) was not compensated.

2. *PAYMENT*: It is agreed that the sum of eight thousand five hundred dollars (\$8,500) is just compensation for the additional services outlined under Scope of Services.

You may acknowledge and signify your agreement by signing and returning two copies of this Change Order No. 3.

On February 22, 1963, the Architects accepted³ Change Order No. 3 and stated as follows:

Thank you for your letter of February 14th, enclosing Change Order No. 3 to our Contract for services on the Visitor Center-Cyclorama Building at Gettysburg National Military Park. Two signed copies as well as a release of claims are enclosed.

We wish to thank you and your staff for being so fair in taking into consideration unforeseen difficulties which we realize you shared with us. As always it is deeply gratifying to be treated as we always have been by your office with dignity and justice.

Ever since we were first called by Mr. Cabot, we have enjoyed an unusually fine relationship, rarely matched by other clients. It has been this atmosphere which enabled us to produce our best.

On March 5, 1963, the certifying officer asked the Comptroller General for an advance opinion whether the amount of \$8,500 contained in Change Order No. 3 is a legal obligation and may be paid under the pertinent appropriation.

On April 3, 1963, the Assistant Comptroller General issued a decision⁴ in which he held that "the amount of \$8,500 covering Change Order No. 3 * * * may not be paid from appropriated funds." The Assistant Comptroller General based his decision on the following conclusions:

As indicated above, the architects were required under the terms of Change Order No. 1 to provide supervision for the entire length of the job until final completion and acceptance of the work by the Government for which compen-

² Government Exhibit No. 16, Transcript, p. 15.

³ Government Exhibit No. 14, Transcript, p. 12.

⁴ Dec. Comp. Gen. B-150094; Government Exhibit No. 13, Transcript, p. 12.

sation was to be 2 percent of the total price of the construction work supervised. It has been our consistent position that provisions of this kind obligate the architect to provide services until work under the construction contracts is completed, notwithstanding that completion of such latter contracts may have been materially delayed beyond the scheduled time. B-42135, November 6, 1944. Therefore, the architects were required to complete performance in accordance with the terms of the contract and Change Order No. 1 without the issuance of Change Order No. 3 and the increase in compensation provided thereunder. Since the right to the described performance had already vested in the Government, there was no consideration for Change Order No. 3 which must be regarded as void and of no effect. 21 Comp. Gen. 31; 16 Comp. Gen. 463. Accordingly, the amount of \$8,500 covering Change Order No. 3 included on voucher schedule No. 29-1574 may not be paid from appropriated funds.

The Architects were apparently unaware that the matter had been transmitted to the Comptroller General by the certifying officer; and also were unaware that the Comptroller General had rendered a decision. On July 18, 1963, the contracting officer notified Mr. Alexander as follows:⁵

It is with regret that we must advise you that Change Order No. 3 to your professional services contract, providing additional compensation for the design and construction of the Gettysburg Visitor Center-Cyclorama, has been ruled illegal by the Comptroller General. Upon request for reconsideration, we had hoped that the decision would be reversed and the additional compensation granted; however, recent correspondence indicated that this is not possible and we have no further recourse in this matter.

On August 21, 1963, Volney F. Morin, Attorney at Law, requested the contracting officer to issue a decision. The letter reads in its pertinent part as follows:

Pursuant to the provisions of Article IX entitled Disputes in Contract No. 14-10-529-2046 entered into by and between the United States of America and Richard J. Neutra and Robert E. Alexander on April 27, 1959, we hereby request that a specific decision or ruling be made that a dispute exists between the contracting officer and the architect over an amount of \$17,591 with interest, claimed for extra services rendered.

On October 11, 1963, the contracting officer wrote a letter to the attorney for the appellant,⁶ in which he wrote as follows:

Dear Mr. Morin:

Receipt is acknowledged of your letter dated August 21, 1963, relative to the referenced contract with Neutra & Alexander, Architects.

We have thoroughly reviewed this matter and find that all services under the

⁵ Government Exhibit No. 7, Transcript, p. 10. The Government stipulated "that no notice was given to Appellant at the time the Certifying Officer submitted it to the Comptroller General."

⁶ Government Exhibit No. 6, Transcript, p. 11.

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aforesaid contract have been furnished and accepted by the Government for which the Government has paid the contractor in full. Payment of additional compensation would be improper under the decision of the Comptroller General of the United States, a copy of which (decision) was recently forwarded to you.

My decision therefore is that the claim of \$17,591 or any part thereof is necessarily refused.

The contractor then appealed timely. The Department Counsel argued:

The action is in form and substance an appeal from the decision of the Comptroller General and requests this Board to overrule the decision of the Comptroller General on the pure question of law, i.e., the interpretation of a contract. * * * that the question raised by this appeal was properly before the Comptroller General in the first instance and is final.

On December 27, 1963, Department Counsel moved that the appeal be dismissed for lack of jurisdiction.

Appellants' counsel, on the other hand, in its main thrust argued that Change Order No. 3 is a bilateral agreement and could not be unilaterally altered by the contracting officer. He quoted our language used in *Wickes Engineering and Construction Company*,⁷ where we stated "The binding effect of agreements of this nature is amply supported by authority."

Despite the simplicity of the issue, no applicable precedent was found by the Board nor cited by the parties. In view thereof, a conference, pursuant to 43 CFR 4.9, was held on June 17, 1964. In that conference, which was conducted by the undersigned, the contents of the appeal file was established consisting of 26 exhibits, some of which are quoted in this opinion. The hearing official stated as follows:⁸

CHAIRMAN GANTT: Further, * * * there are two issues before the Board: One, has the Board jurisdiction? Two, is Change Order Number 3 binding on the government? I am inclined to agree that these are at the present time the two issues which have to be decided by the Board as a threshold question.

But, as I am going to state later on, there is a third issue which the parties have not presented, but which the Board will want to formulate.

The parties then agreed, pursuant to 43 CFR 4.2(b), that the hearing official may "decide" the appeal.⁹ Since the decision which the under-

⁷ IBCA-191 (November 30, 1960), 61-1 BCA par. 2872, 3 Gov. Contr. 30, aff'd on reconsideration IBCA-191 (January 18, 1961), 68 I.D. 30, 61-1 BCA par. 2915, 3 Gov. Contr. 88(e).

⁸ Transcript, p. 20.

⁹ Transcript, p. 25.

signed dictated in the record concerns a novel question. I am going to restate that decision in the language as it appears in the transcript.¹⁰

* * * I want, however, to emphasize that I am not concerned about the finality of the Board's decision. I am only concerned with the power of this Board one, to look at this case; and two, to decide whether the Comptroller General's decision is binding; and three, whether the hearing is necessary and whatnot.

Now, I make the following interlocutory Order, which incidentally, is not appealable at this stage. The Board takes full jurisdiction in this matter since it concerns the question of whether services had been rendered by the A&E which are properly payable under the Contract. This will depend upon the factual examination of what services have actually been rendered. The Board feels that under the Bianchi decision of the Supreme Court, an adequate record must be established in order to enable a competent court, if it is necessary, for the parties to resort to litigation, to be able to dispose of the controversy.

It seems to the Chairman that this is a requirement imposed by the Supreme Court decision on Contract Appeals procedures. This does not exclude that in certain situations, when it is completely out of the power of the Board to dispose of an appeal, that the Board would decline jurisdiction at an early stage; but examples for this would be the failure of appellant to state the cause of action or the established characterization of a claim as one for breach of contract.

Secondly, even if a pure question of law would have been presented to the Board, I do not hesitate to state that the Board would have taken jurisdiction since its jurisdiction does not extend only to questions of fact, but also to questions of law, which this Board has held on numerous occasions.

In that respect, the jurisdiction of the Board is broader than that of the Armed Services Board of Contract Appeals. This does not mean finality. It does not curb the power of the Comptroller General to look at the Board decision, nor does it curb the power of a court to look at the law side of a Board decision, assuming that the facts as found by the Board are supported by substantial evidence.

There are, of course, different charters for the various Boards, but early since its establishment in 1954, the Board has so held to carry out the policy of the Department of the Interior as I understand it, to give it full and adequate remedy, in the terms of the contract, to an appellant.

In summary, then, there are facts to be established, and on the basis of those facts, the Board will interpret and construct, based on the terms of the contract—and my choice of the use of both words "interpret and construct" is a deliberate one.

Now, gentlemen, I come to the second hurdle in our obsolete course here, which is not an easy one, that is the binding effect of the decision of the Comptroller General. I will summarize, for the benefit of both parties, the relationship of this Board to the Comptroller General. I do this with great deference because, being a "land-lubber," I hate to navigate into an unchartered sea, especially since the pilots, which are counsel of both parties, unfortunately have not as yet rendered me any assistance.

Furthermore, I have been unable to find any precedent which would be of any help. I am going, first, to outline the position of the Board in the case of the

¹⁰ Transcript, pp. 23-25.

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submission by the Contracting Officer, and distinguish, then, the consequence of a submission by the Certifying Officer.

* * * * *

I am now going to discuss¹¹ the relationship of this Board to the Comptroller General, and again the parties will have to bear with me in recognizing the difference between the power to dispose of an appeal and the finality accorded to a decision of the Board, or in this case, as to a one-man decision.

There are two situations in which a matter can go to the Comptroller General. There are three instances which affect two government officials: One is, submissions by the Contracting Officer unilaterally; two, joint submissions by the Contracting Officer and the Contractor; and third, submission by a Certifying Officer.

Concerning the unilateral submission, this Board, as well as other Boards, notably the Armed Services Board of Contract Appeals, have held that a unilateral submission does not bind the Board. In fact, there is landmark case in this Board in the appeal of Merritt, Chapman, Scott, where the Comptroller General had given an advance opinion to the Contracting Officer. The Contracting Officer issued the decision based on the Comptroller's advance opinion. The Board made an award of approximately \$4 to \$5 million to the Appellant, and despite the magnitude of the award, the Comptroller General held that the Board's opinion was supported by substantial evidence, and therefore, he would not have any objection to the payment of \$4 to \$5 million.

The decision of the Comptroller General is significant because in the unilateral submission by a Contracting Officer, the Comptroller General will base his advance opinion on a presumption that the facts are correct as presented; whereas, of course, a Board could not be so generous, since, on the basis of the Wunderlich Act, it must base its decision on substantial evidence. And in fact, it is the rule of this Board and of other boards, this being a civil case, to proceed only on the basis of the preponderance of evidence, which I believe requires a higher quantum of evidence than substantial evidence. The difference, of course, is that this would be an ex parte submission.

I believe there is no doubt that if there is a joint submission by a Contracting Officer and the Contractor, that the Board would be bound by the decision of the Comptroller General. My conclusion is completely different regarding a submission by the Certifying Officer.

The Act of December 29, 1941, 55 Stat. 8763, 31 USC 82d, gives the Certifying Officer an express statutory right "to apply for and obtain a decision by the Comptroller General on any question of law when he doubts the legality of a payment."

Obviously, there is a different situation than in the case of submission by the Contracting Officer.

CHAIRMAN GANTT:¹² Despite the absence of the precedents, I am going to hold that the decision of the Comptroller General is binding on the Certifying Officer, which has the consequence that no payment can be made under Change Order No. 3. However, this does not dispose of the claim of appellant, since,

¹¹ Transcript, pp. 25-27.

¹² Transcript, pp. 27-30.

if he rendered additional services, and if such services should be payable under the terms of the contract, he would be entitled to such payment. I consider, however, the decision of the Comptroller General as a valuable precedent, as we have recently said, which will be considered with other precedents, which may have arisen:

Where does that leave us now? It means that the Certifying Officer cannot pay Change Order No. 3 since the statute has given to the Certifying Officer the statutory right to obtain a decision and to the Comptroller the statutory right to make a decision. Therefore, under this analysis, the decision of the Comptroller that the Change Order No. 3 is null and void, is binding.

The difficulty in this case arises from an erroneous assumption on the part of the Contracting Officer that he has discharged his duty to find facts and to make an adequate, just and fair decision by the letter of October 11, 1963. It is obvious that that decision lacks the primary ingredients of a decision, namely, to reasonably inform the Appellant and also the Board of its position. Secondly, he has not made a finding of facts why his prior finding of facts has been erroneous. Obviously, the Comptroller General bases his opinion only on an assumed statement of facts, not made by the Contracting Officer, but by the Certifying Officer.

Also, in certain situations, the Contracting Officer may act in a quasi-judicial capacity. We do not know of any fact-finding authority vested in a Certifying Officer.

I believe that the Certifying Officer acted correctly in submitting a question on which he had doubt, to the Comptroller General, but it seemed to us that fairness would have demanded that a reputable government contractor should be apprised of the submission to the Comptroller General in order to avoid the stigma of an *ex parte* procedure.

The situation is, as I realize, a little bit different from cases adjudicated by the Comptroller General pursuant to 31 USC 74 where the Comptroller normally remands the matter back to the Department to give the contract appellant a possibility to exhaust its administrative remedy. But we are sure that the Comptroller General, who has applied the concept of fairness on numerous occasions, did not want to deprive the contract appellant of his contractual right to have a dispute decided by the executive agency and after hearing.

There are, obviously, two avenues available in this matter to proceed further: One, I could remand the matter back to the Contracting Officer to issue a finding of facts or an appropriate decision for a determination of the question whether additional services had been rendered, and especially whether the five categories of additional work specified by the appellant have been rendered.

The second question which would have to be decided by the Contracting Officer is, whether the terms of the contract provide for changes, and whether such changes are compensable. The other way would be, since proceedings before this Board are *de novo*, to proceed with a hearing to establish by witnesses for the Government and for the appellant what additional services have been rendered.

During the conference, the undersigned found "that not all the facts had been presented to the Comptroller General * * * and that im-

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portant correspondence by the contractor which has a bearing on the case was not furnished to the Comptroller General." The undersigned further found that "the record before me is incomplete and the evidence appearing in the appeal file is insubstantial to enable me merely on the basis of the record before me to make any finding." It was realized, however, by both parties that the amount in dispute involved did not allow the accumulation of further expenses, and steps were considered to minimize such expenses. Consequently, the parties agreed to explore with the Comptroller General a possible settlement of the matter, and a conference was held to avoid the necessity of the hearing in Los Angeles scheduled for October 19, 1964.

The conference was held at the General Accounting Office on September 8, 1964. Both parties had been invited. The undersigned had been invited to attend by Assistant Comptroller General Weitzel to explain, if necessary, the status of the appeal before the Board. At the conference, which was presided over by Assistant General Counsel Haycock, the General Accounting Office acceded informally to the views expressed by the undersigned in the conference of June 17, 1964, and that the fact that the Change Order No. 3 was declared null and void would not prevent the consideration of payment for additional services in the nature of changes and extras, etc., by the contracting officer or the Board.

On October 12, 1964, Department Counsel notified the undersigned that the parties had agreed that the hearing scheduled for Monday, October 19, 1964, in Los Angeles, California, should be canceled, and that an opportunity should be extended by the Board to the parties to dispose of the claim of \$17,000 by agreement. Since it appears that the contracting officer has not, in his decision, passed on all of the claims of the Architects, the following order is hereby issued:

1. The hearing scheduled for October 19, 1964, in Los Angeles, California, is canceled.
2. The matter is remanded to the contracting officer for the prompt taking of appropriate action.¹³

PAUL H. GANTT, *Chairman.*

¹³ Such action may consist of either (1) a legally supportable agreement to dispose of the Architects' claim by payment of legally supportable amount, or (2) if the parties cannot agree on such an agreement, by the issuance of an appropriate decision or findings of fact by the contracting officer, with preservation of appeal rights.

APPEAL OF FEDERAL PACIFIC ELECTRIC COMPANY

IBCA-334

*Decided October 23, 1964***Contracts: Performance**

An interior void in the rotating insulator column of an oil circuit breaker which, at the time of final acceptance of the breaker, was not known to the Government and could not have been discovered by it through reasonable methods of preacceptance inspection is a latent defect within the meaning of the Inspection clause of a standard-form supply contract.

Contracts: Generally—Contracts: Interpretation

The general rules of law stated in the Uniform Sales Act and in the sales provisions of the Uniform Commercial Code form part of the general Federal common law applicable to Government contracts, if not made inappropriate by such controlling factors as Federal statutory law. One such rule is the principle of cumulation of warranties.

Contracts: Breach—Contracts: Interpretation

The inclusion of a Guarantee clause in a standard-form supply contract is not inconsistent with, and does not override, the provision in the Inspection clause which excepts latent defects from the conclusive effect of a final acceptance. Hence, the expiration of the guaranty period does not preclude the Government from exercising the remedies specified in the Inspection clause with respect to latent defects discovered after such expiration.

BOARD OF CONTRACT APPEALS

This is a timely appeal from a decision of the contracting officer asserting that contractor-appellant is indebted to the Government in the amount of \$8,486.15. This sum represents the cost of repairing a power circuit breaker, furnished by appellant, which was severely damaged while in operation, subsequent to acceptance, final payment, and expiration of the guaranty period specified in the contract.

The contracting officer determined that the damage resulted from an explosion due to a latent manufacturing defect, consisting of an improperly laminated rotating insulator column within the circuit breaker. This column was manufactured by a subcontractor.

Appellant contends that the total cost incident to restoring the breaker should be borne by the Government, on the ground that the guaranty period specified in the contract had expired prior to the explosion.

The matter is submitted by the parties on the record without an oral hearing.

The contract, dated December 5, 1957, called for the manufacture and installation of 10 circuit breakers for a total contract price of \$408,801.

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It was executed on Standard Form 33 (Revised June 1955) and incorporated the General Provisions of Standard Form 32 (November 1949 edition), which included a standard Inspection clause (Clause 5). Paragraph (d) of that clause reads as follows:

(d) The inspection and test by the Government of any supplies or lots thereof does not relieve the contractor from any responsibility regarding defects or other failures to meet the contract requirements which may be discovered prior to final acceptance. *Except as otherwise provided in this contract, final acceptance shall be conclusive except as regards latent defects, fraud, or such gross mistake as amounts to fraud.* (Italics supplied.)

The Supplementary General Provisions contained a paragraph relating to responsibility for the equipment following acceptance, which reads as follows:

108. *Acceptance does not relieve Contractor of Responsibility.* The acceptance of material or equipment or parts thereof or waiving of inspection will in no way relieve the contractor of responsibility for furnishing material or equipment or parts thereof meeting the requirements of these specifications. (Italic supplied.)

The Supplementary General Provisions also included a clause which required, among other things, that all materials should be free from defects. It reads as follows:

109. *Material and Workmanship.* Material and workmanship shall be of the type and grade most suitable for the application and as far as practicable shall conform, unless otherwise specified, to the latest applicable standards, specifications, recommended practices, and procedures of such standardizing bodies as the Federal Specifications Board, ASTM, AIEE, ASME, NEMA, and ASA. All materials shall be of recent manufacture, unused and *free from defects.* (Italics supplied.)

The Guarantee Clause of the Supplementary General Provisions provided, in pertinent part, that:

112. *Contractor's Guarantee.* A. The contractor guarantees that equipment furnished under the contract meets all the requirements of these specifications.

B. The contractor hereby agrees to repair or replace any equipment or part thereof which fails in operation during normal and proper use within one year from date of completion of installation due to defects in design, material or workmanship, notwithstanding that final acceptance and payment, may have been consummated; Provided, however, that in each case the contracting officer shall have promptly forwarded written notice of such failure to the Contractor and Provided Further, that in case installation is delayed for more than six (6) months after the date of preliminary acceptance at destination by conditions beyond the control of the contractor, this guarantee shall remain in full force and effect for a period of eighteen (18) months from date of preliminary acceptance at destination regardless of the date of completion of installation. All replacements of equipment or parts thereof as a result of failures after final acceptance

shall be made promptly and free of charge f.o.b. destination. The cost of installing these replacements after final acceptance shall be borne by the Government.

Although the contract called for the manufacture of 10 power circuit breakers, we are concerned here only with one Type RHE-84-L, 230/180 KV, 1600 ampere, floor mounted, oil circuit breaker which was delivered to the Government and preliminarily accepted by it on December 18, 1958. Installation was completed on January 23, 1959. Final acceptance and payment were made on February 9, 1960. The breaker was energized and put into service on March 23, 1960.

The circuit breaker was used intermittently thereafter until June 19, 1961, when a sudden and violent failure accompanied by flash-over, occurred in one of the three tanks. The rotating insulator column which supported the moving contacts, was broken into several pieces and a strip approximately 2 inches wide and 1/8-inch thick was blown out of the column. The resulting explosion bulged and otherwise damaged the tank, stretched or broke foundation lag bolts, cracked insulator porcelain, and caused considerable burning of oil and of metal at the various points of arc termination in the breaker.

Examination of the rotating unit by Government engineers two days later disclosed a void between laminations in the column where the presence of a strip of tape had prevented complete impregnation of the laminations by the glue used to bond them together during manufacture. This strip of tape had been inserted to splice together the two lengths of rolled paper of which the column was formed, and would not have been needed had a continuous strip of paper been used. Corona burns indicated that corona discharge had developed as a result of ionization of the void created by the tape. The current leakage became sufficiently high that the rotating unit exploded and flash-over to the tank resulted therefrom.

By letter of June 23, 1961, the Government advised appellant that the total cost of repair of the damaged circuit breaker should be borne by appellant, since its failure was caused by a latent manufacturing defect which could not have been discovered during pre-acceptance inspection or during normal maintenance and operation.

On December 18, 1961, appellant was advised by the contracting officer that the circuit breaker had been repaired and returned to service and that the total costs attributable to the defect were \$8,486.15, of which \$3,854 represented parts and labor supplied by the Government and \$4,632.15 represented unpaid invoices for parts furnished by appellant.

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In response to this letter, representatives of appellant, including its vice president and marketing manager, Mr. B. J. Stimpson, subsequently met with the contracting officer for the purpose of discussing the Government's claim. Mr. Stimpson, although denying liability for the breaker's failure, stated that another of appellant's customers had experienced similar trouble approximately one month following the failure of the subject breaker. He admitted that investigation had disclosed that both failures were caused by the fact that the central insulating column had been made by appellant's subcontractor from two strips of paper, instead of being fabricated from one continuous length of paper. This admission confirmed the Government engineers' finding that the rotating insulator tube was not properly laminated.

In order to resolve the dispute, it is necessary for the Board to determine whether the appellant or the Government should bear the expense of repairing the circuit breaker, in view of the fact that it failed while in operation subsequent to expiration of the guaranty period specified in the contract. This failure occurred on June 19, 1961, which was more than one year after the completion of installation on January 23, 1959, and more than 18 months after the preliminary acceptance of the breaker at destination on December 18, 1958.

More specifically we must determine (1) whether the Government's remedies under the Inspection clause (Clause 5) survived the final acceptance of the circuit breaker by virtue of the specific exception for latest defects in paragraph (d) of that clause; and (2) whether the express guaranty appearing in the Guarantee clause (paragraph 112) provided an exclusive remedy for defects discovered after final acceptance which—the time limitations of that clause having expired—precludes any recovery by the Government.

Appellant admits that the rotating insulator column was defectively fabricated by splicing strips of paper instead of using one continuous length of paper. Documentary and photographic evidence establishes the fact that the void was an internal defect which could not have been discovered before final acceptance by any customary or reasonable procedures of visual inspection. Nor is it likely that the defect could have been discovered before final acceptance through any customary or reasonable performance tests, particularly since the ionization of the void appears to have been a gradual process. The defect was not actually discovered, by either appellant or the Government, until after the explosion of the column and the concomitant damage to the circuit breaker. We do not hesitate to conclude that the defect in the ro-

tating insulator column was "latent" within the meaning of that word as used in the Inspection clause.¹

Appellant contends, however, that the effect of the Guarantee clause precludes recovery by the Government, since the period of time set forth in that clause expired prior to failure of the equipment. It further avers that the language in the Inspection clause pertaining to latent defects has no application here, and may be applied only where the contract fails to contain a guaranty clause. Appellant also maintains that the Government could not possibly have intended that the rotating insulator column would be guaranteed to last forever.

The Government contends, on the other hand, that the Guarantee clause does not eliminate or limit the Inspection clause, and that the Government is entitled to rely here not only on the remedies specifically enumerated in the Inspection clause, but also on the remedies prescribed by the general law of sales for breach of warranty. It maintains that the Guarantee clause should not be construed as disturbing a subsisting obligation as to latent defects, that this clause provides a cumulative remedy in addition to the ones contained in the Inspection clause, and that the two clauses are consistent.

Paragraph (d) of the Inspection clause states that "final acceptance shall be conclusive except as regards latent defects." By prefacing this language with the words "Except as otherwise provided in this contract," the paragraph recognizes that other provisions of the contract may either narrow or widen the area of conclusiveness resulting from final acceptance. The Guarantee clause expressly narrows that area by excepting from it any defect, whether latent or patent, which results in the occurrence of an operating failure during the guaranty period. On the other hand, the Guarantee clause contains no intimation of an intention to widen the area of conclusiveness by excluding or modifying the exception for latent defects. No intimation of such an intention is to be found in other provisions of the contract. To the contrary, paragraph 108, which amplifies the Inspection clause, and

¹ Compare *F. W. Lang Co.*, ASBCA No. 2677 (June 28, 1957), 57-1 BCA par. 1334 (holding a defect to be "latent" in circumstances comparable to those in the instant case) with *Hercules Engineering & Mfg. Co.*, ASBCA No. 4979 (December 9, 1959), 59-2 BCA par. 2426, 2 Gov. Contr. par. 68 (holding a defect not to be "latent" in circumstances where a painstaking visual inspection would have disclosed its presence). For a further discussion of "latent defects" see Whelan, *Warranties under the General Law of Sales—Some Relationships to Government Contract Law* in George Washington University, *Government Contract Warranties* (Government Contracts Monograph No. 2) pp. 3, 16 (1961); SASS, *Government Contract Warranties*, id. at pp. 22, 24; Borden, *Effect of the Warranty Clause in Government Supply Contracts*, 20 Fed. B. J. 151, 152 (1960).

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paragraph 109, which includes a warranty that all materials shall be "free from defects," are indicative of a purpose to enlarge rather than limit the rights of the Government under the Inspection clause.

The rule that warranties are to be construed as cumulative, wherever reasonable, is a well established principle of the law of sales. Section 15(b) of the Uniform Sales Act ² states that:

An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith.

Section 2-317 of the Uniform Commercial Code ³ states, in pertinent part, that:

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant.

Numerous decisions recognize and apply the rule of cumulation of remedies to which these provisions give expression.⁴

It is, of course, accepted that the law governing the meaning and effect of Government contracts, except in particulars controlled by Federal statutory law, is the general Federal common law as fashioned by the decision of the Federal courts, rather than the law of any State.⁵ In the practical application of this principle, rules of law that have received wide recognition among the States have frequently been adopted as persuasive guides to what the Federal law should be. Notably, the Uniform Sales Act has been regarded as an appropriate source of general rules of law for use in connection with Government

²This act has been adopted by 35 States and the District of Columbia, since its promulgation by the National Conference of Commissioners on Uniform State Laws in 1906. 1 U.S.A., Sales, Table III (Supp. 1963).

³The Code has been adopted by 29 States and the District of Columbia, since its promulgation by the American Law Institute and the National Conference of Commissioners on Uniform State Laws in 1952. Freedman, *Products Liability under the Uniform Commercial Code*, 10 Prac. Law. 49, 63 (1964). The 29 States that have adopted the Code include 22 that had previously adopted the Uniform Sales Act. Only seven States have failed to adopt either the Code or the Act.

⁴E.g., *John A. Roebbling's Sons Co. v. Southern Power Co.*, 142 Ga. 464, 83 S.E. 138 (1914); *Appleman v. Fabert Motors, Inc.*, 30 Ill. App. 2d 424, 174 N.E. 2d 892 (1961); *Inland Products Corp. v. Donovan, Inc.*, 240 Minn. 365, 62 N.W. 2d 211 (1953); *Feehey & Bremer Co. v. Stone*, 89 Ore. 360, 171 Pac. 569, 174 Pac. 152 (1918); *General Motors Corp. v. Dodson*, 47 Tenn. App. 438, 338 S.W. 2d 655 (1960); *Greenland Development Corp. v. Allied Heating Products Co.*, 184 Va. 385, 35 S.E. 2d 801 (1945); *Ford Motor Co. v. Cullum*, 96 F. 2d 1 (5th Cir. 1938), cert. denied 305 U.S. 627 (1938) (dictum); Annot., 164 A.L.R. 1321, 1325, 1334 (1946).

⁵*Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947); *United States ex rel. Mesta Machine Co. v. Allegheny County*, 322 U.S. 174 (1944); *Olearfield Trust Co. et al. v. United States*, 318 U.S. 363 (1943).

supply contracts.⁶ The sales provisions of the Uniform Commercial Code, which supersede the Uniform Sales Act in these jurisdictions where both have been adopted, have also been viewed as an appropriate source of such rules.⁷

In the present case, both the language of the contract and the general principles of the law of sales thus lead to a conclusion that the Guarantee clause does not supersede that portion of the Inspection clause which entitles the Government, notwithstanding final acceptance, to avail itself of the remedies specified in that clause whenever a latent defect is uncovered.

The pertinent remedies are set forth in paragraph (b) of the Inspection clause (Clause 5), which reads as follows:

(b) In case any supplies or lots of supplies are defective in material or workmanship or otherwise not in conformity with the requirements of this contract, the Government shall have the right either to reject them (with or without instructions as to their disposition) or to require their correction. Supplies or lots of supplies which have been rejected or required to be corrected shall be removed or corrected in place, as requested by the Contracting Officer, by and at the expense of the Contractor promptly after notice, and shall not again be tendered for acceptance unless the former tender and either the rejection or requirement of correction is disclosed. If the Contractor fails promptly to remove such supplies or lots of supplies, when requested by the Contracting Officer, and to proceed promptly with the replacement or correction thereof, the Government either (i) may by contract or otherwise replace or correct such supplies and charge to the Contractor the cost occasioned the Government thereby, or (ii) may terminate this contract for default as provided in the clause of this contract entitled "Default." Unless the Contractor elects to correct or replace the supplies which the Government has a right to reject and is able to make such correction or replacement within the required delivery schedule, the Contracting Officer may require the delivery of such supplies at a reduction in price which is equitable under the circumstances. Failure to agree to such a reduction of price shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

Under this paragraph the Government is clearly entitled to charge appellant the costs reasonably incurred in repairing the damaged or destroyed portions of the circuit breaker. The charge of \$4,632.15 for replacement parts could hardly be considered unreasonable, since the parts were furnished by appellant and the charge represents the price

⁶ *Soudercraft Corp.*, ASBCA Nos. 9030 and 9130 (June 30, 1964), 1964 BCA par. 4317; *J. R. Simplot Co.*, ASBCA No. 3952 (January 30, 1959), 59-1 BCA par. 2112, modified (August 11, 1959), 59-2 BCA par. 2306; *F. W. Lang Co.*, *supra* note 1; see *Whitin Machine Works v. United States*, 175 F.2d 504 (1st Cir. 1949); cf. *Cudahy Packing Co. v. United States*, 109 Ct. Cl. 833 (1943).

⁷ *Reeves Soudercraft Corp.*, *supra* note 6.

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set upon them by appellant. The charge of \$3,854 for parts and labor furnished by the Government is contested by appellant on the ground that under the Guarantee clause the cost of "installing" replacements for equipment or parts, that fail after final acceptance, is to be borne by the Government. The Inspection clause, however, contains no comparable exclusion of installation costs. Moreover, the mere fact that the parties have agreed to share the expense of repair work performed under a provision which extends to all defects existing at the time of final acceptance, including defects that could reasonably have been discovered by the Government, affords no convincing basis for an inference that they also intend to share the expense of repair work performed under a provision which is limited to those defects existing at the time of final acceptance that were neither known to, nor reasonably discoverable by, the Government.

We find this construction of the contract to be both reasonable and applicable to the circumstances of the instant case. The defect in question was one which existed at the time when the circuit breaker was delivered to the Government, not one that came into being subsequently. The liability imposed is for a defect which appellant could have prevented, through the exercise of better control over its subcontractor, and which it was duty-bound to prevent under such provisions of the contract as paragraph 109.

The construction here adopted does not proceed upon the assumption that the circuit breaker would endlessly perform its functions or that the rotating insulator column would last forever. Certainly, neither appellant nor the contracting authority, the Bonneville Power Administration, were prescient to the extent that the duration of the useful life of the circuit breaker could be foretold with absolute certainty. If, prior to a failure due to a latent defect, the value of the breaker had been materially diminished by normal wear and tear, technical obsolescence or other forms of depreciation, this reduction in value would be a factor to be considered in determining the amount of the repair costs properly chargeable to appellant. Here, however, the failure of the circuit breaker was proximately caused by the defective manner in which the rotating insulator column had been fabricated, and occurred at a time when the equipment was relatively new.

We find therefore:

1. That the failure of the circuit breaker was caused by defective fabrication of the rotating insulator column, which was an integral component thereof.

2. That this defect was not discernable by the Government through reasonable methods of pre-acceptance inspection, and was a latent defect within the meaning of the Inspection clause (Clause 5) of the contract;

3. That the provisions of the Guarantee clause (paragraph 112) of the contract are not inconsistent with, and do not override the portion of the Inspection clause that pertains to latest defects; and

4. That the failure of the circuit breaker after its final acceptance entitles the Government to the remedies specified in the Inspection clause.

Conclusion

For the reasons set forth above, the appeal is denied.

JOHN J. HYNES, *Member.*

I CONCUR:

THOMAS M. DURSTON, *Member.*

I CONCUR:

HERBERT J. SLAUGHTER, *Acting Chairman.*

STATE OF UTAH

A-29461 et al.

Decided October 30, 1964

School Lands: Indemnity Selections—School Lands: Mineral Lands

The date as of which the determination is to be made whether public land is eligible for selection as school land indemnity is the date on which the State has complied with all the requirements of the statute and regulations, including publication, and not the date when the State selection is filed.

School Lands: Indemnity Selections—School Lands: Mineral Lands—Taylor Grazing Act: Classification—Withdrawals and Reservations: Executive Order 6910—Withdrawals and Reservations: Executive Order 6964

As a result of the general withdrawals accomplished by Executive Orders Nos. 6910 and 6964 and the provisions of section 7 of the Taylor Grazing Act, a State's application for indemnity school lands is a petition to classify the lands as suitable for State selection and until classification the lands are not available for selection.

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School Lands: Indemnity Selections—School Lands: Mineral Lands

School land indemnity selections for lands within the known geologic structure of a producing oil and gas field, unless the lost lands are similarly situated, or for lands in a producing or producible lease, must be rejected, and the date of determination as to whether the selected lands are in the known geologic structure of a producing oil and gas field or are in a producing or producible lease is the date when the State has complied with all requirements for making a selection.

School Lands: Indemnity Selections—School Lands: Mineral Lands—Oil and Gas Leases: Known Geological Structure

The phrase "known geologic structure of a producing oil and gas field" has been so long understood to include oil and gas fields which once produced and are still capable of production, although not currently producing, that the phrase as used in Rev. Stat. § 2276(a)(2) will be considered to have the same meaning, despite the fact that the word "producing" is used in the next paragraph of the statute to mean actual production.

School Lands: Indemnity Selections—School Lands: Mineral Lands—Oil and Gas Leases: Production—Oil and Gas Leases: Unit and Cooperative Agreements

Land in any lease of a suit agreement which is in a participating area is to be considered as land in a producing or producible status so that all lands subject to that lease, whether in the unit or participating area, are not eligible for selection by a State as school indemnity lands.

Administrative Practice—Bureau of Land Management

The Director of the Bureau of Land Management has authority at any time to take up and dispose of any matter pending in a land office or to review any decision of a subordinate officer with or without an appeal.

School Lands: Indemnity Selections—School Lands: Mineral Lands

If a State offers mineral land as base for an indemnity selection of land which is both valuable for oil shale and valuable for oil or gas and is situated within the known geologic structure of a producing oil or gas field (and the base land is not so situated) or is included in a producing or producible oil and gas lease, the State may obtain the selected land, including the oil shale deposits, upon consenting to a reservation to the United States of the oil and gas in the selected land.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

The State of Utah has appealed to the Secretary of the Interior from a decision dated February 28, 1962, and from several other decisions of the Division of Appeals, Bureau of Land Management, affirming

land office decisions rejecting in whole or in part school land indemnity selections filed by the State pursuant to Rev. Stat. §§ 2275 and 2276 (1875), as amended, 43 U.S.C. §§ 851, 852 (1958), as amended, 43 U.S.C. § 852 (Supp. V, 1964).¹

Since common issues of law run throughout the appeals, it is considered advisable to dispose of them in one decision.

Sections 2275 and 2276 of the Revised Statutes, as amended, authorize a State to select public lands in lieu of school lands granted but lost to it before title could pass. Section 2276, as amended by the act of August 27, 1958, 72 Stat. 928, provides in part as follows:

(a) The lands appropriated by section 2275 of the Revised Statutes, shall be selected from any unappropriated, surveyed public lands within the State or Territory where such losses or deficiencies occur subject to the following restrictions:

(1) No lands mineral in character may be selected by a State or Territory except to the extent that the selection is being made as indemnity for mineral lands lost to the State or Territory because of appropriation prior to survey;

(2) No lands on a known geologic structure of a producing oil or gas field may be selected except to the extent that the selection is being made as indemnity for lands on such a structure lost to the State or Territory because of appropriation prior to survey; and

(3) Lands subject to a mineral lease or permit may be selected * * * if none of the lands subject to that lease or permit are in a producing or producible status; * * *

* * * * *

(d) (1) The term "unappropriated public lands" as used in this section shall include, without otherwise affecting the meaning thereof, lands withdrawn for coal, phosphate, nitrate, potash, oil, gas, asphaltic minerals, oil shale, sodium, and sulphur, but otherwise subject to appropriation, location, selection, entry, or purchase under the nonmineral laws of the United States; and lands withdrawn by Executive Order Numbered 5327, of April 15, 1930, if otherwise available for selection.

(2) The determination, for the purposes of this section of the mineral character of lands lost to a State or Territory shall be made as of the date of application for selection and upon the basis of the best evidence available at that time. * * *

The selections considered here were rejected because the lands selected were deemed ineligible under paragraphs (2) or (3) of subsection (a).

One issue involved in many of the appeals, and the sole issue in some, concerns the date as of which the character of the selected land

¹ The other appeals considered in this decision are listed in the appendix to this decision.

² Paragraph (3) of subsection (a) was amended by the act of September 14, 1960, 74 Stat. 1024, 43 U.S.C. § 852 (Supp. V, 1964), but without any change so far as the issues in these appeals are concerned. A number of the State selections considered here were filed prior to the 1960 amendment; the remainder were filed after the amendment.

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is to be determined. In the typical situation, the State selects lands mineral in character as indemnity for lands mineral in character lost to it but which, on the date it files its application, are not within the known geologic structure of a producing oil or gas field. However, before they are classified as suitable for State selection, it is determined that the lands are within the known geologic structure of a producing oil or gas field. Consequently, the application is rejected as to them for the reason that under paragraph (2) of subsection (a) such lands can only be selected as indemnity for similar lands lost to the State.

The appellant contends that, since paragraph (2) of subsection (d), *supra*, provides that the character of the base lands is to be determined as of the time the application for selection is filed, the character of the selected lands is to be determined as of the same date. The decisions below, to the contrary, held that an application for selection is merely a petition for classification which entitles the State to nothing more than having its application considered and that the character of the selected lands may be determined at any time prior to approval of the application for selection.

The legislative history of the act of August 27, 1958, *supra*, throws no light on the problem.

In general, where the mineral character of public land is an issue in its disposition, the requisite determination is made as of the date the applicant has complied with all the requirements of the pertinent statute and regulations. *State of Wisconsin et al.*, 65 I.D. 265, 272 (1958); see *Willcoxon v. United States*, 313 F. 2d 884 (D.C. Cir. 1963), *cert. denied*, 373 U.S. 932 (1963). Among the requirements imposed by the pertinent regulations is one obligating the State to publish notice of its selection in a designated newspaper for a certain period of time and to submit proof of publication. 43 CFR, 1964 Supp., 2222.1-4. There is no indication in the records of the cases on appeal that the State has completed the necessary publication and made the required proof. Until it has done so, it has not met all the obligations imposed on it and it cannot successfully maintain that the date had passed for determining whether the selected lands were within the known geologic structure of producing oil and gas fields.³

³ *State of California*, 60 I.D. 322 (1949), held that until a State seeking an exchange pursuant to section 8 of the Taylor Grazing Act, as amended, 49 Stat. 1976 (1936), 43 U.S.C. § 315g (1958), has complied with all the requirements of the statute and the applicable regulations, including publication, it has not acquired rights in the selected land and the United States may withdraw the land if it chooses. In reaching this conclusion, the decision stated:

"The clear implication of the decisions in the *New Mexico* and *Wyoming* cases [*Payne v. New Mexico*, 255 U.S. 367 (1921), and *Wyoming v. United States*, 255 U.S. 489 (1921)] is

Furthermore, it has long been established that, as a result of the general withdrawals accomplished by Executive Orders Nos. 6910 and 6964 on November 26, 1934, and February 5, 1935, respectively, and the provisions of section 7 of the Taylor Grazing Act, as amended, 49 Stat. 1976 (1936), 43 U.S.C. § 315f (1958), a State in applying for school land indemnity selections merely petitions the Secretary to classify the lands as suitable for State selection and that until he does so the lands are not of the category available for State selection. *State of Arizona*, 59 I.D. 317, 322 (1946); *State of California*, 59 I.D. 451 (1947); *State of California*, 67 I.D. 85 (1960); see also *Carl v. Udall*, 309 F. 2d 653 (D.C. Cir. 1962); Opinion of Attorney General, 70 I.D. 65, 71 (1963).

that if the States had not fully complied with all the requirements prescribed by the pertinent law and regulations, there would not have been an acceptance by each State of the Government's offer, and the State would not have acquired any rights in the selected land. *Hobart L. Pierson*, 49 L.D. 436 (1923); cf. *State of New Mexico, Robert M. Wilson, Lessee, v. Robert S. Shelton and John T. Williams*, 54 I.D. 112 (1932); and *State of California, Robison, Transferee*, 48 L.D. 334 (1921).

"In the present proceeding, there are numerous requirements imposed by section 8 of the Taylor Grazing Act, as amended, and the supplementary regulations which the State of California had not complied with on November 6, 1947. In connection with the publication of the notice required by subsection (d) of section 8, the regulations provide that, after an application has been filed and the necessary investigations have been made by the Commissioner of the General Land Office (now the Director of the Bureau of Land Management), a notice of the exchange will be submitted to the State for publication; and that, after publication of the notice, the State shall submit proof of such publication (43 CFR 147.8, redesignated 43 CFR, 1947 Supp., 147.6). With respect to the conveyance by the State of title to the offered lands, as required by subsection (c) of section 8, the State is required to submit a duly recorded deed of conveyance of the offered lands (unless they are unsurveyed), a certificate that the offered lands have not been sold or otherwise encumbered by the State, a certificate by the county recorder or by an approved abstracter that no instrument purporting to convey or encumber the title to the offered lands is of record or on file in the recorder's office, and, if the offered lands have ever been held in private ownership, an abstract of title and a tax certificate (43 CFR 147.8, redesignated 43 CFR, 1947 Supp., 147.6). None of the steps required of a State in connection with an exchange of lands under section 8 had been taken as of November 6, 1947, by the State of California in the present case, with the exception of the filing of the exchange application. Of course, the notice to be published by the State of California was to be prepared and furnished to the State by this Department, and the Department had failed to perform its part of this procedure as of November 6, 1947. However, I am of the opinion that such failure on the part of the Department could not operate to confer upon the State vested rights in the selected lands under the decisions in the *New Mexico* and *Wyoming* cases. [Pages 326-327.]

* * * * *

"In this connection, it should be noted that, under the Supreme Court's construction of the lieu-selection law involved in the *New Mexico* and *Wyoming* cases, the Department did not have an option to accept or reject a lieu selection; the Department could only ascertain whether the requirements for a selection had been met by a State. Nevertheless, the Court did not hold that a State acquired rights in selected land merely upon filing a selection list. Instead, a State's rights in selected land vested under the lieu-selection law only after the State had complied with all requirements of the law and the pertinent regulations. Similarly, it is reasonable to conclude that under section 8 of the Taylor Grazing Act, as amended, a State must fully comply with all the requirements prescribed by the section and the applicable regulations in order to acquire rights in land selected pursuant to section 8." [Page 328.]

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Thus, at the very least, the character of the selected lands may be determined as of the date of classification and if on that date they are in the known geologic structure of a producing oil and gas field they can be selected only if the lost lands were similarly situated.

The fact that the Congress, in paragraph (2) of subsection (d), selected the date on which the State files its application as the date for determining the mineral character of the lost land does not require a conclusion that the character of the selected lands is to be determined as of the same date. In view of the long-established rulings that the character of the selected lands may be determined as of any time prior to the State's doing all that is required of it to perfect a selection, it would be wholly unreasonable to attribute to the Congress an intent to overrule these holdings in the absence of a clear expression of such intent. No such expression is to be found in the legislative history of the act of August 27, 1958, *supra*, and it would be wholly unreasonable to glean such intent from the silence of Congress in fixing a date for determining the character of the selected lands. On the contrary, the silence of Congress is far more reasonably to be interpreted as evidencing an intent not to change the established rule.

Accordingly, the selections were properly rejected insofar as they covered lands which have been found to be within the known geologic structure of a producing oil and gas field before the lands were classified as suitable for disposition as school land indemnity or before the State had complied with all the requirements of the statute and regulations.

The same conclusion is applicable to those State selections which were rejected in accordance with paragraph (3) of subsection (a) because they included land in outstanding oil and gas leases which attained the status of producing or producible leases at some time after the selections were filed. The State contends that the status of the leases as producing or producible leases should be determined as of the time the selections were filed and not as of some subsequent time. This contention must be rejected for the same reasons just given as to the State's contention concerning the date of determination of known geologic structures of producing fields.

Another issue raised in many of the appeals is whether the selections were properly rejected under paragraph (2) of subsection (a), which prohibits selection of lands within the known geologic structure of a "producing" oil and gas field unless similar lands were lost to the State, if none of the wells in the field are actually producing.

The State points to paragraph (3) of subsection (a), which prohibits selection of land within a mineral lease or permit if any of the land in the lease is in a "producing or producible status," and argues that the use of the words "producing" and "producible" in this paragraph demonstrates that the Congress intended "producing" in paragraph (2) to mean "actually producing" and not merely "capable of production." It concludes that if there is no producing oil and gas well in the field then paragraph (2) is not applicable.

The phrase "known geologic structure of a producing oil and gas field," used in paragraph (2), has been used in connection with oil and gas leasing of public lands since the original Mineral Leasing Act of February 25, 1920, 41 Stat. 437 §§ 13, 17. Its meaning was established soon thereafter as follows:

In its unreported decision of March 24, 1924, in the case of *John H. Moss v. A. D. Schendel* (A-6287, Buffalo 021031-021033), the Department said:

"The applicant Moss has appealed from this decision and alleges that the lands were not, at the time of his application, within a producing field, as all wells in that field which had produced either oil or gas, were not producing, but were exhausted, the wells abandoned and the casing pulled and the wells plugged. * * *

"The records disclose that the Torchlight field was a known producing field long before the passage of the leasing act, and was so defined long prior to the filings by appellant or Schendel. The Department is also aware that large oil companies which have been operating in the field did abandon it in 1923, as alleged, but is not convinced that such abandonment warrants a redefinition of the structure or the revocation of the classification of the area as a producing field at this time. The term 'producing oil or gas field' as used in section 13 of the leasing act must be construed to include areas in which there has been production and which are *capable* of producing more oil, otherwise cessation of production in a given field because of a strike or other external matters would render areas which were clearly oil bearing, subject to prospecting operations and, when oil was brought in, the reward for discovery provided in section 14 of the act would be improperly conferred in a case where such discovery was not essential to the determination, already made, that the land was valuable for oil and gas deposits. Until further showings are made, which are persuasive that the area does not still contain valuable deposits of oil, the field will not be re-defined." (*Kermit D. Lacy*, 54 I.D. 192 (1933).)

The Department has repeatedly adhered to this construction of the phrase and still follows it. *George C. Vournas*, 56 I.D. 390 (1938); *K. S. Albert*, 60 I.D. 62 (1947); *Duncan Miller*, A-27644 (September 22, 1958); *Duncan Miller, Louise Cuccia*, 66 I.D. 388, 390 (1959), and cases cited therein.

In view of the long accepted interpretation of the phrase, which has remained unchanged throughout the many extensive revisions of

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the Mineral Leasing Act without Congressional criticism, its meaning must be deemed to be established. The fact that Congress used the word "producing" in the next paragraph of the statute to mean "actually producing" does not require a different result. Paragraph (3) applies to all leasable minerals while the phrase used in the preceding section applies only to oil and gas lands and constitutes words of art. Lands in the known geologic structure of an oil and gas field which has produced but may not currently be producing are deemed to be of such value that the lands can be leased by the Secretary only through competitive bidding, Mineral Leasing Act, § 17, as amended, 74 Stat. 781 (1960), 30 U.S.C. § 226(b) (Supp. V, 1964). It seems clear that Congress intended that oil and gas lands which could be leased only by competitive bidding should be placed in a special category so far as State selections are concerned and that Congress did not intend that only some land subject to competitive leasing, i.e., land in an actually producing field, should be placed in a special category for State selection purposes.

Accordingly, it was proper, unless similar land was offered as base, to reject selections for lands within the known geologic structure of a producing oil and gas field even though there was not actual production within the field so long as there had been production and the geologic structure has not been redefined.

Another issue raised in several of the appeals is whether land in a unitized lease which is in a participating area is producing or producible land within the meaning of paragraph (3) so that all the lands included in the lease are ineligible for selection by the State, even as to portions of the lands not within the unit or participating area.

Since paragraph (3) prohibits the selection of any lands in a lease if any of the lands in it are in a producing or producible status, lands which are part of a producing or producible lease cannot be selected no matter what their own status is. The only question then is whether a lease, part of which is in a participating area, is such a lease even though there is no well on the land of the lease itself. The very definition of a participating area makes it plain that the answer must be in the affirmative. The standard unit agreement describes it as follows:

11. *Participation after discovery.* Upon completion of a well capable of producing unitized substances in paying quantities or as soon thereafter as required by the Supervisor, the Unit Operator shall submit for approval by the

Director a schedule, based on subdivisions of the public-land survey or aliquot parts thereof, of all unitized land then regarded as reasonably proved to be productive of unitized substances in paying quantities; all lands in said schedule on approval of the Director to constitute a participating area, effective as of the date of first production. * * *

It is the intent of this section that a participating area shall represent the area known or reasonably estimated to be productive in paying quantities; but regardless of any revision of the participating area, nothing herein contained shall be construed as requiring any retroactive adjustment for production obtained prior to the effective date of the revision of the participating area.

* * * * *

12. *Allocation of production.* All unitized substances produced from each participating area established under this agreement, except any part thereof used in conformity with good operating practices within the unitized area for drilling, operating, camp and other production or development purposes, for repressuring or recycling in accordance with a plan of development approved by the Supervisor, or unavoidably lost, shall be deemed to be produced equally on an acreage basis from the several tracts of unitized land of the participating area established for such production and, for the purpose of determining any benefits accruing under this agreement, each such tract of unitized land shall have allocated to it such percentage of said production as the number of acres of such tract included in said participating area bears to the total acres of unitized land in said participating area. * * * 30 CFR 226.12.

Thus it is concluded that a lease any part of which is in the participating area of a unit agreement is a producing or producible lease so that any land covered by the same lease is, whether or not within the participating area or unit agreement, ineligible for selection by a State.⁴

There remains one case, A-29619, in which the Division of Appeal's decision, in addition to affirming the land office decisions, rejected the State's selections as to additional lands on the grounds that a redefinition of the known geologic structure of a producing oil and gas field made while the appeal was pending placed them within the limits of the field. The State contends that the Director (or his delegate) was without jurisdiction to modify the local manager's decision for lands not covered by its appeal. This contention is without merit, for the Director has authority at any time to take up and dispose of any matter pending in a land office or to review a decision of a subordinate officer,

⁴ At the time the decision appealed from in A-29826 was issued, the participating areas had not been established and the appeal objected to a rejection of the selections based on the assumption that the selected lands were certain to be included in participating areas. Since then, parts of the leases of which the selected lands are a part have been included in participating areas, so that this objection is now moot.

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with or without an appeal. *Oscar C. Collins et al.*, 70 I.D. 359, 360 (1963); *Barney R. Colson*, 70 I.D. 409, 412 (1963).

Following the filing of the appeals, the Governor of the State of Utah, by letter dated October 1, 1963, to the Secretary, raised an additional question with respect to a number of the applications involved in a number of the appeals. He stated that the selected lands in the applications contain known deposits of oil shale of good potential and that the selections were filed primarily for the oil shale deposits. He asked if it would be possible for the State, by executing waivers of the oil and gas in the selected lands, to acquire title to the lands and all other minerals in the land, including the oil shale deposits.

The Governor's question is directed to this typical situation: The State has filed an application selecting lands determined to be valuable for oil or gas, oil shale, and possibly other minerals. The application lists as base or lost lands tracts of land also determined to be valuable for oil or gas or oil shale or possibly some other mineral. The application is rejected because the selected land is determined to be on the known geologic structure of a producing oil or gas field (and the base lands are not) or included in a producing or producible oil and gas lease. The Governor's question in essence is whether a waiver by the State of oil and gas rights in the selected lands would eliminate the known geological structure and producing or producible lease objections to approving the selections.

Paragraph (1) of subsection (a) of Rev. Stat. § 2276, *supra*, provides that no mineral lands may be selected by a State except to the extent that the selection is made as indemnity for mineral lands lost to the State. If land selected by a State is valuable for oil or gas or oil shale and the land does not fall within paragraph (2) or (3) of subsection (a), it is clear that the selection may be approved if the lost land is valuable for oil or gas or oil shale or some other mineral.

What is the result if the selected land additionally falls under paragraph (2) or (3)? This is the situation where the lost land is mineral in character and the selected land is reported not only to be valuable for oil or gas but also to be either within the known geologic structure of a producing oil or gas field or in a producing or producible oil and

gas lease. If the lost land is not within the known geologic structure of a producing oil or gas field and the selected land is, the selection, without more, would have to be rejected. Regardless of whether the lost land is on such a structure, the selection, without more, would have to be rejected if the selected land is in a producing or producible lease. Could the selection, however, be approved if the State agreed to a reservation of the oil and gas to the United States?

Prior to the 1958 amendment to Rev. Stat. § 2276, a State could not select mineral lands unless the mineral was one enumerated in the act of July 17, 1914, 38 Stat. 509, as amended, 30 U.S.C. §§ 121-123 (1958), or a similar statute. The 1914 act permitted the selection under a nonmineral land law of land reported to be valuable for oil or gas upon the condition that the oil or gas would be reserved to the United States. Thus, a State could select as indemnity under Rev. Stat. §§ 2275 and 2276 land reported to be valuable for oil or gas provided it consented to a reservation of the oil or gas to the United States. See *State of Arizona*, 71 I.D. 49 (1964); *State of Arizona*, A-27743 (August 16, 1961).

The 1914 act applies to lands "withdrawn or classified as * * * oil, gas * * * or which are valuable for those deposits * * *." 38 Stat. 509, 30 U.S.C. § 121 (1958). It does not differentiate between such land on a known geologic structure of a producing oil or gas field or such land not so situated or between such land in a producing or producible lease and such land not so included. Since prior to the 1958 act the oil or gas had to be reserved to the United States in all these situations, it did not matter what the status of the land was. In other words, it seems clear that prior to the 1958 act, a State could select land within the known geologic structure of a producing oil or gas field or land included in a producing or producible oil and gas lease since the oil and gas were to be reserved to the United States. This was true whether the base land offered by the State was or was not mineral land.

The question then is whether the enactment in 1958 of paragraphs (2) and (3) of subsection (a) of Rev. Stat. § 2276 was intended to change the situation and to bar a State from selecting land on the known geologic structure of a producing oil or gas field (unless the base land was so situated) or land in a producing or producible lease

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upon consenting to a reservation of the oil or gas to the United States. Although there is nothing conclusive in the language of the 1958 amendments or their legislative history on the question, the Department thought that selections could still be made with a mineral reservation under the 1914 act where the base land was nonmineral in character. See Department's report of June 16, 1958, on H.R. 12117, a bill comparable to the legislation enacted as the act of August 27, 1958. S. Rep. No. 1735, 85th Cong., 2d Sess. 9 (1958). In its report the Department said:

This bill clearly expresses the view that States may select land withdrawn for mineral classification. If this provision is enacted the States would be permitted to select such lands, and there would be a reservation of minerals only if the lands for which indemnity is sought had been of a nonmineral character. * * *

If a State offering nonmineral lands as base may select land in the known geologic structure of a producing oil or gas field or land in a producing or producible oil and gas lease upon consenting to a reservation of the oil and gas under the 1914 act, no logical or reasonable ground appears for denying such a right of selection simply because the State offers mineral land as base. It is proper therefore to conclude that the right of selection exists in these circumstances.

As we have concluded earlier, if a State offers mineral land as base, it may select land valuable for oil shale under paragraph (1) of subsection (a) of Rev. Stat. § 2276. See also subsection (d) of section 2276. As we have just concluded, whether a State offers mineral or nonmineral land as base, it may select land reported to be valuable for oil or gas which is situated within the known geologic structure of a producing oil or gas field or which is included in a producing or producible oil and gas lease, upon the State's consenting to a reservation to the United States under the 1914 act of the oil or gas in the land.⁵ It would appear to follow that, if the base land is mineral land and the selected land is both valuable for oil shale and valuable for oil or

⁵ It should be noted at this point that by the act of March 4, 1933, 47 Stat. 1570, 30 U.S.C. § 124 (1958), the right of selection under the 1914 act was modified to the extent that lands "lying within the geologic structure of a field, or withdrawn, classified, or reported as valuable for any of the minerals named" in the Mineral Leasing Act are not subject to selection "unless it shall be determined by the Secretary of the Interior that such disposal will not unreasonably interfere with operations" under the Mineral Leasing Act. This qualification governs all selections made in accordance with the 1914 act, that is, subject to a mineral reservation, and would, of course, apply to selections in the circumstances just discussed.

gas and is situated within the known geologic structure of a producing oil or gas field or included in a producing or producible oil and gas lease, the State may obtain the selected land, including the oil shale deposits, upon consenting to a reservation to the United States under the 1914 act of the oil and gas in the selected land. We so conclude.

If the State wishes to modify its applications in light of the conclusion reached, as suggested by the Governor's letter of October 1, 1963, it should submit promptly appropriate amendments to its applications to the Utah land office.

This is not to be taken as a ruling or an expression of opinion that such amended applications will be approved by the Department. Before a State selection application can be accepted, the Secretary of the Interior must classify the selected land under applicable statutes as proper for State selection. Accordingly, any amended application that is filed by the State can be accepted only if the land selected is classified as being suitable for State selection.

Therefore, 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 decisions appealed from are affirmed.

EDWARD WEINBERG,
Deputy Solicitor.

APPENDIX

<i>Appeal No.</i>	<i>Application</i>	<i>Date of Division of Appeals Decision</i>
A-29466 ----	Utah—034394, 034879, 034881, 034883.	February 21, 1962.
A-29616 ----	Utah—036241, 036242.	May 16, 1962.
A-29619 ----	Utah—041318, 046107, 046112, 046178.	May 18, 1962.
A-29716 ----	Utah—067352, 067353, 067354.	July 16, 1962.
A-29723 ----	Utah—054128.	July 25, 1962.
A-29740 ----	Utah—067357.	August 3, 1962.
A-29786 ----	Utah—067351.	September 17, 1962.
A-29815 ----	Utah—034894, 034904, 046172, 046175, 046177.	October 3, 1962.
A-29826 ----	Utah—087861, 089065.	October 19, 1962.

SOUTHERN CALIFORNIA EDISON COMPANY

A-30325

Decided November 3, 1964

Rights-of-Way: Generally—Rights-of-Way: Act of March 4, 1911—Power: Generally

An applicant for an amended transmission line right-of-way under the act of March 4, 1911, is properly required to file the stipulation required by the Department's regulations agreeing to permit the Department to utilize surplus capacity in the line, or to increase the capacity of the line for the transmission of power by the Department.

See Decision dated May 28, 1964, p. 406.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Southern California Edison Company has appealed to the Secretary of the Interior from a decision dated May 28, 1964, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of the Riverside, California, land office holding in abeyance its application for an amended transmission line right-of-way easement, Los Angeles 096498, filed pursuant to the act of March 4, 1911, 36 Stat. 1253, as amended, 43 U.S.C. § 961 (1958), until the applicant should file a stipulation in the land office as required by regulation 43 CFR, 1964 Supp., 2234.4-1(c)(5), formerly 43 CFR, 1964 rev. 244.44(e).¹

The appellant filed an application dated January 8, 1963, for an amended right-of-way easement across public lands in Kern County, California, for the reconstruction, enlargement and conversion of an existing 33 kilovolt electric transmission line to a 115 kilovolt-volt line. The total length of the line is 28.69 miles, of which 1.87 miles cross Federal lands.

The appellant was advised on May 2, 1963, that it would be required to file a stipulation as called for in 43 CFR 244.44(e), now 43 CFR, 1964 Supp., 2234.4-1(c)(5). The stipulation provides for the agreement of the grantee of a right-of-way that this Department may utilize surplus capacity in the transmission line, or may increase the capacity of the line, for the transmission of power by the Department.

The regulations also provide for the equitable sharing of operation and maintenance costs of the transmission facilities by the Department, for the designation of a board to resolve any disagreements over the existence or amount of surplus capacity and for the modification of the terms and conditions at any time by means of a supplemental agreement negotiated between the holder and the Secretary of the Interior or his designee.

¹ California Electric Company, the original right-of-way applicant, merged with the Southern California Edison Company on December 31, 1963, thereby terminating its corporate existence.

On October 18, 1963, the appellant filed a stipulation consenting— to accept, comply with, and be bound by all lawful terms and conditions of the Bureau of Land Management Department of the Interior Regulations, Title 43, CFR, Part 244, as amended, in effect on the date of this Stipulation for so long as such terms and conditions remain in effect, but Applicant does not agree or consent to accept, comply with or be bound by any of the terms or conditions of any Regulations which may hereafter be finally determined by a court of competent jurisdiction to be unlawful, legally unenforceable or contrary to any statutory provision enacted by the Congress of the United States; nor does Applicant agree or consent to accept, comply with or be bound by the terms or conditions of any Regulations applicable to said right-of-way easements after the time that such terms or conditions are withdrawn or waived.

By a decision of the land office dated January 2, 1964, the appellant was advised that its proposed stipulation did not meet the requirements of the regulations, and it was requested to execute and file a stipulation in conformance with the regulatory requirements.

Following that decision, appellant appealed to the Director, Bureau of Land Management, and then to the Secretary.

Appellant's contentions on this appeal have been carefully considered. However, they are essentially the same as the arguments advanced by appellant on its appeal to the Director and they are fully discussed and answered in the Bureau's decision. No purpose would be served by a repetition of the discussion.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), for the reasons set forth in the decision of May 28, 1964, the decision is affirmed.

EDWARD WEINBERG,
Deputy Solicitor.

May 28, 1964

The Southern California Edison Company has appealed from a letter-decision of the Riverside Land Office, dated January 2, 1964.¹ That decision held that further action on the Company's request to convert its existing 33 kilovolt right-of-way to a 115 kilovolt right-of-way will be held in abeyance until the applicant files a stipulation in the Land Office, pursuant to the requirements of departmental regulation 43 CFR 2234.4-1(c)(5), 1964 Special Supplement (formerly 43 CFR 244.44(e)).

The appellant's original application herein, filed on January 8, 1963, requests that its existing right-of-way easement under the act of March 4, 1911 (36 Stat. 1253; 43 U.S.C. 961), upon and across public

¹ The decision was addressed to the original applicant, the California Electric Power Company, which merged with the Southern California Edison Company on December 31, 1963, and, thereupon, terminated its corporate existence.

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lands in Kern County, California for its 33 kilovolt Inyokern-Ridgecrest transmission line, be amended to permit the reconstruction, enlargement, conversion and operation of said line at 115 kilovolts. The remaining period of that existing easement is 40 years; the total length of the expanded right-of-way requested across public lands is 1.87 miles; the total length of the Inyokern-Ridgecrest line is 28.69 miles.

The regulation in question, as amended, by Circular 2100, published March 23, 1963 (28 F.R. 2905), provides, among other things, that applicants for transmission line right-of-way permits shall execute a stipulation allowing the Government to utilize any surplus capacity in such transmission facilities crossing Government lands. The appellant declined to execute such stipulation. It here appeals the Land Office Manager's decision declining to consider the appellant's application further absent such stipulation, and prays that the easement requested be granted forthwith.

The appellant claims the regulations cannot be applied to it for the following reasons (in the order presented by the appellant) :

I. They are prospective and do not apply to appellant's application.

II. They are contrary to law and the Constitution in that:

A. They exceed the authority of the Secretary;

B. They are unconstitutional administrative legislation, and violate the Due Process Clause;

C. Applicant's freedom to reject permits made subject to the regulations does not cure the invalidity thereof;

D. They are contrary to the intent and rate provisions of the Federal Power Act.

III. They are ambiguous, uncertain, and impractical.

* * * * *

As to argument I, the appellant says its January 8, 1963, application complied with the regulations then in effect, and that the regulations promulgated March 23, 1963, do not apply to applications filed prior thereto. As amended, March 23, 1963, Sec. 244.44(e) of the regulations (now 43 CFR 2234.4-1(c)(5)), provides, among other things, that an applicant for a permit must "* * * execute and file with its application a stipulation * * *" allowing the Government to use the surplus capacity of the transmission line. We agree that the amendment is prospective. But the subject of the amendment relates to permits, not applications. The subject of the amendment is: terms and conditions in permits issued on or after March 23, 1963. The Department has found that permits should not be issued for transmission lines on Government lands after that date unless applicants allowed the Government to use the lines' surplus capacity. The reference (in the regulation) to applications merely states how applicants may

meet these terms and conditions.² Nor is there a problem of retroactivity here. "No vested right in a [transmission line right-of-way] grant is acquired by the filing of an application." (See *California Electric Power Company*, 58 I.D. 607 at 611 (1944), and cases cited therein.) The record does not show that the capacity in question lawfully was in-place or under construction on March 23, 1963. In short, the filing of the application did not operate to prevent the Secretary from granting appellant a permit subject to conditions prescribed by regulations issued, pursuant to statutory authority, shortly after the appellant applied for a permit.

The appellant next argues (II-A above) that the acts of 1901 and 1911, under which the regulations were promulgated, do not support them; that (II-B) therefore, they are unconstitutional administrative legislation; and that these two conclusions are corroborated by the fact that similar departmental wheeling regulations were withdrawn in 1954 because they were considered illegal by the then departmental Solicitor, and by the fact that bills to enact those regulations into law after they were withdrawn were introduced but not considered by the Congress. Under II-A, the appellant asserts that the act of February 15, 1901 (31 Stat. 790; 43 U.S.C. 959) (cited with the 1911 act by the amended regulations as supporting authority therefor) "has no bearing in this case" because the appellant applied for a permit under the 1911 act. The 1911 law, authorizing the issuance of 50-year permits, was enacted because the 1901 Act, which authorized the issuance of revocable permits only, did not provide sufficient investment security. We believe the act of 1901 has bearing insofar as the appellant argues that the act of 1911 does not authorize the subject regulation.³

The appellant misconstrues the 1911 act. A law of May 14, 1896 (29 Stat. 120) dealt with rights-of-way on the public domain for electric power purposes. The act of 1901 "superseded and took the place of the law of May 14, 1896. The act [of 1901] * * * carefully defines the extent of such rights-of-way and embodies provisions not found in any of the earlier enactments."⁴ "It would seem difficult to conceive of a statute couched in terms which would retain a larger measure of public control" than the 1901 statute.⁵ The 1911 act made no change in the 1901 act other than authorizing the granting of easements for up

² Subsequent to the Land Manager's decision of October 11, 1963, the appellant, on October 17, 1963, supplemented its January 8, 1963, application by filing the power line diagrams required by Sec. 244.43(d) as amended, March 23, 1963 (presently 43 CFR 2234.4-1 (b) (4) (IV)).

³ Evidently the appellant really believes so, too, for, elsewhere in its brief, it cites court comment on the scope of regulations that may be issued under the 1901 act, as determinative of the scope of regulations that may be issued under the 1911 act *U.S. v. Colorado Power Co.*, 240 F. 217, 221 (1916).

⁴ *Utah Power and Light Co. v. U.S.*, 243 U.S. 389, 407 (1917).

⁵ 32 Ops. Att'y Gen. 525, 526 (1921).

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to 50 years. As explained by Representative Scott, the House floor manager of the bill that became the 1911 act,

* * * it changes existing law only to this extent, that it provides that a permit may be issued for rights-of-way for the purposes specified for a fixed term of 50 years, whereas the present law requires all such permits to be revocable at the will of the authority granting them. * * * [U]nder this a right-of-way may be granted for a period of 50 years, under such regulations as the head of the department may make.⁶

The act of 1911, thus deals "specifically and solely * * * with rights-of-way for transmission lines."⁷ That act and two others⁸ "occupies a special field carved out of the comprehensive uses and occupancies embraced by the act of 1897. In the fields to which they relate, their provisions are comprehensive and complete * * *. These acts, therefore, bear to the act of 1897 the relation of special and particular to general legislation."⁹

The act of 1911, therefore, by background, emphasis and intent is uniquely an electric power transmission line act as well as a right of way statute. It was carefully constructed and enacted for the purpose of controlling the conditions under which transmission lines in particular should be placed on the public domain. Its intent is that such lines not be placed thereon by right and at random. Its intent on its face is that transmission lines be placed on Government lands under the terms and conditions the Government department responsible for the overall welfare of those lands believes transmission lines should be placed thereon.

Where the permit is to endure for fifty years and is not to be revocable at the will of the Government, the act requires such regulations as will protect Government interests associated with Government lands for the next 50 years. Had the Sixty-first Congress intended permits to be issued summarily—had it intended them to be issued if the applicants met the one, two, or three standards, the Sixty-first Congress in March 1911 thought should govern the placement of transmission lines on Government lands—the Sixty-first Congress would have said so. It legislated differently. Having stated its specific purpose and intent, Congress directed the departments responsible for Government lands to treat by such regulations as they in their expertise deemed appropriate, such developments and exigen-

⁶ Conference Report on H.R. 31596 in the 61st Congress, 3d Sess. and explanation to the House thereof, 46 Cong. Rec. 4014-15 (Mar. 2, 1911).

⁷ 30 Ops. Att'y Gen. 581, 583 (1916).

⁸ February 15, 1901, 31 Stat. 790, authorizing the Secretary to regulate the construction of electrical plants, poles and lines on public lands, forests, and certain reservations; and (February 1, 1905, 33 Stat. 628), authorizing the Secretary to regulate the construction of dams and reservoirs on forest reserves.

⁹ 30 Ops. Att'y Gen. 583 (1916). (The act of 1897 referred to, 30 Stat. 11, 35, authorized the Secretary to regulate the occupancy and use of public forests.)

cies that should materialize during the life of the law that affected the placement of transmission lines on Government lands.

We think a regulation requiring a permittee to let the Government use surplus capacity in a transmission line permittee would build on Government's lands, is uniquely within the purview and intent of the 1911 transmission line act. The use of the transmission lines of one electric system to wheel, convey, or market the power and energy of and for another system is a widespread, long-established operating practice in the power industry. So is the interconnection and the joint use of transmission facilities by two or more different systems; and so is the purposeful overbuilding of transmission line capacity in anticipation of future load growth.¹⁰

The Federal Government is the largest wholesale producer of electric power and energy in the Nation. Its installed generating capacity of about 26 million kilovolts comprises 17 percent of all electric utility generating capacity in the country. Its installed hydroelectric capacity accounts for about 45 percent of the Nation's developed hydroelectric capacity. We are advised by the Assistant Secretary, Water and Power Development, that another 8.8 million kilovolts of Federal generating capacity is under construction; and still another 10.2 million kilovolts has been approved or authorized for future construction. The statutes under which this Federal power and energy is produced require that preference in the sale thereof be given to governmental agencies and to nonprofit organizations. This requirement originated contemporaneously with the transmission line right-of-way laws in question. It began with section 5 of the act of April 16, 1906 (34 Stat. 116, 117), requiring the Secretary of the Interior to give preference to municipal purposes when disposing of power produced at Federal reclamation projects in the western United States under the act of June 17, 1902 (32 Stat. 388).¹¹ It was restated by the act of February 24, 1911 (36 Stat. 930); and it has been affirmed by a long series of statutes enacted and re-enacted down to the present. To avoid constructing the transmission lines needed to market this power and energy,¹² the Government utilizes the transmission facilities of other systems to the maximum extent practicable.¹³ This wheeling service

¹⁰ See, for example, *Report on the Status of Interconnections and Pooling of Electric Utility Systems in the United States*, prepared by Edison Electric Institute, July 1962; revised May 1963.

See also 8 F.P.C. 1177, 1181-1183 (1949); as modified at 9 F.P.C. 399; and as affirmed in *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17 (1952).

¹¹ See 30 Ops. Att'y Gen. 197 (1913).

¹² * * * "The alternative method is to sell the * * * energy at the dam, and the market there appears to be limited to one purchaser, the * * * Power Company." *Ashwander v. TVA*, 297 U.S. 288, 339 (1936).

¹³ See, for example, sec. 5 of the Flood Control Act of 1944, 58 Stat. 887, 890; 16 U.S.C. 825s: "The Secretary of the Interior is authorized * * * to construct or acquire * * * only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale

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that utility systems perform for the Federal Government is based on "the principle of coordination and cooperation * * * the very purpose of which is to make use of company transmission line facilities to avoid duplication and waste of Government funds" for transmission lines.¹⁴

In substance, the contested regulation¹⁵ (43 CFR 244.44(e)(2); now 43 CFR 2234.4-1(c)(5)) provides that the Government may have the use of any surplus capacity in that segment (from substation or interconnection point to substation or interconnection point) of a permittee's transmission line crossing public lands; and that the Government may increase the capacity of that segment. Any disagreement on surplus capacity is to be adjudicated by a three-man board (subparagraph (x)); and when for his own operations the owner needs to recover his surplus capacity, he must give the Government three years notice (subparagraph (ix)). In using the segment, the Government may not unreasonably interfere with the owner's operations (subparagraph (vi)); it may not, without the owner's consent, use his surplus capacity to supply customers the owner was serving when he applied for the permit, unless they are preference customers (subparagraph (vii)); and the Government must pay an equitable share of the segment's costs for any use it may make thereof (subparagraph (viii)). All these provisions may be modified by supplemental agreements (subparagraph (xii)).

We believe the regulation is neither unreasonable nor beyond the intent of the 1911 act. The regulation treats matters uniquely and peculiarly characteristic of transmission lines; the 1911 act expressly "authorizes and empowers" the Secretary to treat such matters by regulation. We also believe the 1911 act does not violate the rules regarding the nondelegability of legislative power. The Supreme Court has stated: "That Congress intends there shall be some administrative regulations on the subject is plainly shown in the [1901] act, and that its discretion in the matter is not narrowly confined is shown by our decisions in *United States v. Grimaud*, 220 U.S. 506, and *Light*

on fair and reasonable terms and conditions * * * the Federal Government, public bodies, cooperative, and privately owned companies."

See also the act of August 31, 1951, 65 Stat. 248, 255: "No part of [the] appropriation [for the Bureau of Reclamation] shall be used to initiate the construction of transmission facilities within those areas covered by power wheeling service contracts which include provision for service to Federal establishments and preferred customers * * *"

¹⁴ Pacific Gas & Electric Company President's testimony on "Transmission Lines" during Senate Appropriations Committee Hearings on H.R. 3790, 82d Congress, p. 1878 (1951).

¹⁵ We find it unnecessary to consider the appellant's objections to the references in the regulation, 244.44(c), to the "power-marketing program of the United States." * * * By letter of January 2, 1964, the Assistant Land Office Manager informed applicant that this Department's Assistant Secretary, Water and Power Development, formally found "no conflict between [applicant's] proposed * * * facility and the power marketing program of the United States."

v. *United States, supra.*"¹⁶ "It was not necessary for Congress to ascertain the facts of or to deal with each case. The act went as far as was reasonably practicable under the circumstances existing."¹⁷

Contrary to appellant's assertions, the 1955 testimony of the then Under Secretary of the Department before a Subcommittee of the House Government Operations Committee, does not show that similar departmental wheeling regulations were withdrawn in 1954 because it was believed they were "unlawful." His testimony was that the issuance and rescission of those regulations "is a subject of administrative discretion on which the Secretary is free to act according to his judgment;"¹⁸ and that the 1954 withdrawal "involved [matters of] administrative discretion rather than of law."¹⁹ The "lawfulness" of the regulations previously had been fully explored, adjudicated and upheld in a Memorandum Opinion of June 2, 1952, by the United States District Court for the District of Columbia, in the unreported case of *Idaho Power Co. v. Chapman* (Civil Action No. 4540-50); and in a Supplemental Memorandum of that Court on October 31, 1952.²⁰ We also disagree with the inference the appellant draws from the failure of Congress to consider bills to enact those regulations in statutory form after the withdrawal thereof in 1954. The only legal inference that may be drawn therefrom is that the 84th Congress was content to have the matter treated under the 1911 Act as the Sixty-first Congress intended it be treated; namely, as a subject of administrative discretion. We do note, though, that when Congress amended the 1911 Act in 1952 to increase (from 40 feet) to 400 feet the width of transmission line rights-of-way that could be granted across public lands, no disapproval was expressed of the well-known transmission line wheeling regulations applicable to all such rights-of-way since 1948.²¹

¹⁶ *Utah Power & Light*, at 410, *supra*, responding to defendants' arguments that the regulations under the act of February 15, 1901, were "unconstitutional, unauthorized and unreasonable."

¹⁷ *United States v. Chemical Foundation*, 272 U.S. 1 (1926). Comparison of the statute and stipulation involved in *Chapman v. El Paso Natural Gas Co.*, 204 F. 2d 46 (1953) with the subject statute and stipulation, shows that *Chapman* is inapposite here. The *Chapman* stipulation is printed in full at 204 F. 2d 49-50. Unlike *Chapman*, "we are * * * dealing here with an order which seeks to compel the granting of a license *in futuro* or the modification and alteration of conditions embodied in the license prior to its issuance." (*Ibid* at 53). The stipulation here does not undertake "to exercise so vast and so detailed a power;" nor "such intimate regulation of corporate affairs as the financing, construction and employment of facilities" (at 51).

¹⁸ Hearings on "Certain Activities Regarding Power, Department of the Interior (Changes in Power Line Regulations)," 84th Congress, page 232.

¹⁹ *Ibid*, at 237.

²⁰ The "Memorandum of Court" together with separate "Findings of Fact and Conclusions of Law," "Amended Findings of Fact and Conclusions of Law," plus the Supplemental Memorandum of Court" are printed in Hearings, *supra*, at pages 88 through 93.

²¹ S.1630 as introduced in the 82d Congress in May 1951; amended and reported by the Senate Committee on Agriculture and Forestry in March 1952 in Senate Rept. 1224; further amended and reported by the House Committee on Agriculture in May 1952, in House Report 1848; and approved as Public Law 367 of the 82d Congress on May 27, 1952, 66 Stat. 95.

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The appellant next argues that insofar as the regulation requires the permittees to allow the Government the use of the entire segment, from substation or interconnection point to substation or interconnection point of a transmission line that crosses public lands, the regulation operates constitutionally to deprive a permittee of its property without due process of law in the portions of that segment not on public lands, but which extend from the borders thereof to the nearest line substation or interconnection point.

We do not agree with the appellant. This aspect of the regulation is reasonable because the portions of the segment in question are inseparably related to the portions of the segment on Government land; the use of the surplus capacity in the segment portions in question in no way interferes with the owner's use of those portions or damages their efficiency; and the alternatives to this aspect of the regulations—constructing a parallel Government line, or tapping into a permittee's line at the points where it would enter and leave Government lands—would not be economic either to the Government or to the permittees. This aspect of the regulation is fair because allowing the Government to use the permittee's surplus capacity in such segments is balanced by allowing the permittee to place segments on the Government's lands. This aspect of the regulation is the result of the due processes of the law because, as previously shown, the condition is one of those inherent characteristics of transmission lines that the law expressly authorizes and empowers the Secretary to control by regulation. We find that this aspect of the regulation would not operate "to take property of Appellant without * * * the payment of just compensation in violation of the Fifth Amendment," because subparagraph (viii) of the stipulation in question expressly says the Government will pay the owner "an equitable share" of the cost of the line segment for any use the Government may make thereof.²² And we do not anticipate that the application of that subparagraph, or any of the other subparagraphs of the stipulation, will violate the intent and rate provisions of the Federal Power Act, as amended (16 U.S.C. 792 *et seq.*). Contrary to the appellant's claims (II-D above), the Secretary's statu-

²² *United States v. Colorado Power Co.*, *supra*, footnote 3, is not apposite. The Power Company there claimed its rights to occupy government lands did not flow from the act of February 14, 1901; and that such act did not authorize the imposition of annual occupancy charges. The Court held that the 1901 act applied, and that it authorized the imposition of annual charges. Then, at page 221, it added that for the Secretary to promulgate a regulation subjecting Power Company's business "to examination as to the amount of electrical energy produced and disposed of, for the purpose of laying tribute thereon as a basis of a charge to be fixed by the Secretary, is to carry the power granted to him [to fix regulations]; to a doubtful length and further than, I think, is given by the [1901] Act." No question of the reasonableness of the annual occupancy charges to be paid on appellant's enlarged line is present here.

tory authority and responsibility to set the terms and conditions at issue hereunder which transmission lines²³ shall be placed on public lands, plainly is not displaced by or in any way repugnant to Federal and State public utility laws regulating the sale or transmission of electricity.

Finally (III above), the appellant argues that the regulations are ambiguous, uncertain, and impractical because (a) it is difficult to determine what is "surplus" transmission line capacity, and to forecast when it should be recovered; and (b) the regulations do not make clear (i) the nature and extent of a permittee's obligation to maintain its facilities on public lands in good condition after the Government makes interconnection therewith; (ii) the Government's obligation to maintain on its own facilities equipment that will protect the permittee's normal and efficient operations; and (iii) whether a permittee, if it has not given 36 months' notice, could use the surplus capacity on its line whenever it "has need to do so."

As to the appellant's general observations regarding the "understanding" evidenced by the regulations, we are constrained to observe that this Department is faced with the responsibility for the marketing of very large quantities of Federally generated power in the manner directed by Congress; the protection and wise utilization of a very substantial Federal investment in hydroelectric power generating facilities; and the preservation and conservation of the Nation's interests in its public lands.²⁴

More responsively, we find the appellant's arguments on this ground premature. The regulations serve to articulate certain fundamental legal relations subsisting between the Government and the permittees who place transmission lines on Government lands. The regulations do not purport to be a substitute for the complex, contractual relations that must exist before Government attempts to make use of a permittee's transmission facilities. This is made expressly clear by the reference to "supplemental agreements" at subparagraph (xii) of the stipulation. The permittees may assume that if or when Government contracts to use any surplus capacity of a permittee's transmission lines, the Government will not interfere with and will respect all legal rights and interests of the permittees. "There can be no purpose in the Act [or the regulations issued thereunder] of dealing unfairly with the permittee and his investment."²⁵

²³ Other than primary transmission lines as defined at section 3(11) of the Federal Power Act, 16 U.S.C. 796.

²⁴ "If any of the regulations go beyond what Congress can authorize or beyond what it has authorized, those regulations are void and may be disregarded; but not so much as are thought merely to be illiberal, inequitable or not conducive to the best results." *Utah Power & Light Co. v. U.S.* 243 U.S. 410 (1917).

²⁵ *U.S. v. Colorado Power*, *supra*, 221 (1916).

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In view of the foregoing, the decision of the Land Office was proper and it is affirmed.

The Southern California Edison Company is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840, 1964 Special Supp. (formerly 43 CFR Part 221). If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D.C., 20240. The filing fee is \$5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting substantial evidence, wherein the decision appealed from is in error.

RICHARD J. McCORMICK,
Chief, Branch of Land Appeals.

FEATHER RIVER RAILWAY COMPANY

Sacramento 013803

November 5, 1964

Public Lands: Jurisdiction Over

By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the land department as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved.

Public Lands: Leases and Permits

A tramroad right-of-way permit granted under the Act of January 21, 1895, as amended, 43 U.S.C. 956 (1958 ed.), is revocable at the discretion of the Secretary.

Rights-of-Way: Nature of Interest Granted—Rights-of-Way: Act of January 21, 1895

A tramroad right-of-way granted under the Act of January 21, 1895, as amended, 43 U.S.C. 956 (1958 ed.) creates no interest in the land. It is a mere permit to use the land, revocable at the discretion of the Secretary.

Trespass: Generally

Occupancy of public lands, without authority after expiration or termination of a right-of-way permit constitutes a trespass.

CEASE AND DESIST AND ORDER TO SHOW CAUSE

By order dated March 18, 1964, the Feather River Railway Company was advised that it was considered in trespass on certain described public lands and was told to cease and desist within 6 months from the date of receipt of the order and to remove its improvements.

On June 11, 1964, the Railway was ordered to show cause within 90 days why the cease and desist order should not remain in effect. The running of time under the latter order was suspended during the period necessary for final determination on the show cause order. By letter dated August 7, 1964, the Railway was notified that, in order to avoid further delay in arriving at a final administrative decision the Secretary of the Interior would assume jurisdiction over this matter upon the filing by the Railway of its reply to the June 11, 1964, order to show cause. The Railway filed its reply on September 10, 1964. A copy was served upon the State of California, Department of Water Resources. On October 12, 1964, the State filed a brief in opposition to the response of the Railway. I have assumed jurisdiction. The Railway has requested an oral hearing. I believe that no useful purpose will be served thereby. Accordingly, the request is denied.

The facts are these. The Feather River Railway Company operates a rail line approximately 18 miles long between land and Feather Falls, California. This line traverses approximately 3.17 lineal miles of public lands in sections 32, 33, and 34, T. 20 N., R. 5 E., and sections 15 and 30 in T. 20 N., R. 6 E., M.D.M.¹ The portions of the right-of-way in sections 32, 33, and 34 are on lands which were withdrawn in 1911 for a waterpower site designated as Power Site Reserve No. 202.² The portion of the right-of-way in section 15 is in the Plumas National Forest. That part of section 30 traversed by the line is vacant public domain.

The railroad in question was constructed as a tramroad around 1921 and 1922 by the Hutchinson Lumber Company. In the course of things it was discovered that the line was being built without authority across powersite reserve and public lands. Accordingly, the Lumber Company made application for a tramroad right-of-way under the provisions of the act of January 21, 1895, as amended, 43 U.S.C. § 956 (1958 ed.). The Company apparently represented that its lumbering operations would be completed in about 25 years after which time the tramroad would have little or no value. It also represented that to relocate the line so as not to interfere with ultimate power development of the land in question would cause abandonment of four miles of the present line, increase the length of the road seven miles, and add about \$800,000 to the cost of construction. In the meantime, the matter was referred to the Federal Power Commission which, by letter dated June 30, 1922, advised this Department that the construction of the tramroad would not impair the power values of the reserved lands, "provided the authorization conferred is limited

¹The right-of-way is 100 feet wide.

²Executive Order dated August 30, 1911.

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to a term of not more than twenty-five years and is subject to sec. 24 of the Federal Water Power Act.³

Therefore, on August 23, 1922, permission was granted the Hutchinson Lumber Company to use the right-of-way for a period not to exceed 25 years and subject to the conditions and reservations of section 24 of the Federal Water Power Act. Section 24 of that Act (41 Stat. 1075) provided, among other things:

* * * Whenever the commission shall determine that the value of any lands of the United States * * * heretofore * * * reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public-land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, subject to and with a reservation of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the commission, for the purposes of this act * * *.

Construction of the tramroad was completed and proof accepted for filing on November 4, 1922, and the railroad operated until around 1928. It was virtually unused between 1928 and 1939, at approximately which time two Corporations, Feather River Pine Mills, Inc., and Feather River Railway Company, were formed, the latter being wholly owned by the former. The lumber company also owned the railroad equipment in question.

In 1940 the Feather River Railway Company received a certificate of convenience and necessity from the Interstate Commerce Commission to operate its line as a common carrier. *Feather River Railway Company Operation*, Finance Docket 12756, 240 I.C.C. 203. It appears that the Lumber Company was represented as owning the rolling stock and right-of-way of the line which it would lease to the Railway Company for a term of 99 years, effective on the date operation of the tramroad was commenced. It does not appear from the Commission's decision that the Railway Company disclosed the limited nature of its right-of-way across the public lands in question or of the terms and conditions of its permit.

In 1939 regulations were approved by this Department requiring the payment of a fee for use of rights-of-way. Circular No. 1459, August 7, 1939. The Railway was billed for \$30 on December 2, 1939. The fee or rent was eventually paid in 1941 and continued to be paid each year thereafter until 1960.

By order of the Federal Power Commission in December 1956, Major Project No. 2100 was originally licensed to the State of California Water Project Authority. Project No. 2100, known as the Feather River Project, involves, among other things, impoundment

³ Act of June 10, 1920, 41 Stat. 1063, 1075.

of water which will inundate the powersite reserve lands here in issue. Since February 11, 1957, the State has had an order from the Commission for this Project which, though it has been amended, is in full force and effect.

In April of 1960, the Railway wrote to the Bureau of Land Management inquiring as to the status of its right-of-way and the basis for the \$30 annual payment. In response to this inquiry the Railway was advised by letter dated June 14, 1960, that its right-of-way permit had "terminated by expiration in 1947," but that it could apply for an extension.

The Railway never responded to this letter. Accordingly, on October 18, 1960, a formal decision was issued canceling the Railway's permit but without prejudice to the filing of an application for extension. The Railway was given the right of appeal; but again the Railway made no response. No appeal was taken and no application for extension made. Therefore, on December 2, 1960, the case records, Right-of-way, Sacramento 013803, were noted "case closed. Permit canceled."

Notwithstanding the aforementioned decision canceling its permit, the Railway continued to occupy and use the lands in question.⁴ Accordingly, the cease and desist order of March 18, 1964, heretofore mentioned, and, subsequently, the show cause order of June 11, 1964, were issued.

From the recitation of the facts we think it altogether too clear to warrant argument that the Feather River Railway is occupying and using public lands without lawful authority. *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917).

The original authority of the Railway to occupy and use the lands in question stemmed from the right-of-way permit which was issued to it in 1922. The permit was limited by its own terms to a period of time not to exceed 25 years. The common carrier certificate from the Interstate Commerce Commission added not one second to the life of the permit. At best, between 1947, when the permit expired by its own terms, and 1960, the Railway might be considered to have occupied the lands in question as a tenant by sufferance because of the annual rental or fee it paid. 1 *Tiffany, Real Property* (1939 ed.), secs. 174, 175. But clearly, since 1960 the Railway has not enjoyed even the protection provided by that possible relationship. See 16 Ops. Att'y. Gen. 205, 212 (1878); 20 Ops. Att'y. Gen. 93 (1891); 20 Ops. Att'y. Gen. 527, 529 (1893).

In the last cited case a railroad was given a lease to occupy and

⁴In 1962, all the assets of the Feather River Pine Mills, Inc., including the Railway were acquired by the Georgia Pacific Corporation. I.C.C. Finance Docket No. 22060, January 24, 1964.

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use certain lands on a lighthouse reservation at Cape May, New Jersey. The Attorney General said:

* * * I am of opinion that the instrument called a "lease" only operated as a revocable license, if it had any legal effect, and did not convey any estate in the strip of land now occupied by the Delaware Bay and Cape May Railroad Company, and that the Secretary of the Treasury has the power to revoke the license at pleasure, and to remove the property of the company from the reservation upon its failure to do so, after reasonable notice. The company, having entered and occupied under the license and authority of the Secretary of the Treasury, is in no condition to question that authority.

In its response to the show cause order the Feather River Railway, while admitting that the Bureau of Land Management (B.L.M.) has unquestioned jurisdiction to determine questions affecting public lands, nevertheless argues that it has no authority to issue a cease and desist order. The argument stems from an apparent misunderstanding of the nature of the cease and desist order. Admittedly, B.L.M. has no authority to enforce such orders. Enforcement is by suit. *Cameron v. U.S.*, 252 U.S. 450, 464 (1920); *Kennedy v. U.S.* (C.C.A. 9, 1941), 119 F. 2d 564. But the cease and desist order is a determination of rights to public lands, and, in this case, an assertion by the proprietor of its title. It is a notice to cease and desist from an unauthorized use or suffer the consequences of a suit. This is clearly within the admitted competence of B.L.M. See *Cameron v. U.S.*, *supra*; *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963); *Reed v. St. Paul, M. & M. Ry. Co., et al.*, 234 Fed. 123 (1915); Rev. Stat. 453, 43 U.S.C. sec. 2 (1958); 5 U.S.C. sec. 485 (1958).

The Railway also argues that B.L.M. has no authority to interfere with the operations of a common carrier railroad without prior approval from the Interstate Commerce Commission. But B.L.M. is not interfering with the Railway's *lawful* operation. So far as this Department is concerned the Railway may operate between land and Feather Falls as long as it wishes. It may not, however, operate on public lands without proper authority. We are unaware that the Interstate Commerce Commission has the power to bestow on a common carrier railroad the authority to use public lands for its right-of-way.⁵ Quite the contrary, Congress has given this Department the exclusive jurisdiction to grant such rights-of-way. Act of March 3, 1875, 43 U.S.C. sec. 934, *et seq.* (1958). Though the Railway suggests that its limited permit has somehow been enlarged into a right under that Act, it is clear that it has not. Apart from the fact that the Rail-

⁵ Contrast in this regard the powers of the Interstate Commerce Commission with those of the Federal Power Commission. Subject to limitations not here material, the latter has the authority by statute to license projects upon the public lands and reservations of the United States. 16 U.S.C. sec. 797(e) (1958).

way never complied with the procedural requirements of the 1875 right-of-way act, see, *Utah Power & Light Co. v. United States, supra*, the short answer to this contention is that the lands here in question were not available and could not have been granted after the withdrawal action of 1911.

Finally, the Railway has argued that the 25 year limitation on the life of the tramroad right-of-way granted it by this Department was invalid. The point is without merit. Moreover, the regulations of this Department under which the right-of-way permit was issued to the Railway's predecessor made it clear that the permittee obtained only a license which was revocable at any time by the Secretary of the Interior in his discretion. 36 L.D. 567, 584. Thus, even if the 25 year limitation had not been imposed, the right-of-way could have been terminated at the will of the Secretary. But, in the last analysis, the language of the Attorney General in 20 Ops. Att'y. Gen. 527, 529 (1893), is dispositive.

* * * The company, having entered and occupied under the license and authority of the Secretary * * * is in no condition to question that authority.

Accordingly, it is concluded that the Feather River Railway Company is using and occupying the public lands in question without proper authority. The cease and desist order of March 18, 1964, as modified by the show cause order of June 11, 1964, is hereby affirmed.

Insofar as the Railway's Response to the show cause order may be considered an application to continue use of the lands in question, it is denied.

This is a final departmental decision.

JOHN A. CARVER, JR.,
Assistant Secretary of the Interior.

APPEAL OF CONCRETE CONSTRUCTION CORPORATION

IBCA-432-3-64

Decided November 10, 1964

Contracts: Changed Conditions—Contracts: Unforeseeable Causes

Neither weather phenomena nor alterations in the physical features of the work site caused by weather phenomena, after initiation of the process of contract formation, constitute changed conditions within the meaning of Clause 4 of a standard-form construction contract. Where the subsurface moisture conditions found when driving test holes are correctly recorded in the contract, neither the underground water encountered during contract performance nor the earth caving induced thereby constitute changed conditions if they are caused by rainfall greater than that which prevailed when the test holes were driven, irrespective of whether the excess rainfall was a normal seasonal event or was an abnormal and unusual occurrence.

November 10, 1964

Contracts: Changed Conditions—Contracts: Delays of Government

Delay by the Government in performing its own obligations under a contract does not constitute a changed condition within the meaning of Clause 4 of a standard-form construction contract.

BOARD OF CONTRACT APPEALS

This appeal pertains to a contract of the Bureau of Indian Affairs for the performance of road work on the Navajo Indian Reservation in Arizona. A major part of the work to be done under the contract was the construction of a bridge across Coyote Wash. The bridge was to be supported by concrete piles, that were to be cast in place within holes drilled in the floor of the Wash. The contract, which was dated April 30, 1963, was on Standard Form 23 (January 1961 edition) and incorporated the General Provisions of Standard Form 23A (April 1961 edition) for construction contracts. Neither party has asked for an oral hearing, and the appeal will be decided on the basis of the appeal file and the other documents of record before the Board.

Appellant encountered substantial quantities of underground water in the course of drilling holes for the concrete piles. The water caused the sides of some of the holes to cave before the piles could be cast and made some of the holes too wet for the concrete to be poured. In order to overcome these difficulties, appellant placed casings in the holes and took other measures to dewater the site. Appellant alleges that the dewatering increased the cost of the pile operations above the amount included in its bid estimates. It contends that the underground water was a changed condition within the meaning of the "Changed Conditions" clause (Clause 4) of the General Provisions, and that it is, therefore, entitled to an equitable adjustment in the contract price on account of the alleged increase in the cost of the pile operations.¹ The amount claimed is \$14,434.10.

The contracting officer, in a decision dated February 28, 1964, found that the underground water was not a changed condition, since "the possibility of an excess amount of subsurface water was set forth in

¹ The "Changed Conditions" clause reads as follows:

"The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (a) Subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (b) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment hereunder shall not be allowed unless he has given notice as above required; or unless the Contracting Officer grants a further period of time before the date of final payment under the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 of these General Provisions."

the plans, and means and methods prescribed therein to cope with the condition." From this decision, the appeal now before us was timely taken.

Both parties to the dispute rely heavily upon test hole data set forth in one of the contract drawings (Drawing C-7). This data shows the materials that were encountered in each of five test holes driven in the immediate vicinity of the places where the piles for the bridge were to be located. It also gives certain figures which, according to a legend appearing on the drawing, show the "Number of hours holes remained clean without any indicated caving of side walls." The figures so given are 6 for two holes, 18 for one, and 24 for the remaining two. It is conceded that caving of the holes subsequently drilled for the piles occurred at a much faster rate than these figures would indicate, and that the faster rate of caving was due to the volume of underground water present when the holes for the piles were being drilled.

In evaluating the test hole data just described, the time when the test holes were driven would be an important factor. Data obtained during the dry season of the year would not necessarily reveal the degree of caving that could be expected to occur during or just after the rainy season. Data obtained during a month in a year of normal rainfall would not necessarily reveal the degree of caving that could be expected to occur during or just after the same month in a year when rainfall was abnormally high. In the instant case, however, the contract revealed nothing concerning the time when the test holes were driven.²

The record shows that the test holes were actually driven in mid-December of 1960, that December is within the dry season of the year, and that in 1960 the month of December, together with the two preceding months, was a period when the rainfall appears not to have varied materially from the normal pattern. The work of drilling the holes for the concrete piles was begun about October 1, 1963, and appellant gave written notice of the alleged changed condition on October 7, 1963. The rainy season, according to findings of the contracting officer which have not been controverted by appellant, comprises August, September, and part of October. It is conceded that the rainfall in August of 1963 was far greater than the normal precipitation for that month.

A second portion of the drawings upon which the Government, but not appellant, relies is a note that appears on Drawing C-6. This note is entitled "Concrete Piles Cast-in-Drilled-Holes" and reads as follows:

² Drawing C-7 is dated "June 1961," but it would hardly be reasonable to infer from this that the test holes were driven during June 1961, particularly since the drawing also covered a number of other subjects.

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All piles shall be concreted "in the dry." If moisture conditions prevent drilled holes from being concreted "in the dry," casings shall be furnished, and all water pumped from holes before placing concrete. Remove casings while placing concrete. Elephant trunks long enough to reach within three feet of the bottom of the hole, and of such size and flexibility to be maneuvered inside the reinforcement cage shall be used. The concrete price, per lin. ft., for "Concrete Piles Cast-in-Drilled Holes" shall include the drilling, dewatering, temporary casing (if required), reinforcement steel, forming for pile extension, all concrete, and any other materials and labor required to complete the work.

This note on the drawings, the Government contends, was a clear forewarning that underground water might be encountered in quantities which would necessitate the use of casing and of other dewatering measures.

The Government also regards as pertinent the "Conditions Affecting the Work" clause (Clause 13) of the General Provisions. This clause reads as follows:

The Contractor shall be responsible for having taken steps reasonably necessary to ascertain the nature and location of the work, and the general and local conditions which can affect the work or the cost thereof. Any failure by the Contractor to do so will not relieve him from responsibility for successfully performing the work without additional expense to the Government. The Government assumes no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the execution of this contract, unless such understanding or representations by the Government are expressly stated in the contract.³

The foregoing summary of the established facts and salient contract provisions reveals nothing that, in the opinion of the Board, could be considered a changed condition within the meaning of Clause 4. That clause provides for the making of an equitable adjustment in the contract price if conditions are encountered during performance of the work which fall within either of the two categories of changed conditions defined in the clause. The first category consists of, and is limited to, "subsurface or latent physical conditions at the site differing materially from those indicated in this contract." The second category consists of, and is limited to, "unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract."

Neither the expression "subsurface or latent physical conditions at the site" nor the expression "unknown physical conditions at the site" are apt methods of describing weather phenomena, such as heavy rain, high winds, or low atmospheric temperature. This has been recog-

³ Generally similar provisions appear in Clause 2 of Standard Form 22 (January 1961 edition) entitled "Instructions to Bidders." This form, however, is not among the documents which are incorporated in the contract by express reference.

nized in the decided cases, which have consistently held that neither of the two categories of changed conditions comprehends storms, floods, or other forms of abnormal weather.⁴ Likewise, it has been held that neither of the two categories comprehends alterations in the physical features of the work site, such as the scouring of a river bed to a greater depth, that are caused by weather phenomena after initiation of the process of contract formation.⁵

Appellant does not contend that the test hole data, as set forth in Drawing C-7, is an inaccurate indication of the subsurface conditions which existed at the time when the test holes were driven. Nor does the record permit any inference that such data was inaccurate as to those conditions. The Government does not contend that the subsurface conditions actually encountered in the holes for the piles conformed to the test hole data, insofar as the volume of underground water and resultant propensity to caving are concerned. From the record it may reasonably be inferred that the difference between the indicated conditions and the actual conditions was due, first, to the occurrence of the rainy season, and, second, to the abnormally heavy rainfall of August 1963. Of these two causes, the second would appear to have been the more important.

The performance of the pile operations at a normally wetter time of the year than that when the test hole data had been obtained plainly was not a changed condition. It does not fall within the first category, since the contract contained no indication or representation concerning the season of the year when the test holes had been driven. It does not fall within the second category, since the annual recurrence of the rainy season is, of course, not an unusual or out-of-the ordinary event.⁶ There is no showing that appellant before bidding sought information as to the time of year when the test holes were driven, or that such information, if sought, would have been refused. In these circumstances the risk that the test holes might have been driven during a normally drier period of the year than the period consumed in contract

⁴ *Arundel Corp. v. United States*, 103 Ct. Cl. 688 (1945), cert. denied 326 U.S. 752 (1945) (both categories); *Inter-City Sand & Gravel Co.*, IBCA-128 (May 29, 1959), 66 I.D. 179, 194-95, 59-1 BCA par. 2215, 1 Gov. Contr. pars. 430-32 (both categories); *Barnard-Curtiss Co.*, IBCA-82 (August 9, 1957), 64 I.D. 312, 314-15, 57-2 BCA par. 1373 (second category); *Morrison-Knudsen Co.*, CA-170 (October 20, 1952) (second category); *Fred G. Koeneke*, ASBCA No. 3163 (June 14, 1957), 57-1 BCA par. 1313 (both categories); *Kuckenberg Construction Co.*, Eng. C&A Board No. 507 (September 14, 1954) (second category); *Annot.* 85 A.L.R. 2d 211, 229 (1962).

⁵ *Arundel Corp. v. United States*, 96 Ct. Cl. 77, 115-16 (1942) (first category); *Lam Building Corp.*, ASBCA No. 3361 (May 2, 1957), 57-1 BCA par. 1308 (both categories); *Ray Mills*, Eng. C&A Board No. 597 (September 1, 1954) (second category); *Dean S. Hogden*, Eng. C&A Board No. 68 (March 8, 1949) (second category).

⁶ *Cf. Osberg Construction Co.*, IBCA-139 (October 16, 1959), 66 I.D. 354, 358, 59-2 BCA par. 2367, 1 Gov. Contr. par. 703.

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performance was a risk that appellant assumed under Clause 13 of the contract, as quoted above.⁷

The abnormally heavy rainfall of August 1963 and its consequences, in the form of increased flows of underground water and of increased caving, likewise were not changed conditions. We have previously cited some of the many authorities which hold that weather phenomena and their consequences are not changed conditions. The applicability of these precedents to the instant case is reinforced by the note on Drawing C-6, as quoted above. This note, by making provision for the contingency that casing might need to be installed and other dewatering measures taken, clearly precludes reading into the contract any indication or representation that the degree of moisture revealed by the test hole data would remain constant, whatever might be the vagaries of the weather, until the job had been finished.⁸

Appellant seeks to buttress its claim of changed conditions by allegations to the effect that commencement of the pile operations was delayed because the bridge abutments—which fell outside the scope of its contract—were not ready on time. Specifically, appellant alleges that its crew and equipment had to be removed from the job site during the week ending June 28, 1963, because of incompleteness of the abutments, and that the latter were not actually completed until the middle of July. From these allegations it would seem that such time as may have been necessarily lost on account of the abutments did not exceed one month. Appellant actually began pile operations about October 1, 1963. It does not appear that if the pile operations had been begun one month earlier, less underground water would have been encountered. On the contrary, the subsurface formations would have had one month less within which to dry out after the abnormal rains of August. Since there is no proof that the abutment delay had any adverse effect upon the working conditions actually experienced at the job site, there is no ground upon which that delay could be regarded as buttressing the changed conditions claim.

Even if it could be found that some or all of the alleged increase in the cost of the pile operations was caused by the unfinished state of the abutments, it would still be beyond the competence of this Board to allow additional compensation on account of such alleged increase. Delay on the part of the Government in fulfilling its own obligations under a contract is not a matter for which an equitable adjustment in

⁷ Cf. *Larsen-Meyer Construction Co.*, IBCA-85 (November 24, 1958), 65 I.D. 463, 469-70, 58-2 BCA par. 1987.

⁸ Cf. *Promacs, Inc.*, IBCA-317 (January 31, 1964), 71 I.D. 11, 17-18, 1964 BCA par. 4016, 6 Gov. Contr. par. 116(a); *J. A. Terteling & Sons, Inc.*, IBCA-27 (December 31, 1957), 64 I.D. 466, 484-85, 57-2 BCA par. 1539.

the contract price may be made under the "Changed Conditions" clause or under any other provision of this contract.⁹

The authorities upon which appellant chiefly relies are *United States v. Smith*, 256 U.S. 11 (1921) and *United States v. Atlantic Dredging Co.*, 253 U.S. 1 (1920). In the *Smith* case *supra*, the Supreme Court allowed recovery of additional compensation in connection with a dredging contract where the contract described the materials to be removed, and where a substantial portion of the materials actually removed did not conform to that description. In the *Atlantic Dredging* case *supra*, the Supreme Court allowed recovery where the contract stated that the Government "believed" the materials were as described in the contract, where the Government possessed information which indicated such description to be erroneous, where the Government did not disclose this information to the bidders, and where a substantial portion of the materials actually dredged did not conform to such description. Neither contract contained a "Changed Conditions" clause, and both cases were decided principally upon the basis of the doctrine of misrepresentation.

In contrast, the contract here involved does not purport to describe the volume of underground water or the degree of propensity to caving that might be expected to be encountered in the holes for the piles. It leaves these matters to the individual bidders for determination by each of them in the light of the data appearing on Drawing C-7, of such supplemental data as a reasonable pre-bid investigation pursuant to Clause 13 would disclose, and of any other information which the particular bidder may possess. As has been mentioned, it is not contended that the data obtained through the driving of the test holes was inaccurately recorded on Drawing C-7. Since nothing was misrepresented in the contract, the *Smith* and *Atlantic Dredging* decisions are not here in point.

Conclusion

The appeal is denied.

HERBERT J. SLAUGHTER, *Acting Chairman*.

I concur:

THOMAS M. DURSTON, *Member*.

JOHN J. HYNES, *Member*.

⁹ *Commonwealth Electric Co.*, IBCA-347 (March 12, 1964), 71 I.D. 106, 1964 BCA par. 4186, 6 Gov. Contr. par. 262; *Wearaco Construction Corp.*, IBCA-48 (September 30, 1957), 64 I.D. 376, 378-81, 57-2 BCA par. 1440; *Lam Building Corp.*, *supra* note 5.

PUBLIC SERVICE COMPANY OF NEW MEXICO

NEW MEXICO

0554658

Decided November 10, 1964

Rules of Practice: Supervisory Authority of Secretary

The Secretary of the Interior may assume jurisdiction over an appeal to the Director, Bureau of Land Management, without waiting for a decision by the Director.

Rights-of-Way: Generally—Rights-of-Way: Act of March 4, 1911—Power: Generally

The requirement imposed by the Department's regulations on an applicant for a transmission line right-of-way that he agree to permit the Department to utilize surplus capacity in the line or to increase the capacity of the line for the transmission of power by the Department is valid.

Rights-of-Way: Generally—Rights-of-Way: Act of March 4, 1911—Power: Generally

The existence of a contract between a power company and the United States, acting through the Atomic Energy Commission, whereby the company agrees to construct a transmission line from its facilities to facilities of the Commission and the Commission agrees to provide a right-of-way across land under its jurisdiction in Los Alamos County, has no bearing upon and is not affected by conditions imposed by this Department upon a grant of a right-of-way for a portion of the line across public land under the jurisdiction of this Department in Sandoval County.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Public Service Company of New Mexico has appealed from a decision dated August 21, 1964, by the manager of the Santa Fe, New Mexico, land office to the extent that the manager required the appellant to agree to the terms and conditions of 43 CFR, 1964 Supp., 2234.4-1(c) (5) as a condition to the grant of a transmission line right-of-way to the appellant.

Although the appeal would normally be considered as one to the Director of the Bureau of Land Management, jurisdiction over it will be assumed in the exercise of the supervisory authority of the Secretary, and final Departmental action on it will be taken. 43 CFR, 1964 Supp., 1840.0-9(d); *United States v. M. V. Browning*, 68 I.D. 183 (1961).

Public Service Company applied, pursuant to the act of March 4, 1911, 36 Stat. 1253, as amended, 43 U.S.C. § 961 (1958), for a right-of-way across 2.829 miles of public land in Sandoval County, New Mexico, for the construction of a 115 kilovolt transmission line. The line, which crosses nonfederal land as well, is to extend from generating facilities of the company in Bernalillo County to Atomic Energy Commission facilities located in Los Alamos County, New Mexico.

In its application, which was filed on July 29, 1964, the company asked that the provisions of 43 CFR, 1964 Supp., 2234.4-1(c) (5) be waived. These provisions, briefly, require an applicant for a right-of-way for a transmission line having a voltage of 33 kilovolts or more to file a stipulation agreeing to allow this Department to utilize for the transmission of power any surplus capacity of the line or to increase the capacity of the line for that purpose. The expense is to be borne by the Department, and other detailed terms and conditions governing the exercise of the right by the Department are prescribed in the regulations.

The manager ruled that he could not waive the requirements of section 2234.4-1(c) (5) and that the company must agree to those requirements.

In its appeal, the company generally asserts that the provisions are unreasonable, arbitrary, and unconstitutional. More specifically, it states that the proposed transmission line was planned and agreed upon by the Atomic Energy Commission, acting for the United States, that other officers and employees of the United States do not have authority to impose additional conditions in the contract between the company and the Commission, and that if the right-of-way is denied for failure of the company to accept the illegal terms and conditions it will be impossible for the company to comply with the contract.

The validity of the regulations under attack was thoroughly discussed and sustained by a decision of the Director, Bureau of Land Management, dated May 28, 1964 (Los Angeles 096498), which was recently affirmed by the Department in *Southern California Edison Company*, 71 I.D. 405 (A-30325, November 3, 1964). There is no need to repeat the discussion. The only point requiring consideration in this appeal is the argument of the company concerning its contract with the United States, acting through the Atomic Energy Commission.

A reading of the contract (Modification No. 2, Supplemental Agreement executed November 13, 1963, to Contract AT (29-1)-1518) reveals no support whatsoever for the company's contentions. The only provision in the contract relating to the construction of the transmission line and rights-of-way for the line is to be found in subsection 1.c. of Article II. This subsection provides in part

c. The Contractor [appellant], in addition, agrees that it will construct, operate and maintain at its sole expense a 115,000 volt * * * transmission line * * *. * * * The [Atomic Energy] Commission agrees that, upon request of the Contractor, it will enter into an agreement with the Contractor to provide a reasonable license, permit or easement (as may be selected by the Commission) for sufficient "right-of-way," for a reasonable length of time, to the Contractor for

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the construction and operation of said transmission line over Government-owned land under the jurisdiction of the Commission in Los Alamos County. * * *

The last sentence quoted obviously pertains only to land under the jurisdiction of the Atomic Energy Commission in Los Alamos County. The right-of-way sought here is across public land under the jurisdiction of this Department in Sandoval County. Clearly under the contract any other rights-of-way like all other elements necessary for the contractor to provide the transmission line "at its sole expense" remains the contractor's responsibility.

It is plain too that this Department is not attempting to impose any additional conditions in the contract. The matter of the right-of-way sought here and the conditions necessary to acquire it are wholly outside the scope of the obligations undertaken on behalf of the United States under the contract.

The company has established no basis for modification of the decision of the Santa Fe, New Mexico, land office.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 IM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.

EDWARD WEINBERG,
Acting Solicitor.

NORA BEATRICE KELLEY HOWERTON

A-30109

Decided November 17, 1964

Color or Claim of Title: Applications—Color or Claim of Title: Good Faith

A color of title application is properly rejected where the deeds under which the tract applied for has been claimed have a description from which it is impossible to define and limit the tract applied for with any certainty, and also where it appears that the appellant cannot establish a holding of the tract in good faith for 20 years since she held it for less than that period and her immediate predecessor-in-interest was aware of the superior title in the United States when he conveyed to her since he had previously filed a color of title application for the tract which had been rejected, and, therefore, his holding could not be tacked on to hers to establish the requisite period.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Mrs. Nora Beatrice Kelley Howerton has appealed to the Secretary of the Interior from a decision by the Division of Appeals, Bureau of Land Management, dated June 20, 1963, affirming a land office

decision rejecting her application to purchase a tract of land allegedly held by her under a claim or color of title. The rejection was on two grounds: that the deeds through which appellant claims the land do not describe it with any degree of certainty; and that the appellant had not shown that her occupation of the tract applied for was founded on any reasonable basis for a belief that the land was held in good faith under a valid claim.

The appellant's application was filed under the Color of Title Act of December 22, 1928, 45 Stat. 1069, as amended by the act of July 28, 1953, 67 Stat. 227, 43 U.S.C. §§ 1068, 1068a (1958), as a class 1 claim, so designated by departmental regulations, 43 CFR, 1964 Supp., 2214.1-1(b), formerly 43 CFR, 1964 rev., 140.3. As provided by the act, class 1 claims are those where purchase must be allowed if it is shown to the satisfaction of the Secretary of the Interior that:

* * * a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation * * *.

The appellant traces her color of title back to probate proceedings instituted in 1898 relating to the Estate of F. S. Quigley. In 1899 the probate judge authorized the administrator of the Estate to sell certain real property in the Estate. By a deed dated January 19, 1900, the Estate conveyed certain property to Achilli Regozzio, who later conveyed to J. B. Holley, who in turn conveyed it to Hoyt Clayton Neer on May 26, 1917. It appears that Neer is the appellant's brother. He conveyed it to their father, H. Clarence Neer, on May 9, 1929, who conveyed the land to the appellant by deed dated August 25, 1952. In the probate proceedings and in all the subsequent deeds, the description as to the tract which appellant claims was conveyed thereby is substantially as follows:

A strip of land lying on the south boundary of the S.W. $\frac{1}{4}$ of the N.E. $\frac{1}{4}$ of Sec. 24, Tp. 26 N.R. 9 E. M.D.M., and lying between the south line of the Yale Placer Claim and north boundary of Crescent Town Site, with the house, barn and other improvements thereon.¹

The appellant also furnished a metes and bounds description of the claimed tract which was run for her by a private surveyor. From this description it appears that the tract is part of lot 7 of sec. 24 of the above mentioned township and is in Plumas County, California.

¹ The land office decision and a statement by a title company dated July 10, 1961, on Bureau Form 4-1251, listing the conveyances, both apparently erroneously omitted the reference to the SW $\frac{1}{4}$ and simply described the land as lying on the "South boundary of the NE $\frac{1}{4}$ of sec. 24." A previous statement by the same company, dated December 23, 1960, gives the description as above.

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The decision below pointed out that the description in the deeds was inadequate and indefinite. It referred to the fact that the only mining claim shown on county records as being in the immediate vicinity of the tract claimed which may have been used in the description is a "Yale Placer Mine," which was located by Daniel Doherty on June 29, 1901, and which had been "surveyed for location," but that the description of that claim would make its south boundary identical with the north boundary of the Crescent Townsite. Thus, as appellant concedes, there would be no in-between area which would include the tract described in the probate proceedings.

Appellant, however, objects to the finding that the description is inadequate to identify the tract, asserting that she was not responsible for the description, but that the description was first given in the probate proceedings and in the subsequent conveyances. She denies that the Yale Placer *Mine* is the same as the Yale Placer *Claim* referred to in the description because of the slight difference in the name and because the location notice of the Yale Placer *Mine* was recorded after the description referring to a Yale Placer *Claim* had been used in the probate proceedings and the first conveyance in 1900. She states that there are several recorded mining claims of the same name in other townships in the county and that therefore the Doherty claim may not be the only Yale Placer Claim which could have been used and that there could have been another claim which was not indexed in the county records by that name.

The difficulty with appellant's contentions is that she does not satisfactorily explain the reference to the Yale Placer Claim or show that there was some identification which could be relied on by anyone referring to the deeds to ascertain where the tract is located on the ground. Indeed, she has submitted affidavits from residents of the area, who, although saying they thought she, her father, and brother were owners of the land they occupied, also state that they do not know of any Yale Placer Claim in the area.

With respect to the fact that the Yale Placer Mine does cover the area applied for, she alleges that it is not a valid mining claim because it was abandoned the year after location by the failure of the locator to do the annual required assessment. She alleges that whoever prepared the description in the Quigley Estate proceedings must have been referring to another Yale Placer Claim or they were mistaken as to the physical location of the Doherty claim.

In order to give color of title to an occupancy of land, the land must be held under some deed or other instrument which describes the tract with some certainty. See *Karvonen v. Dyer*, 261 F. 2d 671 (9th

Cir. 1958). It is apparent that appellant still is not certain as to the exact area which the deeds she relies on purportedly conveyed. Although appellant contends that the Bureau decision overlooked the invalidity of the Yale Placer Mine claim, the invalidity or validity of that claim is not the criterion here insofar as determining whether a known boundary of that claim was a boundary of the tract for which appellant alleges she has a color or claim of title. Likewise, the affidavits showing no knowledge by persons in the area of any Yale Placer Claim do not help, for if no one knew of such a claim and if there is no recorded description of any other claim bearing that name or some other means of identifying its boundaries to which reference might be made, it would be impossible to ascertain the limits of the tract in question here since one of its boundaries is dependent upon ascertaining the boundary of the Yale Placer Claim.

Aside from this problem, the description also appears to be inadequate to establish the north boundary of the claimed tract. A letter dated August 1, 1961, by appellant's surveyor explaining how he ran the survey indicates that he used an existing roadway to delineate the north boundary of the tract since the claimant was not occupying more than the area south of the roadway and did not desire land north of it, although appellant would apparently claim that there is land which lies between the roadway and the Yale Placer Claim. Thus, the tract appellant desires to purchase apparently is a smaller one than the one allegedly described in the deeds although the actual area so described remains undefined. In addition to the deficiencies in the land description already mentioned, it is noted also that there are no aids or references in the description which would establish the limits of the east and west boundaries of the tract.

The uncertainty and inadequacy of description also are relevant to the question of good faith which was raised in the decision below. For the purpose of this decision, however, it will be unnecessary to discuss some of the points raised below and by the appellant since they are superseded by a more fundamental issue with respect to the requirement of a holding "in good faith" for more than 20 years under the Color of Title Act.

Assuming the good faith of the appellant, it is noted that she had not held the tract for the requisite 20-year period when she filed her application on March 28, 1961, because she acquired her interest in 1952 when her father deeded the tract to her. The Color of Title Act, however, permits the "tacking" on of a holding under color of title in good faith by the grantors or ancestors of a claimant to make up the requisite 20-year period so that the 20-year period here could be made up by a holding in good faith by appellant's immediate predecessor-

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in-interest for the length of time by which appellant's holding is short. See discussion on "tacking" and "privity" in 3 *Am. Jur. 2d*, Adverse Possession, § 58 (1962). The decision below indicated that one requirement under the act was lacking, that of good faith, because appellant's grantor, her father, filed a color of title application, Sacramento 036278, on December 11, 1944, for the same tract as well as other land. That application was rejected and the case closed on July 1, 1949, for his failure to substantiate his right of claim. Appellant states that she does not know why her father's application was not processed through to a final decision, although she is informed that his attorney did not supply a requested abstract of title.

The fact that appellant's father attempted to obtain title from the United States and was unsuccessful is significant since it manifests a recognition by him of the superior title of the United States. An admission or recognition of the existence of a title superior to that of one claiming it has been considered as breaking a statute of limitations and disrupting the continuity of adverse possession under State laws recognizing the acquisition of title through adverse possession. See 3 *Am. Jur. 2d*, Adverse Possession, § 82 (1962); *Meaders v. Moore*, 132 S.W. 2d 256, 125 A.L.R. 817 (Tex. Comm. of Apps. 1939). Although many State statutes giving rights of title to persons holding under adverse possession for a specified length of time do not require that there be a "color or claim of title" and "good faith," other than in holding the land adversely to the interests of others, the Color of Title Act requires that there be both.

Appellant appears to suggest that she and others in her family, being lay persons, have held the land in good faith because they do not understand the technical meaning of the words "title," "fee title," "patented," or "unpatented." However, the Supreme Court has considered whether an individual acquired a right of title by prescription under a royal decree of Spain conferring ownership on those who had possessed lands for a requisite time under "just title and in good faith" and held that, despite the grantee's assertions and belief that he had title, if public facts were known to him showing that the conveyance to him was void,

he would not be regarded as holding in good faith, within the requirement of the decree, because a man is not allowed to take advantage of his ignorance of law. *Tigtao v. Insular Government*, 215 U.S. 410, 417 (1910).

This statement adequately answers any suggestion by appellant that her father had good faith after his color of title application was rejected.

It is apparent that that at least from the time appellant's father filed his color of title application he cannot be considered as having possessed the land under color or claim of title in good faith as required. It has been held under the Color of Title Act that any period of time during which a claimant knows or should know that title to the land is in the United States must be disregarded in determining whether the land has been held for 20 years in good faith adverse possession. *Edward T. Harris, Sr.*, A-27785 (January 19, 1959). Also, it has been held that the possession of a grantor could not be tacked on to that of an applicant where the grantor did not have reason to believe that he had title to the land. *Thomas Ormachea*, A-30092 (May 8, 1964). Further, even though land may have been occupied, improved, and held by someone else in good faith for more than 20 years under color of title, if a person acquiring the land is aware that title is in the United States, it has been held that he is lacking in good faith and has no right to a patent under the Color of Title Act. *Anthony S. Enos*, 60 I.D. 106 (1948) and 60 I.D. 329 (1949); *Clement Vincent Tillion, Jr.*, A-29277 (April 12, 1963). In applying the principles of all of these cases, it is concluded that since appellant's grantor could not have been holding the claimed tract in good faith at the time he conveyed to appellant, this disrupted the continuity of any prior holding in good faith even if such prior holding were for the statutory period, thus preventing the appellant from being able to tack on the holding of her grantor and his predecessors. Therefore, she lacked a holding of the tract in good faith for 20 years under a continuous chain of title. The lack of the statutory requisite of a holding in good faith for 20 years by the applicant and her grantor in addition to the failure to substantiate that the claim was held under any valid description identifying the tract were proper bases for the rejection of appellant's application.

Therefore, 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.

ERNEST F. HOM,
Assistant Solicitor.

**UNITED STATES v. HUMBOLDT PLACER MINING COMPANY AND
DEL DE ROSIER**

A-30055

Decided November 20, 1964

Mining Claims: Contests—Rules of Practice: Government Contests

A determination of the invalidity of a mining claim by the manager of a land office is proper in a Government contest when the claimant fails to answer

November 20, 1964

within the period allowed by the departmental rules of practice; it is no excuse that the contestee has brought an action in the Federal district court to enjoin the contest proceedings and secured a temporary restraining order when thereafter the restraining order is dissolved and, although the contestee appeals to the circuit court, he fails to have the injunction restored or a new one granted.

Mining Claims: Contests—Rules of Practice: Government Contests—Regulations: Waiver

Where a mining contest was initiated by this Department and the contestees did not file an answer but brought an action to enjoin the proceedings in the Federal courts and secured a temporary restraining order against the proceedings, but failed to obtain a further stay after the district court dissolved the restraining order or otherwise to relieve themselves of the necessity of filing an answer to the contest complaint, the secretary will nonetheless entertain a petition to have a belated answer accepted where it appears that the litigation was continued in the appellate courts on the assumption of all parties and the courts that the contest proceedings had been held in abeyance and no rights of third parties are affected.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Humboldt Placer Mining Company and Del de Rosier have appealed to the Secretary of the Interior from a decision of the Division of Appeals of the Bureau of Land Management, dated April 24, 1963, affirming a decision of the Sacramento land office, dated February 7, 1963, which rejected their answer to an amended contest complaint against their placer mining claims and dismissed their motion to dismiss the complaint. The land office decision was based on the ground that the answer and motion were not responsive to any action pending before the Department of the Interior because the contest to which they were directed had been closed on October 11, 1960.

On November 19, 1954, the appellants filed in the Sacramento land office their applications for patent to 38 placer mining claims located in Trinity County, California. On June 27, 1957, the United States filed a condemnation action in the United States District Court for the Northern District of California to acquire title to or outstanding adverse interests in certain public land in Trinity County, California. The appellants' unpatented mining claims were located on part of the land.

Thereafter, on May 15, 1958, the State Supervisor, Bureau of Land Management, brought a contest, No. 10-747, against 18 of the claims for which patent applications had been filed, all of which were included in the condemnation action. The contest complaint charged that the claims were invalid for the reasons that the land in the claims is non-mineral, that there had been no finding of minerals in sufficient quanti-

ties to constitute a discovery within the limits of the claims, and that two of the claims embraced noncontiguous land contrary to law. The appellants were properly served and filed an answer on July 16, 1958, denying the charges.

On March 17, 1960, the State Supervisor filed a petition to amend the complaint and also an amended complaint containing the same charges, but limited in its application to 4 claims in their entirety and 9 in part. The petition requested leave to file the amended complaint in full substitution for and amendment of the original complaint. The petition and the amended complaint were served upon the appellants with notice from the land office that they were allowed 15 days after receipt to respond to the petition and 30 days to answer the amended complaint and that—

Unless contestees file an answer to the Amended Complaint in this office within 30 days after service of this notice, the allegations of the Amended Complaint will be taken as confessed.

The appellants filed no objection to the petition and on April 6, 1960, the land office approved the amended complaint, effective March 17, 1960, in full substitution for the original complaint. The land office again informed the contestees that unless they filed an answer to the amended complaint within 30 days after their receipt of it, the allegations of the amended complaint would be taken as confessed.

The appellants failed to answer the amended complaint but, within the 30-day period allowed for answer, they brought suit in the United States District Court for the Northern District of California against the State Supervisor and the manager of the Sacramento land office (Civil No. 8076), asking that the defendants be enjoined from proceeding further against the appellants under the amended complaint or in any other similar proceeding seeking cancellation or nullification of their mining claims. On April 18, 1960, the day the complaint was filed, the District Court issued a temporary restraining order, as prayed. Subsequently, on June 21, 1960, the court sustained the defendants' motion to dismiss, noting in its opinion the pending condemnation suit in the District Court and the contest in the Department of the Interior. The court ruled that the commencement of the suit was not an irrevocable election by the Government of the court as a forum to try the issues in the contest. It acknowledged that the court had jurisdiction but pointed out that it might await adjudication of special issues by an administrative tribunal having special competence or administrative expertise. The court also acknowledged its power to enjoin further proceedings in the contest but said "there is no good reason for the exercise of the power." Therefore, it ordered

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that the temporary restraining order issued on April 18, 1960, "be, and it is, hereby vacated and dissolved." Final judgment was entered in the case on July 13, 1960. *Humboldt Placer Mining Company v. Best*, 185, F. Supp. 290 (N.D. Cal. 1960).

On July 14, 1960, the land office issued an order in Contest IO-747, notifying the appellants that the land office was resuming jurisdiction of the contest and that, because the 30-day period allowed for answering the amended complaint had almost expired when the suit for injunction was commenced, the contestees were allowed an additional 15 days from receipt of the order within which to file an answer and that, if an answer was not filed, the allegations of the amended complaint would be taken as confessed. Counsel for the appellants acknowledged receipt of the notice and thanked the manager of the land office for the extension of time but stated:

Relative to the resumption of jurisdiction of the Bureau, I respectfully refer you to Rule 73(a) of the Rules of Civil Procedure as to the time allowed the plaintiffs in said Federal Court case to appeal to the United States Court of Appeals for the 9th Circuit. At any time during that period, upon the filing of notice of appeal, the appellant is entitled to a supersedeas upon the furnishing of such bond as may be fixed by the District Court.

On August 3, 1960, after the extended time for filing answer to the amended contest complaint had expired, the land office issued a decision declaring that failure to file an answer within the time allowed was considered an admission of the truth of the charges against the mining claims and holding null and void the 4 claims in their entirety and the 9 as to the portions described in the amended complaint. Thirty days were allowed for appeal. On October 11, 1960, in the absence of any action by the appellants, the land office issued a further notice declaring the contest closed in the absence of an appeal from the decision of August 3, 1960.

Meanwhile, on September 8, 1960, the appellants appealed to the United States Court of Appeals for the Ninth Circuit from the decision of the District Court dismissing the injunction suit, without, however, obtaining or attempting to obtain an injunction during the pendency of the appeal under Rule 62(c) of the Federal Rules of Civil Procedure. On August 18, 1961, the Court of Appeals reversed the District Court on the ground that the Department of the Interior did not retain jurisdiction to adjudicate the validity of mining claims on public lands after invoking the jurisdiction of a Federal district court by filing a condemnation action in which it raised the same issue and remanded the case for adjudication of the validity of the mining claims in the condemnation action. *Humboldt Placer Mining Company v.*

Best, 293F. 2d 553 (9th Cir. 1961). The Supreme Court granted certiorari, 368 U.S. 983 (1962), and on January 14, 1963, reversed the circuit court on the ground that resort to condemnation in order to obtain possession of the mining claims did not preclude the United States, as titleholder, from adjudication of their validity by administrative procedures. *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (9th Cir. 1963).

On January 29, 1963, nearly 2½ years after the expiration of the period allowed for filing an answer to the amended contest complaint against their mining claims, the appellants filed an answer and a motion to dismiss the complaint. On February 7, 1963, the land office rejected the answer and dismissed the motion on the ground that they were not responsive to any action pending before the Department.

On appeal to the Director of the Bureau of Land Management, the appellants contended that the land office decision of February 7, 1963, was premature and in violation of the injunctive order of the Federal court and that it is a part of a design to split contest proceedings in order to harass the mining claimants and to promote piecemeal litigation. After the Division of Appeals affirmed, the appellants renewed these contentions in the appeal to the Secretary of the Interior and also alleged that the reversal of the District Court by the Court of Appeals caused the decision of the District Court to become a nullity and thus restored the parties to the status they enjoyed before the District Court's decision so that they had the protection of the temporary injunction restraining the land office officials from any further proceedings against their mining claims. They asserted that the granting of certiorari by the Supreme Court did not restore any power of the defendants in the injunction suit to meddle or interfere with their mining claims until after January 14, 1963, when the Supreme Court issued its decision, and after the expiration of the time allowed for filing a petition for rehearing in the Supreme Court. They requested that the decision of the Division of Appeals be vacated and the contest remanded to the land office for consolidation of all the contests affecting land needed for the reclamation project and the determination of the consolidated contest in accordance with established procedures.

The departmental regulations under which the contest in question was commenced provides that—

The Government may initiate contests for any cause affecting the legality or validity of any entry or settlement or mining claim. (43 CFR, 1964 Supp., 1852.2-1, formerly 43 CFR, 1964 rev., 221.67.)

Within 30 days after service of the complaint or after the last publication of the notice, the contestee must file in the office where the contest is pending an

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answer specifically meeting and responding to the allegations of the complaint, together with proof of service of a copy of the answer upon a contestant * * * (43 CFR, 1964 Supp., 1852.1-6, formerly 43 CFR, 1964 rev., 221.68; 221.64.)

If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing. (43 CFR, 1964 Supp., 1852.1-7(a), formerly 43 CFR, 1964 rev., 221.65(a).)

When the appellants failed to file an answer to the amended complaint within the time allowed by the land office order of July 14, 1960, they were clearly in default under the rules and it was entirely proper for the land office to declare the claims null and void in its decision of August 3, 1960. At that time, the District Court had dissolved the temporary restraining order issued by it on April 18, 1960, thus freeing the land office of any restraint from proceeding further with the contest.

If the appellants desired further restraint on the Departmental proceedings, as they apparently did, a clear course of action was open to them under the Federal Rules of Civil Procedure. Rule 62 provides

(a) * * * Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction * * * shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

* * * * *

(c) Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. * * *

This rule is completely plain that a final judgment of a district court in an injunction action is not stayed during the time allowed for taking an appeal or during the pendency of an appeal unless a further order is obtained restoring or granting an injunction during the pendency of an appeal.

After the District Court dissolved the temporary restraining order in this case, appellants took no steps whatsoever under Rule 62(c) to have the injunction restored or a new one issued. They were inactive despite express notice from the land office that it was resuming the contest proceedings and that if they did not answer the contest complaint within the time allowed, the allegations of the complaint would be taken as confessed. All that appellants did was to file a notice of appeal to the circuit court despite the express provision in Rule 62(a) that an appeal does not stay a judgment in an injunction action.

There was a second course of action available to the appellants besides seeking a restoration of the injunction under Rule 62(c). They could have filed a request under this Department's rules of practice for an extension of time to file an answer pending completion of the judicial proceedings. 43 CFR, 1964 Supp., 1850.0-6(g), formerly 43 CFR, 1964 rev., 221.97(b).

A third course of action was to file the answer and to request the postponement of further proceedings until the litigation was terminated. 43 CFR, 1964 Supp., 1852.3-3, formerly 43 CFR, 1964 rev., 221.71.

The appellants availed themselves of none of these courses of action. They stood therefore in no position to complain of the default action taken by the land office.

This would appear to dispose of the matter except for the peculiar circumstance that litigation in the *Humboldt* case proceeded through the circuit court and the Supreme Court with both parties and the courts apparently assuming that the proceedings in the Department were still open and would remain open until a final decision was rendered in the *Humboldt* case. As noted earlier, the land office rendered its decision declaring appellants' claims to be null and void on August 3, 1960, which was after the final judgment of the District Court was entered on July 13, 1960. On September 8, 1960, the appellants appealed from the District Court's decision. Then on October 11, 1960, the land office closed the contest case because of the appellants' failure to appeal from its August 3, 1960, decision.

The administrative actions were apparently overlooked in the further course of the litigation. Thus, the circuit court, in its opinion issued on August 18, 1961, stated:

* * * While we are not advised whether the district court has deferred further proceedings in the condemnation action *pending the final determination of the administrative proceedings*, it is clear from the following language of the district court's opinion in the instant case that such action *will be taken* (Italics added). 293 F. 2d at 555.

This language reflected the clear understanding of the court that the administrative proceedings were still open, not that they had been finally closed on October 11, 1960, almost a year earlier.

And, when the case was before the Supreme Court, that court took note of an argument by appellants as follows:

Respondents protest, saying that if they are remitted to the administrative proceeding, they will suffer disadvantages in that the procedures before the District Court are much less onerous on claimants than those before the Department of the Interior [footnote omitted]. We express no views on those contentions, *as each of them can appropriately be raised in the administrative proceedings and reserved for judicial review* (Italics added). 371 U.S. at 339-340.

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Thus the Supreme Court too assumed that the administrative proceedings would be resumed following its decision.

In this unusual situation, although the appellants invited the land office action against them by their culpable negligence in failing to have the injunction restored or to have their time for answering extended, the question arises as to whether the land office action must be affirmed.

The language of the pertinent Departmental rule quoted earlier is mandatory that if an answer is not filed "the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing." 43 CFR, 1964 Supp., 1852.1-7(a). This rule has been strictly enforced from its inception and no deviations have been made. This has been so in Government contests¹ and private contests.² Thus the unbroken line of Departmental rulings has been that, where a contestee fails to answer timely, the allegations of the complaint will be taken as admitted and a decision rendered against him.

In view of the consistent rulings of the Department and the appellants' clear and inexcusable failure to relieve themselves of the necessity of filing a timely answer to the contest complaint after the District Court's dissolution of the temporary restraining order, the land office and the Division of Appeals were clearly correct in rejecting the appellants' belated answer filed on January 29, 1963. The question that remains is whether the Secretary is bound to affirm the rejection and, if he is not, whether he should nonetheless affirm the rejection.

In *United States v. J. Hubert Smith*, *supra*, fn. 1, and in *Earl D. Deater v. John C. Slagle*, *supra*, fn. 2, the Department held that the Secretary could not waive the regulation providing for a default decision against a contestee if he fails to answer timely, citing *Chapman v. Sheridan-Wyoming Coal Company*, 338 U.S. 621 (1950), and *McKay v. Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955). In the *Smith* case, however, although a Government contest was brought in the name of the United States, the contest was initiated by the United States Forest Service of the Department of Agriculture. And, in *Deater v. Slagle*, the contest was one between private parties. In Government contest cases initiated by the Bureau of Land Management of this Department no ruling has been made as to whether the

¹ *United States v. J. Hubert Smith*, 37 I.D. 311 (1960); *United States v. Raymer Garnett et al.*, A-28545 (January 31, 1961); *United States v. Henry Gilligan et al.*, A-28857 (February 19, 1962); *United States v. Gifford Allen et al.*, A-28718 (July 26, 1962); *United States v. Ruben J. Garcia et al.*, A-28889 (July 30, 1962); *United States v. Carl D. Jensen*, A-28789 (August 6, 1962); *United States v. Bradley-Turner Mines, Inc.*, A-29813 (November 19, 1963).

² *Earl D. Deater v. John C. Slagle*, A-28121 (May 24, 1960); *F. Don Wadsworth v. Don Farrell Anhder, Sr.*, 70 I.D. 537 (1963).

regulation may be waived by the Secretary in unusual circumstances.

In view of the fact that the contest proceedings here were instituted by the State Supervisor of the Bureau of Land Management and that the interests of third parties are not involved, and in view of the definite impression of the circuit court and the Supreme Court that the contest proceedings had been held in abeyance pending a final decision in the litigation, the Department will entertain a petition by the appellants to have their answer filed on January 29, 1963, accepted and to reinstate the contest proceedings. The petition, to be acceptable, must be filed in the Office of the Secretary within 20 days after service of a copy of this decision upon appellants' counsel.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), further action in the case will be suspended for a period not to exceed 20 days from the date of service of a copy of this decision on appellants' counsel in order to permit appellants to file the petition described; if the petition is not timely filed, the decision appealed from will be affirmed without further notice.

FRANK J. BARRY,
Solicitor.

**PARADISE IRRIGATION DISTRICT v. JAMES DUGUID AND
BERTHA V. DUGUID**

A-30125

Decided November 20, 1964

Mining Claims: Contests—Rules of Practice: Private Contests

A determination of the invalidity of a mining claim by the manager of a land office is proper in a private contest when the claimant fails to answer within the period allowed by the departmental rules of practice; it is no excuse that the contestee has brought an action in the Federal district court to enjoin the contest proceedings and secured a temporary restraining order when thereafter the restraining order is dissolved and, although the contestee appeals to the circuit court, he fails to have the injunction restored or a new one granted.

Mining Claims: Contests—Rules of Practice: Private Contests—Regulations: Waiver

The Departmental regulation providing that, where a timely answer is not filed in a contest proceeding, the case will be decided on the basis of the allegations in the complaint, cannot be waived in the case of a private contest.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

James Duguid and Bertha V. Duguid have appealed to the Secretary of the Interior from a decision of the Division of Appeals of the

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Bureau of Land Management dated July 24, 1963, which affirmed a decision of the Sacramento land office declaring null and void the Duguids' Duguid-Clifford placer mining claim located for gold within the Lassen National Forest in Butte County, California. The decision of the land office followed the filing of a complaint initiating a private contest against the claim based on charges that the land is nonmineral and that no discovery had been made within the limits of the claim and the failure of claimants to file an answer denying the charges within the 30-day period allowed by the Department's rules of practice.

The claim in question was located in 1936. On March 30, 1956, the U.S. Forest Service granted to Paradise Irrigation District a special use permit to do preliminary exploration, to use an earth fill borrow area, and to construct a dam and reservoir of 6,000 acre-foot capacity to supply domestic water within the district. On April 2, 1959, the Sacramento land office granted a right-of-way for Paradise Reservoir and Dam and the Paradise Irrigation District built the dam and reservoir. On May 19, 1959, the Duguids brought an action in the State Superior Court for Butte County, California, against the Paradise Irrigation District asking \$30,000 in damages for the occupation of 3.7 acres and the removal of 55,000 cubic yards of gold-bearing gravel from their mining claim.

While this lawsuit was pending in the State court, the Paradise Irrigation District filed a private Contest, Na. 5740, in the land office against the claim, charging that the land within the boundaries of the claim is nonmineral in character and that no discovery of a valuable mineral deposit has been made within the limits of the claim. The complaint stated expressly that it was filed in the Sacramento land office and that, unless the contestees filed an answer within 30 days after service of the complaint upon them, the allegations of the complaint would be taken as confessed. The complaint was served separately upon the two contestees on February 18, 1960.

On March 10, 1960, within the 30-day period, the contestees brought an action in the United States District Court for the Northern District of California (Civil Action No. 8059) against local officials of the Bureau of Land Management and an Assistant Regional Solicitor, charging a conspiracy between them and the Paradise Irrigation District to harass and annoy the contestees in the use and enjoyment of their mining claim and requesting that the defendants be restrained from proceeding in any manner in connection with the contest complaint and that they and their subordinates be enjoined and restrained from issuing any notices or orders having reference to the contest

complaint of Paradise Irrigation District or from taking any action tending to cloud the title to the contestees' mining claim and that the contestees be awarded such damages as might be proved. The contestees challenged the validity of private contest proceedings. The court issued a temporary restraining order on March 10, 1960.

On March 16, 1960, the Duguids filed a new action in the same court (Civil No. 8063) which superseded the earlier action. The Duguids prayed for the same relief and on March 16, 1960, the court issued a temporary restraining order enjoining the defendants from issuing any notices or orders based upon or having reference to any contest complaint filed by Paradise or taking any action to cloud the title to the Duguids' mining claim or "to cancel the same by any order or directive based upon or referring to said contest complaint."

On June 10, 1960, the District Court held that the Bureau of Land Management had authority to entertain the private contest initiated by Paradise. It therefore granted defendants' motion for summary judgment and "vacated and dissolved" the temporary restraining order. Judgment to that effect was filed on June 21, 1960.

On June 22, 1960, the State court granted the defendants' motion for a stay of proceedings in the damage suit until the Bureau of Land Management should have rendered a final decision on the validity of the Duguid mining claim.

The Duguids appealed on August 8, 1960, from the decision of the Federal district court, and on May 25, 1961, the Court of Appeals affirmed, *Duguid v. Best*, 291 F. 2d 235 (9th Cir. 1961). The court expressly sustained the validity of the Department's regulations providing for private contests.

The Duguids petitioned the United States Supreme Court for a writ of certiorari, and on February 18, 1963, the petition was denied. 372 U.S. 906.

On March 5, 1963, the Duguids filed an answer to the contest complaint in the Sacramento land office. In this answer, they denied there is no gold on the claim and alleged affirmatively that there has been a finding of gold which it will pay to work. On March 19, 1963, the Paradise Irrigation District acknowledged service of the contestees' answer and requested that the claim be declared null and void because of the contestees' failure to comply with the applicable rule of practice, 43 CFR, 1964, rev., 221.65, now 43 CFR, 1964 Supp., 1852.1-7(a), which provides that if an answer is not filed within 30 days after service of a contest complaint.

* * * the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing.

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On April 9, 1963, the land office declared the contestees' mining claim null and void because of the untimely filing of their answer to the contest complaint which, under the rule just quoted, constituted an admission of the charges contained in the complaint.

In their appeal to the Director, the contestees contended that the manager of a land office has no authority over a mining contest and that the land office acts only in the capacity of a clerk of court as a depository of the contest complaint which long ago should have been turned over to a hearing examiner. The Division of Appeals affirmed.

In their appeal to the Secretary, the contestees renew their previous contentions and add the supplemental contention that the answer was filed in time to comply with the land office rule because it was filed within 30 days of the decision of the United States Supreme Court.

The issue presented on this appeal is the effect of appellants' failure to file an answer to the contest complaint within 30 days after it was served upon them. The Department's rules on the contests provide that—

Within 30 days after service of the complaint * * * the contestee must file * * * an answer specifically meeting and responding to the allegations of the complaint * * *. 43 CFR, 1964 Supp., 1852.1-6, formerly 43 CFR, 1964 rev., 221.64.

and, as noted earlier,

If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing. * * * 43 CFR, 1964 Supp., 1852.1-7(a), formerly 43 CFR, 1964 rev., 221.65(a).

The appellants did not file an answer within 30 days after they were served. Instead, within that time, they brought their action against the local Bureau of Land Management officials and secured a temporary restraining order which forbade continuance of the contest proceedings. However, the restraining order was dissolved on June 21, 1960, when the judgment of the District Court was entered. Thereafter, although the contestees appealed to the Court of Appeals, they took no action which prevented the re-running of the 30-day period against them.

Essentially the same facts were presented in *United States v. Humboldt Placer Mining Company et al.*, 71 I.D. 434 (A-30055), decided today. In that case, there was involved a Government contest rather than a private contest but there too, after being served, the contestees, who were represented by the same counsel as the Duguids, elected not to file an answer but filed an action against the Bureau of Land Management officials to enjoin their proceeding with the contest. The

same United States District Court issued a temporary restraining order but dissolved it on June 21, 1960, the day it entered judgment against the Duguids. The contestees in the *Humboldt* case also appealed to the Court of Appeals but, as here, took no action to protect themselves against administrative action while the appeal was pending.

In the *Humboldt* decision it was pointed out that Rule 62 of the Federal Rules of Civil Procedure expressly provides that a judgment in an action for an injunction is not stayed during the period after entry of the judgment and until an appeal is taken or during the pendency of an appeal. Rule 62 provides further that, when an appeal is taken from a judgment dissolving an injunction, the court may restore the injunction during the pendency of the appeal. In the *Humboldt* decision it was noted that the contestees there could have but did not apply for a restoration of the injunction when they appealed from the District Court decision. It was also noted that, in addition or in the alternative, they could have requested from the Department an extension of time to file their answer to the contest complaint pending final action in the litigation. Finally, they could have filed an answer and requested postponement of further proceedings. They did none of these.

The Duguids had the same three courses of action open to them but pursued none of them.

Despite the default of the contestees in *Humboldt*, we waived the pertinent regulation, 43 CFR, 1964 Supp., 1852.1-7(a), *supra*, because of the unusual circumstances pertaining in that case and because the rights of third parties were not involved. The *Humboldt* contest was instituted by the Bureau of Land Management of this Department and there were no other governmental agencies outside of this Department involved or any other third parties. It was held that because of the absence of third parties, the Secretary had authority to waive the regulation.

In the present proceeding we are concerned with a private contest instituted by the Paradise Irrigation District, an agency of the State of California. This makes squarely applicable the ruling of the Department in *Earl D. Deater v. John C. Slagle*, A-28121 (May 24, 1960). In that case, which involved a private contest against a homestead entry, it was held that the Secretary has no authority to waive the pertinent regulation in order to permit a late answer to the complaint to be considered. See also *F. Don Wadsworth v. Don Farrell Anhder, Sr.*, 70 I.D. 537 (1963).

The Duguids, however, contend that the regulation is invalid because it invests the manager rather than a hearing examiner with

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the authority to decide the case when an answer is not filed as required. They contend that this is contrary to the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. § 1001 *et seq.* (1958). They do not, however, point to any provision of the act which is violated, and we are not aware of any.

Section 11 of the act, 60 Stat. 244, 5 U.S.C. § 1010 (1958), provides for the appointment of such examiners as may be necessary for proceedings under sections 7 and 8 of the act. Section 7, 60 Stat. 241, 5 U.S.C. § 1006 (1958), provides for examiners to "preside at the taking of evidence" in hearings. Section 8, 60 Stat. 242, 5 U.S.C. § 1007 (1958), provides for initial decisions to be rendered by the officers who presided at the hearings. There is nothing in the act which provides for the procedure to be followed in cases where a hearing would be held upon a joinder of issues but issue is not joined because of a party's default so that no hearing is held. In short, there is nothing in the Administrative Procedure Act which requires an examiner to act in the situation that we have under consideration.

Therefore, 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.

FRANK J. BARRY,
Solicitor.

UNITED STATES v. E. V. PRESENTIN AND DEVISEES OF THE
H. S. MARTIN ESTATE

A-30004

Decided November 24, 1964

Mining Claims: Determination of Validity—Mining Claims: Discovery

To validate a mining claim covering minerals for which a market must be shown, it must appear that the minerals probably exist on the claim in such quantities as will justify extraction.

Mining Claims: Discovery

A showing of the probable existence of minerals in such quantities as will justify the further expenditure of labor and money with a reasonable prospect of success in developing a valuable mine must be made to meet the test of discovery under the mining laws.

Mining Claims: Discovery

Where mining claimants have not shown that deposits of talc and silica on their claims probably exist in sufficient quantities to justify a prudent man in spending his labor and means with a reasonable prospect of developing

a valuable mine, they have not made a discovery of valuable mineral deposits within the meaning of the mining laws.

Mining Claims: Mill Sites

A mill site is properly declared invalid where the claim is not occupied or used for mining or milling purposes.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

E. V. Pressentin and others have appealed to the Secretary of the Interior from a decision by the Assistant Director, Bureau of Land Management, dated March 6, 1963, which affirmed a decision of a hearing examiner dated February 23, 1962, declaring six mining claims, Silica Lode No. 1, Silica Lode No. 2, Silica Lode No. 3, Rockport Lode No. 1, Rockport Lode No. 3, and Rockport Lode No. 4, and a mill site, Silica Millsite, situated in sections 10 and 15, T. 36 N., R. 11 E., W.M., Washington, within the Mount Baker National Forest, to be null and void.

On March 13, 1956, following the filing of an application for patent (Washington 01255) covering the seven claims, the United States, on the recommendation of the Forest Service, Department of Agriculture, brought charges against the claims on the grounds, among others, that no discovery of minerals had been made within the boundaries of the lode claims, that the land within the mill site is not being used in connection with a valid mining operation, and that there is not located on the mill site a mill or reduction works.

After a hearing on September 13, 1956, the hearing examiner, on January 3, 1957, found that the deposits of talc and silica on the claims must be mined by underground methods, that the success of such methods would be dependent upon the sufficiency of material available for extraction, that the sufficiency of the deposits can be determined by prospecting and exploration, and that, although the claims have been located for approximately 30 years, no such determination has been made. He concluded that the preponderance of the evidence presented at the hearing was that there had not yet been a discovery of a valuable mineral deposit on any of the six mining claims. He found the mill site claim to be invalid for lack of use in connection with a valid mining operation and for lack of use in connection with a mill or reduction works.

Following an appeal by the claimants, the matter was, on December 27, 1960, remanded for a further hearing.

After a second hearing on July 18, 1961, the hearing examiner, on February 23, 1962, again declared the claims to be null and void. He held that talc has been found on Silica Lode No. 2 and that silica has been found on each of the remaining mining claims; that the

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quality of the talc and silica is satisfactory for commercial uses; that there is a market for talc and silica; and that the claims are accessible to that market. He found that, although several thousand dollars had been spent on the claims since the hearing in 1956 on road construction and in further exposing the silica deposits, no one has determined whether there is a sufficient quantity of material on the claims to be economically competitive with the other sources of supply. He concluded that the statement presented at the second hearing in the form of a letter from Drury A. Pifer, in which Pifer gave his opinion as to the indicated and inferred tons of material on the claims, might induce further effort on the claims but that it is not sufficient to induce a production program. He found that, despite the fact that talc and silica have been known to be on the claims for many years and despite the fact that considerable effort has been expended on the claims, the basic exploration necessary to determine whether the material can be successfully marketed has not yet been completed. He stated that until there is sufficient evidence to verify the marketability of the deposits, he could only conclude that the contestees have not proved the existence of a valuable deposit on any one of the claims. He reaffirmed his decision of January 3, 1957, declaring the mill site to be null and void.

The Assistant Director, in his decision of March 6, 1963, after referring to the necessity for a showing of present marketability in connection with claims covering nonmetallic minerals of widespread occurrence in order to validate mining claims covering such materials, stated that the issue posed by the appeal was whether the contestees had refuted the Government's showing that sufficient quantities of commercial talc and silica have not been exposed on the lands to warrant a conclusion that there has been a discovery of mineral deposits of commercial value. He concluded that further exploration work would be necessary to determine the extent of the mineral deposits upon each of the mining claims and held that the hearing examiner was correct in declaring the claims to be null and void. He also affirmed the hearing examiner's decision as to the invalidity of the mill site.

In their present appeal, the contestees contend that the Assistant Director failed to give proper weight to the testimony presented at the hearings dealing with the quantity of talc and silica on the claims and that he has distorted the facts presented at the hearings in order to reach a conclusion that the materials found on the claims are not marketable. They accuse the Department of having added to the elements necessary to show marketability and contend that under the

recent trend of departmental decisions marketability has become the sole test of the validity of mining claims.

Considering the general charge against departmental decisions first, this charge is one which arises through a misunderstanding of the Department's position with respect to the necessity for a showing of marketability when the mineral dealt with is not an intrinsically valuable mineral. The Solicitor recently reviewed the "marketability rule" as applied to the law of discovery and pointed out that the rule is but one aspect of the prudent man test¹ applied over the years to determine the validity of mining claims. The Solicitor held that to determine whether nonmetallic minerals not in themselves intrinsically valuable, and found in a great many places, are valuable mineral deposits within the meaning of the mining laws, Rev. Stat. § 2319 (1875), 30 U.S.C. § 22 (1958), the application of the prudent man test requires that a market for the mineral must be shown. It was said unequivocally that the marketability test is only one aspect of the prudent man test "albeit a very important aspect since in the absence of marketability no prudent man would seem justified in the expenditure of time and money." The Solicitor stressed that each case must be judged on its own facts. 69 I.D. 145 (1962).

The law is that where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine the requirement of discovery necessary to validate a mining claim has been met.

Implicit in the evidence required to justify a prudent man in spending his time and money to extract the minerals is a showing that the quantity of minerals on the claim is sufficient to justify his effort. Thus, even in the case of intrinsically valuable minerals, to constitute a valid discovery upon a lode claim for which patent is sought, there must be actually and physically exposed within the limits thereof a vein or lode of mineral-bearing rock in place, possessing in and of itself a present or prospective value for mining purposes. *East Tintic Consolidated Mining Claim*, 40 L.D. 271 (1911). A discovery, to satisfy the requirements of the law, means more than a showing of isolated bits of mineral not connected with or leading to substantial value. It is not enough that the claimant may have shown that it is possible to detect the presence of some minerals in the material removed from the claim and that this material was removed from

¹ Set forth by the Department in *Castle v. Womble*, 19 L.D. 455 (1894), approved by the United States Supreme Court in *Chrisman v. Miller*, 197 U.S. 313 (1905), and recently reaffirmed in *Best et al. v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963).

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veins or fissures. *United States v. Josephine Lode Mining and Development Company*, A-27090 (May 11, 1955).

A fortiori, to validate a claim covering minerals for which a market must be shown, it must appear that the minerals probably exist in such quantities as will justify their extraction. *United States v. Everett Foster et al.*, 65 I.D. 1 (1958); ² *United States v. Charles H. and Oliver M. Henrikson*, 70 I.D. 212 (1963).³ Otherwise a prudent man would not be warranted in spending his labor and money in an effort to develop a valuable mine and he would not have such a discovery as would satisfy the requirements of the mining laws to entitle him to a patent.

Thus a disclosure of minerals in apparently sufficient quantities to make a mining operation worthwhile, i.e., a showing of minerals to such a probable extent that, with actual mining operations under proper management, a profitable venture may reasonably be expected to result, is required. *United States v. Santiam Copper Mines, Inc.*, A-28292 (June 27, 1960).

While evidence as to the quantity of minerals found on mining claims has often been discussed by the Department in connection with determining the marketability of minerals of widespread occurrence with no intrinsic value, the factor of quantity is an important aspect to be considered in determining whether any claim has validity. Whether that factor is treated as being a part of the showing required to establish a market for the minerals or as a separate phase of the prudent man test is immaterial since, in any event, before a claim can be considered valid under the mining laws there must be shown to be probably present on the claim minerals in such quantities as will justify the further expenditure of labor and money with a reasonable prospect of success in developing a valuable mine.

This is not to say that the full extent of a mineral deposit must be actually blocked out before the prudent man test is satisfied. It is required, however, that there be a preponderance of reliable evidence that the mineral deposit is probably of such a size that a person of ordinary prudence would be justified in spending labor and money on the claim with a reasonable prospect of success in developing a valuable mine.

We come then to the one part of the prudent man test which the hearing examiner and the Assistant Director found the appellants had

² Affirmed *Foster v. Seaton*, 271 F. 2d 836 (D.C. Cir. 1959).

³ Affirmed by the United States District Court in and for the Northern District of California, Southern Division, in *Henrikson v. Udall*, Civil No. 41749, on May 22, 1964, and now on appeal to the United States Court of Appeals, Ninth Circuit.

not met to establish the validity of the six mining claims and to the appellants' contention that proper weight was not given to the evidence presented at the hearings as to the quantity of talc and silica on the claims.

The appellants cite two showings made at the hearings which they contend would support a finding that there are sufficient amounts of talc and silica on the claims to justify the issuance of patents. They contend that this evidence has been misconstrued or ignored. One showing is Exhibit Q, produced at the second hearing. The exhibit is a statement by Drury A. Pifer in which he, on the basis of his field notes taken when he examined the property in August 1956, gave his opinion as to the tonnage of indicated ore and inferred ore on the claims.⁴ Pifer's estimates ranged from 200 tons of indicated silica and 700 tons of inferred silica, a total of 900 tons, on Rockport No. 3 to 80,000 tons of indicated silica and 166,000 tons of inferred silica, a total of 240,000 tons, on Silica No. 3. He estimated 50,000 tons of indicated talc and 300,000 tons of inferred talc, a total of 350,000 tons, on Silica No. 2.

Pifer was present at the first hearing. He testified⁵ that he examined the claims on August 15 and August 22, 1956. He testified that he measured the talc exposure on Silica Lode No. 2 to be 30 feet wide and along the surface for a distance of about 100 feet. Asked whether there would be any way of knowing what quantity of talc might be on Silica Lode No. 2, from the exposure he saw, he answered:

No, there isn't. The claim is covered by detrital [sic] material, forest duff and windfalls, and the rock in place has only been exposed on both sides of the creek and in the creek bed. It may continue. It very likely does. (1st Tr. 70.)

Asked:

From your experience, would you say that a reasonably prudent man would be justified in spending additional time and money to determine the extent of the location and whether or not a profitable operation could be obtained?

He replied:

Certainly when you have a discovery of this size, it would be worth-while to continue developing it, exploring it, in order to determine if the body continues, in the first instance, and how large and extensive it is in the second, with the hope

⁴ Pifer stated that he was using the commonly accepted technical definitions of the terms indicated ore and inferred ore. He quoted a definition of the terms from Parks, R. D., *Examination and Valuation of Mineral Property* (1949):

"Indicated ore is ore for which tonnage and grade are computed partly from specific measurements, samples, or production data and partly from projection for a reasonable distance on geologic evidence. The sites available for inspection, measurement and sampling are too widely or otherwise inappropriately spaced to outline the ore completely or to establish its grade throughout * * *. Inferred ore is ore for which quantitative estimates are based largely on broad knowledge of the geologic character of the deposit and for which there are few if any samples or measurements. The estimates are based on an assumed continuity or repetition for which there is geologic evidence."

⁵ Transcript, first hearing (hereinafter referred to as 1st Tr.), pp. 67-87.

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that it certainly will make a payable proposition from the mining standpoint. (1st Tr. 71.)

In describing the exposures of silica on the other claims, he repeatedly indicated that the claims should be explored more fully to determine the extent of the deposits (1st Tr. 74, 76-78).

The testimony given by Milvoy M. Suchy, the government's mineral examiner, at the first hearing was that not enough work has been done on the claims to warrant a guess as to the tonnage of talc that might be there, that the silica deposits have not been delineated, that there is not enough silica exposed on some of the claims to say what the extent of it is, that he found outcrops or float quite widely scattered, that he found what he believed to be a silica boulder buried in the bank which may be another parallel vein or a piece of float.⁶

At the second hearing, after E. V. Presentin had described the work done on the claims since the first hearing, including stripping the talc dike, removing several hundred tons of talc, and stripping on the silica claims, and after photographs of the claims, taken in May 1961, had been introduced and after the Pifer statement had been discussed, Herman Smith, a Government witness who mines talc from property which he leases, testified⁷ that looking at the claims he was unable to form any ideas as to the quantities of the deposits. This was because "there is no way, only by development work, to prove that." In reply to the question as to why this was, he responded that talc was not consistent, "it can cut off or fault * * *. You have to follow it in order to decide whether it is going on in or whether it is going down." Responding to a question as to the silica deposits on the claims he replied: "Well, they are just kidneys—they are pockets and boulders of talc. There is nothing to indicate that it would go down." (2d Tr. 128-129.)

Suchy also testified at the second hearing. He testified⁸ that there are three faults on Silica Lode No. 2, one of which had been discovered since the first hearing, that where you have faulting and movement you can not depend upon projection because there is a possibility that the fault has moved the deposit, and that where there are faults it would be "rather risky and unreliable to assign any definite tonnage on the small manifestations that are present, of what you can actually see in the exposed face and in the other exposed dimensions near the face" (2d Tr. 151-152). He described an exposure of silica on another of the claims, stating that there are two contacts shown in one of the

⁶ 1st Tr. 16, 21, 24, 29, 32, 35.

⁷ Transcript, second hearing (hereinafter referred to as 2d Tr.), pp. 116-140.

⁸ Tr. 142-176.

photographs introduced in evidence and that there is another contact on that claim not shown in the photograph. He said:

Now, what those contacts mean, I don't know. I don't know if that is a fault of a Silica deposit striking at right angles to it or parallel to it. I don't know. (2d Tr. 153.)

With respect to the projection of indicated and inferred ore that Pifer had made, he stated that such a projection is made

very early in the prospecting stage. There is an inferred or indicated tonnage of a certain grade of ore, then it is right for doing considerable prospecting and exploration work, and by doing this work you are starting to delineate. You get more dimensions and eventually you get to the point where you may have a certain amount of proven ore that would justify your further investment and the establishment of a mine. (2d Tr. 169.)

The only evidence of significant quantities of talc and silica on the contested claims is Pifer's projection of indicated and inferred ore. However, his estimate was based on notes made by him in his examination of the claims in 1956. Yet his testimony at the first hearing was clear to the effect that further prospecting and exploration were needed in order to determine the quantity of minerals in the claims. Pifer was not present at the second hearing so that his estimate was not subject to cross-examination. It seems perhaps significant that although contestees at the second hearing requested and obtained time to arrange for a taking of Pifer's deposition, which would become part of the case record, they never did so.

When the Pifer estimate is considered with the other testimony presented at the hearings, including his own at the first hearing, it cannot be accepted as preponderating evidence, or even substantial evidence, that the appellants have demonstrated that there are present on the claims talc and silica in sufficient quantities to justify a prudent man in spending his labor and means with a reasonable prospect of developing a valuable mine—in other words, that a "valuable mineral deposit" has been discovered.

We turn now to a consideration of the second showing that the appellants contend has been ignored or not given proper consideration. This is the testimony given by J. G. Adderson at the second hearing. They contend that Adderson's testimony shows that Adderson is ready to proceed at the present time with mining operations on the claims, that his company would proceed on the claims with a mining operation which would not be of an experimental character but for commercial purposes, and that, properly construed, his testimony shows a willingness to operate a mine and not just a willingness to explore.

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Careful consideration of Adderson's testimony⁹ does not, however, support the conclusion which the appellants reach therefrom.

Adderson is the principal owner, operator, and manager of Manufacturers Mineral Company in Seattle, engaged in the mining and preparation of various types of nonmetallics for various types of market, and one of the two local operators meeting the demand for talc. In 1958 and 1959, his company used some 500 tons of talc from the Silica Lode No. 2 claim, which it got from Morgan Adair, who, Adderson said, had a working arrangement with Presentin. Asked whether he would say, on the assumption that the estimated total indicated and inferred tonnage on the claim was 350,000 tons, that an ordinarily prudent man would be justified in expending additional time and money in an effort to develop this claim as a talc mine, he answered "Yes" and added that he proposed to do that. "I am hopeful that we will get together and work out an arrangement whereby we can proceed along those lines." Asked: "Actually it is a paying mine, or was when talc was being taken out, is that correct?", he replied: "Well, the operation was on such a small scale at that particular time that I wouldn't say that it was a money-maker, but it was not a money-loser. It was done as an initial state in development." (2d Tr. 69-70.)

His testimony with respect to silica was that his company was always studying and examining properties to determine available known sources of silica for its type of use; that he has seen the outcrop on Silica Lode No. 3; that he had asked another person to make an examination—"a cursory examination"—and to bring him samples, that he had examined those samples and feels that the material is definitely of interest to his company from a quality standpoint, that he is familiar with the practice of estimating indicated and inferred tonnages, and that the practice is standard in the mining industry. Asked whether he had specific plans as to further inspection of the property to see whether or not it might be operated by his company, he replied:

Yes, we expect to get at that before this summer is over. We are just now waiting to get some tangible evidence of our right to go in there and to protect it if we find we can go ahead. (2d Tr. 75.)

He was then asked what the nature of the operation would be. "How would you approach it from a tonnage standpoint?" His reply was:

Because of the nature of our business, we look at these things a little bit differently, particularly now on the silica. It is a little bit different than an

⁹ 2d Tr. 65-97.

operator might whose sole interest was in metallurgical rock, for example. Our primary interest would be to appraise the property from the standpoint of the fine ground industrial material and primarily the construction aggregate type of rock with the idea that we would open up on a relatively small scale until such time as our development had proved the quality and quantity for the metallurgical type of operation, at which time we would certainly not turn our back on that type of operation. The principal problem in this metallurgical field of endeavor is to get adequate sampling and to determine the quality of rock from that particular standpoint. You can sample the surface of these deposits from now until Doomsday and you are still not assured of anything; but once you have the deposit opened up and you can take good cross sections, then you are reasonably sure. That is one other approach that can be used and that is to thoroughly drill the deposit; but that is a very costly type of operation in quartz and we choose to do it the other way because we are more or less paying our way as we go. (2d Tr. 75-76.)

Further stating what his plan of operation would be, Adderson stated:

Now, in some cases and under certain circumstances, you would diamond drill and outline your ore body completely before you ever started to mine—or you might outline it up to a point where you were satisfied you had a sufficient reserve, ignoring what might be an addition to that, to justify the capital expenditures that are necessary to put it into operation.

We, because of our unique market position in the type of materials we furnish, we choose to do it the other way because diamond drilling is just dead expense and it has to be amortized or lost if the deposit doesn't develop.

We are going to do it the other way. We approach it from the standpoint of the small producing unit and pay our way as we go and at the same time open it up and as the material and quantity measures up, we can proceed. (2d Tr. 78.)

Asked whether, in his opinion, an ordinarily prudent man would be justified in spending time and effort to develop a paying mine without knowing the proved tonnage, but on the basis of indicated and inferred tonnage, he replied:

It depends on how you are going to develop. It is an absolutely firm rule, as far as I am concerned, that you don't start building mill facilities until you have proved tonnage adequate to justify the expenditure for those facilities. In the case of a situation such as we are contemplating, if detailed examination of the property indicates a reasonable tonnage of ore in our judgment—and we rely entirely on our judgment when we make that decision—we will undertake to develop but not to put in mill facilities at that point. (2d Tr. 95.)

Asked whether the operation he was discussing would be an actual commercial operation, he replied:

Very definitely. It would not be experimental. It would be with the idea that we were going to recover several years at least of ore from that property; otherwise we don't want to introduce it into the market because we would then have the obligation to our customers to continue to furnish that type of material. (2d Tr. 95.)

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Asked by the hearing examiner: "This is something you are going to do, but haven't done yet? Is that right, as far as exploring the tonnage?" Adderson replied: "That is correct." (2d Tr. 95.) Asked whether on the basis of Pifer's report giving the indicated tonnage he would figure on a mining operation, he replied: "No. I just said that we based upon our judgment—my judgment of the indicated tonnage." (2d Tr. 97.)

It is somewhat difficult to evaluate Anderson's testimony. At first reading it seems to support the appellants in the positive statements made by Adderson that his company is ready to commence a commercial operation on the claims, rather than an experimental operation, and that it intends to start with a small producing unit that would pay its way as operations continued. However, a careful analysis of Adderson's testimony raises a serious question as to whether, in fact, he was not really talking simply about a program of exploration.

Adderson was on Silica No. 2 twice in 1958 and 1959. He had seen the silica outcrop on Silica No. 3 but not on the other claims; however, he had asked Evan M. Johnson to make a "cursory" examination of the properties and to bring him samples. (2d Tr. 69, 73.) Johnson testified that he had made "very sketchy estimates" of quantities, that he was mostly interested in quality, and that he would not be qualified, without further examination, to say whether there was sufficient quantity on the claims to justify an operation (2d Tr. 102-103). Adderson said he would not figure on a mining operation on the basis of Pifer's report, but on his own judgment of indicated tonnage. Thus, there is no evidence that Adderson had any idea as to the amount of minerals in the claims. Yet contestees would have his testimony accepted as establishing justification for a person of ordinary prudence to spend labor and money with a reasonable prospect of developing a valuable mine on the claims.

It is to be further noted that at the time Adderson testified he was simply "hopeful" of getting together with the contestees and working out an arrangement to develop the claims (2d Tr. 69). Even then it was not decided whether his company would do the mining although he thought it would probably contract it out (2d Tr. 87). This again is hardly indicative of any considered evaluation of the facts leading to an informed judgment as to the probable success of a mining operation on the claims.

It would appear that the only proper reading to be given to Adderson's testimony is that the quantities of talc and silica on the respective claims are unknown and therefore a full scale commercial development would not be warranted, that drilling to determine the extent of the

mineral deposits would be expensive and too risky, in the event the deposits were not of the size expected, and therefore that his company proposed simply to explore the size of the deposits by small scale mining, expecting to pay for the cost by selling the ore mined. In essence, Adderson's proposal, whatever the words he used, was simply one for an exploration program.

The contestees have the ultimate burden of proving by a preponderance of credible evidence that they have made a discovery on each of their claims. *Foster v. Seaton, supra*, fn. 2. The record as a whole shows that they have not met this burden. It was, therefore, correct to declare the six lode mining claims to be null and void.

The record shows further that the mill site is not being used or occupied for mining or milling purposes. Therefore, and for the reasons fully set forth in *United States v. Gilbert C. Wedertz*, 71 I.D. 368 (A-30126, October 15, 1964), the appellants are not entitled to a patent on the mill site claim under the terms of section 2337 of the Revised Statutes (1875), as amended, 30 U.S.C. § 42(a) (Supp. V, 1963).

Therefore, 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 of the Assistant Director, Bureau of Land Management, dated March 6, 1963, is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

CLIFTON O. MYLL

A-29920

Decided November 25, 1964

Desert Land Entry: Cultivation and Reclamation

A desert land entryman on lands which are within and which benefit from a reclamation project must comply with the regular requirements of the desert land law as to cultivation and reclamation within the time fixed by that law and in addition must satisfy the requirements of the reclamation law.

Desert Land Entry: Extension of Time

The rule announced in *John H. Haynes*, 40 L.D. 291 (1911), that a homestead entry of lands later proposed to be irrigated under the reclamation law is not bound by the time limitation of the original homestead law does not apply to entries made after June 25, 1910.

Desert Land Entry: Extension of Time

The extension granted a desert land entry by section 5 of the act of June 27, 1906, as amended, applies only where the entryman has been hindered,

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delayed, or prevented from complying with the desert land law by reason of a reclamation withdrawal or irrigation project and the mere fact that an entry is within the exterior limits of such a withdrawal or project does not entitle an entry to the benefits of the statute where no hindrance is shown.

Desert Land Entry: Proof

Since there has been no prior determination of how long after water becomes available a desert land entryman has to comply with the requirements of the law for an entry suspended under the *Maggie L. Havens* case, a determination of the time limit in the first case considering the problem cannot be considered as a retroactive application of the time limit to him.

Desert Land Entry: Proof

The period available to a desert land entryman of an entry suspended under the *Maggie L. Havens* decision to comply with the requirements of the desert land law after notice of the availability of water is given him is two years or the time left in the entry at the time of suspension of the entry, whichever is longer.

Equitable Adjudication—Desert Land Entry: Cultivation and Reclamation

Equitable adjudication is properly denied to a desert land entryman who has neither cultivated nor reclaimed his entry within the time allowed by law.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Clifton O. Myll has appealed to the Secretary of the Interior from a decision dated December 14, 1962, of the Division of Appeals of the Bureau of Land Management, holding for cancellation a desert land entry within the Coachella Valley County Water District in Riverside County, California, for failure to comply with the requirements of the desert land law within the statutory life of the entry, as extended.

The desert land entry in question, covering the NW $\frac{1}{4}$ SW $\frac{1}{4}$ and the SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 12, T. 5 S., R. 7 E., San Bernardino Meridian, was allowed to Mrs. May E. Patton on June 2, 1917. Under the desert land law, 19 Stat. 377, as amended, 43 U.S.C. § 321 *et seq.* (1958), the entrywoman became entitled by allowance of the entry to possession of the land for a period of four years during which time she was required to file proof annually for the first three years showing at least the minimum expenditures specified in the statute for improvements and to present final proof of the reclamation and cultivation of the entry within the 4-year life of the entry as required by the statute.

Mrs. Patton filed the required annual proofs, but, because she was unable to obtain water for irrigation, she asked for and obtained three

different extensions of the life of the entry. The first was granted pursuant to the act of March 28, 1908, 35 Stat. 52, 43 U.S.C. § 333 (1958), and continued her entry until June 2, 1924. Further extensions continued the entry to June 2, 1927, and June 2, 1930, pursuant to the act of April 30, 1912, 37 Stat. 106, 43 U.S.C. § 334 (1958), and the act of February 25, 1925, 43 Stat. 982, 43 U.S.C. § 336 (1958). However, both of these latter extensions were unnecessary because, before the first of them was allowed, the Department had adopted a policy of suspending a certain class of desert land entries into which Mrs. Patton's fell. On October 11, 1923, the Department of the Interior held expressly in *Maggie L. Havens*, A-5580, that the Havens' desert land entry and all other entries similarly situated, i.e., entries on public land withdrawn for development within and as a part of a Federal reclamation project, should be suspended "until water for the irrigation of the lands * * * becomes available" or until the suspension should be revoked for any other sufficient reason. The land in the Patton entry was included in a reclamation withdrawal effective October 19, 1920, pursuant to section 3 of the act of June 17, 1902, 32 Stat. 388, 43 U.S.C. § 416 (1958); thus, the entry was in fact suspended under the *Havens* case, as the decisions below recognized.

Mrs. Patton died on January 28, 1929, while her entry remained in a suspended status. Her heirs took no note of the entry immediately thereafter.

On April 19, 1954, the Secretary of the Interior issued Public Notice No. 1, Coachella Division, Boulder Canyon Project, covering certain land within the Coachella Valley County Water District, specifically including the Patton entry. The notice announced the availability of irrigation water for several suspended homestead and desert land entries within the Coachella Water District and made other unentered land available for reclamation homestead entry.

The Bureau of Reclamation sent an informal notice accompanied by a copy of Public Notice No. 1 to Mrs. Patton at her address of record by registered mail on June 3, 1954, in an attempt to give her personal notice of the availability of water for her entry. Notice was also given by the publication of Public Notice No. 1 in the Federal Register on June 5, 1954, 19 F.R. 3340, by publication of the description of the notice in local newspapers, and by posting on the bulletin board of the local post office. The informal notice told Mrs. Patton that she could obtain information and advice pertaining to the requirements for submission of final proof from the local land office. The records of the entry do not indicate whether this notice was received or called to the attention of Mrs. Patton's heirs. In any event, no action was taken in response thereto until September 19, 1956, when

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C. F. Patton, claiming to represent all of the heirs, notified the land office of Mrs. Patton's death and inquired as to the status of her entry.

In a letter to Patton dated December 10, 1956, the land office manager reviewed the history of the entry, pointed out that water was then available, and stated:

* * * final proof must be submitted as to "Farm Unit No. 1 E," on or before July 2, 1958. The entry is no longer in a suspended status, and, if acceptable final proof is not submitted on or before such date, the entry will be subject to cancellation.¹

Meanwhile, sometime in 1955, Myll, on checking the assessor's rolls in Riverside County, California, found the land in the Patton entry listed as public land of the United States. Further investigation disclosed the existing desert land entry, and inquiry at the land office led him to one of the May E. Patton heirs. Myll obtained quitclaim deeds from a number of persons and subsequently opposed the claim of Mary E. Kindy, who also claimed to be an assignee of the Patton heirs. Proceedings before the land office resulted in approval of the assignment of the entry to him and disapproval of the assignment to Mrs. Kindy.

During these happenings, Randolph Ritchey brought a contest against the entry, charging that final proof had not been submitted within the time allowed by law. This contest was dismissed on the ground that Ritchey had not served notice of his contest upon any of the heirs of the entrywoman and that his charge was not a proper basis for contest because it presented an issue to be determined on the basis of the records of the land office and not on extrinsic evidence. On Ritchey's appeal this decision was affirmed by the Director of the Bureau of Land Management on August 8, 1960, and the Director's decision by the Secretary of the Interior. *Randolph Ritchey v. Clifton O. Myll and Mary E. Kindy*, 68 I.D. 269 (1961).

In response to Ritchey's further argument on appeal that the suspension of the Patton entry was terminated when water became available to the entry, the departmental decision said:

* * * Since, as we have seen, the facts relating to the availability of water were shown by the records of the Bureau of Land Management, the termination of the suspension for this reason would not cure the defects in appellant's

¹The manager determined the expiration date of the entry by adding to the date, July 3, 1950, on which water first became available for land in the entry the 8-year development period provided for in Public Notice No. 1. While this method of establishing the life of the entry was not proper, the letter does demonstrate that as early as 1956, or three years before Myll filed his assignment, the record indicated that the obligations of the desert land law had to be met and that there was a limit to the time for filing final proof.

contest complaint. It might, however, afford a basis for the initiation of proceedings by the Department to cancel the entry, if it in some way put the entrywoman or her heirs in default.

The record of the Patton entry should be carefully examined to determine when the suspension of the entry terminated, what obligations under the desert land law and the reclamation law it then became subject to, and whether these obligations have been timely met. If it is concluded that the time for filing final proof has passed and that the entry is subject to cancellation on that ground, then proceedings should be initiated pursuant to 43 CFR 232.34. *Id.* at 272.

The case was remanded for further proceedings in the land office consistent with the Secretary's decision.

In the meantime, Myll was proceeding with the preparation of the entry for cultivation. As soon as he received the Director's decision of August 8, 1960, affirming the land office decision approving the assignment to him, without waiting to learn whether this decision would become final either for want of an appeal or because of affirmation by the Secretary of the Interior, he had the entire 80 acres surveyed and staked for leveling and 13 acres leveled, and he installed an underground concrete pipe irrigation system and fertilized, planted, and irrigated the 13 acres. He paid the water rental charges of the Coachella Water District that had accrued since the announcement of the availability of water and the current charges for water delivery to irrigate 13 acres in 1960. He refrained from further development of the entry when he learned of Ritchey's appeal to the Secretary. On May 1, 1962, the land office notified him that the life of the entry had expired. He then leveled more land, furrowed and irrigated 20 acres several times, installed more concrete pipe and fixtures. He thereafter halted all development work, upon advice of counsel, after he had talked with land office officials and learned that in their view the suspension of the entry had terminated before he became interested in the land. He now claims a total expenditure of \$19,913.92, including \$7,000 for acquisition of the interests of the Patton heirs.

The land office notice of May 1, 1962, also informed Myll that he should take immediate action looking toward submission of final proof or show cause why the entry should not be canceled for noncompliance with the requirements of the law. Myll appealed and requested a hearing. The Division of Appeals, in its decision of December 14, 1962, affirmed the land office and in a supplementary decision dated January 23, 1963, denied the request for a hearing. Myll has again appealed to the Secretary.

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Myll contends first that he must meet only the requirements for reclamation proof for which there is no time limit for compliance. This contention is not well taken. All those who enter on reclamation land or who have entries on land which benefits from a reclamation project must comply with both the requirements of the law under which their entry was made and of the reclamation law. For example, a homestead entryman on a reclamation project must comply with the residence and cultivation requirements of the regular homestead law or suffer cancellation of his entry. *Hulse v. Griggs*, 67 I.D. 212 (1960); 43 CFR, 1964 Supp., 2211.7-6(d), formerly 43 CFR, 1964 rev., 230.41, 230.46. While it is true that the reclamation law demands that the entryman cultivate more of the entry, the increased obligation is in addition to, not in lieu of, the requirements of the ordinary homestead and desert land acts. 43 CFR, 1964 Supp., 2211.7-6(a) (4), formerly 43 CFR, 1964 rev., 230.44.

Myll next argues that under the doctrine announced in *John H. Haynes*, 40 L.D. 291 (1911), the time limit for compliance could have been set out in the first public notice but that, this procedure not having been followed, no time limit for compliance has been established. While the *Haynes* case did hold that the 7-year time limitation of the original homestead law, Rev. Stat. § 2291 (1875), did not apply to homestead entries upon lands later proposed to be irrigated under the reclamation law, the Department thereafter made it clear in the pertinent regulation, 43 CFR, 1964 Supp., 2211.7-6(a) (4), that the *Haynes* case was limited to entries made prior to June 25, 1910.² Since Mrs. Patton's entry is a desert land entry made in 1917, it does not come within the scope of the *Haynes* case.

Myll also argues that the entry is entitled to the benefits of section 5 of the act of June 27, 1906, 34 Stat. 520, as amended by the act of June 6, 1930, 46 Stat. 502, 43 U.S.C. § 448 (1958). Section 5 provides in part:

* * * where any bona fide desert-land entry has been or may be embraced within the exterior limits of any land withdrawal or irrigation project under * * * [the reclamation law] and the desert-land entryman has been or may be directly or indirectly hindered, delayed, or prevented from making improvements or from reclaiming the land embraced in any such entry by reason of such land

²This is the date of the act prohibiting entry on reclamation reserved lands until the Secretary had established the farm unit and water was available. 36 Stat. 836 (1910), 43 U.S.C. § 436 (1953).

It is also the date of an act (36 Stat. 864) granting a leave of absence to homesteaders who had theretofore made entry on lands proposed to be irrigated under the reclamation law until water became available. In addition, the act of April 30, 1912, 37 Stat. 105, excused entrymen who made entries prior to June 25, 1910, from compliance with residence requirements on land to be irrigated prior to the time when water became available.

withdrawal or irrigation project, the time during which the desert-land entryman has been or may be so hindered, delayed, or prevented from complying with the desert-land law shall not be computed in determining the time within which such entryman has been or may be required to make improvements or reclaim the land embraced within any such desert-land entry: * * *

Myll contends that the mere fact that the entry is within the limits of a first form withdrawal constitutes hindrance and brings him under the act. In a similar case involving lands in sec. 20, T. 5 S., R. 8 E., S.B.M., the Department rejected the same argument and held that the relief provisions of the act are not available where, as here, the method of irrigation was to be by use of water to be procured from wells sunk in the lands, and there is no showing that the withdrawal prevented the entryman from carrying out his original plan. *Donald K. McLennan*, 53 I.D. 21 (1930).³ That the withdrawal was no hindrance to Mrs. Patton is evident from the fact that in neither of her three applications for extension did she allege that it was. But, for reasons set out below, the statute would not help Myll, even if it covered his entry.

Myll also urges that to set a date for filing final desert land proof which he cannot meet will be, in effect, to apply a time limit to him retroactively.

No cases have been called to our attention, and we have found none, which have ruled upon or discussed the time within which an entryman holding an entry suspended under the *Havens* case must comply with the requirements of the desert land law after water becomes available. The problem, then, is one of first impression and its resolution cannot be said to constitute the retroactive application of a rule to the entry nor a change of a previous practice, to the disadvantage of the appellant, first announced in this decision. Therefore, it is our opinion that there is nothing improper in concluding that the time has passed which the entrywoman or her successors had for meeting their obligations under the desert land law.

The primary issue, then, is how long after water became available did the entrywoman or her successors have to comply with the requirements of the desert land law.

The record shows plainly that the entry allowed in 1917 had run for the statutory 4-year life of a desert land entry and would have expired in 1921, except for a 3-year extension that was added to the statutory life of the entry at that time. The entry was, as we have seen, suspended October 11, 1923, by the *Maggie L. Havens* decision. There were then 7 months and 21 or 22 days of the first 3-year exten-

³ To the same effect: *Frank C. Jones*, 41 L.D. 377 (1912).

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sion, which ran to June 2, 1924, remaining in the extended life of the entry. This period was, in the absence of a continuance of the suspension for a further period of time or a further extension of the entry, the only time remaining for the completion of the requirements of the desert land law when the suspension was lifted in 1954. It is arguable, therefore, that in the case of a *Havens* entry, the entryman is entitled, upon termination of the suspension, only to the time remaining in the life of his entry at the time when the suspension became effective.

This conclusion, however, would be meaningless in cases where very little time remained in the life of an entry at the time when the entry was suspended. For example, if only a week remained it would be impossible to assume that the entryman could meet the reclamation and cultivation requirements in the week ensuing after the suspension was terminated. The question then is whether a minimum period can be fixed upon the termination of a *Havens* suspension which will give the entryman a reasonable time to meet the reclamation and cultivation requirements. An answer is suggested by a relevant statutory provision.

As we have seen, section 5 of the act of June 27, 1906, as amended, *supra*, provides that if a desert land entry has been embraced within the limits of a reclamation withdrawal which hinders or delays the entryman in improving or reclaiming the land the time during which the delay persists shall not be computed in determining the time within which the entryman is required to make improvements on or reclaim the land in his entry. See 43 CFR, 1964 Supp., 2226.4-1 (a), formerly 43 CFR, 1964 rev., 230.101.

Section 5 of the act of June 27, 1906, as amended, *supra*, contains the following proviso:

* * * *Provided*, That if after investigation the irrigation project has been or may be abandoned by the Government, time for compliance with the desert land law by any such entryman shall begin to run from the date of notice of such abandonment of the project and the restoration to the public domain of the lands withdrawn in connection therewith, and credit shall be allowed for all expenditures and improvements theretofore made on any such desert-land entry of which proof has been or may be filed; but if the reclamation project is carried to completion so as to make available a water supply for the land embraced in any such desert-land entry the entryman shall thereupon comply with all the provisions of the aforesaid action [sic] of June 17, 1902; and shall relinquish within a reasonable time after notice as the Secretary may prescribe and not less than two years all land embraced within his desert-land entry in excess of one farm unit, as determined by the Secretary of the Interior, and as to such retained farm unit he shall be entitled to make final proof and obtain patent upon compliance

with the regulations of said Secretary applicable to the remainder of the irrigable land of the project and with the terms of payment prescribed in said Act of June 17, 1902, and not otherwise. But nothing herein contained shall be held to require a desert-land entryman who owns a water right and reclaims the land embraced in his entry to accept the conditions of said reclamation Act.

Since section 5, as amended, extends the life of an entry by the time that a reclamation withdrawal hindered or delayed the entryman if the reclamation project is later abandoned and provides another method for computing that period when the project is carried to completion, it cannot have intended the time period to be the same in both situations and must have meant to give the entryman more time in the second case than in the first.

While the time remaining to a desert land entryman who intends to use a reclamation developed water supply is not expressly stated in the act or the pertinent regulation, it may be deduced from it. The proviso, *supra*, limits a desert land entryman to a farm unit instead of the 160 acres he originally had, gives him not less than two years to conform his entry to the farm unit, and otherwise brings him under the regulations applicable to the other irrigable land in the project. This seems clearly to give the entryman a minimum period of two years after water becomes available to meet the requirements of the desert land and reclamation laws, notwithstanding that there may have been less than two years remaining in the life of the entry at the time when it was included in the reclamation withdrawal.

In some situations it appears that the suspension granted by the statute and that granted by the *Havens* decision may both be applicable. Although the two methods of extending the effective period of a desert land entry overlap in some cases, there does not seem to have been any departmental discussion of why the statute was not sufficient or when one was to be used and not the other.⁴ In any event, the two are so similar that the practice under the statute may well suggest how entries suspended under the *Havens* decision should be handled.

Following this through, it would appear that in the case of a *Havens* suspension the entryman should be entitled, upon termination of the

⁴ In a letter dated June 2, 1933, to the Register, The Dalles, Oregon, from the Commissioner, General Land Office, approved by the Secretary, two desert land entries, The Dalles 625437 and 028450, were extended under the statute even though they were covered by a first form reclamation withdrawal in connection with the Owyhee Irrigation Project. The *Havens* case was not mentioned.

Compare also *Donald K. McLennan, supra*, in which relief under the act of June 27, 1906, was denied a desert land entryman and the entry canceled for lands embraced in the withdrawal of October 19, 1920, because he could not show that the withdrawal had hindered his plans to irrigate by wells, with *Hazel, Assignee of Patterson*, 53 I.D. 644 (1932), in which a similar entry cornering on the other was found to be eligible for relief under the *Havens* doctrine or the purchase relief act of March 4, 1929, 45 Stat. 1548, 43 U.S.C. § 339 (1958), as the entryman chose.

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suspension, to a minimum period of two years in which to meet the cultivation and reclamation requirements necessary for final proof, regardless of what time remained in the life of the entry when the suspension became effective.

This establishes the minimum time. If more than two years remained when the entry was suspended, it would seem logical and reasonable that the entryman would be entitled to the longer period. This is consonant with the concept of the act of June 27, 1906, which speaks in terms simply of not computing the time when an entryman is prevented by a reclamation withdrawal from meeting the requirements of the desert land law in determining the time in which he must reclaim the land. It is also consistent with the statement in the *Havens* decision that an entry shall simply be "suspended" until water becomes available. Both the statute and the decision convey the notion of simply carving out of the life of an entry the period of suspension granted.

As we have seen, a desert land entry suspended under the *Havens* doctrine has not as much claim to leniency as one coming under the act of June 27, 1906, as amended. The holder of such an entry cannot even allege that the reclamation withdrawal hindered or delayed its completion while one benefiting from the statute must perforce have been so obstructed. Furthermore, the suspension granted by the *Havens* case rests solely upon an administrative policy while the Department's actions under the statute are, of course, based upon a Congressional direction.

Thus, there is no reason for treating a *Havens* entry any more generously than one that falls within the terms of the statute. In other words, a *Havens* entry can have, from the date of notice of the availability of water and of the designation of the entry as a farm unit, no more than two years or the time remaining in the life of the entry at the time when the suspension was granted, whichever is longer, to satisfy the obligations of the desert land law.

In this case the requisite notice was given by registered mail and publication no later than June 5, 1954, so that at the most the entry had two years of life from that date. Since Myll did not file his request for approval of the assignment of the entry to him until March 24, 1959, and did no work on the entry until August 1960, the requirements of the desert land law were not met within the period allotted for compliance and the entry must be canceled.

Myll contends that the decision of the land office "is without the scope of the remand of the Secretary of the Interior dated September 27, 1961," that the denial of a hearing is a violation of the Admin-

istrative Procedure Act, and that there is no law under which the entry in question can be canceled. He requests that he be allowed a reasonable time to submit final proof or, in the alternative, that he be granted equitable relief.

The action of the land office following the departmental decision in response to Ritchey's appeal is precisely within the directive contained in that decision. There was no violation of the Administrative Procedure Act since Myll was not denied an opportunity to present evidence of facts which are determinative of the legal issue presented on this appeal. He does not deny any of the facts shown by the record and he concedes that the announcement of the availability of irrigation water for the entry lifted the suspension. Nor does he claim that he ever inquired as to the length of time available to him for development of the entry during the eight years which elapsed between that announcement and the decision of May 1, 1962. He requested a hearing seemingly for the purpose of showing his efforts to obtain title from the Patton heirs and his belated development work, none of which has been questioned.⁵ The entry was properly held for cancellation under the desert land law because final proof of the development of the entry within the life of the entry, as extended, was not submitted. *United States v. Cale Clinton Smith*, A-28408 (November 30, 1960); *Ted Orlan Hicks*, A-29350 (July 2, 1963); *Marvin M. McDole*, A-29376 (April 1, 1963).

Finally, equitable relief can be granted only in those cases wherein "the law has been substantially complied with" and an error of informality is satisfactorily explained as arising from ignorance, accident, or mistake or obstacle over which the entryman had no control. Rev. Stat. § 2457 (1875), 43 U.S.C. § 1164 (1958); 43 CFR, 1964 Supp., 2011.1-1. In a case wherein neither cultivation nor reclamation has been accomplished on the entry within the time allowed by law, there is no opportunity for equitable adjudication. *George Arnold Jurn*, A-28948 (August 16, 1962); *Umberto Sarno, Phyllis Ruggio*, A-29220 (March 11, 1963).

Therefore, 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.

EDWARD WEINBERG,
Deputy Solicitor.

⁵ On April 28, 1964, appellant and counsel, pursuant to their request, discussed the appeal with the Assistant Solicitor, Branch of Land Appeals.

469] AUTH. OF THE SEC. OF THE INT. TO MANAGE AND CONTROL 469
 RESIDENT SPECIES OF WILDLIFE WHICH INHABIT FEDERALLY
 OWNED REAL PROPERTY WITHIN THE NATIONAL WILDLIFE
 REFUGE SYSTEM

**AUTHORITY OF THE SECRETARY OF THE INTERIOR TO MANAGE
 AND CONTROL RESIDENT SPECIES OF WILDLIFE WHICH INHABIT
 FEDERALLY OWNED REAL PROPERTY WITHIN THE NATIONAL
 WILDLIFE REFUGE SYSTEM**

Constitutional Law

Under the Constitution the United States may acquire land for many purposes, including wildlife refuges; may make all needful rules and regulations respecting this land; and may delegate such powers to the Secretary of the Interior. These rules and regulations are superior to those of the State where there is a conflict.

Secretary of the Interior

The authority to regulate hunting and fishing on Federally owned land within the National Wildlife Refuge System has been delegated to the Secretary of the Interior by specific legislation.

Regulations: Generally

When the Federal Government owns land which is under the administration of the Secretary of the Interior as part of the National Wildlife Refuge System, the Secretary may make rules and regulations for the control and management of resident species of game on the land even though these regulations may be more restrictive than the hunting and fishing laws of the State within which the land is located. These rules and regulations take supremacy over State law where there is a conflict.

Words and Phrases

Title, Fish and Wildlife. Such title as a State may hold to wild animals is a trust interest for the benefit of its citizens, not a possessory title.

M-36672

December 1, 1964

TO: ASSISTANT SECRETARY FOR FISH AND WILDLIFE
SUBJECT: AUTHORITY OF THE SECRETARY OF THE
INTERIOR TO MANAGE AND CONTROL RESIDENT
SPECIES OF WILDLIFE WHICH INHABIT FEDERALLY
OWNED REAL PROPERTY WITHIN THE NATIONAL
WILDLIFE REFUGE SYSTEM

The Secretary of the Interior has promulgated general regulations, contained in Title 50 of the Code of Federal Regulations, and special regulations,¹ published annually in the Federal Register, that control

¹ The authority of the Secretary to promulgate special hunting and fishing regulations for particular refuges, ranges, or areas has been delegated to the Regional Directors of the Bureau of Sport Fisheries and Wildlife. See 25 F.R. 8524, 4 AM 49C, Administrative Manual of the Bureau of Sports Fisheries and Wildlife, as amended by 28 F.R. 12884.

**AUTHORITY OF THE SECRETARY OF THE INTERIOR TO MANAGE
AND CONTROL RESIDENT SPECIES OF WILDLIFE WHICH INHABIT
WILDLIFE REFUGES, GAME RANGES, WILDLIFE RANGES, AND
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the hunting and fishing activities of the general public upon those lands within the National Wildlife Refuge System (i.e., game ranges, wildlife ranges, wildlife refuges, and waterfowl production areas). These hunting and fishing regulations have taken one of two forms. Either the regulations incorporate by reference all the hunting and fishing laws of the State in which the refuge, range, or area is located, or the regulations expressly prohibit certain hunting and fishing activities which are permitted by State law. For example, if the State law authorizes the killing of two deer of either sex during a fixed season, the Secretary has either expressly adopted the State's season and bag limit for a particular refuge or has authorized only the killing of one deer of the male sex during a time period which is less than the deer hunting season prescribed by the State. The latter type of regulation is specifically designed to be more restrictive than the State hunting and fishing laws.

During the past several years Commissioners and Directors of the various State fish and game departments have questioned the authority of the Secretary to promulgate hunting and fishing regulations for lands within the National Wildlife Refuge System, when the regulations prohibit those activities which the State fish and game laws permit. These State officials have argued that the Secretary of the Interior does not have the authority to manage and control resident species of wildlife (i.e., all species of fish and game), which inhabit Federally owned land under the administration of the Secretary. These State fish and game departments and the Ad Hoc Committee of the International Association of Fish and Game Commissioners, through conferences and correspondence with this Department, have maintained that the Secretary may issue *only* hunting and fishing regulations for resident species of wildlife that incorporate completely State law, because all resident species of wildlife, other than migratory birds, are subject to the *exclusive* jurisdiction and control of the several States, and the States have some semblance of title to the resident species of wildlife. Accordingly, the U.S. Fish and Wildlife Service has raised the following question: Does the Secretary of the Interior have the authority to promulgate regulations which control the hunting and fishing activities of the general public on lands within the refuge system, when such regulations are more restrictive than State fish and game laws?

In order to analyze and answer this question it is necessary to eliminate certain collateral issues. When the States have ceded exclusive jurisdiction over land to the Federal Government, pursuant to Article I, Section 8 of the Federal Constitution and Section 355 of the Revised Statutes, as amended, 40 U.S.C. § 255 (1958), there is no question, in our opinion, that State fish and game laws have no application

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to the Federally owned land. In those areas where there has been a cession of exclusive jurisdiction to the Federal Government, by definition, a State has no jurisdiction or control over the area.

Similarly, we do not feel that it is necessary to give extensive analysis to the problem of the States controlling the hunting and fishing activities of the general public on nonfederally owned land. There is no question that the States have control and jurisdiction over the hunting and taking of resident species of wildlife, provided that such hunting activity occurs *only* upon land which is not owned by the Federal Government. The general power of a State to protect fish and game has always been considered an attribute of the sovereign power of the State. This proposition is supported by a long line of precedents. *Geer v. Connecticut*, 161 U.S. 519 (1896); *Ward v. Race Horse*, 163 U.S. 504 (1896); *LaCoste et al. v. Department of Conservation of the State of Louisiana*, 263 U.S. 545, 552 (1924); *Foster-Fountain Packing Company v. Haydel*, 278 U.S. 1, 11 (1928); *State v. McCoy*, 387 P. 2d 942 (1963).

It is important to recognize that in all the above-cited cases the relationship involved was between a State and an individual, not between a State and the Federal Government. Therefore, when hunting activities occur on Federally owned land, an entirely different analysis and approach is required, since the relationship would then involve a State and the Federal Government.

There can be no doubt that the Federal Government may acquire lands within a State for purposes within the ambit of its constitutional powers, and that it may do so by virtue of the power of eminent domain. *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525, 531 (1885). In the exercise of this power the United States has acquired land for many purposes, including wildlife refuges, game ranges, preserves, parks, and reservations, to name a few. Furthermore, the property clause of the Constitution, Article IV, Section 3, states, "The Congress shall have the Power to dispose of and *make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * **" (Italics added). Finally, there is the supremacy clause of the Constitution, Article VI, which reads, "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land * * *." The powers contained in the property and supremacy clauses of the Constitution extend not only to the public domain

but also to property acquired by purchase or eminent domain. *McKelvey v. United States*, 260 U.S. 353 (1922); *Utah Power and Light Company v. United States*, 243 U.S. 389 (1917). It is the exercise of this power under the property and supremacy clauses which is dispositive of the question of the authority of the Federal Government, acting through the Secretary of the Interior, to manage and control resident species of wildlife, on Federal lands under his jurisdiction, through regulations which prohibit what State law permits.

The exercise of this constitutional authority to make rules and regulations for Federally owned lands has often been challenged, but just as often upheld by the Courts. "The States and the public have almost uniformly accepted this [Federal] legislation as controlling, and in instances where it has been questioned in this Court *its validity has been upheld and its supremacy over State enactments sustained.*" (Italics added.) *Utah Power and Light Company v. United States*, *supra*, at 404, and cases cited therein.

The general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case. *Camfield v. United States*, 167 U.S. 518, 525 (1897).

These broad powers arise out of the proprietary interest of the United States to control the use of its land, and they exceed the powers of an ordinary landowner in the respect that the interest is held by a Sovereign and carries with it enforcement powers, referred to as police powers. *Utah Power and Light Company v. United States*, *supra*, at 405.

Even the property interest of an ordinary landowner is protected to the extent that: "The State cannot, within constitutional limits, by the issuance of hunting licenses which purport to give a hunter the right to invade the private hunting grounds owned by another person, or by any other means, authorize one to enter another's premises, for the purpose of taking game, without the latter's permission." 24 AM. Jur., *Game and Game Laws*, § 5. (See cases cited.)

A fortiori, the Sovereign's proprietary interest includes that of an ordinary landowner. It too may protect its holding and forbid trespass and control people on the land whether they be hunting, fishing, or just visiting. In addition, articles of value on the land—timber, hay, water, resident game and wildlife—may also be protected by control over the land and persons on the land. "True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use, and to prescribe

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in what manner others may acquire rights in them." *Utah Power and Light Company v. United States, supra*, at 404.

The authority of the proprietary interest is so substantial that it has been protected by holding enforceable Congressional statutes forbidding acts on lands adjoining Federally owned lands that might endanger the latter. *United States v. Alford*, 274 U.S. 264, 267 (1927); *Camfield v. United States, supra*.

The basic constitutional authority appertaining to the proprietary interest in land owned by the United States has sustained the killing of game on Federally owned land by Federal officials while acting within the scope of their authority, although acting in violation of the game laws of the State in which the land was located. *Hunt v. United States*, 278 U.S. 96 (1928); *Chalk v. United States*, 114 F. 2d 207 (4th Cir., 1940). See also *Arizona v. California*, 283 U.S. 423 (1931) and *Johnson v. State of Maryland*, 254 U.S. 51, 56 (1920).

From the foregoing authorities it is apparent that the United States constitutionally empowered as it is, may gain a proprietary interest in land within a State and, in the exercise of this proprietary interest, has constitutional power to enact laws and regulations controlling and protecting that land, including the persons, inanimate articles of value, and resident species of wildlife situated on such land, and that this authority is superior to that of a State.

This broad Federal power to regulate and manage resident species of wildlife on Federally owned land, which is derived from the Federal Constitution and the inherent powers of the Federal Government as a landowner, has been vested in the Secretary of the Interior with respect to those land and water areas which comprise the National Wildlife Refuge System by the regulatory sections of the following legislation.

Section 4 of the Act of September 28, 1962, 76 Stat. 653, 654 (1962); 16 U.S.C. § 460k-3 (Supp. V, 1959-63).

Section 4 of the Fish and Wildlife Coordination Act, 48 Stat. 401, 402 (1934), as amended, 16 U.S.C. §§ 661, 664 (1958).

Section 10 of the Migratory Bird Conservation Act, 45 Stat. 1222, 1224 (1929), as amended, 16 U.S.C. § 715i (1958).

Section 4 of the Duck Stamp Act, 48 Stat. 451 (1934), as amended, 16 U.S.C. § 718d(b) (1958).

Furthermore, this authority to regulate and manage resident species of wildlife, which has been delegated to the Secretary by the above legislation, has been supplemented by *specific* legislation for the ad-

ministration of particular areas. Examples of the regulatory sections of this specific legislation are as follows:

Bear River Migratory Bird Refuge, Section 5 of the Act of April 23, 1928, 45 Stat. 449, 16 U.S.C. § 690d (1958).

Lea Act Refuges, Section 3 of the Act of May 18, 1948, 62 Stat. 239, 16 U.S.C. § 695b (1958).

National Key Deer Refuge, Section 1 of the Act of August 22, 1957, 71 Stat. 412, 16 U.S.C. § 696 (1958).

Upper Mississippi River Wildlife and Fish Refuge, Section 3 of the Act of June 7, 1924, 43 Stat. 650, 16 U.S.C. § 723 (1958).

We interpret the regulatory sections of these statutes as containing sufficient legal authority for the Secretary to make all appropriate rules and regulations which are necessary for the effective administration of these lands within the National Wildlife Refuge System, including the authority to regulate such activities as public use, access, recreation, hunting and fishing, provided the regulations are (1) reasonable and appropriate (i.e., "needful"); (2) not inconsistent with the statutory source of the regulatory authority; and (3) consistent with the purposes for which the area was placed under the administration of the Secretary.

Concerning the restriction that the regulations must not be inconsistent with the statutory source of the regulatory power, it is to be noted that the language contained in the regulatory sections of these statutes (*supra*) is broad in both scope and intent. An examination of the regulatory sections will show that sweeping, general language was used by Congress to authorize the Secretary to make rules and regulations which are necessary for the effective administration of refuge areas. This statutory source of regulatory authority is, in our opinion, sufficiently broad to permit the Secretary to prohibit all forms of public access, entry, and use of any portion of a refuge area. A fortiori, the statutory source necessarily includes the lesser power to permit the access and use of a refuge for limited purposes and upon such conditions as the Secretary may prescribe.

* * * we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. *McCulloch v. Maryland*, 4 U.S. (4 Wheat.) 415, 431 (1819).

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Accordingly, the only meaningful legal issue to be discussed is whether the regulations governing fishing and hunting of resident species of wildlife within a refuge area are reasonable and appropriate, as well as related to the purpose for which the refuge area was acquired or established. Although these issues are primarily questions of fact, a discussion of the principles involved is in order.

Many areas within the National Wildlife Refuge System were acquired primarily for the protection and development of the migratory bird populations; however, some areas, such as the Desert Game Range, were established for the primary purpose of protecting an endangered species. It should also be noted that the Secretary, by law, is required to protect and manage resident species of wildlife which inhabit areas primarily acquired for migratory waterfowl. 48 Stat. 451 (1934), as amended, 16 U.S.C. § 718d (1958). Regardless of the particular species of wildlife for which the refuge area was primarily acquired, the Secretary must use sound conservation principles which are designed to prevent the overpopulation of wildlife, prevent the destruction of food supplies, and protect the general ecology, in administering all refuge areas.

In addition, the Secretary is now required to manage all areas within the National Wildlife Refuge System in such a manner as to allow various forms of recreational activity, which includes hunting and fishing, that are not inconsistent with the purposes for which the area was established. 76 Stat. 653 (1962), 16 U.S.C. § 460k-3 (Supp. V, 1959-63). In managing areas within the refuge system, the Secretary must, out of necessity to preserve the area, control hunting and fishing pressures. Any regulation concerning hunting and fishing which has as its focal point sound conservation principles is not only reasonable and proper but is also related to the purpose for which the area was acquired. To argue otherwise is to say that the Secretary is helpless to properly manage Federally owned land and the public use of that land.

Inevitably, out of any discussion concerning the control of resident species of wildlife it is not surprising to have the questions of title to wild animals raised by the States.

With respect to game and wildlife generally, the Supreme Court has said that the power to control lodged in the State is to be exercised as a *trust for the benefit of the people* and not as a prerogative for the advantage of the Government. *Geer v. Connecticut, supra; Foster-Fountain Packing Company v. Haydel, supra; State v. Rodman,*

58 Minn. 393 (1894); *Magner v. People*, 97 Ill. 320 (1881); *In Re Eberle*, 98 Fed. 295 (1899).

It is the law that he who claims title to game must first reduce it to possession. This proposition is supported by State court decisions too numerous to recite which enunciate that principle. These decisions extend from *Pierson v. Post*, 3 Caines 175 (New York, 1805), to *Koop v. United States*, 296 F. 2d 53 (8th Cir., 1961).

The statutes declaring the title to game and fish as being in the State speak only in aid of the State's power of regulations; leaving the landowner's interest what it is. (Italics added.) *McKee v. Gratz*, 260 U.S. 127, 135 (1922).

It is clear that the "ownership" of wildlife by a State is a trust interest, and not a possessory title. *McKee v. Gratz*, *supra*; *Missouri v. Holland*, 252 U.S. 416 (1920); *Sickman et al. v. United States*, 184 F. 2d 616 (7th Cir., 1950). Further, the Supreme Court states that as between a State and its inhabitants, the State may regulate the killing and sale of migratory birds, "but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed." *Missouri v. Holland*, *supra*, at 434. This authority of the State to regulate the killing of wildlife is based upon a trust concept, not upon ownership of or title in the wild animals. Under basic constitutional doctrine the trust or police power (i.e., regulatory jurisdiction) of a State yields to the exercise by the national government of its powers under the property clause of the constitution.

In this memorandum we have attempted to set out the broad authority of the Federal Government, as a landowner, to make needful rules and regulations for the management of its property. We have set forth some of the more pertinent legislation which delegated this broad power to the Secretary of the Interior. It is our conclusion that the Secretary has ample legal authority to make hunting and fishing regulations for particular areas within the National Wildlife Refuge System that prohibit activities authorized and permitted by State law. The regulation of the wildlife populations on Federally owned land is an appropriate and necessary function of the Federal Government when the regulations are designed to protect and conserve the wildlife as well as the land.

EDWARD WEINBERG,
Deputy Solicitor.

December 2, 1964

RAYMOND L. GUNDERSON

A-30134

Decided December 2, 1964

Homesteads (Ordinary): Applications—Homesteads (Ordinary): Second Entry—Alaska: Homesteads

The filing of an allowable homestead application in Alaska constitutes an entry within the meaning of the act of September 5, 1914, so that an individual who has filed an allowable homestead application in Alaska but withdrawn it prior to allowance by the land office has exercised his right of entry under the homestead law and is properly required to make the necessary showing for a second homestead entry under the 1914 act in connection with any subsequent homestead application.

Homesteads (Ordinary): Applications—Homesteads (Ordinary): Second Entry—Alaska: Homesteads—Administrative Practice

An amendment of a departmental regulation to provide expressly for the first time that the showing required for making a second homestead entry must be made in cases where a homestead application has been filed but withdrawn prior to allowance will not be applied where the first application was filed and withdrawn prior to the effective date of the amendment, particularly where the practice of the land office has been not to require the showing.

Applications and Entries: Priority—Homesteads (Ordinary): Applications

The filing of concurrent homestead applications by an individual bars the allowance of either so long as both applications remain of record and, while the withdrawal of one will permit the allowance of the other, such allowance will be subject to otherwise intervening rights that have been asserted prior to the withdrawal of the first application.

Words and Phrases

Entry. An "entry," within the meaning of the act of September 5, 1914, permitting a second homestead entry where a prior entry has been lost for reasons beyond the control of the entryman, includes the filing of an allowable homestead application in Alaska which is withdrawn by the applicant before it is allowed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Raymond L. Gunderson has appealed to the Secretary of the Interior from a decision dated August 13, 1963, whereby the Division of Appeals, Bureau of Land Management, affirmed a decision of the Anchorage, Alaska, land office rejecting his application for second homestead entry.

On February 21, 1961, Gunderson filed an application for homestead entry, Anchorage 053871, for the S $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 28, T. 5 N., R. 11 W., Seward Mer., Alaska. On April 7, 1961, he filed a relinquishment of all right, title, and interest in and to the land described in

his application. The land office accepted the relinquishment and accepted another application for the same land which was subsequently allowed. Meanwhile, on March 10, 1961, Gunderson had filed a new application for homestead entry, Anchorage 053965, for the NE $\frac{1}{4}$ of the same section, stating in his application that he had not theretofore made any entry under the nonmineral public land laws. The land office took no action on the application until January 5, 1962, when it notified him that a filing in his name, Anchorage 053871, appeared on the records of the land office and that he was allowed 30 days to indicate whether this was his filing. On February 2, 1962, he acknowledged that Anchorage 053871 was his homestead application and stated that he had denied in his later application that he had made an entry under the nonmineral public land laws because his previous application had never been allowed, so that he had never had an entry. The land office then required him to file an application for second homestead entry under the act of September 5, 1914, 38 Stat. 712, 43 U.S.C. § 182 (1958), which requires a showing that he abandoned or lost his first homestead entry for reasons beyond his control.

Gunderson filed an application for second homestead entry, stating that he had made a personal examination of the land described in his first application from the air and on foot. He said, however, that he had been cautioned about revealing the location of any land available for settlement lest someone file an application while he was examining it. His examination was thus limited to what he could see in the month of February, which appeared to be 80 acres of land suitable for agricultural purposes. Shortly after his filing, he was told that most of the area was hopelessly wet with no possibility of drainage. He returned to the land with tools and found that this land was, indeed, unfit for the most part for agricultural purposes. He then searched the land office records and found that the N $\frac{1}{2}$ of section 28 was open for settlement. He examined the NE $\frac{1}{4}$ of this land and found slightly over 80 acres that would be more expensive to clear than the land described in his first application but suitable for agricultural purposes and, accordingly, filed on this land.

In a subsequent letter, he stated that he established residence on the land described in the second application on May 12, 1961; that he had constructed a dwelling house and 1 $\frac{3}{4}$ miles of access road, had commenced construction of a barn, made an agreement with a contractor for clearing and cultivating 22 acres, consulted with the Soil Conservation office on soils, crops, and prospective crop yields; and that he felt he had invested as much as he could without an allowance of the entry.

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On March 1, 1963, the land office rejected Gunderson's application for second entry on the grounds that he had not abandoned or forfeited his first entry because of matters beyond his control and supported this conclusion with the observation that the Soil Conservation Service records show that 55 percent of the land in the first application is suitable for agricultural purposes and only approximately 35 percent of the land in the second application is suitable, so that the second tract would not appear to be as well adapted to agricultural use as the relinquished tract.

The Division of Appeals sustained the rejection of the application for second entry on the grounds given by the land office. It also held that the appellant's initial homestead application was rightly construed as an entry and that the appellant was properly required to make the necessary showing for a second homestead entry under the act of September 5, 1914, *supra*, as a condition to the allowance of his second application, citing the Department's decision in *Aronni v. Vance*, 48 L.D. 543 (1922).

The appeal to the Secretary presents essentially two questions, (1) whether an application for homestead entry may exhaust the applicant's right to make such entry even though the application is withdrawn or relinquished prior to any action thereon by the land office or actual entry on the land by the entryman, and (2) if so, whether the appellant has shown himself to be qualified to make a second entry under the act of September 5, 1914.

The appellant contends, in substance, that the Division of Appeals has erroneously applied the principle set forth in *Aronni v. Vance*, *supra*, that if an entry is allowed, the allowance dates from the date of the application. The appellant asserts that, if the entry is not allowed, the applicant has no rights whatsoever and, therefore, has not exhausted his rights under the homestead law. In the alternative, he contends that he is entitled to make a second entry, that the act of September 5, 1914, is remedial in character and should be liberally construed and applied, that an applicant is not required to demonstrate obstacles which would amount to a complete and absolute bar to holding and perfecting a former entry in order to qualify for a second entry, and that he did abandon the first entry in good faith because of matters beyond his control.

The act of September 5, 1914, *supra*, provides as follows:

That any person otherwise duly qualified to make entry or entries of public lands under the homestead or desert-land laws, who has heretofore made or may hereafter make entry under said laws, and who, through no fault of his own, may have lost, forfeited, or abandoned the same, or who may hereafter lose, forfeit, or abandon same, shall be entitled to the benefits of the homestead or desert-land laws as though such former entry or entries had never been made:

Provided, That such applicant shall show to the satisfaction of the Secretary of the Interior that the prior entry or entries were made in good faith, were lost, forfeited, or abandoned because of matters beyond his control, and that he has not speculated in his right nor committed a fraud or attempted fraud in connection with such prior entry or entries.

With respect to the initial question as to whether or not the appellant's application, filed on February 21, 1961, constituted an "entry" within the meaning of the public land laws, an entry has been defined as "that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim" in the proper office. *Chotard v. Pope*, 25 U.S. (12 Wheat.) 586, 588 (1827). It has been held that:

Under the homestead law three things are needed to be done in order to constitute an entry on public lands: First, the applicant must make an affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made—the land is entered. *Hastings and Dakota R.R. Co. v. Whitney*, 132 U.S. 357, 363 (1889).

At an early date, the Department held that when land is once entered it becomes segregated from the mass of public lands, that the right of the claimant attaches upon such entry, and that a tract of land covered by a homestead entry is regarded as being reserved from appropriation in any manner by a private citizen prior to the cancellation of the entry. *Thomas v. St. Joseph and Denver City R.R. Co.*, 2 Copp's Public Land Law 869 (1887).

The Department has long held that an application to enter land subject thereto is equivalent to an actual entry so far as the rights of the applicant are concerned and, while pending, reserves the land from other disposition. *Goodale v. Olney*, 12 L.D. 324 (1891); *Rippy v. Snowden*, 47 L.D. 321 (1920); *E. Clark White v. Alfred Roos*, 55 I.D. 605 (1936). An exception to this rule occurs, and an application for public lands confers no absolute right, where the allowance of such claim is discretionary with the Secretary of the Interior, or classification of the land is a prerequisite to the allowance of an entry. *Joseph E. Hatch*, 55 I.D. 580 (1936); *Lewis Lafon Gourley*, A-28497 (November 6, 1961). The classification provisions of section 7 of the Taylor Grazing Act, as amended, 49 Stat. 1976 (1936), 43 U.S.C. § 315f (1958), are not applicable to lands in Alaska, and the allowance or disallowance of a homestead entry application in Alaska is not discretionary with the Secretary. Thus, the principle enunciated in *Goodale v. Olney*, *supra*, and succeeding cases is applicable to the appellant's application.

In *John J. Maney*, 35 L.D. 250 (1906), the Department held that a homestead application does not segregate a tract of land from the

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public domain but, while pending, it merely protects the applicant against the intervention of a subsequently asserted adverse claim to the land by another person. This rule, however, was modified by the decisions of the Supreme Court in *Payne v. Central Pac. Ry. Co.*, 255 U.S. 228 (1921), and *Payne v. State of New Mexico*, *id.* at 367. Circular No. 759, 48 L.D. 153 (1921). Thereafter, the Department applied—

* * * the previously more or less well-settled rule that when a person has done all that the law requires to entitle him to an entry or to obtain a right under the public-land laws, he has, in the eye of the law, obtained that right, even though it has not been acknowledged or recognized by the Land Department. *John F. Silver*, 52 L.D. 499, 500 (1928) ;

see *Charles C. Conrad*, 39 L.D. 432 (1910).; Solicitor's opinion, 55 I.D. 205, 210 (1935).

While the Department has long recognized the segregative effect of an allowable application to enter public lands, it does not appear that any pronouncement was made, until September 13, 1923, upon the question as to what effect the filing of an allowable application, *without actual allowance*, had on the right of the applicant to file another such application.

On that date, the Department issued instructions, with respect to desert land entries, that an allowable application will be treated as an entry within the meaning of the act of September 5, 1914, *supra*, and that if such an application is withdrawn prior to its allowance the applicant will be required, in connection with any subsequent application, to make the showing required of persons who seek to make second desert land entries. Instructions, 50 L.D. 135, 184 (1923) ; 43 CFR 2226.0-6(b).

The instructions did not cite any basis for treating an allowable desert land application as an entry other than that :

It appears from data submitted by * * * [the Commissioner of the General Land Office] that in at least one land district certain persons are segregating public land by the filing of applications to make desert-land entries, and later withdrawing the applications when purchasers for the "relinquishments" are found. With a view to putting an end to such practices, the following administrative rule is adopted: * * *

In view of the decisions in the cases cited above, and in other related cases, it appears that the rule set forth in the Secretary's instructions of September 13, 1923, is a logical and proper sequence to long-established doctrine. It would appear to be inconsistent to hold that all of the rights of an entry under the public land laws vest in an applicant upon the filing of his application, regardless of the delay between the filing and the allowance of the entry, but, if he should elect to

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relinquish the entry prior to allowance thereof by the land office, he has not exercised any right. While it is true that under such circumstances the entryman may have derived no actual beneficial use of the land, yet he had the right to enter the land to the exclusion of everyone else, and he was prevented from exercising that right only by his own election. Of course, if an application is not allowable for any reason, the applicant is not chargeable with the exercise of his right to make entry, whether the application was actually rejected by the land office or was withdrawn prior to action by the land office. *Jack Edward Kahlow, A-26173 (May 2, 1951).*

In the *Kahlow* decision, it was noted that the Department's interpretation of the act of September 5, 1914, as reflected in the then current regulation, 43 CFR, 1949 ed., 232.6, appears to be broader than the language of the act itself, in that the act refers only to an "entry," whereas the regulation refers to an "allowable application." Without discussing the merits of the broader language, the Department decided the case on the basis that *Kahlow's* application was not allowable at the time it was withdrawn.

At the time when the Department issued the desert land instructions in 1923, it did not issue similar instructions with respect to homestead entries. There is no apparent reason, however, why the same rule was not equally applicable to both desert land and homestead entries. Under both the homestead and desert land laws the right to enter land is limited to a single exercise of the right. *Marmaduke William Mathews, 38 L.D. 406 (1910); Harrington v. Patterson, id. at 438.* There is no difference in the meaning of "entry" or "allowable application" in either case, and the same requirements are imposed in either case by the 1914 act as a condition to the granting of the right to make a second entry.

As a natural consequence, when it appeared recently that there was a traffic in relinquishments of homestead applications in Alaska, the Chief of the Division of Lands and Recreation, in the office of the Director, Bureau of Land Management, instructed the State Director, Alaska, on July 21, 1961, that, in effect, the same practice should be followed in homestead cases as in desert land cases. The instructions were subsequently incorporated in the Department's regulations on July 18, 1963, 28 F.R. 7561; 43 CFR 2211.9-4(b). The regulations provide that if an applicant has made a homestead entry "or made an allowable homestead application" and failed to perfect title, he must in connection with another application to make homestead entry make the showing required by the act of September 5, 1914, *supra*.

It is not disputed that where a homestead entry has been allowed,

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the entryman has exercised his right of entry under the homestead law, and if he fails to earn a patent to the land he is precluded from making another entry unless he can make the showing required by the act of September 5, 1914, *supra*. This is true whether the entry is relinquished before the entryman takes physical possession of the land (*Velma Lorene Shelley*, A-28572 (March 10, 1961)) or after the entryman has commenced residence on the land (*Kermit A. Dowse*, A-29355 (June 7, 1963)); *John E. Schultz*, A-29552 (September 25, 1963).

There is essentially no difference between the withdrawal of an allowable application before it has been allowed and the relinquishment of an entry after it has been allowed but before the entryman has taken physical possession of the premises. In either event, the entryman, without deriving any tangible benefit from the use of the land, has given up his right, through compliance with the requirements of the homestead law, to obtain title to a particular tract of land. The right is the same in either case, and that right is exercised, if at all, by the filing of the application. The allowance of an entry by the land office is no more than administrative recognition of the fact that an applicant has successfully exercised his right to make an entry by the filing of his application. Rejection of an application, on the other hand, is the administrative determination that an applicant did not exercise that right by the filing of his application. The exercise or nonexercise of the right of entry, however, is determined by the facts that exist at the time the application is filed and not by the act of allowance or disallowance by the land office. Accordingly, I find the term "allowable application" to be within the meaning of the word "entry" as used in the act of September 5, 1914, and as used in the Department's regulations pertaining to entries under the homestead law.

The appellant contends that even if this interpretation is correct, it is wrong to apply it in his case because the Anchorage land office had, prior to the July 21, 1961, instructions to the State Director, followed a practice of not requiring the showing necessary for a second homestead entry by an applicant who had withdrawn a previous application prior to its allowance by the land office.¹ He argues that his case should be governed by the policy that was being followed at the time of his relinquishment in April 1961.

¹ In the instructions the Chief of the Division of Lands and Recreation stated:

"* * * Your office has enunciated the view that unless and until a homestead application is allowed, the applicant therefor may withdraw his application and is not thereafter to be required to make in connection with subsequent applications the 'second entry' showing contemplated by the Act of September 5, 1914 * * *"

"We cannot concur in that view. * * *"

The appellant's position is well-taken. Prior to July 18, 1963, the pertinent homestead regulation on second entries in Alaska provided that the showing required by the 1914 act must be made only "if the applicant has made homestead entry * * * and failed to perfect title to the land." 43 CFR, 1954 rev., 65.12. Contrasted with the specific reference in the desert land regulation to an allowable application which is withdrawn, the homestead regulation at least created a doubt as to whether an allowable homestead application would count as an entry under the 1914 act. The Alaskan land offices apparently read the regulation as not including allowable applications. It was not until July 18, 1963, that the regulation was amended to make its meaning clear.

In a case in which the Bureau of Land Management interpreted an oil and gas regulation contrary to its plain meaning and issued leases to numerous applicants whose applications were defective under the express language of the regulation, the Department held, in reversing the Bureau, that it would, in effect, apply the correct meaning of the regulation only prospectively and would not vitiate actions taken under the prior erroneous interpretation. *S. J. Hooper*, 61 I.D. 350 (1954); *De Armas, Jr. and McKenna*, 63 I.D. 82 (1956). The Department was sustained by the courts. *McKenna v. Seaton*, 259 F. 2d 780 (D.C. Cir. 1958).

In a second situation in which the Bureau of Land Management extended oil and gas leases under a Solicitor's opinion which was subsequently overruled, the Department applied the second opinion only prospectively. *Franco Western Oil Company et al.*, 65 I.D. 427 (1958). Again the Department was sustained by the courts. *Safarik v. Udall*, 304 F. 2d 944 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 901.

These cases are closely analogous to the situation under consideration and seem fully to justify a ruling that the amended homestead regulation be applied only to allowable homestead applications filed after the effective date of the amendment to the regulation. Until the Department provided by specific regulation that the word "entry," as used in the act of September 5, 1914, included the filing of an allowable application for homestead entry, the meaning of the term "entry" was not so clear as to warrant holding an applicant accountable for understanding that the mere act of filing an allowable homestead entry application would exhaust his rights under the homestead law even if he should elect to withdraw the application before it was acted upon. Under these circumstances, the appellant will not be required to make the showing required by the act of September 5, 1914, in connection with the filing of his present application.

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In view of the conclusion just reached, it is unnecessary to consider whether or not the appellant made the necessary showing to entitle him to make a second homestead entry.

One further issue requires clarification. The land office decision of March 1, 1963, stated that when the appellant filed his application on March 10, 1961, for the NE $\frac{1}{4}$ section 28 he already had one application of record and he was not, therefore, a qualified applicant.

The Department has, on several occasions, had to consider the effect of concurrent applications for land filed by the same applicant. In *Dunn v. Hutton*, 39 L.D. 451 (1911), Hutton filed two homestead applications at the same time, designating one as "first choice" and the other as "second choice." Following a series of less-than-well-thought-out acts on the part of both Hutton and the land office, the Department held that one cannot by two concurrent homestead applications hold segregated double the quantity of land he is entitled to enter.

In *Moritz v. Hinz*, 36 L.D. 450 (1908), Moritz, having previously made a homestead entry, filed application for a second entry, offering to relinquish the first entry. The first entry was thereafter contested and canceled for abandonment. Subsequent to the filing of the second entry application by Moritz, but prior to the cancellation of his first entry, Hinz applied for the land described in the second entry application. The Department held that no rights are acquired by an application to make a second entry while the first is still of record and not actually abandoned as will prevent the allowance of the subsequent application of another for the same land.

In the foregoing cases, the principal issue was the rights of a prior applicant whose right of priority was lost through some act or neglect of his own as opposed to those of an intervening applicant, an issue apparently not involved in the present case. In none of the cases cited, however, is it indicated that the invalidating factor was more than a temporary impediment to the allowance of an application. In other words, while the filing of concurrent homestead applications by an applicant bars allowance of either, the relinquishment of one permits the allowance of the other if there have been no intervening rights asserted. In the present case, the appellant's application could receive no priority during the period from March 10, 1961, to April 7, 1961, during which time he had two applications of record for a total of 240 acres. Had another valid application been filed during that period for any of the same land, it would have been entitled to priority over the appellant's application. In the absence of such an intervening claim, however, the appellant's application is not disqualified by virtue of the earlier application and is entitled to consideration with priority

dating from April 7, 1961, when the first application was relinquished.

Therefore, 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 reversed and the case is remanded to the Bureau of Land Management for further action consistent with this decision.

ERNEST F. HOM,
Assistant Solicitor.

CLIFTON O. MYLL

A-29920 (Supp.) *Decided December 11, 1964*

Desert Land Entry: Proof

The dictum in the Department's decision of November 25, 1964, in the case of *Clifton O. Myll*, 71 I.D. 458 (A-29920), that, where the suspension of a desert land entry under the *Maggie L. Havens* decision terminates because water becomes available, the entryman is entitled to a period of two years in which to fulfill the requirements of the desert land law, if less than two years remained in the life of his entry at the time of the suspension, is withdrawn.

SUPPLEMENTAL DECISION

In the Department's decision of November 25, 1964, in this case there was considered the question as to how much time is afforded the holder of a desert land entry suspended under the Department's decision of October 11, 1923, in *Maggie L. Havens*, A-5580, to meet the requirements of the desert land law, 19 Stat. 377, as amended, 43 U.S.C. § 321 *et seq.* (1958) upon termination of the suspension. It was concluded that the entryman should be entitled to the period of time remaining in the life of his entry at the time of the *Havens* suspension or a period of two years, whichever is greater.

The facts in this case giving rise to the question were as follows: The desert land entry in question was allowed to Mrs. May E. Patton on June 2, 1917. The 4-year term of the entry expired on June 2, 1921, but she obtained a 3-year extension to June 2, 1924, pursuant to the act of March 28, 1908, 35 Stat. 52, 43 U.S.C. § 333 (1958). On October 11, 1923, the entry was suspended under the *Maggie L. Havens* case until water for irrigation of the lands became available. At that time there remained 7 months and 21 or 22 days of the 3-year extension. On June 5, 1954, notice of availability of water for the land in the entry was published in the Federal Register. Thereafter the Patton entry was assigned to Clifton O. Myll, who proceeded to reclaim and cultivate the land in the entry in August 1960.

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As stated earlier, it was concluded in the decision of November 25, 1964 that, since less than two years remained in the life of the Patton entry at the time it was suspended, the holder of the entry should be allowed a maximum of two years after termination of the suspension to fulfill the requirements of the desert land law.

In view of the fact that Myll did not commence reclamation and irrigation of the entry until August 1960, more than six years after notice of availability of water was published, it would have been necessary to find some basis for extending the entry through August 1960 in order to make Myll's compliance timely. Since no possible basis could be found for extending the entry that length of time, it was unnecessary to determine whether Myll was entitled to a shorter length of time to comply with the desert land law. Accordingly, the conclusion that he was entitled to a period of two years from publication of the notice of availability was unnecessary to the decision.

In view of the importance of the question, an answer to it should be deferred until an occasion arises in which a resolution of the question is necessary.

Therefore, 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 of November 25, 1964, is modified to withdraw the conclusion that, upon termination of a suspension of a desert land entry under the *Havens* case because water becomes available, the entryman is entitled, if the remaining life of his entry was less than two years at the time of the suspension, to a period of two years in which to fulfill the requirements of the desert land law.

EDWARD WEINBERG,
Deputy Solicitor.

APPEAL OF CLIFFORD W. GARTZKA

IBCA-399

Decided December 24, 1964

Contracts: Breach—Contracts: Delays of Government

A claim by a construction contractor for additional compensation on account of the withdrawal of bids by prospective subcontractors, because of delay by the Government in issuing notice to proceed to the prime contractor is, in the absence of a contract provision for equitable adjustment of the contract price on account of Government delay, a claim for breach of contract that neither the contracting officer nor the Board of Contract Appeals has jurisdiction to decide.

Contracts: Acts of Government—Contracts: Breach

A claim by a construction contractor for additional compensation on account of the withdrawal of bids by prospective subcontractors, because of apprehension that the contract might be administered too strictly by the Government is, in the absence of circumstances amounting to either an express change or a constructive change in the drawings or specifications, a claim for breach of contract that neither the contracting officer nor the Board of Contract Appeals has jurisdiction to decide.

Contracts: Performance

The Government as a party to a construction contract is entitled to the performance specified in the contract, irrespective of whether such performance conforms to customary construction standards in the area, and need not accept something else that, from a functional standpoint, may be "just as good."

BOARD OF CONTRACT APPEALS

This is a timely appeal from the contracting officer's denial of contractor-appellant's claim for additional compensation in the amount of \$4,500. The claim is described as a "building loss," arising from several causes. The alleged causes may be summarized as follows: (1) a mistake was made in computing the amount of the bid; (2) issuance of notice to proceed was unduly delayed; (3) furnishing of gas service was unduly delayed; (4) concrete forms of better quality than the contract specified were required; (5) inspection was overly exacting; and (6) specifications and design were unreasonable.

The contracting officer denied the entire claim on the ground that it constituted a claim for unliquidated damages which was beyond his jurisdiction.

The issue of whether the contract price could be increased because of the alleged mistake in bid was decided adversely to appellant by the Comptroller General, prior to the taking of this appeal.¹ It was also decided adversely to appellant by this Board in its initial decision upon this appeal.² The first of the six alleged causes of the "building loss" thus affords no basis on which additional compensation could be granted.

A motion by Department Counsel to dismiss the appeal *in toto* on jurisdictional grounds was denied by the Board in its initial decision so as to give appellant an opportunity to show, if possible, that some one or more of the five other alleged causes of the "building loss" would afford a basis on which relief could be granted.

An oral hearing pertaining solely to these latter elements of appellant's claim was held before the writer of this decision on July 14, 1964, at Great Falls, Montana.

¹ Dec. Comp. Gen. B-149574 (August 24, 1962).

² *Clifford W. Gartzka*, IBCA-399 (January 22, 1964), 1964 BCA par. 4021, 6 Gov. Contr. 95(1).

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The contract was awarded appellant on June 12, 1962. It called for the construction of two frame residences, a sewage disposal system, and miscellaneous water piping at Benton Lake National Wildlife Refuge, located 12 miles north of Great Falls, Montana, for a fixed contract price of \$39,453. The work was to begin within 10 days of appellant's receipt of notice to proceed, and all work was to be completed 90 days subsequent thereto.

The contract was on Standard Form 23, (January 1961 ed.) and was to be performed in accordance with the General Provisions of Standard Form 23A (April 1961 ed.). These included the customary "Changes," "Changed Conditions," and "Termination for Default—Damages for Delay—Time Extensions" provisions (Clauses 3, 4, and 5, respectively). The General Conditions contained a "Temporary Suspension of the Work" provision (section 20) which reads in pertinent part as follows:

The Engineer shall suspend the work by written order for such period or periods as are necessary because of extended unsuitable weather or for such other conditions as may be unfavorable for the prosecution of the work. * * * Extensions of time will be allowed as provided in Clause 5(d) of the General Provisions * * *.

The evidence adduced at the hearing shows that appellant's claim for an equitable adjustment of the contract price is premised principally on the theory that the issuance of notice to proceed was unduly delayed, thereby causing an increase in the costs of performance, and on the theory that the construction standards enforced or threatened to be enforced by the Government were too stringent, thereby also causing an increase in the costs of performance.

The evidence discloses that on June 14, 1962, which was two days following the date of award of the contract, appellant advised the contracting officer by telephone that he had made a mistake in the computation of his bid costs. Submission of the supporting documentation by appellant was not completed until June 29, 1962. The contracting officer then transmitted the claim of mistake in bid to the appropriate Washington office of the Department of the Interior, where it was reviewed and put in order for submission to the Comptroller General for his decision. The claim was transmitted to the latter on July 27, 1962.

The Comptroller General, on August 24, 1962, issued a decision holding that the acceptance of appellant's bid on June 12, 1962, had created a valid and binding contract, and that there was no legal basis for increasing the contract price above the amount of such bid.

By a letter dated September 14, 1962, the contracting officer advised appellant of the Comptroller General's decision. After an unsuccessful

ful attempt by appellant's counsel to have the decision reconsidered, notice to proceed with the work was issued by the contracting officer. The notice was issued on September 25, 1962, and was received by appellant three days later.³

In the interim, the firms to whom appellant expected to subcontract the excavation, concrete forming, and plumbing work withdrew their bids for such work. One reason assigned for these withdrawals was that the lapse of approximately three months between the dates when their bids were submitted and the date when appellant received notice to proceed would necessarily extend the performance of the job into the winter season, whereas their bids were predicated on summertime work, which is less costly. Another reason assigned was that during these three months the prospective subcontractors had learned, through experience gained in performing another job at the Benton Lake National Wildlife Refuge, that they would probably be required to adhere to more exacting standards of construction than were allowed for in their bids. As the result of the withdrawal of the subcontract bids, appellant himself performed some of the work that he had expected to subcontract, and had the remainder performed on a cost-plus basis. Appellant began work on October 4, 1962, and the contract was completed within the time required by its terms, as ultimately extended.⁴

The contract did not contain a provision requiring the contracting officer to issue notice to proceed within a specified time.⁵ In the absence of such a provision, the law allowed a reasonable time for the giving of notice to proceed.⁶ Whether the time actually consumed was reasonable depends upon the weight which should be accorded to various pertinent circumstances. Among them are the fact that the mistake in bid was made by appellant, the fact that the papers requisite for an intelligent determination of the claim for reformation of the bid were not submitted immediately by appellant, and the fact that action by the Comptroller General as well as by the Department of the Interior was necessary.

In any event, it is unnecessary to determine whether, in the circumstances here present, notice to proceed was issued within a reasonable

³ Tr. pp. 42, 100.

⁴ An assessment of liquidated damages in the amount of \$3,150 for a delay of 70 days in performance was originally made. The time for performance was, however, subsequently extended for a period of 70 days, pursuant to the "Temporary Suspension of the Work" clause, thereby canceling out the assessment of liquidated damages.

⁵ This omission distinguishes the present appeal from *Abbett Electric Corp. v. United States*, 142 Ct. Cl. 609 (1958) and *T. C. Bateson Construction Co., ASBCA No. 5985* (August 30, 1960), 60-2 BCA par. 2767, 2 Gov. Contr. par. 522, where the dates for issuance of notice to proceed were specified in the contract.

⁶ *Parish v. United States*, 120 Ct. Cl. 100, 124-26 (1951), cert. denied, 342 U.S. 953 (1952); *Montgomery-Maeri Co., IBCA-59* and *IBCA-72* (June 28, 1963), 70 I.D. 242, 323, 1963 BCA par. 3819, p. 19,047, 5 Gov. Contr. par. 419.

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time. This is because the contract contains no provision which would authorize the making of an equitable adjustment in the contract price on account of an unreasonable delay in giving notice to proceed. The "Termination for Default—Damages for Delay—Time Extensions" provision (Clause 5) and the "Temporary Suspension of the Work" provision (section 20) authorize the granting of extensions of time for performance on account of delays caused by various circumstances, including conduct of the Government. However, neither of these provisions contains any language that could be interpreted as affording a basis for the granting of monetary compensation on account of such delays.

Since the contract does not authorize a price adjustment for a delay in giving notice to proceed, a claim for additional compensation on the ground that the giving of notice to proceed was unduly delayed is not cognizable by the Board. Such a claim is one for breach of contract, as distinguished from a claim under the contract. In the absence of specific authorization for their consideration, claims for breach of contract arising from Government delay are beyond the jurisdiction of contracting officers and boards of contract appeals to determine.⁷ Hence, the second alleged cause of the "building loss" affords no basis on which relief could be granted by us.

This is also true of the third alleged cause, undue delay in furnishing gas service. Such service did not become available at the site of the work until about December 7, 1962. The evidence falls short of demonstrating that the Government failed to perform on time any obligation with respect to gas service that rested on it, or that appellant could have effectively utilized gas service prior to the time when it actually became available. But, even if both of these essential elements had been proved, the claim would, nevertheless, be one for breach of contract and, as such, not cognizable by the Board.

The fourth, fifth and sixth alleged causes of the "building loss" are similar in nature and will be considered together. In the main, they stem from events that occurred in connection with the construction of a service building at the Benton Lake National Wildlife Refuge. This building was constructed under a different contract than is here involved, held by a different contractor than appellant. During the summer of 1962, while appellant was awaiting resolution of his claim of mistake in bid, work on the service building was performed by the firms from whom appellant had obtained excavation, concrete forming,

⁷ *Electrical Builders*, IBCA-406 (August 12, 1964), 1964 BCA par. 4377; *Commonwealth Electric Co.*, IBCA-347 (March 12, 1964), 71 I.D. 106, 1964 BCA par. 4136, 6 Gov. Contr. 262, and cases cited therein.

and plumbing bids. These firms appear to have formed the opinion that various features of the design of that building, such as the tolerance of one-eighth inch allowed for surface irregularities in concrete walls, either were unnecessary departures from customary building practices in the area or were enforced too literally. A like opinion was formed by the prime contractor for that building. The attitudes in question appear to have affected the work under the instant contract in two ways: by inducing prospective subcontractors to withdraw their bids, and by inducing appellant to adopt higher construction standards, with respect to such matters as concrete forms, than he had originally contemplated.

The weight of the evidence is to the effect that the Government did not require better work, either under the contract for the service building or under the instant contract, than the applicable contract provisions authorized. Where extra work was required, additional compensation was paid pursuant to the "Changes" clause of the contracts. Fundamentally, the burden of the testimony offered on behalf of appellant is that the various contract and subcontract bids were prepared on the basis of customary construction standards in the area, rather than on the basis of the standards spelled out in the contract. The law, on the other hand, is plain that the Government as a party to a construction contract is entitled to the performance specified in the contract, and need not accept something else that, from a functional standpoint, may be "just as good."⁸

Even if it were to be found that in some particulars the contracts were administered too strictly, there is no showing of circumstances which would amount to either an express change or a constructive change in the drawings or specifications of the instant contract and which would justify an equitable adjustment of the contract price, in addition to the price adjustments already made by the contracting officer. On the contrary, the testimony bearing upon the fourth, fifth, and sixth alleged causes of the "building loss" reveals that any claim which appellant may have on account of excessively strict administration would be a claim for breach of contract and, therefore, beyond our jurisdiction as well as that of the contracting officer.

Conclusion

We find from the evidence that appellant is not entitled to an equitable adjustment for any of the elements of his claim, none of which present matters cognizable by the Board within the meaning of the "Changes" clause (Clause 3), the "Changed Conditions" clause (Clause

⁸ *Farwell Co. v. United States*, 137 Ct. Cl. 832 (1957).

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4), or any other provision of the contract. Consequently, appellant's claim for additional compensation is dismissed in its entirety.

JOHN J. HYNES, *Member*.

WE CONCUR:

THOMAS M. DURSTON, *Member*.

HERBERT J. SLAUGHTER, *Acting Chairman*.

TORT LIABILITY AND WAIVER REQUIREMENTS

Torts: Conflicts of Law

In view of the state of the authorities, it is not possible to state with certainty whether State or Federal law will ultimately be accepted as governing the effectiveness of pre-flight waivers of liability obtained by the United States from nonofficial passengers on Government aircraft.

Torts: Aircraft

As a general rule, under Federal law and State laws, pre-flight waivers of liability, in the form used by the Bureau of Reclamation, obtained by the United States from nonofficial passengers on Government aircraft will be upheld, except as against willful misconduct or gross negligence.

Torts: Personal Injury or Death

In wrongful death actions brought under derivative type statutes, pre-flight waivers of liability executed by the decedent have been given the same effect as they would have been given in an action brought by the decedent while still alive.

Torts: Personal Injury or Death

In wrongful death actions brought under nonderivative type statutes, pre-flight waivers of liability executed by the decedent may be held not to bar the right of action, on the theory that the decedent could not give away something which did not belong to him.

M-36674

December 30, 1964

TO: COMMISSIONER OF RECLAMATION

SUBJECT: TORT LIABILITY AND WAIVER REQUIREMENTS

This is in response to the memorandum in which Assistant Commissioner Kane asked for an opinion on the legal aspects of rescinding the requirement in Reclamation Instructions 334.6.16 that nonofficial passengers transported in Bureau aircraft be required to sign a waiver

releasing the Government from any and all responsibility for accidental death or injury resulting from such transportation.¹

The problem presented, as we understand it, is to determine whether or not these waivers, when secured, are of sufficient value to the Government to justify the difficulty and embarrassment that sometimes accompanies securing them. The results of our research are summarized below.

Our first concern was to determine whether State or Federal law governs pre-flight waivers. Federal law governs contracts to which the United States is a party. Therefore, it would seem that Federal law should govern these waivers, since they are contracts to which the United States is a party. There are cases which support this view.² However, there are other cases which take the position that waivers of this type are so closely related to the substantive law of torts that, under the Federal Tort Claims Act, the law of the State where the wrongful or negligent act or omission took place should govern the effectiveness of the waiver.³ In view of the state of the authorities, it is not possible to say with certainty whether State or Federal law will ultimately be accepted as controlling.⁴

¹ The form of waiver used by the Bureau of Reclamation reads as follows:

"RELEASE

"KNOW ALL MEN BY THESE PRESENT: Whereas, I, _____ (Full Name), am about to take a flight or flights as a passenger in certain Bureau of Reclamation Aircraft on _____; and whereas I am doing so entirely upon my own initiative, risk, and responsibility; now, therefore in consideration of the permission extended to me by the United States through its officers and agents to take said flights, I do hereby, for myself, my heirs, executors, and administrators, remise, release, and forever discharge the Government of the United States and all claims, demands, actions or causes of action, on account of my death or on account of any injury to me which may occur by reasons of the said flight or flights.

"The term 'flight or flights' as used herein is understood and agreed to include the preparation for, continuation, and completion of flight or flights whether or not one or more than one aircraft is used throughout the entire flight or flights, as well as all ground and flight operations incident thereto. It is further understood and agreed that this release, among other things, extends to and includes negligence, faulty pilotage, and structural failure of the aircraft thereof.

"The execution hereof does not operate to waive any statutory right conferred by act of Congress."

The foregoing text is clerically imperfect in that the word "and" following the expression "Government of the United States" makes no sense and was probably intended to be "from."

² *United States v. Starks*, 239 F. 2d 544 (7th Cir. 1956) (provision for indemnification of United States in Federal lease); *Guy F. Atkinson Co. v. Merritt, Chapman & Scott Corp.*, 141 F. Supp. 833 (N.D. Cal. S.D. 1956) (provision for indemnification of United States in Federal construction contract).

³ *Air Transport Associates v. United States*, 221 F. 2d 467 (9th Cir. 1955); *Montellier v. United States*, 202 F. Supp. 384 (E.D.N.Y. 1962), *aff'd* 315 F. 2d 180 (2d Cir. 1963); *Rogov v. United States*, 173 F. Supp. 547 (S.D.N.Y. 1959).

⁴ A number of cases hold that State law governs the question of whether the liability of the United States is discharged when a settlement is made with another person liable for the same harm. Examples are *Bacon v. United States*, 321 F. 2d 880 (8th Cir. 1963); *Matland v. United States*, 285 F. 2d 752 (3d Cir. 1961); *Rushford v. United States*, 204 F. 2d 831 (2d Cir. 1953). These cases involved waivers given to persons other than the United States and, therefore, are not necessarily precedents for the application of State law to waivers given to the United States.

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Our second concern was to ascertain the extent to which pre-flight waivers would be upheld. The answer to this question will, of course, vary from State to State if Federal law is not accepted as controlling. The general criterion that appears to have the most support in the cases decided to date, whether purporting to apply Federal law or State law, is that a waiver in the form used by the Bureau of Reclamation will be upheld except as against willful misconduct or gross negligence.⁵ This is in accord with the common law rules pertaining to waivers of tort liability that do not involve employment relationships or the obligations of public service enterprises.⁶

The application of local precedents by courts which follow State, rather than Federal, law is illustrated by a decision holding, on the basis of New York law, that a pre-flight waiver is ineffective as against even ordinary negligence if the Government derives some benefit from the transportation of the person executing the waiver.⁷ The court considered that, under the New York decisions, a person traveling on a military aircraft in furtherance of a military project was within the scope of the common law rules that preclude employers from enforcing waivers by their employees of liability for torts sustained by the employees while on duty, and that preclude common carriers and other public service enterprises from enforcing waivers by their paying patrons of liability for torts sustained by such patrons.⁸

Wrongful death actions deserve special mention. The statutes of some States treat the right of action for wrongful death, granted to the decedent's representatives, as being derived from the right of action for the tort that caused the decedent's death, possessed by him while still alive. The statutes of other States treat the right of action for wrongful death as being a new cause of action that arises upon the decedent's death and that is not derived from any right of action previously possessed by him. In suits brought under statutes of the derivative type, such as those of New York and Louisiana, pre-flight waivers executed by the decedent have been given the same effect as they would have been given in an action brought by the decedent while still alive.⁹ On the other hand, in a suit brought under the non-derivative statute formerly in force in Massachusetts, the waiver

⁵ *Air Transport Associates v. United States*, *supra* note 3; *Friedman v. United States*, 138 F. Supp. 530 (E.D.N.Y. 1956); *Chapman v. United States*, Civil No. 5187 (S.D. Tex. 1950), *aff'd on other grounds*, 194 F. 2d 974 (5th Cir. 1952), *cert. denied*, 344 U.S. 821; see *Davies Flying Service v. United States*, 216 F. 2d 104 (6th Cir. 1954).

⁶ *Restatement, Contracts*, secs. 574, 575 (1932).

⁷ *Rogov v. United States*, *supra* note 3.

⁸ *Restatement, Contracts*, sec. 575 (1932); see *Air Transport Associates v. United States*, *supra* note 3.

⁹ *Rogov v. United States*, *supra* note 3; *Friedman v. United States*, *supra* note 5; *Chapman v. United States*, *supra* note 5.

was held not to bar the right of action for wrongful death on the theory that the decedent could not give away something which did not belong to him.¹⁰

A survey of agencies within this Department which operate airplanes reveals that four—Geological Survey, Bureau of Land Management, National Park Service and Bureau of Reclamation—require waivers in situations comparable to those covered by Reclamation Instructions 334.6.16; and that two—Bonneville Power Administration and Bureau of Sport Fisheries and Wildlife—do not. Among outside agencies, the military departments (which, of course, have the largest volume of such situations) require waivers, whereas the Federal Aviation Agency does not.

The decisions cited in this memorandum illustrate some of the complexities that make it impossible to state a simple hard and fast rule as to when pre-flight waivers are enforceable and when they are not. The best which may be said is that they can, at times, help in the defense of a lawsuit—and cannot, in any event, hinder its defense.

EDWARD WEINBERG,
Deputy Solicitor.

APPLICABILITY OF THE EXCESS LAND LAWS IMPERIAL IRRIGATION DISTRICT LANDS

Bureau of Reclamation: Excess Lands

Sections 1 and 4(b) of the Boulder Canyon Project Act (45 Stat. 1057, 1059; 43 U.S.C. secs. 617, 617(c)), which require the costs of the main canal and appurtenant structures to connect with the Imperial Valley to be repaid pursuant to reclamation law, carry into effect the excess land provisions of section 46 of the Omnibus Adjustment Act of May 25, 1926 (44 Stat. 649; 43 U.S.C. sec. 423e).

Bureau of Reclamation: Construction—Statutory Construction: Generally

Where a federal statute provides that the reclamation laws shall govern the construction, operation, and management of project works, the excess land provisions of the reclamation laws are thereby carried into effect unless the terms of the statute provide otherwise.

Bureau of Reclamation: Excess Lands—Bureau of Reclamation: Water Right Applications

The provision in section 5 of the Reclamation Act of June 17, 1902 (32 Stat. 388, 389; 43 U.S.C. sec. 431) that "no right to the use of water for land in private ownership shall be sold" for more than 160 acres means that the

¹⁰ *Montellier v. United States*, *supra* note 3. But cf. *Van Sickle v. United States*, 285 F. 2d 87 (9th Cir. 1960) (personal representatives of deceased serviceman whose death was not within purview of the Federal Tort Claims Act, since it occurred while the serviceman was on active duty, are not entitled to recover for his wrongful death even under a non-derivative statute).

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use of project facilities shall not be made available to a single owner for service to more than 160 acres. Sections 4 and 5 of the 1902 Act, read together, indicate that the "sale" referred to is not merely a commercial transaction, but is the contract by which the government secures repayment and the water user obtains the range of benefits resulting from the construction of the federal project.

**Bureau of Reclamation: Generally—Bureau of Reclamation: Excess Lands—
Water and Water Rights: Generally**

Nothing in the Reclamation Act of 1902 (32 Stat. 388) or its legislative history suggests that private landowners with water rights could participate in a project, pay their share of its cost, but be exempt from acreage limitation.

Water and Water Rights: Generally—Bureau of Reclamation: Excess Lands

Neither the existence nor nonexistence of a vested water right is itself determinative of whether the excess land laws are applicable in any given case.

Statutory Construction: Legislative History

The legislative history of the Boulder Canyon Project Act (45 Stat. 1057, 1066; 43 U.S.C. secs. 617, 617t) does not reveal that Congress intended to exempt, by implication or otherwise, the private lands within Imperial Valley from the federal excess land laws.

Administrative Practice

The letter from Secretary of the Interior Ray Lyman Wilbur to the Imperial Irrigation District, February 24, 1933, which informally ruled that the excess land laws did not apply to lands in the Imperial Irrigation District, was based upon clearly erroneous conclusions of law.

Administrative Practice

Administrative practice, no matter of how long standing, is not controlling where it is clearly erroneous.

Statutory Construction: Administrative Construction

The departmental regulation, currently found at 43 CFR 230.70, which provides that section 5 of the Act of June 17, 1902 (32 Stat. 388, 389; 43 U.S.C. sec. 431), does not prevent the recognition of a vested water right for more than 160 acres and the protection of same by allowing the continued flowing of the water covered by the right through works constructed by the Government under appropriate regulations and charges, applies only to special situations where existing physical facilities or water rights are acquired under the authority of section 10 of the 1902 Act (32 Stat. 389, 390; 43 U.S.C. sec. 373) for incorporation in a project and where the lands to which the water right appertains are not included within that project. This regulation was intended as a codification of the Opinion of Assistant Attorney General, 34 L.D. 351 (January 6, 1906).

Statutory Construction: Generally

The language of section 1 of the Boulder Canyon Project Act (45 Stat. 1057; 43 U.S.C. sec. 617) does not by its plain terms create or recognize a water right.

**Desert Land Entry: Water Right—Bureau of Reclamation: Excess Lands—
Administrative Practice**

Under departmental regulations (May 31, 1910, 38 L.D. 646, para. 78; currently, 43 CFR 230.110), a desert land entryman who owns a water right can rely on his own efforts to convey his water to his entry without assistance from a government project, thereby avoiding the requirements of the reclamation law, or he can participate in the project. In the latter case he must observe requirements of the reclamation law, including land limitations.

Bureau of Reclamation: Excess Lands

Where the claimants of existing water rights covering lands in the Imperial Irrigation District have sought and obtained the construction of a federal reclamation project to eliminate the hazards of drought, flood and silt and to obtain a canal entirely within the United States, they must accept the conditions imposed by the reclamation law, including land limitations.

Statutory Construction: Generally—Bureau of Reclamation: Excess Lands

Where Congress has deemed it proper to waive or modify the excess land laws in certain projects, it has always found it appropriate to enact positive legislation setting forth the exemption or other modification in unmistakable terms.

Statutory Construction: Generally

Statutes which grant privileges or relinquish rights of the public are to be strictly construed against the grantee.

Bureau of Reclamation: Excess Lands

Privately owned lands in the Imperial Irrigation District, even those assumed to have vested Colorado River water rights, are subject to the excess land laws.

United States—Res Judicata

The United States, not having intervened as a party and not being suable without its consent, is not bound by either the finding, the decision, or the final judgment of a state court in proceedings held to confirm a repayment contract.

M-36675

*December 31, 1964***To: SECRETARY OF THE INTERIOR****Subject: EXCESS LAND LAWS: IMPERIAL IRRIGATION DISTRICT**

On August 7, 1961, the Chairman of the Senate Committee on Interior and Insular Affairs reported that complaints had been made that the excess land laws were not being enforced by the Bureau of Reclamation in Imperial and Coachella Valleys in California. He requested advice as to whether the excess land laws applied there, and if so what the status of land ownership was.¹

¹ Letter from Senator Clinton P. Anderson to Secretary Udall, August 7, 1961. See Appendix L.

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You replied on May 15, 1962, stating that lands in Coachella Valley County Water District are subject to, and in compliance with, the excess land laws. You indicated, however, that while Secretary Wilbur in 1933 had ruled that the excess land laws do not apply to Imperial Irrigation District, there is some reason to suggest he may have been mistaken. You expressed the hope that time and staff would permit a study of this matter in the future.²

This question arose again at the Senate hearings on S. 1658 last April when Senator Kuchel of California asked if the excess land laws apply under the Boulder Canyon Project Act. The Senator stated that the question was, in his view, an important one.³

You have therefore asked me as Solicitor to make a careful study of the problem and advise you. After consideration of all issues I have concluded that, as a matter of law, the excess land laws do apply to lands in the Imperial Irrigation District.

The Imperial Irrigation District embraces about 530,000 irrigable acres of desert land in Southern California. Approximately 430,000 acres are now irrigated by Colorado River water which is stored at Hoover Dam and diverted at Imperial Dam to the All-American Canal for distribution within the District. The Hoover and Imperial Dams and the All-American Canal are federal projects authorized by the Boulder Canyon Project Act (the act of December 21, 1928, 45 Stat. 1057, 43 U.S.C. secs. 617-617t).

The federal government did not construct and does not own the system of canals and laterals through which water is distributed to individual farms after its discharge from the All-American Canal.

If the land limitation provisions of the reclamation law (herein sometimes referred to as the excess land laws) apply to privately owned lands in the Imperial Irrigation District, it is by virtue of terms of the Boulder Canyon Project Act.

Section 9 of the Project Act expressly applies the 160 acre limitation to public lands in the project. Hence, we are only concerned here with privately owned lands. Since Secretary Wilbur's ruling was limited to lands then irrigated from the Colorado River, this opinion considers lands to which an antecedent water right was assumed to be appurtenant. Thus, the question considered here is: Are privately

² Letter from Secretary Stewart L. Udall to Senator Anderson, May 15, 1962. See Appendix M.

³ *Hearings on S. 1658 Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs*, 88th Cong., 1st Sess., pt. 2, at 349-351 (1964).

owned lands in the Imperial Irrigation District, assuming they have appurtenant water rights, subject to the excess land laws?

Boulder Canyon Project Act

Section 1 of the Act states the purposes of the project, and authorizes the construction of a storage dam on the Colorado River and of a diversion dam and main canal to divert water to the Imperial and Coachella Valleys in California. While Section 1 provides that "no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys * * *," it also requires that the "expenditures for * * * [the] main canal and appurtenant structures [are] to be reimbursable, as provided in the reclamation law * * *." Since Congress does not purposely enact contradictory provisions in the same act, we must conclude that reimbursement for the main canal and appurtenant structures was not regarded by Congress as a charge for water or for its use, storage or delivery.

Section 4(b) of the Act outlines the terms under which the United States will be repaid for its investment. With respect to the "* * * main canal and appurtenant structures to connect * * * with the Imperial and Coachella Valleys in California * * *," the Secretary is instructed to "make provision for revenues, by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation, and maintenance * * * in the manner provided in the reclamation law."

Finally, section 14 of the Project Act reads as follows:

This Act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided.

Section 1 provides that the expenditures for the construction of the main canal and appurtenant structures are to be reimbursable "as provided in the reclamation law." Section 4(b) requires that the United States be repaid its expenses for construction, operation, and maintenance "in the manner provided in the reclamation law."

The Act defines "reclamation law" in section 12 as "that certain Act of the Congress of the United States approved June 17, 1902 * * * and the Acts amendatory thereof and supplemental thereto."

On December 21, 1928, the date of the Project Act, and on June 25, 1929, the date when it became effective, the law prescribing the manner by which repayment was to be made for reclamation projects was section 46 of the Omnibus Adjustment Act of 1926 (act of May 25, 1926, 44 Stat. 649-50, 43 U.S.C. sec. 423e). Section 46 provides that

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no water is to be delivered⁴ upon completion of "any new project" until repayment contracts have been entered into with irrigation districts organized under State law. Section 46 further requires that:

* * * Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior * * *.

The conclusion is inescapable, therefore, that the law, on December 21, 1928, required that the excess land laws apply to the Imperial Irrigation District.

This conclusion is reinforced by section 14 which provides that reclamation law "except as otherwise herein provided" shall govern "the construction, operation, and management" of the project works.

The provisions of reclamation law of general application dealing with land limitations include section 5 of the 1902 Act,⁵ Sections 1 and 2 of the Warren Act,⁶ Section 3 of the 1912 Act,⁷ Section 12 of the 1914 Act,⁸ and Section 46 of the 1926 Act, *supra*.

Section 5 of the 1902 Act forbids the sale of a water right for lands in private ownership for more than 160 acres. The "sale" can only be understood in the context of sections 4 and 5 of the Act. A reading of the two sections together reveals that the sale is not merely a commercial transaction involving the transfer of a water right. It is the contract by which the government secures repayment and the water user obtains the range of benefits resulting from the construction of the federal project.

In section 4 the Secretary is directed to estimate and announce the per-acre charge and the number of annual installments. This is his estimate of the consideration to be paid by the water user for the sale referred to in section 5. When section 5 states "no right to the use of water for land in private ownership shall be sold" for more than 160 acres, it obviously means that the use of project facilities

⁴ The Project Act in Sec. 4(b) modifies this to provide that "[b]efore any money is appropriated * * *" the Secretary must make adequate provision for repayment.

⁵ Act of June 17, 1902. 32 Stat. 388, 389, 43 U.S.C. § 431.

⁶ Act of February 21, 1911. 36 Stat. 925-26. 43 U.S.C. § 523-24.

⁷ Act of August 9, 1912. 37 Stat. 265, 266. 43 U.S.C. § 544.

⁸ Act of August 13, 1914. 38 Stat. 686, 689, 43 U.S.C. § 418.

shall not be made available to a single owner for service to more than 160 acres.

The owner of private land may also own a water right. Clearly a water right will not be sold, in the conventional sense, to such an owner.

Sections 4 and 5 disclose a scheme by which all participants in a project share its cost. If a private landowner cannot be sold a water-right because he already owns one, he cannot be charged for it either and, since section 5 contains all the provisions of the Act for repayment, there is no way by which he can participate in the project.

Nothing in the 1902 Act or its legislative history suggests that private landowners with water rights could participate in a project, pay their share of its cost, but be exempt from acreage limitation.

In 1911, in the Warren Act, *supra*, Congress dealt directly with the situation where federal facilities may store or carry water owned by others. The use of federal facilities under the Warren Act is expressly conditioned on compliance with the excess land laws.

Section 3 of the 1912 Act provides that water shall not be "furnished under said [reclamation] acts nor a water right sold or recognized for such excess" over 160 acres. Here is manifested in the clearest manner possible that the ownership of a water right prior to the construction of a federal reclamation project would not entitle its owner to service from the federal project for more than 160 acres.

The 1914 Act, *supra*, extended the time for repayment under the 1902 Act and made other changes in the reclamation law. Repayment by private landowners was effected as before, by the making of a water-right application and the "sale" (in the sec. 5 sense) of a water right.

However, Section 12 of the 1914 Act provided that any owner of lands in excess of what should be determined to be sufficient to support a family could not be included in the project unless he agreed to sell his excess lands. Thus, as applied to the lands under the All-American Canal, the 1914 Act would require the landowners to agree to sell excess lands or not get any water through the Canal at all. When stated this way no distinction is possible between a landowner with and a landowner without a water right. Neither could get in the project without making the prescribed agreement.

The Act of May 15, 1922 (42 Stat. 541, 43 U.S.C. sec. 511), authorized joint liability contracts with districts in lieu of individual water-right applications. Section 46 of the Act of May 25, 1926, *supra*, made joint liability contracts mandatory for new projects. Such was the contract entered into with Imperial Irrigation District.

By Section 46 the mechanism of repayment by "selling" water rights to private landowners disappeared and was replaced by an undertaking by the district to repay construction charges.

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The Project Act differed from section 46, which required a repayment contract before water was delivered to the district, by requiring, in section 4(b), the contract "before any money is appropriated." That this was the only change intended, and that section 46 was otherwise applicable, is clear from the section 4(b) requirement that repayment is to be effected "in the manner provided by the reclamation law."

"The manner provided by the reclamation law" on the effective date of the Project Act was section 46 of the 1926 Act. As already pointed out, section 46 required the application of the excess land laws in all cases where repayment contracts, such as the Imperial Irrigation District contract, were to be made.

In *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958), the Court considered the validity of contracts of the United States with irrigation districts made pursuant to the act authorizing the Central Valley Project (Act of August 26, 1937, 50 Stat. 850, as amended by the Act of October 17, 1940, 54 Stat. 1199). The contracts were challenged as invalid because they contained acreage limitation provisions. The Court held the contracts to be valid and authorized by Congress. The only provisions in the authorizing legislation which invoke the reclamation law are the third proviso of Section 2 of the 1937 Act, which provides, in part, as follows:

* * * except as herein otherwise specifically provided, the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals, power plants, pumping plants, transmission lines, and incidental works deemed necessary to said entire project * * *.

and section 2 of the 1940 Act, which adds authority to construct distribution systems "under the provisions of the Federal reclamation laws." The language in each instance is substantially the same as the language of the Boulder Canyon Project Act.

The Supreme Court in *Ivanhoe* declare that "* * * the authority to impose the conditions of the contracts here comes from the power of Congress to condition the use of federal funds, works, and projects on compliance with reasonable requirements [i.e. compliance with the excess land laws] * * * . [I]f the enforcement of those conditions impairs any compensable property rights, then recourse for just compensation is open in the courts." *Ibid.* at 291. In describing the effect of the excess land laws the Court said, "* * * the excess acreage provision acts as a ceiling, imposed equally upon all participants, on the federal subsidy that is being bestowed." *Ibid.* at 297.

Legislative History

The plain terms of the Project Act dictate that the excess land laws apply to lands served by the All-American Canal, Imperial Dam and appurtenant structures. After a thorough examination of the history of the Project Act itself and of legislative consideration of the bills which preceded it,⁹ I have found no inference of congressional intent to exempt said lands from the excess land laws. As pointed out in *Ivanhoe*, “* * * where a particular project has been exempted because of its peculiar circumstances, the Congress has always made such exemption by express enactment.” *Supra* at 292.

The Boulder Canyon Project Act was the enactment of the last of a series of Swing-Johnson bills. The fourth, and final, Swing-Johnson bill was introduced in the House as H.R. 5773 on December 5, 1927, and in the Senate as S. 728 on the following day.¹⁰

Unlike its predecessors,¹¹ the House version of the bill contained an express acreage limitation proviso covering private lands. The proviso was substantially identical with the excess land provision of section 46, Omnibus Adjustment Act of 1926.¹²

In contrast to the House bill, the Senate version of the fourth Swing-Johnson measure, S. 728, included no specific provision on acreage limitation relative to private lands. A bill introduced by Senator Phipps of Colorado, S. 1274, contained language similar to the Section 46 excess land provision,¹³ and the Senate Committee on Irrigation

⁹ H.R. 6044, 66th Cong., 1st Sess. (1919); H.R. 11553, 66th Cong., 2d Sess. (1920); H.R. 11449, 67th Cong., 2d Sess. (1922); H.R. 2903 and S. 727, 68th Cong., 1st Sess. (1924); H.R. 6251, S. 1868, H.R. 9826, and S. 3331, 69th Cong., 1st Sess. (1926); H.R. 5773 and S. 728, 70th Cong., 1st Sess. (1927).

¹⁰ 70th Cong., 1st Sess.

¹¹ H.R. 11449, 67th Cong., 2d Sess. (1922); H.R. 2903 and S. 727, 68th Cong., 1st Sess. (1924); H.R. 6521, S. 1868, H.R. 9826, and S. 3331, 69th Cong., 1st Sess. (1926).

¹² On February 5, 1926, Elwood Mead, Commissioner of Reclamation, testified during the hearings on H.R. 6251 and H.R. 9826 (third Swing-Johnson bill) before the House Committee on Irrigation and Reclamation that “old land,” i.e., land already irrigated, “would be sold water under a Warren [Act] contract” and that the owners thereof would be allowed to occupy their then existing farm units, irrespective of the acreage involved. On the same occasion Congressman Swing affirmed that nothing in the third Swing-Johnson bill required owners of land in excess of 160 acres to sell that excess at a price set by the Secretary. *Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation*, 69th Cong., 1st Sess., pt. 1, at 32-33 (1926). These statements were made prior to the enactment of section 46 of the Act of May 25, 1926, and hence are not relevant to the interpretation of the Project Act finally enacted. Moreover, Dr. Mead’s statement was based on an erroneous understanding of the then existing reclamation law. The All-American Canal project was not a project of the character considered in the Warren Act of 1911 (36 Stat. 925). Had it been, the terms of that Act would have precluded the delivery of water to more than 160 acres of private land in a single ownership. In addition, both Dr. Mead and Mr. Swing overlooked section 12 of the Reclamation Extension Act of 1914 (38 Stat. 689), which was a reclamation law of general applicability then in effect. Section 12 required that owners of private excess lands agree to dispose of them before they could participate in a project. Both H.R. 6251 and H.R. 9826 incorporated the reclamation law by reference.

¹³ Section 5(b) of S. 1274, 70th Cong., 1st Sess. (1928).

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and reclamation considered both S. 728 and S. 1274 in its hearings.¹⁴ The Phipps bill never emerged from the Committee, whereas the Swing-Johnson measure was favorably reported.¹⁵

According to the minority statements filed by Senator Ashurst of Arizona and appended to the Committee report, the Committee either failed to act upon or rejected an amendment presented by him which would have added an express acreage limitation provision to S. 728.¹⁶ No particular import can be ascribed to this incident related by Senator Ashurst. The record is devoid of any inference that a majority of the committee members, in failing to adopt the Ashurst amendment, favored an acreage limitation exemption for private lands. Even if Senator Ashurst's comments could be interpreted as an expression of his view that without specific incorporation the excess land laws would not apply, the construction placed on a bill by an unsuccessful opponent is not a reliable indicator of its meaning. "An unsuccessful minority cannot put words into the mouths of the majority and thus, indirectly, amend a bill." *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 288 (1956). See also *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

During the consideration of the fourth Swing-Johnson bill, Senators Ashurst and Hayden conducted a filibuster. Senator Hayden offered many amendments including one similar to the excess land proviso of H.R. 5773.¹⁷ This amendment, like dozens of others presented and printed during the filibuster, never came to a vote. Discussion of hydroelectric power production at Boulder Dam and of the interstate apportionment of the waters of the Colorado River dominated the debates. The issue of acreage limitation was only one of many incidental points advanced by the opponents of S. 728. There is no indication that the failure of the Senate to act on the amendment evinced its rejection of the proposition that excess land provisions would be applicable to private lands in Imperial Valley.

The House passed H.R. 5773 on May 25, 1928.¹⁸ On December 5, 1928, Senator Johnson made a motion to substitute H.R. 5773 for S. 728 in such a way as to retain the bill number and enacting clause of H.R. 5773, on the one hand, and the text of S. 728, on the other. Referring to the fact that the House and Senate versions of the bill contained "like purposes" and "like designs," Senator Johnson urged the consoli-

¹⁴ *Hearings on S. 728 and S. 1274 Before the Senate Committee on Irrigation and Reclamation*, 70th Cong., 1st Sess. (1928).

¹⁵ S. Rep. No. 592, 70th Cong., 1st Sess. (1928).

¹⁶ *Id.*, part 2, at 26.

¹⁷ 69 Cong. Rec. 7634-35 (1928).

¹⁸ 69 Cong. Rec. 9990 (1928).

dation in order to further "orderly legislative procedure." The motion carried.¹⁹ The bill with amendments was passed on December 14, 1928.²⁰

The debates contain no evidence that any members of the Senate viewed what had occurred as exempting private lands from the excess land laws. Under certain circumstances the rejection of a provision on the floor of either house of Congress can be referred to as an indication of legislative intent. In the instant case, however, the Senate did not reject the House bill. It did not purport to pass upon it. In fact, it could be argued that since the principal proponent had represented that the two bills had the same purpose and design, they were substantially the same, i.e., land limitations were included in each—which indeed was the case.

No better guideline exists for approaching the legislative material related above than that provided by Justice Rutledge in the case of *Gemsco, Inc. v. Walling*, 324 U.S. 244, 260 (1945):

The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.

The Boulder Canyon Project Act must be read *in pari materia* with the general body of reclamation law. The rules in such cases were stated by Mr. Justice Miller in *Wilmot v. Mudge*, 103 U.S. 217, 221 (1880), as follows:

First, that effect shall be given to all the words of a statute, where this is possible without a conflict; and Second, that, as regards statutes *in pari materia* of different dates, the last shall repeal the first only when there are express terms of repeal, or where the implication of repeal is a necessary one. When repeal by implication is relied on it must be impossible for both provisions under consideration to stand, because one necessarily destroys the other. If both can stand by any reasonable construction, that construction must be adopted.

Excess land policy was the cornerstone of the reclamation law when the All-American Canal Project was authorized in 1928. "Derangement of a system thus rooted in tradition" is not to be inferred from enactments which do not purport to alter that system, "where inveterate usage forbids the implication." Mr. Justice Cardozo, in *General Motors Acceptance Corporation v. United States*, 286 U.S. 49, 61-62 (9th Cir. 1932).

So firmly established are the excess land provisions of the reclamation law that Congress suspends their operation only where extraordinary circumstances dictate.²¹ Where Congress has seen fit to waive

¹⁹ 70 Cong. Rec. 67-68 (1928).

²⁰ 70 Cong. Rec. 603 (1928).

²¹ *Ivanhoe, supra*, at 292.

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or modify the excess land laws in certain projects, it has always found it appropriate to enact positive legislation setting forth the exemption or other modification in unmistakable terms.²² Where Congress deems a departure from its established policy to be in order it so provides by express terms, and not by implication.

The doctrine of *pari materia* acquires special force in this case by virtue of the fact that the excess land laws had been undergoing a thorough overhaul since the report of the "Fact Finders" in 1924²³ and culminating in section 46 of the 1926 Act. This activity is reflected in adoption as modified of many of the recommendations of the Fact Finders on excess lands, in an act authorizing an Indian project (Act of June 7, 1924, 43 Stat. 475), in appropriation acts (Act of December 5, 1924, 43 Stat. 672; Act of March 3, 1925, 43 Stat. 1141; Act of May 10, 1926, 44 Stat. 453) and in the Omnibus Adjustment Act of 1926, *supra*. It is worthy of note that the Omnibus Adjustment Act was enacted in the Congress immediately preceding that which enacted the Boulder Canyon Project Act.

A holding that the landowners in Imperial Valley are exempt from acreage limitations must find support in clear language of the Project Act. Substantial rights were conferred by that act. A grant by the United States of rights, privileges or immunities is construed strictly against the grantee and what is not expressly granted is reserved. The Supreme Court has stated,

The reason of [this] rule is obvious—parties seeking grants for private purposes usually draw the bills making them. If they do not make the language sufficiently explicit and clear to pass everything that is intended to be passed, it is their own fault; while, on the other hand, such a construction has a tendency to prevent parties from inserting ambiguous language for the purpose of taking, by ingenious interpretations and insinuation, that which cannot be obtained by plain and express terms.

²² See Columbia Basin Antispeculation Act of May 27, 1937, 50 Stat. 208; Act of June 16, 1938, 52 Stat. 764 (Colorado-Big Thompson project); Act of October 14, 1940, 54 Stat. 1119 (water conservation and utilization projects); Act of November 29, 1940, 54 Stat. 1219 (Truckee River and Humboldt projects); Act of March 10, 1943, 57 Stat. 14 (Columbia Basin project); Act of June 27, 1952, 66 Stat. 282 (San Luis Valley project, Colorado); Act of August 28, 1954, 68 Stat. 890 (Owl Creek Unit, Missouri River Basin project); Act of September 3, 1954, 68 Stat. 1190 (Santa Maria project); Act of August 1, 1956, 70 Stat. 775 (Washoe project); Act of August 6, 1956, 70 Stat. 1044 (small reclamation projects); Act of July 24, 1957, 71 Stat. 309-310 (East Bench unit, Missouri River Basin project); Act of September 4, 1957, 71 Stat. 608 (Kendrick project); Act of April 7, 1958, 72 Stat. 82 (Lower Rio Grande rehabilitation project, Mercedes division); Act of August 28, 1958, 72 Stat. 963 (Seedskađee project); Act of September 22, 1959, 72 Stat. 641 (Lower Rio Grande rehabilitation project, La Feria division); Act of September 27, 1962, 76 Stat. 634 (Baker project); and Act of October 1, 1962, 76 Stat. 677 (Columbia Basin project).

²³ *Federal Reclamation by Irrigation*, S. Doc. No. 92, 68th Cong., 1st Sess. (1924).

Dubuque and Pacific Railroad v. Litchfield, 64 U.S. 66, 88-89 (1859). See also *United States v. Grand River Dam Authority*, 363 U.S. 229 (1960), *Slidell v. Grandjean*, 111 U.S. 412 (1883), *The Delaware Railroad Tax (Minot v. The Philadelphia, W. & B. R.R.)*, 85 U.S. (18 Wall.) 206 (1874).

In *Wisconsin Central Railroad Co. v. U.S.*, 164 U.S. 190 (1896) the Court dealt with a situation analogous to that presented here. By an 1864 Act a grant of land was made to the railroad company, "upon the same terms and conditions" as in an 1856 Act. The 1856 Act provided that the rates for transporting mail could be fixed by Congress. The act of March 3, 1873, prescribed the rates for transporting mail and provided that land grant railroads whose grant was on condition that Congress could fix the rates would receive 80% of the regular rate.

The company received 80 percent and sued in the Court of Claims for the balance of the regular rate. The Court held that the words "upon the same terms and conditions" incorporated in the 1864 Act, the provisions of the 1856 Act. "* * * [T]he settled rule is that statutes granting privileges or relinquishing rights of the public are to be strictly construed against the grantee." *Ibid.* at 202.

Applying the same rationale to the application of the acreage limitations to lands in Imperial Valley, section 14 of the Project Act incorporated the reclamation law, and the land limitation provisions of section 46 of the 1926 Act are part of the reclamation law. Nothing in the Project Act exempts the lands in Imperial Valley from section 46. Therefore, the land limitations of section 46 are a part of the Project Act; and since "statutes granting privileges or relinquishing rights of the public are to be strictly construed against the grantee," the excess land laws apply to the lands in Imperial Valley served by the federal project.

The Wilbur Letter and Prior Administrative Practice

The repayment contract of the Imperial Irrigation District with the United States was executed by Ray Lyman Wilbur, Secretary of the Interior, on December 1, 1932. Article 1 states the contract is made "pursuant to" the reclamation law and Article 30 states that "Except as provided by the Boulder Canyon Project Act, the reclamation law shall govern the construction, operation and maintenance of the works to be constructed hereunder."

It has been the practice of the Bureau of Reclamation to include in irrigation district contracts detailed requirements for the implementation of land limitation provisions. Such detailed requirements vary from case to case, but are substantially similar to those described in *Ivanhoe, supra*, at 285-86. No such detailed requirements were in-

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cluded in the Imperial Irrigation District contract, and to date the District has not complied with the excess land laws. Excess land provisions have been applied to lands within the Coachella Valley County Water District which are also serviced by the All-American Canal under contracts executed pursuant to the Boulder Canyon Project Act. Detailed provisions were included in the supplemental Coachella contract of December 22, 1947, in conformity with a ruling from the then Solicitor of the Department, Mr. Fowler Harper.²⁴

An anomalous situation now exists. The two districts, Imperial and Coachella, while serviced by the same federally constructed facility, are accorded different administrative treatment as to excess land. The reasons for the administrative treatment accorded Imperial were announced in a letter, dated February 24, 1933, from the Secretary of the Interior Ray Lyman Wilbur to the Imperial Irrigation District.²⁵ See Appendix E for text.

²⁴ Solicitor's Opinion, M-33902 (May 31, 1945). See Appendix H.

²⁵ The Wilbur letter was written within three months following execution of the contract. While not relevant to the conclusion reached in this opinion, the record is ambiguous as to whether the Department had actually determined the excess land laws not to be applicable to Imperial Irrigation District prior to the execution of the contract. There is no direct evidence of such a conclusion. To the contrary, the only record we have been able to find of consideration of the question prior to the execution of the contract indicates that the excess land limitations did apply. On November 4, 1930, Executive Assistant to the Secretary Northcutt Ely stated that the excess land laws would have to be enforced in Imperial Valley. (Response No. 3 by Northcutt Ely. See Appendix D.)

The Wilbur letter itself states that the question was raised "early in the negotiations" and adds that "upon careful consideration the view was reached that this limitation does not apply to land now cultivated and having a present water right." When this conclusion was reached, the Secretary did not say.

The genesis of the Wilbur letter is found in a letter of February 4, 1933 (Appendix B), from Mr. Coffey to Porter W. Dent, Assistant Commissioner and Chief Counsel of the Bureau of Reclamation.

Mr. Coffey's letter takes no position but reports a conversation with Mr. Charles L. Childers, general counsel for Imperial. Mr. Childers apparently told Mr. Coffey that Mr. Dent and Judge Finney, the Solicitor, had agreed during the contract negotiations that acreage limitations did not apply to Imperial. He requested a formal Solicitor's ruling to that effect but significantly, said Mr. Coffey, "He doesn't want any formal ruling, of course, if the Solicitor were to hold that the limitation applies * * *"

Assuming the Childers' conversation was correctly reported by Mr. Coffey—we have nothing directly from Mr. Childers—two facts are evident: first, that Mr. Childers is not certain that the application of the excess land laws is precluded by failure to incorporate detailed provisions in the contract; and, second, that he is not sufficiently certain that a conclusion has been reached that the excess land laws do not apply to preclude the possibility that a formal opinion might declare that they do.

Mr. Coffey's letter was transmitted to Mr. Ely by a memorandum of February 7, 1933 (Appendix B), from Mr. Dent. While the Dent memorandum, like the Wilbur letter, states that the question of applicability of the 160-acre limitation was raised "early in the negotiations connected with the All-American Canal contract," Mr. Dent went on to say that "So far as I am advised, all who have given this matter consideration agree that this limitation does not apply to lands now cultivated and having a present water right. The view has been, and is, I believe, that those lands having already a water right, are entitled to have such right recognized without regard to the acreage limitation mentioned."

It is to be noted that while Mr. Dent stated that the question had arisen "early in the negotiations," he did not state that it had been then resolved. His remarks which follow

Secretary Wilbur based his conclusion that the excess land laws do not apply to the private lands in the Imperial District on two contentions. The first was that no "sale" of a water right had occurred within the meaning of section 5 of the Reclamation Act of June 17, 1902,²⁶ because the private lands in the Imperial District had a vested water right which was recognized by the Congress in section 1 of the Project Act through the water-charge exemption.

Secretary Wilbur's understanding of the word "sale" in section 5 of the 1902 Act has already been disposed of, and the fact, that Congress gave Imperial an exemption from charges "for water and the use, storage, or delivery of water" does not constitute the granting of a water right.

This point is not material to the question being considered in this memorandum since, as has been shown, the ownership of a water right does not preclude the application of the excess land laws. However, if it were material, it must be pointed out that the language of section 1 of the Project Act does not in terms create or recognize a water right, it merely exempts from a charge. And as already noted "the established rule of construction in such cases is, that rights, privileges, and immunities not expressly granted are reserved. There is no safety to the public interests in any other rule." *The Delaware Railroad Tax (Minot v. The Philadelphia, W. & B. R.R.)*, 85 U.S. (18 Wall.) 206, 225 (1874).

that statement are as susceptible to a present resolution of the matter as to a resolution in the course of the negotiations.

By memorandum of February 16, 1933, Mr. Ely advised Mr. Dent that he concurred in the Dent view and requested Mr. Dent to prepare what became the Wilbur letter (Appendix C).

The only other contemporary departmental record heightens the ambiguity as to when the conclusion announced in the Wilbur letter was actually reached. This is the March 1, 1933, letter from Mr. Dent to Mr. Coffey (Appendix F). In this letter Mr. Dent referred to the opinion that he had shared with Mr. Coffey early in the negotiations that some specific provision should be inserted regarding acreage limitation. He then stated that representatives of the District feared that a specific provision "would only be confusing and make ratification by the landowners more difficult." He went on to say that the ground relied on by the Wilbur letter, i.e., non-applicability of the acreage limitation to lands having a vested water right, "is the ground upon which you and I with reluctance agreed to elimination of the specific provision regarding acreage limitation." It is not clear from this statement whether Mr. Dent reluctantly agreed with that ground prior to execution of the contract, or only reluctantly agreed to delete a reference to excess lands on that ground.

In any event, in the extensive departmental files covering the negotiation of the Imperial contract, save for Mr. Ely's memorandum of November 4, 1930, there has been found no contemporary record either of legal analysis or discussion of the excess land question. On the other hand, these files do reveal that counsel for the Imperial District was not satisfied that a decision had been reached in the Department prior to execution of the contract, and sought formal assurance on the question. The request for formal decision was rejected in favor of the informal Wilbur letter. Neither in that letter nor in the memoranda leading up to its preparation is the ambiguity of when the decision was first reached resolved.

²⁶ 32 Stat. 389. "No right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner * * *"

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For the same reason the requirement in section 6 for "satisfaction of present perfected rights" cannot be read as insulating the District lands from acreage limitation. It is not in plain terms an exemption from the limitations of reclamation law in connection with the obligation to repay the cost of Imperial Dam and the All-American Canal.

We turn now to Secretary Wilbur's second contention, namely, that the Department had interpreted section 5 of the 1902 Act to permit the recognition of a water right for more than 160 acres in single ownership by allowing the continued flow of water covered by the right through federal project facilities.

This had been the position of the Department in the special situation where existing physical facilities were being acquired by the Government for incorporation in a project. In such cases, lands to which the water right was appurtenant were considered to be outside the project.

The first authority cited by Secretary Wilbur, Opinion of Assistant Attorney General, 34 L.D. 351 (January 6, 1906), serves to illustrate the limited nature of this practice. There, an entire irrigation system already partially completed and in service, owned by a private land and irrigation company, was proposed to be acquired by the United States at a purchase price of \$15,000. It was to be incorporated into a larger federal reclamation project (East Umatilla). The agreement contemplated that some 8,000 to 9,000 acres of project land owned by the company would be placed in trust for sale to individuals in units conforming to the acreage limitations prescribed in accordance with sections 4 and 5 of the 1902 Act.

The company's water rights, held or claimed, were to be included in the conveyance to the United States except for the reservation by the company of a water right sufficient to irrigate 300 acres of land it proposed to retain. It was explained by the Director of the Geological Survey (of which the Reclamation Service was then—1905—a part) that to purchase the water right for the 300 acres would require a larger expenditure than could be justified.²⁷ The government agreed to satisfy this right through project works. The company was not to pay any construction charges although it was to pay for operation and maintenance.

The Director pointed out that:

The furnishing of this water supply as part consideration is therefore a condition favorable to the United States. Besides, it is the usual practice in cases

²⁷ Memorandum from Director, Geological Survey, to Secretary of Interior, November 16, 1905. See Appendix A.

where an existing irrigation system is purchased for enlargement, to agree to furnish a water supply to the prior owners, frequently without even reserving the right to make a charge for maintenance. This practice is founded on sound business principles for it is always cheaper to furnish the water when available than to buy the right to water which has already vested.

* * * * *

If for instance the government were merely to recognize a vested right for water for 300 acres, the company could utilize the right only by building a canal system paralleling the government system or else the government would be required to forego the advantage of using the company's works now constructed.

He viewed section 10 of the 1902 Act²⁸ as authorizing the arrangement.

Assistant Attorney General Campbell, to whom the matter was referred for consideration, thereupon issued the decision cited in the Wilbur letter. The Assistant Attorney General concluded that under the transaction, the 300 acres covered by the reserved right, "is not brought within the limits of [the] project," *Supra* at 354. He held that the agreement did not conflict with section 5.²⁹

The cases of the Newlands (Truckee-Carson) and North Platte projects alluded to by Secretary Wilbur involved comparable purchases of existing private irrigation works.³⁰

This practice referred to by Secretary Wilbur is not a precedent for the Imperial Valley situation. The United States acquired no preexisting facilities; the Imperial lands were not only a part of the project, they were the primary reason for the project; and finally, the lands in Imperial were not exempted from, but were expressly required to repay, construction charges for the All-American Canal, Imperial Dam, and appurtenant structures "in the manner provided by the reclamation law." Section 4(b) of the Project Act.

On the other hand, the practice of the Department in respect or the carriage of water through reclamation project facilities for the irrigation of desert land entries, shows an intention to apply excess

²⁸ 32 Stat. 390, 43 U.S.C. sec. 373. The section authorizes the Secretary "to perform any and all acts and to make such rules and regulations as may be necessary and proper" for the purpose of carrying the provisions of the Act into full force and effect.

²⁹ While the Wilbur letter does not cite it, the 1906 ruling was followed on May 31, 1910, by a departmental regulation (38 L.D. 637, para. 45), which is currently found at 43 CFR 230.70:

The provision of section 5 of the act of June 17, 1902 (32 Stat. 389; 43 U.S.C. 381, 392, 431, 439), limiting the area for which the use of water may be sold, does not prevent the recognition of a vested right for a larger area and protection of the same by allowing the continued flowing of the water covered by the right through works constructed by the Government under appropriate regulations and charges.

As is apparent from comparison of its text with a headnote to the 1906 decision, this regulation was evidently intended as no more than a codification thereof.

³⁰ See Department of the Interior *Second Annual Report of the Reclamation Service, 1902-3*, at 368-69 (1904), and *Fourth Annual Report of the Reclamation Service, 1904-5*, at 236 (1906).

Anna M. Wright, 40 L.D. 116 (1911), also referred to in the Wilbur letter, merely cited the 1910 regulation. It has no relevance to the question here involved.

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land limitations of reclamation law if project benefits are received. This situation is analogous to that presented by the privately owned lands in the Imperial Irrigation District.

To obtain a desert land entry, an entryman must demonstrate the fact and legal sufficiency of his water right. If the claim is one of an appropriative right, he must show that he has taken all necessary steps to perfect that right as one of the requirements of making final proof. *Instruction*, November 16, 1906, 35 L.D. 305, 43 CFR 2226.1-5(h).

By section 5 of the Act of June 27, 1906 (34 Stat. 520, 43 U.S.C. sec. 448) a desert land entryman is permitted under certain circumstances to bring his entry under a reclamation project and obtain a water supply through the project if he complies with reclamation law and relinquishes that part of his entry in excess of 160 acres. The Department's regulation under this act states, however, that—

Special attention is called to the fact that nothing contained in the act of June 27, 1906, shall be construed to mean that a desert-land entryman who owns a water right and reclaims the land embraced in his entry must accept the conditions of the reclamation act of June 17, 1902, but he may proceed independently of the Government's plan of irrigation and acquire title to the land embraced in his desert-land entry by means of his own system of irrigation.³¹

In short, the desert land entryman, who for this purpose is treated like the owner of patented lands, has a choice. He can rely on his own efforts to convey his water to his entry without assistance from the government project, thereby avoiding the requirements of the reclamation law, or he can participate. In the latter case he must observe the law's requirements including land limitation.

It is evident that neither the existence nor nonexistence of a vested water right is itself determinative of whether the excess land laws are applicable in any given case. Where, as here, the claimants of existing water rights have sought and obtained the construction of a federal reclamation project to eliminate the hazards of drought, flood and silt and to obtain a canal entirely within the United States, they must accept the conditions imposed by federal law.

*Administrative Practice
Subsequent to the Wilbur Letter*

As soon as the Wilbur letter was issued representatives of the District expressed concern that reliance had been placed exclusively on section 5 of the 1902 Act whereas the principal problem was the

³¹ *Regulations*, May 31, 1910, 38 L.D. 646, para. 78; currently, 43 CFR 230.110.

effect of section 46 of the 1926 Act. Assistant Commissioner and Chief Counsel Dent replied ²² to this suggestion by stating that section 46 was only an incorporation of section 5 of the 1902 Act as construed by the Wilbur letter. Dent conceived, albeit "with reluctance," that section 5 precluded application of the excess land laws to lands having a vested water right. We have already disposed of this argument and have analyzed section 5 of the 1902 Act and the Acts supplementary thereto, including section 46 of the 1926 Act.

Mr. Dent also argued that the Boulder Canyon Project Act was complete in itself and did not incorporate reclamation law. This argument completely ignores the import of sections 1, 4(b), and 14 of the Project Act.

In 1944, William E. Warne, Assistant Commissioner of Reclamation, testifying before a Senate subcommittee, stated that acreage limitation provisions relative to private lands were not carried into effect by the Boulder Canyon Project Act and had not been applied to Imperial Valley.³³ The following day, the Assistant Commissioner qualified this testimony by linking the exemption not to the law but directly to the Wilbur letter,³⁴ thereby revealing that his statements were not based on new and independent legal research.

Doubts as to the legal validity of the Wilbur opinion were expressed in December of 1944 in connection with negotiations for a supplemental contract between the United States and the Coachella Valley County Water District. Commissioner of Reclamation Bashore advised the Secretary on December 15, 1944, that—

Probably because of an informal decision of the then Secretary of the Interior, Ray Lyman Wilbur * * * *, the Coachella contract of October 15, 1934, contained no provision for enforcement of the excess-land provisions * * *. The correctness of the 1934 contract's disregard of the excess-land laws is doubtful, in the opinion of the Chief Counsel of the Bureau; and he is of the opinion that the proposed contract is subject to the excess-land laws * * *. Because the applicability of a Departmental ruling is involved, and perhaps the soundness of that ruling, I recommend that this matter be referred to the Solicitor for an opinion on the applicability of the excess-land laws to the proposed contract.³⁵

The matter was referred to Solicitor Fowler Harper, who rendered a formal opinion holding that the Wilbur letter was not intended to apply to Coachella lands.³⁶ But this limited finding did not prevent the Solicitor from raising serious doubts as to the validity of the Wilbur opinion. In contrast to the Wilbur letter, Fowler Harper's

²² Letter from Porter W. Dent to Richard J. Coffey, March 1, 1933. See Appendix F.

³³ *Hearings on H.R. 3961 before the Subcommittee of the Senate Committee on Commerce*, 78th Cong., 2d Sess., pt. 5, at 599 (1944). See Appendix G.

³⁴ *Id.* at 764.

³⁵ Memorandum from Commissioner Bashore to Secretary Ickes, December 15, 1944.

³⁶ Solicitor's Opinion, M-33902 (May 31, 1945). See Appendix H.

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opinion construed the Project Act as incorporating the excess land provisions of the reclamation law.

The apparent inconsistency in administrative treatment on excess lands accorded the Imperial and Coachella districts gave rise to an inquiry from the Veterans of Foreign Wars to the Secretary in March of 1948. In reply, then Secretary Julius A. Krug confirmed the fact that different administrative practices were followed with regard to the two districts:

Concerning * * * the substantive questions which relate alike to both districts, we have concluded that inasmuch as the Secretary of the Interior then charged with the administration of law construed the acreage limitation as not being applicable to lands of the Imperial Irrigation District under the facts as he then understood them, and it being clear that the then owners and subsequent purchasers of irrigable lands in the Imperial Irrigation District were entitled to rely upon advice from the Secretary and thus establish an economy in the district consistently with that advice, they should not now be abruptly advised that the economy of the project is to be changed under a contrary ruling of the present officer charged with the administration of the law.

To the extent, therefore, that the actual fact situation with respect to lands and water rights may be identical in the two districts in question, and to the extent that the advice furnished in the *Coachella* case would otherwise be applicable in the *Imperial* case, we feel that we must allow that inconsistency, if such there be, to continue. I think that you will understand the position which the Department must take in this matter in fairness to those who have relied on its action, even though that action might now be subject to valid question.³⁷

It is pertinent to observe that Secretary Krug does not purport to give a legal interpretation of the Imperial question in the above entry. Solely in deference to considerations of economic reliance, the Secretary elected to continue the practice of exempting the Imperial lands from acreage limitations.

In 1958 the question of acreage limitation in Imperial Valley was raised outside the Department of Interior in proceedings held before the Hon. Samuel H. Rifkind, Special Master of the Supreme Court, in the case of *Arizona v. California*. In its oral argument the State of Arizona sought certain admissions relative to Imperial Irrigation District's noncompliance with the excess land provisions of the reclamation law.³⁸ The Special Master asked that memoranda be submitted on the question of whether a motion for admission ought to be granted. Pursuant to this request the Solicitor General of the United States, Hon. J. Lee Rankin, sought the views of the Solicitor of the Department of Interior, Elmer F. Bennett.³⁹ Solicitor Bennett, while

³⁷ Letter from Secretary Krug to H. C. Herman, April 27, 1948. See Appendix I.

³⁸ Record, vol. 94, pp. 15, 550-15, 601, *Arizona v. California*, 373 U.S. 546 (1963).

³⁹ Letter from the Hon. J. Lee Rankin to Elmer F. Bennett, January 24, 1958.

doubting that acreage limitation had any relevance to the major issue of water entitlement, voiced the following concerns which were reminiscent of those expressed a decade earlier by Secretary Krug:

* * * I have not had occasion to undertake a legal analysis of the respective views heretofore expressed by Secretary Wilbur and former Solicitor Harper. Whatever the conclusion might be, to my mind the time has long since passed when it is realistic and practicable to do so. * * *

The water contract between the United States and the Imperial Irrigation District was executed December 1, 1932, some 25 years ago. The negotiations leading to the contract were lengthy and extensively in the public view. Except at the time of court confirmation, I am not aware of any challenge as to the legality of the contract during this entire period. Water has been delivered to the lands of Imperial District pursuant to the contract since the early 1940's. I am not aware that any administrative action has been proposed or taken either by the preceding administration or by this one to recognize or enforce application of the 160-acre limitation to the lands of the Imperial Irrigation District.⁴⁰

It is important to note that no pretense was made at offering a legal opinion on the Imperial question.

The memorandum filed in behalf of the United States took the position that the issue of noncompliance had no relevancy to the *Arizona v. California* dispute at bar.⁴¹ The Solicitor General did not refrain, however, from expressing his opinion on the merits of the issue posed by the State of Arizona:

Briefly, it may be stated that for the reasons stated in Solicitor Harper's opinion, as well as others, no conclusion seems permissible other than that the limitations of the reclamation law upon the quantity of privately owned lands which might receive irrigation water under the All-American Canal are applicable in the Imperial Valley just as are the similar limitations relating to public lands opened for entry within the district.⁴²

Finally, there is the 1961 inquiry of the then Chairman of the Senate Committee on Interior and Insular Affairs and the inquiry of Senator Kuchel in April of 1964 during the hearing on S. 1658 which were adverted to at the outset of this opinion.

Effect of Administrative Practice

The facts in this case apparently suggested to Secretary Krug and Solicitor Bennett that the Wilbur letter, the long practice of non-enforcement and the reliance which may have been placed on these circumstances by private parties, precluded a re-examination of the legal basis for the exemption of lands in Imperial Valley from acreage

⁴⁰ Letter from Elmer F. Bennett to the Hon. J. Lee Rankin, February 5, 1958. See Appendix J.

⁴¹ Memorandum in Behalf of the United States with Respect to Relevance of Noncompliance with Acreage Limitations of Reclamation Law, February 28, 1958, *Arizona v. California*, 373 U.S. 546 (1963).

⁴² *Id.* at 3, fn. 5. See Appendix K.

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limitations. Other circumstances have compelled us to make that examination, and we have found Secretary Wilbur's ruling to be without legal foundation. The question now is whether the Wilbur ruling, the long practice of non-enforcement and the assumed reliance can have the effect of validating the exemption which was initially without legal justification. The answer is, of course, that they cannot.

It is well settled that administrative practice cannot " * * * thwart the plain purpose of a valid law." *United States v. City and County of San Francisco*, 310 U.S. 16, 31-32 (1940). Even if it might be said that Secretary Wilbur's interpretation of section 5 of the 1902 Act was plausible, the law in 1933, when he wrote, included the 1912 Act, the 1914 Act and the 1926 Act, which clearly forbade the conclusion he reached and which he completely ignored. As Judge Story said, "One cannot wink so hard as not to see . . ." *The Henry Ewbank*, 1 Summ. 400, 11 Fed. Cas. 1166, 1168, Fed. Cas. No. 6,376 (1833).

Long practice, especially long practice of neglect, cannot make legal that which was initially illegal. The Supreme Court in *Baltimore and Ohio Railway Co. v. Jackson*, 353 U.S. 325 (1957) and *United States v. DuPont & Co.*, 353 U.S. 586 (1957), cases involving administrative positions of more than 60 and 40 years' standing, respectively, upset them to require compliance with the plain language of the law.

Finally, the fact that private parties may have relied upon the Wilbur ruling would not alter our conclusion. "Of this it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917). The Government holds its interests in trust for all the people and its agents cannot estop the United States by neglect or acquiescence. *United States v. California*, 332 U.S. 19, 40 (1947).

State Court Proceedings

The only issue remaining is whether the state court confirmation proceedings or the decision in the *Malan* case preclude present inquiry into the validity of the administrative acreage limitation exemption. It is clear that they do not.

The confirmation action (*Hewes v. All Persons*, No. 15460, Superior Court of Imperial County, California) was filed in 1933 pursuant to Article 31 of the Imperial Contract and in accordance with section 46 of the 1926 Act.

In a finding of fact the court concluded that the contract would not impose excess land limitation⁴³ and it entered a decision holding the excess land laws inapplicable.⁴⁴

It suffices to say that the United States, not having intervened as a party and, since it is not suable without its consent, not having been reached by the "in rem" nature of the action, is not bound by either the finding, the decision, or indeed by the judgment finally entered.

The Malan case (*Malan v. Imperial Irrigation District*) proceeded in the same court and concurrently with the confirmation action. Malan, an excess landowner, asserted the repayment contract to be invalid under California law because it subjected the district to the excess land laws. It was the *Malan* case that gave rise to the request for a ruling which resulted in the Wilbur letter. Malan's case was dismissed in the same unreported decision that confirmed the contract, the court holding that the contract did not impose acreage limitations.

Again, the United States not having been a party, it is not bound by this decision. Contrary to Malan's contention it should be noted that California law does not preclude an irrigation district from contracting to observe the federal excess land laws. *Ivanhoe Irrigation District v. All Persons*, 3 Cal. Repr. 317, 350 Pac. 2d. 69 (1960).

Conclusion

The Boulder Canyon Project Act by its plain terms incorporates those provisions of law which impose acreage limitations on lands served from federal reclamation projects. The Boulder Canyon Act works, including the All-American Canal, Imperial Dam and appurtenant structures, are federal reclamation facilities. Nothing in the history of the Project Act and nothing in the legislative history of reclamation law modifies what has been expressed by Congress as its plain intent.

The interpretation in the Wilbur letter of the meaning of the Project Act was clearly wrong and could not effect a change in the statutes enacted by Congress. The fact that the Department has failed for over 30 years to enforce the excess land laws acreage limitations in Imperial Valley cannot legitimize a violation of public policy contrary to the spirit and the letter of the law.

I have concluded, after a consideration of all issues, that the question stated on page 3 of this memorandum must be answered in the affirmative: Privately owned lands in Imperial Irrigation District,

⁴³ Finding of Fact No. 35, July 1, 1933.

⁴⁴ Superior Court, Imperial County, unreported.

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even those assumed to have vested Colorado River water rights, are subject to the excess land laws.

FRANK J. BARRY,
Solicitor.

APPENDIX

This Appendix is voluminous because many of the records which are pertinent to this opinion are not published elsewhere.

Items:

- A Memorandum from the Director of Geological Survey to the Secretary of Interior, November 16, 1905.
- B Memorandum from Porter W. Dent to Northcutt Ely, February 7, 1933.
- C Memorandum from Northcutt Ely to Porter W. Dent, February 16, 1933.
- D Item No. 8 posed by Richard J. Coffey and response No. 8 by Northcutt Ely, November 4, 1930.
- E Letter from Secretary Wilbur to Imperial Irrigation District, February 24, 1933.
- F Letter from Porter W. Dent to Richard J. Coffey, March 1, 1933.
- G Testimony of William E. Warne, Assistant Commissioner of Reclamation, during Hearing on H.R. 3961 before a subcommittee of the Senate Committee on Commerce, 78th Cong., 2d Sess. 599, 764 (1944).
- H Solicitor Harper's Opinion, M-33902 (May 31, 1945).
- I Letter from Secretary Krug to H. C. Hermann, April 27, 1948.
- J Letter from Solicitor Bennett to Solicitor General Rankin, February 5, 1958.
- K Footnote 5 of the Memorandum in Behalf of the United States with Respect to Relevance of Non-Compliance with Acreage Limitations of Reclamation Law, filed in the case of *Arizona v. California*, No. 10 Original, October Term 1957, Before the Honorable Simon H. Rifkind, Special Master.
- L Letter from Senator Clinton P. Anderson to Secretary Udall, August 7, 1961.
- M Letter from Secretary Udall to Senator Clinton P. Anderson, May 15, 1962.

APPENDIX A

November 16, 1905.

The Honorable the Secretary of the Interior.

Dear Mr. Secretary:

By reference from the Department under date of November 11, I am in receipt of my letter of the 8th instant recommending that \$1,000,000 be set aside for the Umatilla Project in Oregon.

Said letter was returned with the following indorsement:

Respectfully returned to the Director of the Geological Survey for report on the following propositions:

1. Do not the provisions of paragraph 2 of the enclosed agreement conflict with the provisions of paragraph 5 of the Reclamation Act prohibiting the right to the use of water on land in private ownership in excess of 160 acres.

2. Are not the provisions of paragraph 11 likewise in conflict with the provisions of said paragraph 5 of the Reclamation Act.

3. What authority has the Secretary of the Interior, under existing law, to approve the provisions of paragraph 13 of said agreement which contemplates the extension of time for compliance with the provisions of the Desert Land Act.

Return all enclosed papers with your reply.

The first proposition calls attention to the provisions of paragraph 2 and asks whether or not they conflict with the provisions of section 5 of the Reclamation Act, "prohibiting the right to the use of water on land in private ownership in excess of 160 acres."

In paragraph 2 of the contract it is provided that the United States shall recognize a vested right in the said company for 300 acres to be hereafter selected by it. These lands are now owned by the company and it has, as stated in my letter of transmittal, partially completed the construction of a canal system to irrigate them. The company had already furnished water to certain of its lands and proposed to continue the construction until the canal would be completed to cover the entire area owned by it, which would give them a vested right for water for nearly 9,000 acres. The claim to water for the greater part or the whole of this area would then be established, for the company has been diligently prosecuting its work.

There has already been established in the company a vested right to the use of part of these waters and the company would either require the recognition of this right or else payment at the rate of \$50 an acre therefor. This would be a much larger amount than is involved in furnishing the water supply in question for 300 acres, for the reason that the right of the company to a certain amount of the waters of Umatilla River can be utilized in the project without additional expense.

As the entire project is intended to irrigate about 20,000 acres, the amount of water required to irrigate 300 acres would be one-sixty-

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sixth of the entire amount of water carried in the system, and as the main feed canal of the reservoir is to carry flood water and must be of sufficient size to carry a large volume in a short time, the storage of the added quantity required for 300 acres would involve no additional expense. Furthermore, the lateral system of the project must cover the entire area irrigated and would necessarily be built of the same extent whether or not these 300 acres were to be irrigated.

The furnishing of this water supply as part consideration is therefore a condition favorable to the United States. Besides it is the usual practice in cases where an existing irrigation system is purchased for enlargement to agree to furnish a water supply to the prior owners, frequently without even reserving the right to make a charge for maintenance. This practice is founded on sound business principles for it is always cheaper to furnish the water when available than to buy the right to water which has already vested.

The water right for at least 300 acres has now vested in the company and it is such a right as would be subject to the provisions of section 8 of the Reclamation Act, that nothing therein "shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation or *any vested right acquired thereunder.*"

If for instance the government were merely to recognize a vested right for water for 300 acres, the company could utilize the right only by building a canal system paralleling the government system or else the government would be required to forego the advantage of using the company's works now constructed.

In the former case the government would be required to pay the company the additional cost to them of new construction without deriving any benefit from such expenditure, for the government system as proposed would carry the required water supply without extra cost for construction. The necessary crossing and recrossing of a parallel system would also add to the cost of the government system.

In the latter case the government would be required to spend a greater sum in the construction of its system because it would not have the use of the excavation and other work already performed by the company. There would be further expense for right-of-way as most of the odd sections crossed are railroad lands now in the hands of other parties.

Congress could not have had in mind that the vested rights should be recognized and at the same time deprive the parties of the existing means of conveying the water, for such has not been the practice, as

must have been well-known to all the members of Congress from the Reclamation States. In fact the laws of most western States provide for the enlargement of ditches and occupation in common by the parties, and the courts of all the States of the West have repeatedly recognized this right, which is just as essential in irrigation matters as the common right of occupancy of canyons, passes and defiles by railroad companies, recognized by section 2 of the Act of Congress of March 3, 1875 (18 Stat. 482).

It is understood by this office that section 8 of the Reclamation Act authorizes and requires the Secretary of the Interior to recognize such vested rights and it has heretofore been the policy of the engineers of the Reclamation Service in negotiating contracts of this kind to provide for the recognition of such rights and the furnishing of the water whenever this plan would be cheaper than to pay for the water rights involved.

It is believed that the prohibition of section 5 of the Reclamation Act that, "no right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner," does not apply to such cases as this, because the water right is not sold, belonging as it does to the company, and such ownership being recognized by the contract.

This water right having vested in the company and not being subject to sale by the Secretary of the Interior, the carriage of the water does not seem to be prohibited by the Reclamation Act.

I find nothing in the Reclamation Act which prohibits such treatment of vested rights to the use of water, and the general authority given to the Secretary of the Interior by section 10 of the act, "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect" was evidently intended to cover the many details of administration of this kind arising in connection with such a complex business system as a large irrigation enterprise, and which could not be specifically provided for in a general act.

This question was considered by the Department in passing upon the purchase of the system of the Klamath Falls Irrigating Company (Ankeny Canal), October 9, 1905 (Assistant Attorney General's opinion of October 3) and doubt was expressed upon these points.

The negotiations with the Maxwell Land and Irrigation Company had been concluded and the form of contract agreed upon, before this opinion was known to the engineers engaged upon this matter.

The present contract was submitted to the Department for consideration in connection with a discussion which was in course of preparation for presentation to the Department in order that these questions

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might be again considered along lines similar to the present discussion. The letter concerning the Klamath Falls Irrigating Company's case will be forwarded in a few days.

The second proposition of the endorsement refers to paragraph 11 of the contract with the company. The intent of the paragraph is to permit the company to operate its present water system and to supply to certain parties, with whom they have contracts, water sufficient to complete their cultivation under the Desert Land Act, until such time as the government project shall be completed and in operation. The government undertakes no responsibility for furnishing water to the lands specified under this paragraph in schedule A. The company is to continue the operation of its system for this purpose until the government system has been completed, in which case the parties in question will either make application under the Reclamation Act or receive no further water supply. It was stated to the engineers negotiating this agreement that these parties proposed to make final proof next year.

It was supposed that the provisions of paragraph 11 would be acceptable as they cannot be understood as placing any obligation upon the government to furnish water to the lands listed in schedule A.

The third proposition of the indorsement of the Secretary relates to paragraph 13 of the contract with the company, in which it is agreed, (1) that the desert land entrymen listed in schedule B may complete the acquisition of their lands by obtaining water under the Reclamation Act; (2) that they shall have such extension of time in which to conform to the requirements of the desert land act as may become necessary on account of their obtaining water for such lands from the reclamation project; and (3) that water shall not be furnished for more than 160 acres to each of such claimants.

The first and third of these provisions conform to the decision of the Secretary of the Interior of July 14, 1905 (Department letter No. 2304-1903), holding that desert land entrymen could be recognized as proprietors of the land entered, within the spirit and purpose of the Reclamation Act, and that if the entry involves more than 160 acres of irrigable land the entryman must relinquish the excess.

The second provision of paragraph 11 of the contract involves the question of extension of time. In the Departmental letter referred to it was stated that it is not advisable to anticipate that question.

As the matter of extending the time for these desert land entries was of great importance, it was deemed advisable that the matter should be made part of the contract and in that manner be brought to the attention of the Department for consideration and decision.

The company, as stated in paragraph 12 of the contract, is under obligations to furnish water to these entrymen in order that they shall be able to comply with the Desert Land law, the entries having been made in view of the proposed construction of the company's canal system which would probably have been completed next spring if the government project had not intervened.

These entrymen would be left in a very uncertain position as to the validity of their entries if they should bring themselves within the provisions of the Reclamation Act in pursuance of the provisions of Departmental letter of July 14, 1905, and at the same time find themselves unable to make proof under the Desert Land Act. It would therefore be unlikely that any of them would bring their lands within the project until it should be determined that they would be permitted to make final proof when the Government had furnished water from the project, even though at a later period than was contemplated by their entries.

The entrymen could not be expected to release the Maxwell Land & Irrigation Company from its obligation to furnish the water unless they were assured that they could make proof by means of the water supply furnished under the Reclamation Act.

If they were compelled to rely upon the smaller system of the company which would be built if the Reclamation project were not, the lands might be irrigated sufficiently to comply with the Desert Land Act but they would not be nearly so productive as if irrigated under the reclamation project. It is therefore not only an advantage to the project if these entrymen can be brought within the provisions of the Reclamation Act, but also of general benefit to the Government and all public interests, as providing for a more efficient and productive use of the land in question.

The authority of the Secretary of the Interior to allow final proof to be made at such time as would be possible under the Reclamation project seems to be deducible from several Departmental decisions, as for instance the case of *Thompson v. Bartholet*, 18 L.D. 96 (1894).

The rule of the board of equitable adjudication therein quoted specifies certain causes of failure on the part of the entryman which can be considered in connection with the matter of confirming the entry, among them, "obstacles which he could not control."

The conditions existing in these cases would come within this description as the withdrawal of this company and its decision not to complete its system would clearly be an obstacle which he could not control.

Under the decision in *Thompson v. Bartholet*, *supra*, a continuance of the effort on the part of the entryman to comply with the law in

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good faith would authorize the acceptance of his proof after the expiration of the statutory period and bar the attachment of an adverse claim.

Under the terms of Departmental letter of July 14, 1905, referred to, the question of extending the time was left unsettled and it was therefore assumed that an investigation of the matter along the lines herein indicated might result in a decision that such action could be authorized, and it was supposed that upon consideration of the contract in question the Department would decide whether such action could be taken.

The papers transmitted are herewith returned as directed.

Very respectfully,

THOMAS WALCOTT,

Director.

APPENDIX B

February 7, 1933

Memorandum for Mr. Ely

Attached letter of February 4 from District Counsel Coffey is self-explanatory.

This letter refers to the suit now pending in the Superior Court of Imperial County, California entitled *Charles Malan v. Imperial Irrigation District et al.* Among other things the complaint in this case contains the following allegation:

And it is further provided by the reclamation law of the United States that water shall not be delivered from any canal so constructed by the Secretary of the Interior under the said reclamation law to any landowner owning more than 160 acres of land.

The foregoing is an incorrect statement of the reclamation law in this respect. Presumably the pleader intends to refer to section 5 of the Reclamation Act of June 17, 1902, which reads in part as follows:

No right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made.

It will be noted that the reclamation law instead of providing, as alleged, that no water shall be delivered from a canal constructed by the Government to any tract exceeding 160 acres in area, provides that

no water shall be *sold* for a tract in excess of 160 acres in single ownership.

The All-American Canal contract with the Imperial District does not provide for the sale of storage water for use in the Imperial and Coachella Valleys. The contract, in article 17, provides merely for the delivery of water for use in these valleys through the works to be constructed by the United States. No charge whatever is made for the water so to be delivered, and under the provisions of the Boulder Canyon Project Act no such charge can legally be made. From section 1 of this act for convenient reference the following is quoted:

* * * *Provided, however,* That no charge shall be made for water or for the use, storage, or delivery of water for irrigation of water for potable purposes in the Imperial or Coachella Valleys * * *.

Early in the negotiations connected with the All-American Canal contract the question was raised regarding whether and to what extent the 160-acre limitation is applicable to lands to be irrigated from this proposed canal. So far as I am advised, all who have given this matter consideration agree that this limitation does not apply to lands now cultivated and having a present water right. The view has been, and is, I believe, that these lands having already a water right, are entitled to have such right recognized without regard to the acreage limitation mentioned. Congress evidently recognized that these lands had a vested water right when the provision was inserted that no charge shall be made for the storage, use or delivery of water to be furnished these areas.

In connection with the activities of the Bureau it has been held that the provisions of section 5 of the reclamation act restricting the sale of a right to use water for land in private ownership to not more than 160 acres will not prevent the recognition of a vested water right for a larger area, and protection of the same by allowing the continued flowage of the water covered by the right through the works constructed by the Government. (*Opinion of Assistant Attorney General*, 34 L.D. 351 (1906); *Anna M. Wright*, 40 L.D. 116 (1911)). On many projects it has been the practice to recognize vested rights in single ownership in excess of 160 acres and to deliver the water necessary to satisfy such rights through works constructed by and at the expense of the Government. This is true of the Newlands project, the North Platte project, the Umatilla project, and others.

It is my view that the limitation quoted from section 5 of the Reclamation Act does not apply to those areas now cultivated and having a vested right to the use of water.

The provision quoted from section 5 relates to land in private ownership. This of course would not apply to the tributary public lands

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to be included within the boundaries of the district. While this particular provision would not be applicable to the public lands, they would be governed by section 4 of the reclamation act and other provisions which limit the area of public lands that may be entered to a farm unit required for the support of a family. This area will be such as may be fixed by the Secretary, consisting of not less than 10 nor more than 160 acres. (Section 9 of the Boulder Canyon Project Act and act of June 27, 1906, 34 Stat. 519).

This matter is submitted for your consideration and such action as may be considered advisable. If the Department is in agreement with the foregoing I believe a letter to the district or a formal decision to that effect would be helpful.

PORTER W. DENT,
Assistant Commissioner.

608 Grant Building,
Los Angeles, California,
February 4, 1933.

Mr. P. W. Dent
Assistant Commissioner
Bureau of Reclamation
Washington, D.C.

Dear Mr. Dent:

Mr. Childers, attorney for Imperial Irrigation District, advises me that he is very much worried over that particular part of the complaint in the Malan suit, copy of which you have in the files at Washington, which claims that the All-American Canal contract is illegal because of the feature of the general reclamation laws which restricts the use of water to one hundred sixty acres. He advises me, also, that at one time he discussed the matter with Judge Finney, and with you, and that you were both of the opinion that the 160-acre restriction on the use of water, found in the reclamation laws, didn't apply to the All-American Canal contract.

Childers is very anxious to get a ruling on the point from the Solicitor, prior to the hearing of the confirmation proceedings and the Malan suit, both of which are to be called up for hearing on March 6, next; provided, that such ruling would be that the 160-acre limitation did not apply. He doesn't want any formal ruling, of course, if the Solicitor were to hold that the limitation applies so far as Imperial Irrigation District is concerned.

I wonder if it wouldn't be a good plan for you to discuss the matter with Judge Finney and see what may be done in this regard.

As you have noted from a clipping which I sent in the other day, Directors DuBois and Blair were defeated at the general district election held February 1. They were strong supporters of Mark Rose, but the campaign issue which seemed to have ousted them was that they were not doing their best to bring about construction of the All-American Canal. The press states that a campaign is now under way to recall Directors Aten and Adams, on the claim that they too are hindering consummation of the All-American Canal deal.

Sincerely yours,

RICHARD J. COFFEY,
District Counsel.

APPENDIX C

February 16, 1933

Memorandum for Mr. Dent

I agree with the views expressed in your memorandum of February 7 regarding the case of *Charles Malan v. Imperial Irrigation District et al.* Will you be good enough to have a letter from the Secretary to the Board prepared along those lines?

NORTHCUTT ELY.

APPENDIX D

Item No. 8 posed by Richard J. Coffey for consideration in connection with the Imperial All-American Canal contract (no date):

8. Reclamation laws restrict individual holdings to 160 acres. How does this affect the District.

Response No. 8 by Northcutt Ely to Item No. 8, November 4, 1930:

8. The Reclamation Law's limitation of 160 acres to a particular owner presents a serious problem, in view of the fact that this, being an existing project, includes many farms with larger area.

I see nothing to do but enforce it unless the Imperial Irrigation District can get new legislation. In any event, enforcement of this requirement would undoubtedly have a salutary effect on suspected speculative activities in that locality.

IMPERIAL IRRIGATION DISTRICT LANDS

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APPENDIX E

February 24, 1933

Imperial Irrigation District,
El Centro, California

Gentlemen:

Information at hand indicates that in connection with the contract with your district signed by me on behalf of the United States under date of December 1, 1932, some question has been raised concerning the maximum area of land in single ownership that may be irrigated from the proposed All-American Canal. My attention has been specifically called to the suit now pending in the Superior Court of Imperial County, California entitled *Charles Malan v. Imperial Irrigation District et al.* Among other things the complaint in this case contains the following allegation:

And it is further provided by the reclamation law of the United States that water shall not be delivered from any canal so constructed by the Secretary of the Interior under the said reclamation law to any landowner owning more than 160 acres of land.

The foregoing is an inaccurate statement of the reclamation law in this respect. Presumably this allegation is intended to refer to section 5 of the Reclamation Act of June 17, 1902, which reads in part as follows:

No right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. (Italics supplied).

It will be noted that while the reclamation law provides that no water shall be sold for a tract of land in excess of 160 acres in single ownership, it does not provide, as alleged, that no water shall be delivered from a canal constructed by the Government to any tract exceeding 160 acres in area.

The All-American Canal contract with the Imperial Irrigation District does not provide for the sale of storage water for use in the Imperial and Coachella Valleys. The contract, in article 17, provides merely for the delivery of water for use in these valleys through the works to be constructed by the United States. No charge whatever is made for the water so to be delivered, and under the provisions of the Boulder Canyon Project Act no such charge can legally be made. From section 1 of this act for convenient reference the following is quoted:

* * * *Provided, however,* That no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys.

Early in the negotiations connected with the All-American Canal contract the question was raised regarding whether and to what extent the 160-acre limitation is applicable to lands to be irrigated from this canal. Upon careful consideration the view was reached that this limitation does not apply to lands now cultivated and having a present water right. These lands, having already a water right, are entitled to have such vested right recognized without regard to the acreage limitation mentioned. Congress evidently recognized that these lands had a vested right when the provision was inserted that no charge shall be made for the storage, use, or delivery of water to be furnished these areas.

In connection with the activities of the Bureau of Reclamation it has been held that the provisions of section 5 of the Reclamation Act restricting the sale of a right to use water for land in private ownership to not more than 160 acres will not prevent the recognition of a vested water right for a larger area, and protection of the same by allowing the continued flowage of the water covered by the right through the works constructed by the Government. (*Opinion of Assistant Attorney General*, 34 L. D. 351 (1906); *Anna M. Wright*, 40 L. D. 116 (1911)). On many projects it has been the practice to recognize vested rights in single ownership in excess of 160 acres and to deliver the water necessary to satisfy such rights through works constructed by and at the expense of the Government. This is true of the Newlands project, the North Platte project, the Umatilla project, and others.

The provision quoted from section 5 of the Reclamation Act relates to land in private ownership. This of course would not apply to the tributary public lands to be included within the boundaries of the district. While this particular provision would not be applicable to the public lands, they would be governed by section 4 of the reclamation act and other provisions which limit the area of public lands that may be entered to a farm unit required for the support of a family. This area will be such as may be fixed by the Secretary, consisting of not less than 10 nor more than 160 acres. (Section 9 of the Boulder Canyon Act and act of June 27, 1906, 34 Stat. 519.)

The foregoing has been long settled by decisions of the Department and by the practice in carrying such decisions into effect.

Sincerely yours,

RAY LYMAN WILBUR,
Secretary.

December 31, 1964

APPENDIX F

March 1, 1933

Richard J. Coffey, Esquire
608 Grant Building
Los Angeles, Cal.

Dear Mr. Coffey:

In your telegram of February 28 from Phoenix relating to the All-American Canal contract you requested that Mr. Childers be furnished with a certified copy of the Department's ruling on the 160-acre limitation. When your telegram was sent you no doubt assumed that this ruling would take the form of a formal decision. This, however, is not the case. It was decided that the matter should be passed upon in a letter addressed by the Secretary to the Imperial Irrigation District. This letter was dated February 24 and I understand the original has been forwarded by Messrs. Du Bois and Dowd to Mr. Childers. If the letter is to be used in the case under the well-known rule a certified copy could not be used until satisfactory explanation is made of failure to produce the original. A certified copy, therefore, presumably, would serve no useful purpose and accordingly is not being furnished.

Messrs. Du Bois and Dowd were in the office this morning and exhibited a telegram received by them from Mr. Childers, who in his telegram indicated that the situation is not fully met in that the discussion relates to the 160-acre limitation in the Reclamation Act, whereas they are apprehensive concerning the act of May 25, 1926, presumably section 46. You will recall that this is a matter which was very extensively discussed. You and I were of the opinion that some specific provision should be inserted regarding this acreage limitation and the original draft of contract so provided. However, representatives of the district entertained the fear that should a specific provision be inserted in the contract it would only be confusing and make the ratification by the landowners more difficult. In my view the same principle discussed in the Secretary's letter of February 24, based upon section 5 of the Reclamation Act, involves precisely that contained in section 46 of the act of May 25, 1926. The latter act merely ties up with and emphasizes what has always been the law in this respect.

The Secretary's letter was directed to the specific allegations in the complaint, which, so far as could be ascertained, had no direct

reference to the act of May 25, 1926. I assume, however, that regardless of the allegations in the complaint, Mr. Childers is apprehensive that argument may be submitted based upon the 1926 act. If this is done it seems to me the defense would necessarily be based upon the propositions, first, that the All-American Canal work constitutes a special project specifically authorized by the Boulder Canyon Project Act and that this stands upon a basis quite different from the ordinary conception of a project. The second proposition is that the acreage limitation in the reclamation law (including section 46 of the act of May 25, 1926) does not apply to the lands having a vested right. This is the ground upon which you and I with reluctance agreed to elimination of the specific provision regarding acreage limitation.

Section 14 of the Boulder Canyon Project Act provides that it shall be deemed a supplement to the reclamation law, which shall govern the construction, operation and maintenance of the works authorized except as otherwise provided in that act. The specific provisions of the Boulder Canyon Project Act are therefore controlling. Section 4(b) of this act provides that contracts for repayment of costs shall be made before any money is appropriated or construction started. Section 46 of the act of May 25, 1926, contains an entirely different provision in this respect. This section does not require a contract in advance of appropriation of money or construction but does require a contract of the character described before water is delivered. Section 46 is of general application and of course contemplates a case where a project is being constructed from which a new and complete water right will be sold and where a distribution system is constructed and water deliveries made through it. The special conditions in the Imperial and Coachella Valleys were known to Congress, and I believe some consideration was given to incorporating a special provision regarding the acreage limitation, though my memory in this respect is not entirely clear. Mr. Childers probably may recall what was contemplated and the reasons for no specific provision being inserted in this respect.

I hope the outcome of litigation will be satisfactory.

Sincerely yours,

PORTER W. DENT.

APPENDIX G

Testimony of William E. Warne, Assistant Commissioner of Reclamation, during Hearing on H. R. 3961 before a Subcommittee of the Senate Committee on Commerce, 78th Cong., 2d Sess. 599, 764 (1944):

December 31, 1964

Representative Elliott. Why was the limitation lifted in the southern part of California down in the Imperial Valley? Why was that 160-acre limitation lifted? That applied there, just the same as it did elsewhere.

Mr. Warne. No, there was never a 160-acre limitation applied to the Imperial Valley.

Representative Elliott. There weren't any uniform water districts until that was developed, were there?

Mr. Warne. The irrigation district has been in existence much longer than the Boulder Canyon project dam.

Representative Elliott. But I say, was it not a matter of fact that they would not sign that water district until that limitation was taken off?

Mr. Warne. The limitation was never applied under the law to the Imperial Valley, except as a matter of new lands—

* * * * *

Mr. Warne. Yesterday, I indicated the development of the lands of the Imperial irrigation district [sic] from the Reclamation Act. There is, however, a letter from Ray Lyman Wilbur, Secretary of the Interior, dated February 24, 1933, addressed to the Imperial Irrigation District, El Centro, California, which I would like to submit for the record on that matter.

APPENDIX H

APPLICABILITY OF THE EXCESS LAND PROVISIONS OF THE FEDERAL RECLAMATION LAW TO THE BOULDER CANYON PROJECT ACT

FEDERAL RECLAMATION LAW—BOULDER CANYON PROJECT ACT—APPLICABILITY OF THE EXCESS LAND PROVISIONS OF THE FEDERAL RECLAMATION LAW TO COACHELLA VALLEY COUNTY WATER DISTRICT LANDS.

Section 14 of the Boulder Canyon Project Act (45 Stat. 1065; 43 U.S.C. sec. 617m) declares that statute to be a supplement to the Federal reclamation law and thereby carries into operation as to lands irrigated under authority of the former act the excess land provisions contained in the latter legislation. The Coachella Valley County Water District lands are subject to the excess-land provisions of the Federal reclamation law.

M-33902

May 31, 1945

The Honorable the Secretary of the Interior.

My dear Mr. Secretary:

Reference is made to Commissioner Bashore's memorandum to you, dated December 15, 1944, in which he recommends that my opinion be obtained on the question of the general applicability of the excess

land provisions of the Federal reclamation law to the Coachella Valley County Water District lands in California.

This question arises in connection with a proposed contract between the United States and the Coachella Valley County Water District to provide for the construction of a new distribution system to furnish irrigation water, and to cover repayment of the increased costs of the All-American Canal, and appurtenances. Previously, the construction of the All-American Canal, for the purpose, *inter alia*, of supplying irrigable water to the Coachella Valley, was undertaken pursuant to a contract entered between the United States and the Coachella Valley County Water District on October 15, 1934, contract symbol Ilr-781. This contract was made pursuant to the act of Congress of June 17, 1902 (32 Stat. 388), and acts amendatory and supplementary thereto, commonly known and referred to as the Federal reclamation law, and particularly pursuant to the act of December 21, 1928 (45 Stat. 1057, 43 U.S.C. sec. 617), designated as the Boulder Canyon Project Act. The question whether the general excess land provisions which are part of the Federal reclamation law, apply to the Coachella Valley Water District lands, depends on the construction and the interpretation of these statutes.

It is my opinion that the excess land provisions of the Federal reclamation law apply to the Coachella Valley County Water District lands and, accordingly, these provisions should be incorporated in the contracts presently under consideration.

The Federal reclamation law is contained in the Reclamation Act of June 17, 1902 (32 Stat. 388), which, together with acts amendatory and supplementary thereto, forms a complete legislative pattern in the field. The Supreme Court describes this type of legislation succinctly in *United States v. Barnes*, 222 U.S. 513, 520 (1912):¹

Much of our national legislation is embodied in codes, or systematic collections of general rules, each dealing in a comprehensive way with some general subject, such as the customs, internal revenue, public lands, Indians, and patents for inventions; and it is the settled rule of decision in this court that where there is subsequent legislation upon such a subject it carries with it an implication that *the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears.* * * * (Italics supplied.)

Congress has followed precisely this type of legislative policy in enacting the Federal reclamation law.

The excess land provisions of general applicability in this law are the following:

¹ This case held that certain procedures set out in section 3177 of the Revised Statutes, providing for the enforcement of the internal revenue laws, applied to the collection or enforcement of the specific tax imposed on oleomargarine by the act of August 2, 1886, c. 840, 24 Stat. 209.

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The Reclamation Act of June 17, 1902 (32 Stat. 388, 389, 43 U.S.C. sec. 431) ;

Section 46 of the Omnibus Adjustment Act of May 25, 1926 (44 Stat. 636, 649, 43 U.S.C. sec. 423(e)) ;

The Warren Act of February 21, 1911 (36 Stat. 925, 926, 43 U.S.C. secs. 523, 524) ;

The act of August 9, 1912 (37 Stat. 265, 266, 43 U.S.C. secs. 543, 544) ;

The Reclamation Extension Act of August 13, 1914 (38 Stat. 686, 689, 43 U.S.C. sec. 418).

Since, in the opinion of the Bureau of Reclamation, "the excess land provisions of section 46 of the Omnibus Adjustment Act seem to be applicable to contracts made with the Coachella District" (see copy of undated letter attached from the Acting Commissioner to the Regional Director, Boulder City, Nevada), these provisions will be used, for illustrative purposes only, of this type of statute:

No water shall be *delivered* upon the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district * * * organized under State law providing for payment by the district * * * of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States * * * Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; * * * (Italics supplied.)

The language used in the other statutes listed is similar. As will be considered presently, section 5 of the Reclamation Act employs the term "sold" in connection with water rights, in contrast to the term "delivered" in the Omnibus Adjustment Act.

Generally speaking, these excess land provisions represent a firmly established, time-honored, and sound public policy which seeks to achieve the twofold purpose of preventing speculation and of spreading the benefits of a reclamation project among the larger group of smaller landowners rather than confining those benefits to the relatively smaller group of large landowners. These excess land pro-

visions are of general applicability to all reclamation projects in the 17 States enumerated in section 1 of the Reclamation Act of 1902, as amended.

Whenever these general excess land provisions did not fit the special circumstances of a project, or were found not to be adequate enough to check speculation, special excess land provisions were enacted by Congress, applicable only to specific projects. Examples of this type of legislation are:

Interior Department Appropriation Act of May 10, 1926² (44 Stat. 453, 465);

Columbia Basin Antispeculation Act of May 27, 1937³ (50 Stat. 208), as amended by the

Columbia Basin Project Act of March 10, 1943⁴ (47 Stat. 14, 16 U.S.C.A. App., sec. 835).

Furthermore, Congress has waived the excess land provisions of the Federal reclamation law, with regard to two projects, in view of the peculiar circumstances involved which threatened to make these projects economically unsound:

Act of June 16, 1938 (52 Stat. 764, 43 U.S.C. sec. 386), with respect to the Colorado-Big Thompson project:

Act of November 29, 1940 (54 Stat. 1219), with respect to the Washoe County Water Conservation District, Truckee storage project, and the Pershing County Water Conservation District, both in Nevada.

In the act of June 16, 1938, *supra*, the language reads:

The excess land provisions of the Federal reclamation laws shall not be applicable to lands which on June 16, 1938, had an irrigation water supply from sources other than a Federal reclamation project and which will receive a supplemental supply from the Colorado-Big Thompson project.

The exclusion is equally positive in the act of November 29, 1940, *supra*.⁵

The existence of the two foregoing types of statutes is of tremendous importance in the instant situation and has a direct bearing on the problem before me. Congress in enacting them has shown clearly that the excess land provisions are the heart of the reclamation law.

² This act contains the 160-acre limitation but provides the manner, peculiar to the statute, in which excess lands may be conveyed to the United States.

³ This statute contains the following proviso: "That every such contract with any district shall further require that all irrigable land held in private ownership by any one owner in excess of forty irrigable acres * * * shall be designated as excess land and as such shall not be entitled to received water from said project." (Italics supplied.)

⁴ The limitation here is to farm units containing not less than 10 nor more than 160 acres.

⁵ "That the excess land provisions of the Federal reclamation laws shall not be applicable to land in the Washoe County Water Conservation District, Nevada, irrigated from the Boca Reservoir, Truckee River storage project, Nevada, nor to the Pershing County Water Conservation District, Nevada, irrigated from the Humboldt River Reservoir, and the Secretary of the Interior is authorized to enter into a contract with said districts, amending, in accordance with this Act, the contract of December 18, 1936, between the United States and the Washoe County Water Conservation District, and the contract of October 1, 1934, between the United States and the Pershing County Water Conservation District."

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Where such provisions are not sufficiently drastic, Congress has enacted a special excess land law designed to meet the particular situation, as in the Columbia Basin Antispeculation Act. But where reasons of policy militate against the application of the excess land provisions, Congress provides express exemption, as in the Colorado-Big Thompson project.

When the pertinent parts of the Boulder Canyon Project Act are analyzed, it becomes apparent that Congress incorporated therein neither special excess land provisions nor exemption from the excess land provisions generally.⁶ Instead, it showed clearly that it intended these provisions to be applicable to irrigable lands within the project. Section 14 reads:

This Act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided.

Section 12, which is definitive, reads in part:

* * * "Reclamation law" as used in this Act shall be understood to mean that certain Act of the Congress of the United States approved June 17, 1902, entitled "An Act appropriating the receipts from the sale and disposal of public land in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," and the Acts amendatory thereof and supplemental thereto. * * *

These sections will now be analyzed in the light of the general structure of the Boulder Canyon Act, its relationship to the reclamation law, its legislative history, and the few court decisions which have endeavored to interpret it.

When Congress in section 14 made the Boulder Canyon Act "a supplement to the reclamation law," it incorporated into the former statute the 160-acre limitation of the act of June 17, 1902. Webster defines the word "supplement" as "that which completes, or makes addition to, something already organized, arranged, or set apart." (Webster's New International Dictionary, First Edition, 2083.) Thus, the word "supplement," as used in the Boulder Canyon Act, means an addition to legislative enactments already existing.

With the exception of one unpublished decision by an inferior State court in California—which will be analyzed in detail subsequently—

⁶ A 160-acre limitation on lands for *homesteads* within the project is expressly stated in section 9 of the Boulder Canyon Act, as follows: "That all lands of the United States found by the Secretary of the Interior to be practicable of irrigation and reclamation by the irrigation works authorized herein shall be withdrawn from public entry. Thereafter, at the direction of the Secretary of the Interior, such lands shall be opened for entry, in tracts varying in size but not exceeding one hundred and sixty acres, as may be determined by the Secretary of the Interior, in accordance with the provisions of the reclamation law * * *"

the only case found in which the relationship between the Boulder Canyon Act and the reclamation law was considered is *Six Companies, Inc. v. DeVinney*, 2 F. Supp. 693 (D.C. Nev. 1933).

The legal problem in this case may be stated simply. The Six Companies, Incorporated, sought to enjoin a county assessor in Nevada from collecting State taxes on its personal property and from demanding the payment of poll taxes from its employees. The plaintiff's principal contention for avoiding tax liability was that all of its property and the homes of its employees were inside the Boulder Canyon Project Federal *Reservation*, to which territory the State of Nevada was alleged to have ceded jurisdiction.

In dismissing the bill, the Federal District Court for Nevada observed, in part:

The statutes referred to are the Reclamation Law and the Boulder Canyon Project Act. The latter act, as before pointed out, is supplementary to the Reclamation Law, except as otherwise therein provided.

* * * * *

The Boulder Canyon Project Act clearly discloses that the dam and incidental works therein referred to are of a permanent character, and specifically provides that "the title to said dam, reservoir, plant and incidental works shall forever remain in the United States." * * * There is no specific provision in the Boulder Canyon Project Act authorizing the Secretary of the Interior to establish any reservation, and if such authority may be inferred it would be limited to the area covered by the expression last above quoted, including any additional area necessary for administrative purposes.

While, "except as otherwise herein provided," the Project Act is deemed a supplement to the Reclamation Law, a reference to the latter law * * * discloses nothing which the national government might be said to intend the retention of control beyond the consummation of the purposes of the law—the reclamation by means of irrigation of portions of the arid domain. This law comprehends the acquisition by citizens of the United States of the land and water rights. The law generally comprehends that its purposes will be carried out under national direction, but, subject thereto, always without relinquishment of state jurisdiction. * * *

Only in the Reclamation Law is there any provision for the establishment of town sites within reclamation projects or under the authority of the Bureau of Reclamation. Sections 561-570 (43 USCA). These provisions of the law clearly indicate the intention of Congress that the towns so established will be and remain subject to local state jurisdiction, and lots therein acquired by individual residents, and parks, playgrounds, community centers, and school grounds acquired by the public. (Italics supplied.)

In a word, then, the court, in order to find the answer to this question of tax liability, was required to revert to the reclamation law, of which the Boulder Canyon Act is a supplement. The answer clearly was not in the Boulder Canyon Act proper. Therefore, is it not logical to conclude that, if the provisions for the establishment of town sites carried over from the reclamation law to the Boulder Canyon Project

December 31, 1964

Act, the excess-land limitation of 160 acres—one of the most basic provisions of the reclamation law⁷—carried over in like fashion?

While the following State court decision concerns the original Homestead Act and the Enlarged Homestead Act rather than the reclamation law and the Boulder Canyon Project Act, it is sufficiently in point to merit discussion:

First State Bank of Shelby v. Bottineau County Bank, 56 Mont. 363, 185 Pac. 162 (1919).

In that case, one Charles R. Wilbur, on July 25, 1913, made final proof upon 320 acres of land which he had entered under the Enlarged Homestead Act of February 19, 1909 (35 Stat. 639). On July 30 of the same year, the Bottineau County Bank recovered judgment against Wilbur. In January 1914, Wilbur received his patent and on April 15, 1914, he conveyed the land by warranty deed to the First State Bank of Shelby, Montana. In November 1914, the Bottineau Bank attempted to levy execution on the land in satisfaction of its judgment, whereupon the First State Bank sought to restrain the sheriff from making the levy.

The question was whether the provisions of the original Homestead Act of May 20, 1862 (12 Stat. 392), [containing a 160-acre limitation], exempting the land from the past debts of the patentee, carried over to the Enlarged Homestead Act, *supra* [containing a 320-acre limitation]. The language in the original statute provided flatly that no land acquired thereunder could "in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." The "enlarged" statute was silent in the matter. If the provision of the original statute carried over to the latter act, the attempted levy of the Bottineau Bank was without legal sanction.

The Supreme Court of Montana so held. It reviewed in detail the history and policy of the two statutes. It then summarized the six sections of the Enlarged Homestead Act and concluded:

* * * It will be seen at once that the Enlarged Homestead Act does not in terms change any of the provisions of the original act. The determination of the principal question before us, therefore, depends upon the proper construction of the Enlarged Homestead Act with reference to the original act.

Was it intended as an independent statute, or was it meant to become a part of the original homestead act as it existed at the time this new measure went

⁷ How thoroughly the 160-acre limitation permeates both the homestead and the reclamation laws is emphasized in 34 Stat. 116, 43 U.S.C. § 561, cited by the court, as follows: "The Secretary of the Interior may withdraw from public entry any lands needed for town-site purposes in connection with irrigation projects under the reclamation law, *not exceeding one hundred and sixty acres* in each case, and survey and subdivide the same into town lots * * *." (Italics supplied.)

into effect? Aside from any other consideration, the bare reading of the act of 1909 would seem to be sufficient to convince one that it could not have been intended as an independent act. * * *

* * * * *

If the Enlarged Homestead Act was intended as an amendment to the prior homestead laws, then the acts are to be construed as one—as originally in the amended form. The history of this act is fairly conclusive that it was never intended to be construed otherwise than as a part of the original homestead law as it was then in force. Without quoting from the committee reports or the debates in the Congress, we think it is apparent from them that it was the intention of the lawmakers by this act to supplement the existing statutes—to improve the homestead laws and encourage the settlement of the vast areas of public lands in the semiarid regions, by increasing the amount of land subject to entry * * *

A supplemental act is one designed to improve an existing statute, by adding something thereto without changing the original text * * *. Supplemental statutes include every species of amendatory legislation which goes to complete a legislative scheme * * *.

*Our conclusion is that the Enlarged Homestead Act is merely supplementary to the original homestead law, and is to be construed as a part of it. It follows that land acquired under it becomes subject to the provisions of section 2296 of the United States Revised Statutes * * * and that the land in controversy in this action could not in any event become liable to the satisfaction of any debt contracted by Wilbur prior to the date his patent was issued.* (Italics supplied.)

The answer to the question in the instant case is contained in the italic lines from the opinion of the Montana Supreme Court. If anything, our case is stronger. Section 14 of the Boulder Canyon Project Act makes that statute “a supplement to the reclamation law.” There was no such express statutory connection between the original Homestead Act and the Enlarged Homestead Act. Yet the court found such a connection, even in the absence of express language, and enforced a limitation contained in the original act against land acquired under the supplemental act.³

The Montana Supreme Court had a clear precedent for its decision. Three years earlier, Federal Judge Bourquin had so held in a bankruptcy case. *In re Auge*, 238 Fed. 621 (D.C. D. Mont. 1916). On that occasion the court observed:

The bankrupt's contention that all said land is exempt is based on section 2296, R.S. * * * which reads:

“No lands acquired under the provisions of this chapter shall in any event be-

³ There are many cases which discuss the meaning of the word “supplement” in statutory construction. The prevailing opinion clearly is that the term signifies something which adds to, or completes, or extends that which is already in existence, without changing or modifying the original. *McCleary v. Babcock*, 169 Ind. 228, 82 N.E. 453 (1907); *Lost Creek School Tp. 1, Vigo Co. v. York*, 215 Ind. 636, 21 N.E. 2d 58, 60 (1939). See also *Loomis v. Runge*, 66 Fed. 856, 859 (C.C.A. 5th, 1895); *Swanson v. State*, 132 Neb. 82, 271 N.W. 264, 268 (1937); *Edwards v. Stein*, 94 N.J. Eq. 251, 119, Atl. 504, 507 (1923); *Bradley & Currier Co. v. Loring*, 54 N.J.L. 227, 23 Atl. 685, 686 (1892); *Rahway Savings Institution v. City of Rahway*, 53 N.J.L. 48, 20 Atl. 756, 757 (1890).

IMPERIAL IRRIGATION DISTRICT LANDS

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come liable to the satisfaction of any debt contracted prior to the issuing of the patent therefore."

The chapter referred to is that of the federal original homestead law, providing for entries of 160 acres or less. Later homestead enactments * * * permit entries for as much as 320 acres—enlarged homesteads—of public lands of certain quality and subject to somewhat different conditions. *These latter are but additions to and amendments of the original law, and upon settled principles all form a whole, to be taken and read together as though the later enactments were part of the original law from the beginning, so far as the protection extended by section 2296 is concerned.* Said section provides protection; other sections define the area protected. Changes in the latter affect not the former. Hence enlarged homesteads are "lands acquired under the provisions of this chapter," within section 2296, and are entitled to its protection, even as lesser or ordinary homesteads are. (Italics supplied.)

Even in the absence of the specific provision of section 14 of the Boulder Canyon Project Act, the general structure of this statute reveals that it was not meant to exist independently but rather as a part of the legislative scheme embodied in the Federal reclamation law. For instance, section 1 contains the authorization for the Secretary of the Interior to construct the All-American Canal. The act specifically provides "the expenditures for said main canal and appurtenant structures to be reimbursable, as provided in the reclamation law * * *" In order to determine the extent and mode of reimbursement, the pertinent provisions of the Federal reclamation law must be consulted. Other reference to the Federal reclamation law are found in sections 4(b),⁹ section 5,¹⁰ and section 9¹¹ of the Boulder Canyon Project Act. "It cannot be said that an act so absolutely dependent upon prior acts is an independent statute." *First State Bank v. Botineau County Bank, supra*, at 164. Thus the intent of Congress, to

⁹ "Sec. 4(b) * * * Before any money is appropriated for the construction of said main canal and appurtenant structures to connect the Laguna Dam with the Imperial and Coachella Valleys in California, or any construction work is done upon said canal or contracted for, the Secretary of the Interior shall make provision for revenues, by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation, and maintenance of said main canal and appurtenant structures *in the manner provided in the reclamation law.*" (Italics supplied.)

¹⁰ "Sec. 5. That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe to contract for the storage of water in said reservoir and for the delivery thereof * * * upon charges that will provide revenue which, in addition to other revenue accruing *under the reclamation law* and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States * * *." (Italics supplied.)

¹¹ "Sec. 9. That all lands of the United States found by the Secretary of the Interior to be practicable of irrigation and reclamation by the irrigation works authorized herein shall be withdrawn from public entry. Thereafter, at the direction of the Secretary of the Interior, such lands shall be opened for entry, in tracts varying in size but not exceeding one hundred and sixty acres, as may be determined by the Secretary of the Interior, *in accordance with the provisions of the reclamation law* * * *." (Italics supplied.)

make the Boulder Canyon Project Act part of the legislative pattern of the Federal reclamation laws, is clearly manifest.

Furthermore, there is no language in the Boulder Canyon Project Act which expressly and directly repeals the excess-land provisions of the reclamation law. As laws are presumed to be enacted with deliberation and with a full knowledge of all existing statutes on the same subject, it is only reasonable to conclude that Congress, in passing the Boulder Canyon Project Act, did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two should prove irreconcilable. *United States v. Noce*, 268 U.S. 613 (1925); ¹² *United States v. Greathouse*, 166 U.S. 601, 605 (1897); ¹³ *Frost v. Wenie*, 157 U.S. 46 (1895); ¹⁴ *Henderson's Tobacco*, 78 U.S. 652 (11 Wall.) (1870).¹⁵ The rule has been well stated in *Red Rock v. Henry*, 106 U.S. 596 (1882),¹⁶ at page 601:

* * * when an affirmative statute contains no expression of a purpose to repeal a prior law, it does not repeal it unless the two acts are in irreconcilable conflict, or unless the later statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it, and the intention of the legislature to repeal must be clear and manifest.

Repeals by implication are not favored, and it will not be presumed that, by a subsequent enactment, the legislature intended to repeal former laws upon the general subject, and more especially in a case such as this where the existing reclamation law is referred to directly. See decisions cited in notes 11 through 15 and *State v. Bowker*, 63 Mont. 6,

¹² This case held that a provision in section 11 of the act of May 18, 1920 (41 Stat. 601), reading, "*That hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service, and Coast and Geodetic Survey shall be based on the total of all service in any or all of said services,*" did not repeal section 6 of the act of October 24, 1912 (37 Stat. 569, 594), providing "*That hereafter the service of a cadet who may hereafter be appointed to the United States Military Academy, or to the Naval Academy, shall not be counted in computing for any purpose the length of service of any officer of the Army.*"

¹³ The proviso in the act of March 3, 1887, 24 Stat. 505, known as the Tucker Act, * * * "*That no suit against the Government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made,*" did not repeal so much of section 1069 of the Revised Statutes as provides, "*that the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased;* * * *"

¹⁴ This decision held that Congress, by enacting the act of December 15, 1880 (21 Stat. 311), opening for settlement certain lands in Kansas within the abandoned Fort Dodge military reservation, "*in the absence of express words of repeal,*" did not impair the rights guaranteed to the Osage Indians by the treaty of 1865.

¹⁵ The doctrine of repeal by implication was repudiated. The case held that the act of July 20, 1868, imposing taxes on distilled spirits and tobacco, did not repeal the proviso to section 25 of the Internal Revenue Act of March 2, 1867, which limited to 20 days the time for commencing proceedings to enforce forfeitures.

¹⁶ The Minnesota statutes in question both concerned municipal financing.

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205 Pac. 961, 963 (1922);¹⁷ *Jobb v. Meagher County*, 20 Mont. 424, 51 Pac. 1034 (1898).¹⁸

Nothing in the legislative history of the Boulder Canyon Project Act indicates that it was the intention of Congress to abdicate the public policy embodied in the excess-land provisions of the reclamation law and thus open the door to the vicious real estate speculation which was all ready to take advantage of the Boulder Canyon project lands. Congress was fully aware of this danger, and it was commonly assumed by Congress that the Boulder Canyon Project Act was subject to the excess-land provisions.¹⁹

In the light of the foregoing authorities, it is my conclusion that the Boulder Canyon Project Act is supplementary to the reclamation law, except as otherwise therein provided, and, accordingly, the excess-land provisions are applicable to the Coachella Valley County Water District lands.

It now becomes necessary to examine and refute the principal arguments against the foregoing conclusion.

It has been contended, for example, that in view of the language of section 14 of the Boulder Canyon Project Act the reclamation law applies only to the "construction, operation, and management of the works." This contention must, by necessity, be based either on the doctrine of *ejusdem generis* or on the doctrine of *expressio unius est*

¹⁷ This case, which held that the procedure provided by a State prohibition statute, enacted in 1921, did not by implication supersede procedures established under a general statute, enacted in 1917, contains a comprehensive discussion of the subject. The Montana Supreme Court said: "Repeals by implication are not favored, and it will not be presumed that by a subsequent enactment the Legislature intended to repeal former laws upon the subject not mentioned * * * and more especially so in the case before us where the existing law appears to have been under consideration to the extent of direct reference thereto, both in the title and in the repealing clause." (Italics supplied.)

¹⁸ Two Montana statutes concerning the appointment of deputy sheriffs were involved. The court refused to countenance any idea of repeal by implication.

¹⁹ See, for example, the following discussion in the House of Representatives [69 Cong. Rec. 9626 (1928)].

"Mr. MORTON D. HULL. The language of the bill is not clear to me.

"Mr. DOUGLAS of Arizona. The bill authorizes the Secretary of the Interior to construct a canal to the Imperial and Coachella Valleys. The appropriation bill in specific terms is only for the all-American canal to the Imperial Valley. If the Coachella Valley, where there are public lands, and if the areas in the vicinity of the Imperial Valley are to be brought in under cultivation, then the Congress must appropriate another \$18,000,000.

"Mr. SWING. Mr. Chairman, if the gentleman will permit, I think perhaps the gentleman from Illinois [Mr. Morton D. Hull] is referring to the limitation on the area that one person can hold after the canal is built, requiring that any large holding must be broken up, and if it is not broken up, it must be turned over to the Secretary of the Interior, who may sell it at an appraised price, so that no one will hold over a maximum of 160 acres.

"Mr. DOUGLAS of Arizona. That is in the bill. I thank the gentleman. *In this connection I might state also that the Imperial Valley and southern California is deluged with advertisements now 'Buy land in Imperial Valley now; speculate on Boulder Dam.'*" (Italics supplied.)

exclusio alterius. These doctrines belong more properly in the field of contract construction than statutory construction. The courts have repeatedly held that these doctrines are not of universal application, but serve only as an aid in the ascertainment of the meaning of the law, and must yield whenever a contrary intention of the lawmaker is apparent. *Buringer v. Philippine Islands*, 277 U.S. 189, 206 (1928); *Helvering v. Stockholm Enskilda Bank*, 293 U.S. 84, 89 (1934). The contrary intent of Congress is apparent in section 14 of the Boulder Canyon Project Act.

The unreported decision of the Superior Court for Imperial County, California in *Hewes v. All Persons* (May 24, 1932), has been cited as precedent for the nonapplicability of the excess-land provisions. The Superior Court held that the contract between the United States and the Imperial Irrigation District, dated December 1, 1932, providing for the construction of the All-American Canal, and all proceedings leading to its execution, are valid in all particulars. The jurisdiction of the court was invoked pursuant to the following provision of the contract:

Article 31. The execution of this contract by the District shall be authorized by the qualified electors of the District at an election held for that purpose. Thereafter, without delay, the District shall prosecute to judgment proceedings in court for a judicial confirmation of the authorization and validity of this contract. The United States shall not be in any manner bound under the terms and condition of this contract unless and until a confirmatory final judgment in such proceedings shall have been rendered, including final decision, or pending appellate action if ground for appeal be laid. * * *

The court made the following finding No. 35:

That under said Contract between the United States and Imperial Irrigation District, dated the 1st day of December, 1932, the delivery of water will not be limited to 160 acres in a single ownership and that the lands of the defendant Charles Malan in excess of 160 acres will not be denied water because of the size of said ownership, and that water service to lands regardless of the size of ownership will not be in any manner affected by said contract, so far as the size of individual ownership is concerned.

The court amplified this finding in its decision as follows:

Use of Water not Limited by Reclamation Law.

Defendant Malan, the owner of 210 acres of land in Imperial Irrigation District, asserts that the contract is void because section 5 of the Reclamation Law provides that no right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres in any one landowner, thus preventing him from obtaining water for all of his land, that he will be required to pay water assessments upon all of his land but will be able to get water for only 160 acres, and that the contract takes from him, without compensation, his water right for all of his land in excess of 160 acres.

The water right of neither the defendant Malan nor of any other person in the Imperial Irrigation District may be taken by the district or by the government without compensation. Furthermore, section 5 of the Reclamation Law

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does not apply in these proceedings. The Boulder Canyon Project Act provides a complete scheme for the construction of the Boulder Dam, the All-American Canal, and the dam diverting water from the Colorado River into the canal. Section 1 of the Boulder Canyon Project Act provides that the expenditures for the main canal and appurtenant structures shall be "reimbursable, as provided in the Reclamation Law," and in section 4(b) it is required that before any money is appropriated for the construction of the main canal and appurtenant structures, the secretary shall make provision for revenues adequate in his judgment to secure payment of all expenses of construction, operation, and maintenance "in the manner provided in the Reclamation Law." Section 14 provides that the Boulder Canyon Project Act "shall be deemed a supplement to the Reclamation Law, which said Reclamation Law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided." The act does not adopt the Reclamation Law or any of its provisions, except as above stated, and the authority of the secretary with reference to the delivery of water must be found in the Boulder Canyon Project Act and not in the Reclamation Law. Section 5 of the Boulder Canyon Project Act authorizes the secretary to contract for the delivery of water "under such general regulations as he may prescribe" and provides that "contracts respecting water for irrigation and domestic uses shall be for permanent service." Article 30 of the contract reads as follows: "Except as provided by the Boulder Canyon Project Act, the Reclamation Law shall govern the construction, operation and maintenance of the works to be constructed hereunder." There is nothing in the statute or in the contract limiting the acreage to which water may be sold and delivered.

The reading of Article 31 of the contract shows that the jurisdiction of the court was invoked solely "for a judicial confirmation of the authorization and validity of the contract." Since the court was not called upon to determine the applicability of section 5²⁰ of the Reclamation Act to the contract it thus clearly exceeded its authority. Accordingly, its finding No. 35, and that part of the opinion referring to it, must be regarded as dictum. This dictum is narrowly confined to the question of the applicability of section 5 of the reclamation law. Even assuming for purposes of discussion that the California court might be right as to the nonapplicability of section 5, this decision completely disregards the whole legislative scheme of the Federal reclamation laws on the subject of excess-land laws, e.g., section 46 of the Omnibus Adjustment Act, *supra*; the Warren Act, *supra*.

Appeal was instituted by the Imperial Water District and by stipulation of the parties, the appeal was dismissed by the Supreme Court of California on February 26, 1934. The outcome of this action was

²⁰ This section provides: "No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made." (Italics supplied.)

of utmost importance to the United States because the construction of the All-American Canal was delayed because of a decision of the Comptroller General who held (A-32702, December 6, 1933) that no funds might be expended for construction until the contract had been found valid by the State court of last resort.

These circumstances furnish the background and explanation for a letter of former Secretary of the Interior, Hon. Ray Lyman Wilbur, dated February 24, 1933. In this letter the Secretary stated:

Early in the negotiations connected with the All-American Canal contract the question was raised regarding whether and to what extent the 160-acre limitation is applicable to lands to be irrigated from this canal. Upon careful consideration the view was reached that this limitation does not apply to lands now cultivated and having a present water right. These lands, having already a water right, are entitled to have such vested right recognized without regard to the acreage limitation mentioned. Congress evidently recognized that these lands had a vested right when the provision was inserted that no charge shall be made for the storage, use, or delivery of water to be furnished these areas.

A study of the letter reveals that it completely disregards all other excess-land provisions except section 5 of the Reclamation Act of 1902.²¹ This construction of the congressional intention is not borne out by a review of the proceedings of Congress. Senator Pittman introduced, on December 14, 1928, the following amendment:

That no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys.²²

The following discussion ensued:

Mr. PITTMAN. * * *

* * * * *

I will state that originally I entered a motion to strike out that whole proviso. However, as the representatives of Imperial Valley desired [sic.] to stay in, and are willing to limit its effects entirely to that valley, I defer to their wishes.

Mr. JOHNSON. I have no objection to the amendment that is suggested.

Mr. KING. Mr. President, may I inquire of the Senator from Nevada whether that is similar to the amendment which was offered yesterday? I have just entered the Chamber, and did not hear the entire statement of the Senator. The purpose, as I understand, of the amendment, is to relieve Imperial Valley from any charges whatever, except such as would be imposed under the reclamation act.

Mr. PITTMAN. That is the opinion of the representatives of Imperial Valley, and that is the reason why it is put in that form. They feel that in some way that paragraph is more in harmony with the reclamation act. There is some doubt in my mind as to that; but, as they are willing to limit its effect entirely to their own valley, it is not a matter of such great concern to me.

²¹ While this section, set out in footnote 20, *supra*, limits the sale of water rights to tracts of 160 acres or less, section 46 of the Omnibus Adjustment Act, set out previously in the text of this opinion, uses the term "delivered" instead of "sold."

²² 70 Cong. Rec. 575 (1928); the amendment was accepted and appears in exactly the same wording as the last proviso of § 1 of the Boulder Canyon Project Act.

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Mr. KING. Let me ask the Senator, in my own time, if he does not have the time, whether in his opinion the new lands which it is expected will be brought under cultivation in the Coachella or Imperial Valleys ought to be exempted from contribution to the construction of the dam?

Mr. PITTMAN. There is no charge in this bill whatever on the Imperial Valley land or the Coachella Valley land for the construction of the dam or power house.

Mr. KING. I know that, but inquire whether the Senator believes the users of water should exempt [sic]. Under the reclamation projects, as the Senator knows, those who make contracts for the purchase of land or the purchase of water are required to pay for both water and the construction of canals and dams, and the amount which they pay includes all of the expenses of the Government. Here we are asking the settlers to pay only for the canal, and exempting them from paying anything whatever toward the construction of the dam.

Mr. PITTMAN. I admit this is an exception to the practice under the reclamation act in that it relieves this land from the payment of any part of the cost of the dam. It simply limits it to the cost of the canal. In this particular case the Senate has allocated \$25,000,000 toward the cost of the dam. It is true that the \$25,000,000 must be paid back, but the payment may be postponed until the end of the period of amortization. I think that in view of the fact that this dam has to be built for flood-control purposes, and in view of such allocation, we should exempt those lands in Imperial Valley from the payment of any part of the cost of that dam.

Mr. KING. Then it is apparent that the residents of Imperial Valley will have the benefits of flood control, storage water, the certainty of getting an equated flow, and will be required to pay for nothing except the cost of the All-American canal.

Mr. PITTMAN. That is the fact; but I think the circumstances warrant it.

Mr. KING. Does the Senator think there should be no distinction between those who have vested rights, who have already appropriated water in the Imperial Valley, and those who have no vested rights, and have never appropriated any water?

Mr. PITTMAN. No; I do not think we can have a successful reclamation project if we attempt to draw that distinction, because undoubtedly even those with the vested rights will have to pay a part of this cost if the Government is to be repaid—

Although the language of the letter of Secretary Wilbur seems broad enough to include the Coachella Valley district lands, the letter was clearly intended only to apply to the Imperial Irrigation lands. It apparently assumes that all privately owned land in the District was under irrigation and has a vested water right. Nothing in the files indicates whether such is the factual situation, and there is strong indication that the Coachella Valley lands are to a very large degree as yet not irrigated.

Furthermore, an examination of the files reveals that the letter of the former Secretary was written at the request of counsel of the Imperial District who wanted a ruling on the application of the excess

land provisions "provided, that such ruling would be that the 160-acre limitation did not apply." Purposely, the letter of Secretary Wilbur never took the form of a formal decision. It was written solely for the purpose of giving partisan help to the Imperial Water District, as the delay of the final confirmation of the contract held up the construction of the All-American Canal. Besides, the time of the Hoover Administration was near its close. In less than ten days after the date of Secretary Wilbur's letter (February 24, 1933), President Roosevelt was inaugurated.

In summary, then, I reach the conclusion that in view of section 14 of the Boulder Canyon Project Act, which makes that act supplementary to the Federal reclamation law, the excess-land provisions contained therein are carried into operation with respect to the Coachella Valley water lands and should be incorporated in the contracts presently under consideration.

Respectfully,

FOWLER HARPER,
Solicitor.

Approved: May 31, 1945
HAROLD L. ICKES,
Secretary of the Interior.

APPENDIX I

Mr. H. C. HERMANN
Department Quartermaster Adjutant
Veterans of Foreign Wars
107 Veterans Building
San Francisco 2, California

April 27, 1948

MY DEAR MR. HERMANN:

Pursuant to advice in our letter of March 18, the questions which you asked in your letter of February 27 concerning the Imperial Irrigation District have been thoroughly considered in the Bureau of Reclamation.

As you have suggested in your letter, Secretary Wilbur on February 24, 1933, advised the Imperial Irrigation District to the effect that, in the factual situation presented there, in so far as described in that letter, the 160-acre limitation of the Federal Reclamation Law would not result in restrictions of the acreage of land in one ownership eligible to receive water from the project. As you have also observed, the Solicitor for the Department on May 31, 1945, considered the

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applicability of the acreage restrictions under the Boulder Canyon Project Act with reference to the Coachella Valley County Water District. In that opinion the Solicitor made it clear that, based upon the situation placed before him with respect to the Coachella Valley County Water District lands, the acreage limitations of the Federal Reclamation Law are applicable. You will understand, I think, that even though both of the irrigation districts referred to are served from the All-American Canal under the same statute, the Solicitor's opinion, approved by the Department, was only with respect to the Coachella case. Therefore, simply as a matter of technical ruling, the approved opinion did not itself affect the situation with respect to the Imperial case.

Concerning, however, the substantive questions which relate alike to both districts, we have concluded that inasmuch as the Secretary of the Interior then charged with the administration of law construed the acreage limitation as not being applicable to lands of the Imperial Irrigation District under the facts as he then understood them, and it being clear that the then owners and subsequent purchasers of irrigable lands in the Imperial Irrigation District were entitled to rely upon advice from the Secretary and thus establish an economy in the district consistently with that advice, they should not now be abruptly advised that the economy of the project is to be changed under a contrary ruling of the present officer charged with the administration of the law.

To the extent, therefore, that the actual fact situation with respect to lands and water rights may be identical in the two districts in question, and to the extent that the advice furnished in the Coachella case would otherwise be applicable in the Imperial case, we feel that we must allow that inconsistency, if such there be, to continue. I think that you will understand the position which the Department must take in this matter in fairness to those who have relied on its action, even though that action might now be subject to valid question.

If you have further questions in connection with these matters, please do not hesitate to advise us.

Sincerely yours,

J. A. KRUG,
Secretary of the Interior.

APPENDIX J

February 5, 1958

Hon. J. Lee Rankin
Solicitor General
Department of Justice
Washington 25, D.C.

Dear Mr. Rankin :

I have received your letter of January 24, and its enclosure, in connection with the case of *Arizona v. California, et al.*, No. 10 Original in the Supreme Court of the United States.

The question posed in the course of oral argument by the State of Arizona is whether the so-called 160-acre limitation of the Federal Reclamation Law is applicable to the lands of the Imperial Irrigation District. I am, of course, familiar with the views expressed by Secretary Wilbur in his letter of February 24, 1933, to the Imperial Irrigation District, and I am also familiar with the views expressed by former Solicitor Harper in his opinion M-33902, dated May 3, 1945. However, since assuming my duties as Solicitor of the Department last year, I have not had occasion to undertake a legal analysis of the respective views heretofore expressed by Secretary Wilbur and former Solicitor Harper. Whatever the conclusion might be, to my mind the time has long since passed when it is realistic and practicable to do so. My reasons for viewing the matter in this light will be briefly stated.

The water contract between the United States and the Imperial Irrigation District was executed December 1, 1932, some 25 years ago. The negotiations leading to the contract were lengthy and extensively in the public view. Except at the time of court confirmation, I am not aware of any challenge as to the legality of the contract during this entire period. Water has been delivered to the lands of Imperial District pursuant to the contract since the early 1940's. I am not aware that any administrative action has been proposed or taken either by the preceding administration or by this one to recognize or enforce application of the 160 acre limitation to the lands of the Imperial Irrigation District.

At the time of court confirmation of the Imperial water contract (*Hewes v. All Persons* (May 24, 1933), unreported, before the Superior Court for Imperial County, California), defendant Malan, the owner of 210 acres, attacked the validity of the contract on the ground that the 160 acre limitation would prevent water delivery to all of his land. The court found the contract valid in all respects and made the following finding No. 35.

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That under said Contract between the United States and Imperial Irrigation District, dated the 1st day of December, 1932, the delivery of water will not be limited to 160 acres in a single ownership and that the lands of the defendant Charles Malan in excess of 160 acres will not be denied water because of the size of said ownership, and that water service to lands regardless of the size of ownership will not be in any manner affected by said contract, so far as the size of individual ownership is concerned.

The United States was not a party to that confirmation proceeding. Article 31 of the Imperial water contract reads as follows:

CONTRACT TO BE AUTHORIZED BY ELECTION AND CONFIRMED
BY COURT

ARTICLE 31. The execution of this contract by the district shall be authorized by the qualified electors of the District at an election held for that purpose. Thereafter, without delay, the District shall prosecute to judgment proceedings in court for a judicial confirmation of the authorization and validity of this contract. The United States shall not be in any manner bound under the terms and conditions of this contract unless and until a confirmatory final judgment in such proceedings shall have been rendered, including final decision, or pending appellate action if ground for appeal be laid. The District shall without delay and at its own cost and expense furnish the United States for its files, copies of all proceedings relating to the election upon this contract and the confirmation proceedings in connection therewith, which said copies shall be properly certified by the clerk of the Court in which confirmatory judgment is obtained.

The United States acting through the then Secretary of the Interior accepted the contract as having been confirmed and acting thereon proceeded to initiate construction of the All-American Canal and engage upon a variety of transactions in reliance upon the validity of the contract. There must surely arise a point of time, again I believe long since past, when the contract in keeping with the terms of Article 31 became binding upon the United States and the District. To treat otherwise at this date could have far-reaching effect.

By letter of April 27, 1948, the Secretary of the Interior, responding to an inquiry made by the Veterans of Foreign Wars concerning the apparent inconsistency of the application of the 160 acre limitation to the lands of the Imperial Valley and to the lands of the Coachella Valley, stated in part:

* * * * *

Concerning, however, the substantive questions which relate alike to both Districts, we have concluded that inasmuch as the Secretary of the Interior then charged with the administration of law construed the acreage limitation as not being applicable to lands of the Imperial Irrigation District under the facts as he then understood them, and it being clear that the then owners and subsequent purchasers of irrigable lands in the Imperial Irrigation District

were entitled to rely upon advice from the Secretary and thus establish an economy in the district consistently with that advice, they should not now be abruptly advised that the economy of the project is to be changed under a contrary ruling of the present officer charged with the administration of the law.

To the extent, therefore, that the actual fact situation with respect to lands and water rights may be identical in the two districts in question, and to the extent that the advice furnished in the Coachella case would otherwise be applicable in the Imperial case, we feel that we must allow that inconsistency, if such there be, to continue. I think that you will understand the position which the Department must take in this matter in fairness to those who have relied on its action, even though that action might now be subject to valid question.

Further, it may be significant to note that the 1932 Imperial water contract was amended in 1952 after extensive negotiation to accommodate the Imperial Dam and All-American Canal operations to the Mexican Water Treaty of 1944. The amendatory contract of 1952 in no way seeks to revive or treat with the application of the 160 acre limitation.

Quite apart from the timeliness of now probing anew the application of the 160 acre limitation, I believe there are other pertinent aspects of the matter which warrant careful consideration. I have in mind particularly the relevance of the 160-acre limitation to the primary issue of determining as between Arizona and California their respective entitlements to water, the position of the Government regarding the validity of its water contracts and perhaps the standing of Arizona to inject the question of the application of the 160 acre limitation. I shall discuss these matters briefly in the order mentioned.

Under section 4 of the Boulder Canyon Project Act and the California Self-Limitation Act, California is entitled to the beneficial use of 4,400,000 acre-feet of III(a) water, plus one-half the surplus. This has always been the view of this Department; see 54 I.D. 593 (1934). What lands that water is delivered to is a matter first, of internal California law and second, and of more importance, of contracts between the California interests and the United States. The failure of the parties, if it be a failure, to include all necessary provisions in the Imperial contract cannot operate to enlarge the Arizona entitlement. She must stand on the strength of her own title and not the weakness of her opponent's title. Accordingly, we believe the 160-acre limitation issue is not one relevant to the rights of the states under the law of the river.

In its Petition of Intervention (Paragraph XXXI, pages 27 and 28) the United States asserts that its water contracts are valid and binding and denies "each and every allegation of the parties to the cause in their respective pleadings with reference to these treaties, conventions, compacts, documents, laws and contracts which in any way contravenes, contests, or challenges the validity of them or any

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provision or provisions of them; * * *." As previously indicated, I believe we cannot take a different view at this time.

The water delivery contract between the United States and the State of Arizona, dated February 9, 1944, clearly recognizes the right of the United States to contract with the agencies of the State of California for the storage and delivery of water from Lake Mead. Article 7(h) of that contract reads:

(h) Arizona recognizes the right of the United States and agencies of the State of California to contract for storage and delivery of water from Lake Mead for beneficial consumptive use in California, provided that the aggregate of all such deliveries and uses in California from the Colorado River shall not exceed the limitation of such uses in that State required by the provisions of the Boulder Canyon Project Act and agreed to by the State of California by an Act of its Legislature (Chapter 16, Statutes of California of 1929) upon which limitation the State of Arizona expressly relies.

Since the Imperial water contract was nearly 12 years old and well-known to the State of Arizona at the time the Arizona water contract was executed, it would appear reasonable to conclude that the above-quoted language was, at least so far as Arizona is concerned, a recognition of the right of a Secretary to have executed the Imperial water contract of December 1, 1932.

In keeping with your request I am attaching a copy of the document requested entitled "Land Ownership Survey on Federal Reclamation Projects." There is also attached for your information a copy of Secretary Krug's letter of April 27, 1948, from which I have heretofore quoted. We shall be glad to discuss the subject of your inquiry if that seems desirable.

Sincerely yours,

ELMER F. BENNETT,
Solicitor.

APPENDIX K

IN THE SUPREME COURT OF THE UNITED STATES

NO. 10 ORIGINAL

October Term 1957

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, ET AL.,
DEFENDANTS,UNITED STATES OF AMERICA and STATE OF NEVADA, INTERVENERS,
STATE OF UTAH and STATE OF NEW MEXICO, IMPLEADED DEFENDANTS.

Before the Honorable Simon H. Rifkind, Special Master

MEMORANDUM IN BEHALF OF THE UNITED STATES
WITH RESPECT TO RELEVANCE OF NON-COMPLIANCE
WITH ACREAGE LIMITATIONS OF RECLAMATION LAW

for Imperial County, California, on July 1, 1933,³ found and concluded that, without distinguishing between privately owned and public lands which might be opened for entry, there is no limit on the quantity of lands in single ownership which might be served with irrigation water from the All-American Canal; and that by opinion No. M-33902 dated May 31, 1945⁴ the Solicitor for the Department of the Interior, with Secretarial approval, repudiated the conclusion reached in the Wilbur letter of 1933 and concluded that the acreage limitation provisions of the reclamation law were fully applicable to lands under the All-American Canal within the Coachella Valley County Water District.

But, we submit, the Special Master's disposition of the Arizona request and of the California objections thereto neither requires nor justifies a resolution of the question whether the acreage limitation provisions of the reclamation law apply to lands in the Imperial Irrigation District or the question whether the decree in *Hewes, et al. v. All Persons, et al.* precludes further consideration of that question. For even though an affirmative answer to the first of those questions and a negative answer to the second be assumed, the California objec-

³ California Exhibit No. 207.

⁴ Arizona Exhibit 249 for identification.

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tions to the Arizona request should nevertheless be sustained.⁵ A demonstration of the reasons why this is believed to be so is the principal burden of this memorandum.

⁵ It is not the purpose of the United States to avoid taking a position on these questions, but simply to avoid unnecessary argument. Briefly, it may be stated that for the reasons stated in Solicitor Harper's opinion, as well as for others, no conclusion seems permissible other than that the limitations of the reclamation law upon the quantity of privately owned lands which might receive irrigation water under the All-American Canal are applicable in the Imperial Valley just as are the similar limitations relating to public lands opened for entry within the District. (See, e.g., section 9 of the Boulder Canyon Project Act, 43 U.S.C. § 617h.) Clearly, the All-American Canal is a reclamation project (36 Op. Atty. Gen. 121, 130, 138, Dec. 26, 1929), subject to all the provisions of "Reclamation law," as defined in section 12 of the Boulder Canyon Project Act (43 U.S.C. § 617k), except as such provisions are by the Project Act made inapplicable. Section 1 of the Project Act (43 U.S.C. § 617) reads "the expenditures for said main canal and appurtenant structures to be reimbursable, as provided in the reclamation law." Section 14 (43 U.S.C. § 617m) is even more explicit. "This act shall be deemed a supplement to the reclamation laws, which said reclamation laws shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided." (Italics supplied.) It is at best no more logical to argue, as the California defendants have, that the omission to include in the Project Act an express limitation with respect to lands in private ownership indicates a Congressional intent that no such limitation should apply than it is to argue that the express provision was deleted because it was thought section 14 was entirely adequate to accomplish the purpose. The express limitation with respect to public lands contained in section 9 is not inconsistent with such an assumption. For the express provision of section 9 with respect to the opening of public lands for entry made necessary the accompanying limitation on the size of the tracts. We think the reasoning whereby the conclusion of non-applicability was reached in Appendix A to the "King Report" (quoted at page 47 *et seq.* of the Brief of Imperial Irrigation District on this question) is utterly devoid of logic and of any other basis for support. Other references to the controlling effect of the provisions of reclamation law are to be found throughout the Project Act. In addition to Secretary Wilbur's failure to consider all of the possibly applicable provisions of the various supplements to the Reclamation Act of 1902, there are other inadequacies in his premises for the conclusion he stated. Among them are his assumption, without analysis, that "lands now cultivated" in the District had as against the United States vested water rights, and his assumption that those lands would receive through the works constructed by the Government only "the continued flowage of the water covered by the right * * *."

With respect to the Superior Court's findings and conclusions in *Hewes, et al. v. All Persons, et al.*, we shall limit our comments at this point (1) to the statement that the United States had not, and has not, consented to be sued in cases of that kind and that its officers could therefore not have submitted the United States to the jurisdiction of the Court even had they attempted to do so—which they did not, and (2) to the observation that the Superior Court's attempted determination of the applicability to lands in the District of the acreage limitation provisions went far beyond the direction of Congress "That no contract with an irrigation district under this act shall be binding on the United States until the proceedings on the part of the district for the authorization of the execution of the contract with the United States shall have been confirmed by decree of a court of competent jurisdiction * * *." (Act of May 15, 1922, section 1, 42 Stat. 541; 43 U.S.C. § 511. See also Act of May 25, 1926, § 46; 44 Stat. 649, 650; 43 U.S.C. § 423e.)

The question of the general applicability in California of the acreage limitation provisions of the reclamation law and the question whether the United States can be a party defendant to "validation" proceedings such as *Hewes, et al. v. All Persons, et al.*, are now pending before the Supreme Court of the United States in the case of *Ivanhoe Irrigation District v. All Persons, et al.*, 47 Cal. 2d 597, 306 P. 2d 824, 355 U.S. 803, and related cases. Although the United States did not appear in the State court proceedings in the case except as *amicus curiae* in support of the State's petition to the California Supreme Court for rehearing, it is planned that an *amicus curiae* brief will be filed with the United States Supreme Court. None of the briefs on that appeal has yet been filed. For this reason it is believed inappropriate, as well as unnecessary for the reasons stated in the text, to argue at length here the question adverted to in this footnote.

APPENDIX L

August 7, 1961

Honorable Stewart Udall
Secretary of the Interior
Washington 25, D.C.

Dear Mr. Secretary :

I have had some complaints from Southern California that the acreage limitation provisions of the Reclamation law have not been enforced in Bureau of Reclamation Projects in the Coachella and Imperial Valleys.

Would you kindly advise me if these areas are subject to acreage limitation provisions, and if so, the status of land ownership within them?

Sincerely yours,

CLINTON P. ANDERSON,
Chairman.

APPENDIX M

May 15, 1962

Hon. Clinton P. Anderson
Chairman, Committee on Interior and Insular Affairs
United States Senate, Washington, D.C.

Dear Mr. Chairman :

On August 7, 1961, you made inquiry as to whether lands in the Coachella and Imperial Valleys are subject to acreage limitation provisions of the Federal Reclamation laws and, if so, the status of land ownership within them. Unfortunately, your letter was misplaced.

The Coachella Valley County Water District is in compliance with the land limitation provisions of the Federal Reclamation laws. The Coachella distribution system contract of December 22, 1947, includes provisions implementing the acreage limitation provisions through recordable contracts as specified in section 46 of the Act of May 25, 1926. No acreage limitation provisions were included in the Coachella All-American Canal contract of October 15, 1934, whereby the Coachella County Water District contracted for capacity in the Imperial Dam and the All-American Canal and for the repayment of a propor-

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tionate share of the costs of those facilities. Omission of land limitation provisions in the 1934 contract was no doubt based upon a ruling by Secretary of the Interior Wilbur made in 1933 in the case of the Imperial Irrigation District. Further comment upon Secretary Wilbur's ruling is made hereafter in this letter.

In connection with negotiation of the Coachella distribution contract, the Solicitor of the Department made a thorough review of the possible applicability of land limitation provisions and in an opinion dated May 31, 1945 (copy enclosed) the Solicitor held that the land limitation provisions of the Federal Reclamation laws were applicable to lands in the Coachella County Water District. Accordingly, as above indicated, land limitation provisions were included in the distribution system contract.

Currently available records indicate that of the 923 ownerships in the Coachella District larger than five acres, which comprise an aggregate total of 74,718 irrigable acres, none contain excess lands. Hence, there is no indication of violation of the acreage limitation provisions of reclamation law in the Coachella service area.

By reason of Secretary Wilbur's ruling of 1933, records have not been maintained of excess ownerships in the Imperial Irrigation District. Consequently, we are unable to advise with respect to the extent of noncompliance with excess land limitations in the Imperial District, but we would assume from general knowledge that there are considerable large holdings and that they have been increasing.

With respect to the applicability of excess land limitations to lands in the Imperial Irrigation District, as noted above, Secretary Wilbur in 1933, shortly before he left office, ruled that lands within the District did not come under the statutory restrictions. The rationale of the Solicitor's opinion of May 31, 1945, however, challenges the validity of Secretary Wilbur's view. In a letter of April 27, 1948 (copy enclosed) the then Secretary of the Interior advised the Veterans of Foreign Wars that the Department did not plan to take any action to reverse the Wilbur ruling as to the Imperial Irrigation District. This position taken by the Department in 1948 was called to the attention of the Department of Justice by the enclosed copy of a letter from the then Solicitor of this Department to the Solicitor General of the United States, dated February 5, 1958. However, the Department of Justice in pleadings filed in the case of *Arizona v. California* has expressed disagreement with Secretary Wilbur's ruling. We enclose in this connection a copy of a memorandum filed by the Solicitor General

in *Arizona v. California*. You will find of particular interest footnote 5 commencing on page 2 and footnote 45 on page 30a in the Solicitor General's opinion.

The continuing press of other matters has caused us to defer a current study of the Imperial situation. We hope, however, to go into it in the future, as circumstances of available staff and time permit.

Sincerely yours,

STEWART L. UDALL,
Secretary of the Interior.

* * * * *

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- 1. The general rules of law stated in the Uniform Sales Act and in the sales provisions of the Uniform Commercial Code form part of the general Federal common law applicable to Government contracts, if not made inappropriate by such controlling factors as Federal statutory law. One such rule is the principle of cumulation of warranties.----- 384

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- 1. Under a contract for the construction of a transmission line containing the "Permits and Responsibility for Work, etc.," Clause of Standard Form 23A (March 1953), as implemented by a provision that "final acceptance is to be in writing at the time all work is completed to the satisfaction of the contracting officer," the contractor is responsible for repairing at his own expense a tower erected under the contract that before final acceptance of the line is damaged, without the fault of either party, by logs and debris thrown against the tower by forces of nature.----- 6
- 2. The allegation that the logs and debris may have belonged to the Government is not sufficient to shift liability for the tower repairs to it. Final acceptance may be deferred until after the contracting officer has had a reasonable opportunity to satisfy himself that the work fully conforms to all requirements of the contract. Assumption by the Government of responsibility for removal of the logs and debris is not an assumption of liability for repairs to the tower which are made by the contractor with knowledge that the Government disclaims responsibility for such repairs.----- 6
- 3. A claim by a construction contractor for additional compensation on account of the withdrawal of bids by prospective subcontractors because of apprehension that the contract might be administered too strictly by the Government is, in the absence of circumstances

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ACTS OF GOVERNMENT—Continued

amounting to either an express change or a constructive change in the drawings or specifications, a claim for breach of contract that neither the contracting officer nor the Board of Contract Appeals has jurisdiction to decide.....

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ADDITIONAL COMPENSATION

1. Under a contract for the construction of a transmission line containing the "Permits and Responsibility for Work, etc.," Clause of Standard Form 23A (March 1953), as implemented by a provision that "final acceptance is to be in writing at the time all work is completed to the satisfaction of the contracting officer," the contractor is responsible for repairing at his own expense a tower erected under the contract that before final acceptance of the line is damaged, without the fault of either party, by logs and debris thrown against the tower by forces of nature.....
2. The allegation that the logs and debris may have belonged to the Government is not sufficient to shift liability for the tower repairs to it. Final acceptance may be deferred until after the contracting officer has had a reasonable opportunity to satisfy himself that the work fully conforms to all requirements of the contract. Assumption by the Government of responsibility for removal of the logs and debris is not an assumption of liability for repairs to the tower which are made by the contractor with knowledge that the Government disclaims responsibility for such repairs.....
3. A contractor is not entitled to additional compensation on the theory of a changed condition, where the only basis for the claim is the absence of contract warnings as to possible rock and permafrost, if the contractor had the same opportunity before bidding, as did the Government, to ascertain that rock and permafrost were being encountered at nearby excavation work, and should have known that they probably would be found at the job site also.....
4. Where the contractor's chosen method of performance of a contract for construction of a bridge was the building of a dike across the river for accommodating contractor's equipment, and the impounding of the river during high water due to insufficient openings in the dike caused erosion damage to the river bank, the work of restoring the bank at the Government's direction pursuant to contract provisions requiring the contractor at his own expense to restore landscape features damaged by the contractor's operations, is not extra work. No additional compensation is due the contractor.....
5. Under the "Changed Conditions" clause of a contract for the stringing of electric conductor on towers to be provided by the Government, where the contractor knows when bidding the job that some of the towers have not yet been completed, and where the Government fails to have these towers completed by the time when they are reasonably needed for stringing, an equitable adjustment is not allowable for the extra expense incurred by the contractor in moving crews back to these towers after they have become available for stringing, since such events do not amount to

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ADDITIONAL COMPENSATION—Continued

- a changed condition, and since, if they did, such expense would be in the nature of consequential damages flowing from delay----- 106
6. A contractor is not entitled to additional compensation where the extra work on which the claim is founded was performed outside of the paylines established by the contracting officer pursuant to his contract authority. Under such circumstances the work was unnecessary and the contractor was a mere "volunteer" with respect thereto----- 132

APPEALS

1. The Board of Contract Appeals has authority to apply equitable principles in determining matters over which it has jurisdiction. It has authority to direct contract administration action by the contracting officer if the contractor has a substantive right to such action, and if such action pertains to a matter over which the Board has jurisdiction. Its powers and those of the Office of the Survey and Review complement each other----- 61
2. The Board of Contract Appeals does not have jurisdiction to entertain an appeal with respect to a claim which the contracting officer has neither determined, nor refused to determine, nor delayed unreasonably in determining----- 61
3. The timeliness of an appeal is governed by the period of time elapsed between the date when the findings of fact and decision were received by the contractor and the date when the notice of appeal was mailed or otherwise furnished to the contracting officer. The day on which the findings of fact and decision were received by the contractor is not included in the computation----- 68
4. An appeal will be remanded to the contracting officer for issuance of new or supplemental findings of fact and decision where it appears that the contractor was in receivership prior to the filing of the notice of appeal and no information is contained in the appeal file concerning the present status of the receivership or as to the identity of the legal owners and representatives of the contractor----- 68
5. Questions of law may be determined by the Board of Contract Appeals under a standard-form Government contract, as well as questions of fact----- 152
6. A provision in a standard-form Government contract which specifically grants the contracting officer authority to decide particular matters does not exempt his decisions upon such matters from review under the "Disputes" clause of the contract even though the provision is written in terms that call for the exercise of judgment and discretion by him, unless the provision affirmatively discloses an intent that decisions by the contracting officer with respect to such matters shall be final----- 152
7. Decisions by a contracting officer not to waive the defense that a claim is untimely are subject to review under a standard-form "Disputes" clause, irrespective of whether the waiver authority of the contracting officer is express, as under the "Changes" clause, or is implied, as under some provisions of "Protests" clauses----- 152

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APPEALS—Continued

- 8. Decisions upon questions of law made by the Comptroller General are without binding effect in D "Disputes" clause proceedings that have as their subject claims which, although they involve the same problems, are not the same claims, as were the subject of his rulings. In such situations the decision of the Comptroller General constitute significant and valuable precedents, but should not be followed if outweighed by other precedents..... 152
- 9. Motions for reconsideration of a decision of the Board of Contract Appeals will be denied if they are based on factual contentions that are contrary to the preponderance of the evidence, determined by evaluating the testimony and exhibits as a whole in accordance with accepted criteria of evaluation, or if they are based on legal contentions that are inapplicable to the factual situation revealed by the record..... 253
- 10. Final determinations concerning the disclosure to contractors of records that the custodian of the records is unwilling to produce are, as a matter of general practice, made by the Solicitor where the disclosure sought is not connected with any pending contract appeal, and by the Board of Contract Appeals where the records are sought in connection with a pending contract appeal..... 301
- 11. The question of whether particular documents, sought by a contractor for use in connection with a contract appeal, are within or without the scope of the Government's privilege against disclosure is a question that calls for the evaluation of such factors as: (1) the relevancy of the documents to the subject matter involved in the appeal; (2) the necessity of the documents for the proving of the appellant's case; (3) the seriousness of the danger to the public interests which disclosure of the documents would involve; (4) the presence in the documents of factual data, on the one hand, or of policy opinions, on the other; (5) the existence of confidential relationships which disclosure of the documents might unduly impair; and (6) the normal desirability of full disclosure of all facts in the possession of either party to the appeal..... 301
- 12. An appeal from findings of a contracting officer granting an extension of time which is taken solely on the ground that the findings state an erroneous reason for granting the extension will be dismissed where it appears that the challenged statement will have no relevancy or effect in the adjudication of any ungranted claim of the appellant..... 365

AUTHORITY TO MAKE

- 1. Section 14 of the Reclamation Project Act of 1939 (53 Stat. 1197, 43 U.S.C. 389) and section 5(b) of the Bonneville Project Act (50 Stat. 734, 16 U.S.C. 832d(d)) authorize the Bonneville Power Administrator to enter into exchange agreements, subject only to his determination that such agreements are in the interest of the United States and economical operation..... 315

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BREACH

1. A claim for additional compensation on account of delay by the Government in performing its own obligations under a contract is not a claim for relief under the contract that the contracting officer or a board of contract appeals would have authority to adjudicate by virtue of a standard-form "Disputes" clause, since it is a claim for breach of contract..... 106
2. The provisions of the Bonneville Project Act which authorize settlement of claims against the Bonneville Power Administration are applicable to claims for breach of contract involved in appeals taken to the Board of Contract Appeals from decisions of contracting officers of the Bonneville Power Administration..... 253
3. The inclusion of a Guarantee clause in a standard-form supply contract is not inconsistent with, and does not override, the provision in the Inspection clause which excepts latent defects from the conclusive effect of a final acceptance. Hence, the expiration of the guaranty period does not preclude the Government from exercising the remedies specified in the inspection clause with respect to latent defects discovered after such expiration..... 384
4. A claim by a construction contractor for additional compensation on account of the withdrawal of bids by prospective subcontractors because of delay by the Government in issuing notice to proceed to the prime contractor is, in the absence of a contract provision for equitable adjustment of the contract price on account of Government delay, a claim for breach of contract that neither the contracting officer nor the Board of Contract Appeals has jurisdiction to decide..... 487
5. A claim by a construction contractor for additional compensation on account of the withdrawal of bids by prospective subcontractors because of apprehension that the contract might be administered too strictly by the Government is, in the absence of circumstances amounting to either an express change or a constructive change in the drawings or specifications, a claim for breach of contract that neither the contracting officer nor the Board of Contract Appeals has jurisdiction to decide..... 488

CHANGED CONDITIONS

1. A contractor is not entitled to additional compensation on the theory of a changed condition, where the only basis for the claim is the absence of contract warnings as to possible rock and permafrost, if the contractor had the same opportunity before bidding, as did the Government, to ascertain that rock and permafrost were being encountered at nearby excavation work, and should have known that they probably would be found at the job site also..... 11
2. Under the "Changed Conditions" clause of a contract for the stringing of electrical conductor on towers to be provided by the Government, where the contractor knows when bidding the job that some of the towers have not yet been completed, and where the Government fails to have these towers completed by the time when they are reasonably needed for stringing, an equitable adjustment is not allowable for the extra expense incurred by the contractor

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- in moving crews back to these towers after they have become available for stringing, since such events do not amount to a changed condition, and since, if they did, such expense would be in the nature of consequential damages flowing from delay----- 106
3. Neither weather phenomena nor alterations in the physical features of the work site caused by weather phenomena, after initiation of the process of contract formation, constitute changed conditions within the meaning of Clause 4 of a standard-form construction contract. Where the subsurface moisture conditions found when driving test holes are correctly recorded in the contract, neither the underground water encountered during contract performance nor the earth caving induced thereby constitute changed conditions if they are caused by rainfall greater than that which prevailed when the test holes were driven, irrespective of whether the excess rainfall was a normal seasonal event or was an abnormal and unusual occurrence----- 420
4. Delay by the Government in performing its own obligations under a contract does not constitute a changed condition within the meaning of Clause 4 of a standard-form construction contract----- 421

CHANGES AND EXTRAS

1. Where the contractor's chosen method of performance of a contract for construction of a bridge was the building of a dike across the river for accommodating contractor's equipment, and the impounding of the river during high water due to insufficient openings in the dike caused erosion damage to the river bank, the work of restoring the bank at the Government's direction pursuant to contract provisions requiring the contractor at his own expense to restore landscape features damaged by the contractor's operations, is not extra work. No additional compensation is due the contractor----- 73
2. A contractor is not entitled to additional compensation where the extra work on which the claim is founded was performed outside of the paylines established by the contracting officer pursuant to his contract authority. Under such circumstances the work was unnecessary and the contractor was a mere "volunteer" with respect thereto----- 132
3. A contractor is entitled to an extension of time pursuant to the Clause 5 of Standard Form 23-A (April 1961 edition) where unforeseeable overrun of estimated quantities delayed the performance of the contract----- 132

COMPTROLLER GENERAL

1. Decisions upon questions of law made by the Comptroller General are without binding effect in "Disputes" clause proceedings that have as their subject claims which, although they involve the same problems, are not the same claims, as were the subject of his rulings. In such situations the decisions of the Comptroller General constitute significant and valuable precedents, but should not be followed if outweighed by other precedents----- 152

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COMPTROLLER GENERAL—Continued

2. The opinion of the Comptroller General (Dec. Comp. Gen. B-149016, B-149083, July 16, 1962) affirming the authority of the Administrator to execute exchange agreements pertaining to the output of the generation to be constructed in connection with the Hanford NPR is applicable as affirmation of such authority to execute Canadian Entitlement Exchange Agreements----- 315

CONTRACTING OFFICER

1. Where a claim for a time extension is presented to the contracting officer, it is the duty of the latter to make an impartial and objective determination of all questions that are directly relevant to the extent of the delays upon which such claim is founded----- 68
2. A contractor is not entitled to additional compensation where the extra work on which the claim is founded was performed outside of the paylines established by the contracting officer pursuant to his contract authority. Under such circumstances the work was unnecessary and the contractor was a mere "volunteer" with respect thereto----- 132
3. A provision in a standard-form Government contract which specifically grants the contracting officer authority to decide particular matters does not except his decisions upon such matters from review under the "Disputes" clause of the contract, even though the provision is written in terms that call for the exercise of judgment and discretion by him, unless the provision affirmatively discloses an intent that decisions by the contracting officer with respect to such matters shall be final----- 152
4. Decisions by a contracting officer not to waive the defense that a claim is untimely are subject to review under a standard-form "Disputes" clause, irrespective of whether the waiver authority of the contracting officer is express, as under the "Changes" clause, or is implied, as under some provisions of "Protests" clauses----- 152

CONTRACTOR

1. An appeal will not be dismissed for technical defects consisting of the inadvertent omission of the corporate name of the contractor in the notice of appeal and the substitution therefor of the name of the contractor's representative or officer----- 68

DAMAGES**Liquidated Damages**

1. Where damages for default by a bidder in a timber sale have been liquidated by the parties in the amount of a deposit submitted with the bid, such liquidated damages are for assessment as measuring the extent of the bidder's obligation in the matter without the necessity of inquiring into the question of the actual damages incurred----- 247

DELAYS OF CONTRACTOR

1. Where a claim for a time extension is presented to the contracting officer, it is the duty of the latter to make an impartial and objective determination of all questions that are directly relevant to the extent of the delays upon which such claim is founded----- 68

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DELAYS OF CONTRACTOR—Continued

- 2. Where official records of water levels and rates of flow in a river over a period of 9 years show that high water occurred on 195 occasions, the occurrence of such high water on several occasions during more than a year of contract performance is not an unforeseeable cause of delay within the meaning of Clause 5 of Standard Form 23A..... 73
- 3. A contractor is entitled to an extension of time pursuant to the Clause 5 of Standard Form 23-A (April 1961 edition) where unforeseeable overruns of estimated quantities delayed the performance of the contract..... 132
- 4. Where the date for completion of a contract falls on a Sunday or a legal holiday, the next succeeding working day is considered to be the required completion date, provided that the contract is completed on that date. If, however, the contract is not completed until a subsequent date, the Sunday or holiday on which the completion date falls, and succeeding Sundays and holidays, are included in the computation of the period of delay in completion, unless specifically excepted by the terms of the contract..... 216

DELAYS OF GOVERNMENT

- 1. Under the "Changed Conditions" clause of a contract for the stringing of electrical conductor on towers to be provided by the Government, where the contractor knows when bidding the job that some of the towers have not yet been completed, and where the Government fails to have these towers completed by the time when they are reasonably needed for stringing, an equitable adjustment is not allowable for the extra expense incurred by the contractor in moving crews back to these towers after they have become available for stringing, since such events do not amount to a changed condition, and since, if they did, such expense would be in the nature of consequential damages flowing from delay..... 106
- 2. A claim for additional compensation on account of delay by the Government in performing its own obligations under a contract is not a claim for relief under the contract that the contracting officer or a board of contract appeals would have authority to adjudicate by virtue of a standard-form "Disputes" clause, since it is a claim for breach of contract..... 106
- 3. Delay by the Government in performing its own obligations under a contract does not constitute a changed condition within the meaning of Clause 4 of a standard-form construction contract..... 421
- 4. A claim by a construction contractor for additional compensation on account of the withdrawal of bids by prospective subcontractors because of delay by the Government in issuing notice to proceed to the prime contractor is, in the absence of a contract provision for equitable adjustment of the contract price on account of Government delay, a claim for breach of contract that neither the contracting officer nor the Board of Contract Appeals has jurisdiction to decide..... 487

DRAWINGS

- 1. Where the contract specifications and drawings are not ambiguous, there is no need to construe the contract. The contractor's in-

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terpretation being unreasonable, the doctrine of *contra proferentem* does not apply-----

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INTERPRETATION

1. Under a contract for the construction of a transmission line containing the "Permits and Responsibility for Work, etc.," Clause of Standard Form 23A (March 1953), as implemented by a provision that "final acceptance is to be in writing at the time all work is completed to the satisfaction of the contracting officer," the contractor is responsible for repairing at his own expense a tower erected under the contract that before final acceptance of the line is damaged, without the fault of either party, by logs and debris thrown against the tower by forces of nature----- 6
2. The allegation that the logs and debris may have belonged to the Government is not sufficient to shift liability for the tower repairs to it. Final acceptance may be deferred until after the contracting officer has had a reasonable opportunity to satisfy himself that the work fully conforms to all requirements of the contract. Assumption by the Government of responsibility for removal of the logs and debris is not an assumption of liability for repairs to the tower which are made by the contractor with knowledge that the Government disclaims responsibility for such repairs---- 6
3. Where a duly issued modification of specifications incorporated in the contract eliminates provisions for adjustment of price for excavation in the event that rocks of a certain size and extent are encountered, and substitutes a provision that all excavation shall be paid for at the stipulated contract price without any adjustment, an interpretation by the contractor of such modification, as constituting a representation by the Government that no rock would be encountered in the excavation work, is so strained as to be unreasonable. The unreasonableness of the interpretation precludes application of the doctrine of *contra proferentem*----- 11
4. An appeal will not be dismissed where a waiver and exception provision in a payment voucher omitted mention of one of the contractor's claims, but did not provide for release of all claims not excepted, where it appears that the voucher was prepared prior to the original submission of the omitted claim and the conduct of both parties at all times until the hearing of the appeal indicated an intent to preserve the claim. The presentation of such a motion to dismiss during the hearing is untimely----- 73
5. Where the contract specifications and drawings are not ambiguous, there is no need to construe the contract. The contractor's interpretation being unreasonable, the doctrine of *contra proferentem* does not apply----- 132
6. A provision in a standard-form Government contract which specifically grants the contracting officer authority to decide particular matters does not exempt his decisions upon such matters from review under the "Disputes" clause of the contract, even though the provision is written in terms that call for the exercise of judgment and discretion by him, unless the provision affirmatively

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INTERPRETATION—Continued

- discloses an intent that decisions by the contracting officer with respect to such matters shall be final..... 152
- 7. The general rules of law stated in the Uniform Sales Act and in the sales provisions of the Uniform Commercial Code form part of the general Federal common law applicable to Government contracts, if not made inappropriate by such controlling factors as Federal statutory law. One such rule is the principle of cumulation of warranties..... 384
- 8. The inclusion of a Guarantee clause in a standard-form supply contract is not inconsistent with, and does not override, the provision in the Inspection clause which excepts latent defects from the conclusive effect of a final acceptance. Hence, the expiration of the guaranty period does not preclude the Government from exercising the remedies specified in the Inspection clause with respect to latent defects discovered after such expiration..... 384

PAYMENTS

- 1. An appeal will not be dismissed where a waiver and exception provision in a payment voucher omitted mention of one of the contractor's claims, but did not provide for release of all claims not excepted, where it appears that the voucher was prepared prior to the original submission of the omitted claim and the conduct of both parties at all times until the hearing of the appeal indicated an intent to preserve the claim. The presentation of such a motion to dismiss during the hearing is untimely..... 73

PERFORMANCE

- 1. Under a contract for the construction of a transmission line containing the "Permits and Responsibility for Work, etc.," Clause of Standard Form 23A (March 1953), as implemented by a provision that "final acceptance is to be in writing at the time all work is completed to the satisfaction of the contracting officer," the contractor is responsible for repairing at his own expense a tower erected under the contract that before final acceptance of the line is damaged, without the fault of either party, by logs and debris thrown against the tower by forces of nature..... 6
- 2. The allegation that the logs and debris may have belonged to the Government is not sufficient to shift liability for the tower repairs to it. Final acceptance may be deferred until after the contracting officer has had a reasonable opportunity to satisfy himself that the work fully conforms to all requirements of the contract. Assumption by the Government of responsibility for removal of the logs and debris is not an assumption of liability for repairs to the tower which are made by the contractor with knowledge that the Government disclaims responsibility for such repairs..... 6
- 3. Where the contractor's chosen method of performance of a contract for construction of a bridge was the building of a dike across the river for accommodating contractor's equipment, and the impounding of the river during high water due to insufficient openings in

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- the dike caused erosion damage to the river bank, the work of restoring the bank at the Government's direction pursuant to contract provisions requiring the contractor at his own expense to restore landscape features damaged by the contractor's operations, is not extra work. No additional compensation is due the contractor ----- 73
4. A contractor is entitled to an extension of time pursuant to the Clause 5 of Standard Form 23-A (April 1961 edition) where unforeseeable overruns of estimated quantities delayed the performance of the contract ----- 132
5. An interior void in the rotating insulator column of an oil circuit breaker which, at the time of final acceptance of the breaker, was not known to the Government and could not have been discovered by it through reasonable methods of pre-acceptance inspection is a latent defect within the meaning of the Inspection clause of a standard-form supply contract ----- 384
6. The Government as a party to a construction contract is entitled to the performance specified in the contract, irrespective of whether such performance conforms to customary construction standards in the area, and need not accept something else that, from a functional standpoint, may be "just as good" ----- 488

SPECIFICATION

1. Where a duly issued modification of specifications incorporated in the contract eliminates provisions for adjustment of price for excavation in the event that rocks of a certain size and extent are encountered, and substitutes a provision that all excavation shall be paid for at the stipulated contract price without any adjustment, an interpretation by the contractor of such modification, as constituting a representation by the Government that no rock would be encountered in the excavation work, is so strained as to be unreasonable. The unreasonableness of the interpretation precludes application of the doctrine of *contra proferentem* ----- 11
2. Where the contract specifications and drawings are not ambiguous, there is no need to construe the contract. The contractor's interpretation being unreasonable, the doctrine of *contra proferentem* does not apply ----- 132

SUBSTANTIAL EVIDENCE

1. Motions for reconsideration of a decision of the Board of Contract Appeals will be denied if they are based on factual contentions that are contrary to the preponderance of the evidence, determined by evaluating the testimony and exhibits as a whole in accordance with accepted criteria of evaluation, or if they are based on legal contentions that are inapplicable to the factual situation revealed by the record ----- 253

UNFORESEEABLE CAUSES

1. Where official records of water levels and rates of flow in a river over a period of 9 years show that high water occurred on 195 occasions, the occurrence of such high water on several occasions during

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UNFORESEEABLE CAUSES—Continued

more than a year of contract performance is not an unforeseeable cause of delay within the meaning of Clause 5 of Standard Form 23A -----

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2. Neither weather phenomena nor alterations in the physical features of the work site caused by weather phenomena, after initiation of the process of contract formation, constitute changed conditions within the meaning of Clause 4 of a standard-form construction contract. Where the subsurface moisture conditions found when driving test holes are correctly recorded in the contract, neither the underground water encountered during contract performance nor the earth caving induced thereby constitute changed conditions if they are caused by rainfall greater than that which prevailed when the test holes were driven, irrespective of whether the excess rainfall was a normal seasonal event or was an abnormal and unusual occurrence-----

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WAIVER AND ESTOPPEL

1. An appeal will not be dismissed where a waiver and exception provision in a payment voucher omitted mention of one of the contractor's claims, but did not provide for release of all claims not excepted, where it appears that the voucher was prepared prior to the original submission of the omitted claim and the conduct of both parties at all times until the hearing of the appeal indicated an intent to preserve the claim. The presentation of such a motion to dismiss during the hearing is untimely-----
2. Decisions by a contracting officer not to waive the defense that a claim is untimely are subject to review under a standard-form "Disputes" clause, irrespective of whether the waiver authority of the contracting officer is express, as under the "Changes" clause, or is implied, as under some provisions of "Protests" clauses-----

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CONVEYANCES

INTEREST CONVEYED

1. In construing the scope of an easement acquired for electric transmission line the interpretation placed upon the instrument by the parties for many years is entitled to great weight-----

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DESERT LAND ENTRY

CULTIVATION AND RECLAMATION

1. A desert land entryman on lands which are within and which benefit from a reclamation project must comply with the regular requirements of the desert land law as to cultivation and reclamation within the time fixed by that law and in addition must satisfy the requirements of the reclamation law-----
2. Equitable Adjudication is properly denied to a desert land entryman who has neither cultivated nor reclaimed his entry within the time allowed by law-----

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EXTENSION OF TIME

1. The rule announced in *John H. Haynes*, 40 L.D. 291 (1911), that a homestead entry of lands later proposed to be irrigated under the

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EXTENSION OF TIME—Continued

reclamation law is not bound by the time limitation of the original homestead law does not apply to entries made after June 25, 1910 -----

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2. The extension granted a desert land entry by section 5 of the act of June 27, 1906, as amended, applies only where the entryman has been hindered, delayed, or prevented from complying with the desert land law by reason of a reclamation withdrawal or irrigation project and the mere fact that an entry is within the exterior limits of such a withdrawal or project does not entitle an entry to the benefits of the statute where no hindrance is shown -----

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PROOF

1. Since there has been no prior determination of how long after water becomes available a desert land entryman has to comply with the requirements of the law for an entry suspended under the *Maggie L. Havens* case, a determination of the time limit in the first case considering the problem cannot be considered as a retroactive application of the time limit to him -----
2. The period available to a desert land entryman of an entry suspended under the *Maggie L. Havens* decision to comply with the requirements of the desert land law after notice of the availability of water is given him is two years or the time left in the entry at the time of suspension of the entry, whichever is longer -----
3. The dictum in the Department's decision of November 25, 1964, in the case of *Clifton O. Myll*, 71 I.D. 458 (A-29920), that, where the suspension of a desert land entry under the *Maggie L. Havens* decision terminates because water becomes available, the entryman is entitled to a period of two years in which to fulfill the requirements of the desert land law, if less than two years remained in the life of his entry at the time of the suspension, is withdrawn -----

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WATER RIGHT

1. Under departmental regulations (May 31, 1910, 38 L.D. 646, para. 78; currently, 43 CFR 230.110), a desert land entryman who owns a water right can rely on his own efforts to convey his water to his entry without assistance from a government project, thereby avoiding the requirements of the reclamation law, or he can participate in the project. In the latter case he must observe requirements of the reclamation law, including land limitations. ---

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EQUITABLE ADJUDICATION

1. Equitable adjudication is properly denied to a desert land entryman who has neither cultivated nor reclaimed his entry within the time allowed by law -----

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HOMESTEADS (ORDINARY)**APPLICATIONS**

1. The filing of an allowable homestead application in Alaska constitutes an entry within the meaning of the act of September 5, 1914, so

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APPLICATIONS—Continued

- that an individual who has filed an allowable homestead application in Alaska but withdrawn it prior to allowance by the land office has exercised his right of entry under the homestead law and is properly required to make the necessary showing for a second homestead entry under the 1914 act in connection with any subsequent home application----- 477
2. An amendment of a departmental regulation to provide expressly for the first time that the showing required for making a second homestead entry must be made in cases where a homestead application has been filed but withdrawn prior to allowance will not be applied where the first application was filed and withdrawn prior to the effective date of the amendment, particularly where the practice of the land office has been not to require the showing----- 477
3. The filing of concurrent homestead applications by an individual bars the allowance of either so long as both applications remain of record and, while the withdrawal of one will permit the allowance of the other, such allowance will be subject to otherwise intervening rights that have been asserted prior to the withdrawal of the first application----- 477

SECOND ENTRY

1. The filing of an allowable homestead application in Alaska constitutes an entry within the meaning of the act of September 5, 1914, so that an individual who has filed an allowable homestead application in Alaska but withdrawn it prior to allowance by the land office has exercised his right of entry under the homestead law and is properly required to make the necessary showing for a second homestead entry under the 1914 act in connection with any subsequent homestead application----- 477
2. An amendment of a departmental regulation to provide expressly for the first time that the showing required for making a second homestead entry must be made in cases where a homestead application has been filed but withdrawn prior to allowance will not be applied where the first application was filed and withdrawn prior to the effective date of the amendment, particularly where the practice of the land office has been not to require the showing----- 477

INDIAN ALLOTMENTS ON PUBLIC DOMAIN

GENERALLY

1. While both the Indian Allotment Act of 1887, 24 Stat. 388, and the Alaska Allotment Act, 34 Stat. 197, as amended, 70 Stat. 954, are representative of the method which was used to grant land to "uncivilized" person in the late nineteenth and early twentieth centuries, the specific requirements of the numerous allotment statutes enacted during that time vary according to the particular situations which they were intended to meet and the two acts should not be read *in pari materia* to impose identical requirements on applicants under each statute----- 340

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CLASSIFICATION	
1. An Indian allotment application for nonirrigable grazing land is properly rejected on the ground that the land applied for is not proper for acquisition as an Indian allotment because it contains insufficient forage to comprise an economic grazing unit.....	66
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1. Lands which are reported by the Geological Survey to be prospectively valuable for minerals subject to leasing under the Mineral Leasing Act are not subject to entry or selection under the nonmineral land laws without a mineral reservation to the United States in accordance with the act of July 17, 1914----- 49
2. Where a State has appealed to the Secretary from a requirement that it file a mineral waiver for selected school indemnity land reported to be prospectively valuable for oil and gas and the regulation requiring such waiver is amended to eliminate the requirement, the case will be remanded for further processing under the amended regulation----- 49

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1. Where after an application for a State exchange is filed it appears that the selected lands are covered by apparently valid mining claims, the State, if it denies the validity of the claims, is to be allowed a hearing on the issue of whether or not the claims are valid ----- 199

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1. A deposit of building stone fractured to a large extent into regular rectangular shapes and sizes which are suitable for use in construction without further cutting or splitting and which exist in a greater proportion in the deposit than in other deposits of the same stone in the vicinity is not an uncommon variety of building stone which is locatable under the mining laws because it has a special and distinct value where it appears that the regularly shaped stone is usually, by customer preference, mixed with irregularly shaped stone from the claim in construction usage and that the regularly shaped stone is not shown to have any uses over and above those of deposits of ordinary building stone in the locality ----- 331

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- fails to answer within the period allowed by the departmental rules of practice; it is no excuse that the contestee has brought an action in the Federal district court to enjoin the contest proceedings and secured a temporary restraining order when thereafter the restraining order is dissolved and, although the contestee appeals to the circuit court, he fails to have the injunction restored or a new one granted..... 442
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3. A decision declaring a mining claim null and void is conclusive and will not be reopened and vacated in the absence of a strong legal or equitable basis warranting reconsideration even though the basis for the cancellation has been found, in other proceedings, to be erroneous, where the claimant, who received notice of adverse charges against his claim, fails to answer the charges as required and fails to appeal or otherwise attack the decision declaring his claim invalid and takes no action with respect to the claim for many years..... 169
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1. Although a mining claim may have been valid in the past because of a discovery on the claim of a valuable deposit of mineral, the mining claim will lose its validity if the mineral deposit ceases to be valuable because of a change in economic conditions..... 144
2. Mining claims located for manganese must be declared null and void for lack of a discovery where, although manganese was sold from some of the claims and other claims in the vicinity during World War II and the post-war period when a Government buying program was in existence, the evidence shows that since the end of the buying program in 1959 the price of manganese has dropped 50 percent and sales of domestic manganese have ceased and

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- 3. To validate a mining claim covering minerals for which a market must be shown, it must appear that the minerals probably exist on the claim in such quantities as will justify extraction..... 447
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- 1. A hearing is not required by departmental practice or by the requirements of due process on the rejection of an application for a patent on mining claims which, over 25 years before the patent application was filed, were declared null and void in adverse proceedings or by a default decision after notice of charges against the claims and an opportunity for a hearing thereon were given the record title owner of the claims..... 169

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- 1. Because Revised Statute 2320 provides that no lode mining claim shall extend more than 300 feet on each side of the middle of the vein at the surface, a patent applicant should indicate the direction of the vein and adjust his survey accordingly if the course of the vein diverges from a line through the center of the claim and one of the side lines is more than 300 feet from the center of the vein..... 273

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- 1. Because Revised Statute 2320 provides that no lode mining claim shall extend more than 300 feet on each side of the middle of the vein at the surface, a patent applicant should indicate the direction of the vein and adjust his survey accordingly if the course of the vein diverges from a line through the center of the claim and one of the side lines is more than 300 feet from the center of the vein.... 273
- 2. The Department has no power to issue a mineral patent to any surface ground exceeding 300 feet in width on each side of the middle of the vein or lode, and a patent so issued is void as to the excess over 300 feet and is subject to collateral attack..... 273

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- 1. Land withdrawn for reclamation purposes can be opened to location under the mining laws only where the land is known or believed to be valuable for minerals; consequently, nonmineral land in a reclamation withdrawal cannot, in the absence of other considera-

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- tions, be opened for location of a mill site, which is locatable only on nonmineral land----- 140
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3. A mill site claim is properly declared invalid where the claim is not occupied or used for mining or milling purposes----- 368
4. The use of a rehabilitated structure on land embraced in a mill site claim as a base for occasional prospecting activities on nearby patented lode claims and the intention to use the land in the future for workmen's housing and an assay office presumably when the claims are developed are not sufficient to comply with the requirements of section 2337 of the Revised Statutes for obtaining a mill site----- 368
5. A mill site is properly declared invalid where the claim is not occupied or used for mining or milling purposes----- 448

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1. Because Revised Statute 2320 provides that no lode mining claim shall extend more than 300 feet on each side of the middle of the vein at the surface, a patent applicant should indicate the direction of the vein and adjust his survey accordingly if the course of the vein diverges from a line through the center of the claim and one of the side lines is more than 300 feet from the center of the vein---- 273

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1. The proceedings leading to the cancellation of a mining claim will not be reopened many years after the decision has become final in the absence of a compelling legal or equitable basis warranting reconsideration and an application for patent on a mining claim is properly rejected where, more than sixteen years before the patent application was filed, the claim had been declared null and void and thereafter canceled----- 169
2. The Department has no power to issue a mineral patent to any surface ground exceeding 300 feet in width on each side of the middle of the vein or lobe, and a patent so issued is void as to the excess over 300 feet and is subject to collateral attack----- 273

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1. The purchaser under a contract of sale of an undivided two-thirds interest in a mining claim may file the verified statement required of a mining claimant by section 5 (a) of the act of July 23, 1955--- 3

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1. Land withdrawn for reclamation purposes can be opened to location under the mining laws only where the land is known or believed to be valuable for minerals; consequently, nonmineral land in a reclamation withdrawal cannot, in the absence of other considerations, be opened for location of a mill site, which is locatable only on nonmineral land----- 140

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2. In opening reclamation withdrawn land to mining location it is necessary that each 10-acre subdivision be mineral in character but it is not required that every acre of the 10-acre tract be mineral in character; consequently where a tract of land is open to mining location and part of the land is nonmineral in character, that part of the land can be included in a mill site.....

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1. In considering whether an assignee of an oil and gas lease was a bona fide purchaser and entitled to protection in accordance with the bona fide purchaser provisions of the Mineral Leasing Act, as amended, the basic question is whether he in good faith and for value acquired his interest without notice of a superior right to the lease; he will not be considered as having constructive or imputed notice that an offeror whose offer was junior to that for which the lease issued had a right to the lease superior to the lessee, if he acted prudently, even though an extremely cautious person might have a right to have the voidable lease canceled.....

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OIL AND GAS LEASES**GENERALLY**

1. A protest by a junior offeror in a drawing of simultaneously filed oil and gas lease offers which charges disqualification of a senior offeror because the senior offeror is married to another offeror so that neither was actually the sole party in interest in the separate offers filed is properly dismissed in the absence of any proof that either of the two offerors in question was not acting in his own behalf and that under the law of the State in which the land applied for lies a married person cannot hold or acquire property for his sole benefit without the other spouse's consent.....
2. Although a junior offeror may have been the first qualified applicant for an oil and gas lease, if a lease was mistakenly issued to the senior offeror and it is assigned to a bona fide purchaser and the assignment is filed before the land office records show any action taken against the lease, the interests of the bona fide purchaser will be protected in accordance with the 1959 and 1960 amendments of the Mineral Leasing Act and the junior offeror's offer must be rejected.....
3. In considering whether an assignee of an oil and gas lease was a bona fide purchaser and entitled to protection in accordance with the bona fide purchaser provisions of the Mineral Leasing Act, as amended, the basic question is whether he in good faith and for value acquired his interest without notice of a superior right to the lease; he will not be considered as having constructive or imputed notice that an offeror whose offer was junior to that for which the lease issued had a right to the lease superior to the lessee, if he acted prudently, even though an extremely cautious person might have ascertained that the junior offeror might have a right to have the voidable lease canceled.....

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4. An assignee of an oil and gas lease, if the assignment is otherwise valid, is entitled to protection in accordance with the bona fide purchaser provisions of the Mineral Leasing Act if his assignment is filed before any adverse action or protest has been made against the lease even though the assignment had not been approved before such action or protest is made..... 206

ACQUIRED LANDS LEASES

1. An acquired lands lease offer for a tract of land consisting of portions of several irregularly shaped surveyed tracts of land no part of the boundaries of which coincide with any part of the boundary of the tract applied for need not, in addition to giving a complete metes and bounds description of the tract tied to a corner of the public land surveys, give the section numbers of the surveyed tracts portions of which are included in the tract applied for..... 45
2. An oil and gas offer for acquired land is not defective because it is not accompanied by a map or plat showing the location of the land within the administrative unit or project of which it is a part, but the offeror may be required to submit a satisfactory showing of such a map or plat..... 278

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1. Acreage embraced in a lease offer which is subject to drawing to determine priority will not be charged against the offeror until the offer has been successfully drawn..... 337

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1. The Departmental decision in *Henry S. Morgan, Floyd A. Wallis, et al.*, BLM-A-036376 (1956), affirmed by the Secretary of the Interior, 65 I.D. 369 (1958), is overruled to the extent that it is inconsistent or in conflict with the conclusion reached in the opinion of the Solicitor General issued December 20, 1963..... 20
2. Oil and gas lease offers which do not draw first priority in a drawing of simultaneously filed offers may be conditionally rejected, subject to reinstatement in the event offers with higher priorities do not ripen into leases..... 121
3. Any name used by an individual, whether real or fictitious, by which she may be known or by which she may transact business or execute contracts, may constitute her signature if affixed by that individual without fraudulent intent and if there is no doubt as to the identity of the individual, and an oil and gas lease offer in which the signed name of the offeror differs from the typed name of the offeror in the first block of the lease form is acceptable if, in fact, the signature is that of the offeror and the offer is, in all other respects, acceptable..... 269
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- 5. A protest against a noncompetitive oil and gas lease offer for acquired land is properly sustained where the offer is signed by an attorney in fact for a corporate offeror and is accompanied only by a statement of the attorney in fact as to the nonexistence of an agreement between the attorney in fact and the offeror whereby the attorney in fact will acquire an interest in any lease to be issued and by a statement by the offeror that a third party will have an interest in the lease and there is not filed any statement by the offeror as to whether the attorney in fact will acquire any interest in the lease. . . . 277
- 6. Where only one copy of an oil and gas offer for acquired lands is filed and thereafter within the time allowed the additional copies required are filed but such additional copies vary from the first copy in a portion of the land description, the offer is not fatally defective and the first copy filed is deemed to be controlling despite the fact that it was not marked as the "original" copy by either the offeror or the Bureau of Land Management. . . . 277
- 7. An oil and gas lease offer signed by an attorney in fact is not to be rejected for failure to accompany it with evidence of his authority to sign the offer and lease if the offer contains a reference to a land office record in which the pertinent information has been filed. . . . 287
- 8. An oil and gas lease offer signed by an attorney in fact for the offeror is properly rejected where it is not accompanied by a statement of the attorney's possible interest in the offer and the lease, if issued, and, if there is such interest, the further statements as to the attorney's qualifications to hold an oil and gas lease as required by departmental regulation. . . . 288

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- 1. Although a junior offeror may have been the first qualified applicant for an oil and gas lease, if a lease was mistakenly issued to the senior offeror and it is assigned to a bona fide purchaser and the assignment is filed before the land office records show any action taken against the lease, the interests of the bona fide purchaser will be protected in accordance with the 1959 and 1960 amendments of the Mineral Leasing Act and the junior offeror's offer must be rejected. . . . 206
- 2. In considering whether an assignee of an oil and gas lease was a bona fide purchaser and entitled to protection in accordance with the bona fide purchaser provisions of the Mineral Leasing Act, as amended, the basic question is whether he in good faith and for value acquired his interest without notice of a superior right to the lease; he will not be considered as having constructive or imputed notice that an offeror whose offer was junior to that for which the lease issued had a right to the lease superior to the lessee, if he acted prudently, even though an extremely cautious person might have ascertained that the junior offeror might have a right to have the voidable lease canceled. . . . 206

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3. An assignee of an oil and gas lease, if the assignment is otherwise valid, is entitled to protection in accordance with the bona fide purchaser provisions of the Mineral Leasing Act if his assignment is filed before any adverse action or protest has been made against the lease even though the assignment had not been approved before such action or protest is made..... 206
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CANCELLATION

1. Where an oil and gas lease offer was filed prior to enactment of the Alaska Statehood Act on July 7, 1958, a selection for the land was filed thereafter by the Territory of Alaska pursuant to the grant for the University of Alaska, and a lease was subsequently issued in response to the offer and prior to the admission of the State of Alaska on January 3, 1959, it is error to cancel the lease because of the filing of the selection and it is immaterial that subsequent to the admission of the State the land was patented to the State pursuant to the selection..... 1
2. An oil and gas lease offer which describes land within an area over six miles in width and within an area covering five whole sections and parts of two end sections in width does not comply with the regulation requiring that land sought for leasing must be within an area six miles square or within an area not exceeding six surveyed sections in length or width, and a lease issued in response to such offer is improperly issued and subject to cancellation if proper junior offers have been filed for the land..... 89
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4. In considering whether an assignee of an oil and gas lease was a bona fide purchaser and entitled to protection in accordance with the bona fide purchaser provisions of the Mineral Leasing Act, as amended, the basic question is whether he in good faith and for value acquired his interest without notice of a superior right to the lease; he will not be considered as having constructive or imputed notice that an offeror whose offer was junior to that for which the lease issued had a right to the lease superior to the lessee, if he acted prudently, even though an extremely cautious person might have ascertained that the junior offeror might have a right to have the voidable lease canceled..... 206

DESCRIPTION OF LAND

1. An acquired lands lease offer for a tract of land consisting of portions of several irregularly shaped surveyed tracts of land no part of

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- the boundaries of which coincide with any part of the boundary of the tract applied for need not, in addition to giving a complete metes and bounds description of the tract tied to a corner of the public land surveys, give the section numbers of the surveyed tracts portions of which are included in the tract applied for----- 45
- 2. A description in an oil and gas lease offer for acquired land of land in a right-of-way which is excluded from the land applied for is insufficient where the right-of-way is described only by giving the course and distance of the center line and the width of the right-of-way and by tying the description to a quarter-quarter section corner ----- 110
- 3. Where an oil and gas offer for land described as the S1/2S1/2 of a section is deficient because it improperly describes land in the S1/2S1/2 which is to be excluded from the offer, the offer cannot be accepted for the S1/2SE1/4 because it is ascertained that the excluded land lies in the S1/2SW1/4 of the section----- 110
- 4. Under regulation 43 CFR 3123.8, which requires that oil and gas lease offers for lands shown on protracted surveys include only entire sections of land or describe all of the lands available for leasing in each section by legal subdivisional parts, where only a portion of a section is available, it is not proper to reject an offer for such land which describes all of the land in the section with a statement that the offer is to be deemed to include all of the land in the described section which is available for lease if the offer is accompanied by the first year's rental payment for the entire section----- 124
- 5. Where only one copy of an oil and gas offer for acquired lands is filed and thereafter within the time allowed the additional copies required are filed but such additional copies vary from the first copy in a portion of the land description, the offer is not fatally defective and the first copy filed is deemed to be controlling despite the fact that it was not marked as the "original" copy by either the offeror or the Bureau of Land Management----- 277
- 6. An oil and gas offer for acquired land is not defective because it is not accompanied by a map or plat showing the location of the land within the administrative unit or project of which it is a part, but the offeror may be required to submit a satisfactory showing of such a map or plat----- 278

DRILLING

- 1. To qualify as actual drilling operations sufficient to extend an oil and gas lease pursuant to section 4(d) of the Mineral Leasing Act Revision of 1960, drilling must be conducted in such a way as to be a serious effort which one seriously looking for oil and gas could be expected to make in that particular area, given existing knowledge of geologic and other factors normally considered when drilling for oil and gas----- 257
- 2. Where the purpose of drilling a well is only to test shallow formations 500 feet deep, known to be fresh water aquifers in the area surrounding the well, where gas has been found within several miles only in formations below 7,000 feet, and the nearest produc-

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tion from the shallow formations is about 25 miles away, the drilling does not serve to extend the life of a lease that would otherwise expire.....

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3. An oil and gas lease is not entitled to a 2-year extension under section 4(d) of the Mineral Leasing Act Revision of 1960, which grants such an extension when the lessee has commenced "actual drilling operations" before the end of its term and is diligently prosecuting such operations at the end of the term, when prior to the expiration date of the lease the only acts undertaken by the lessee are acts preliminary to the actual drilling and the actual drilling is not commenced until after the lease has terminated....

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EXTENSIONS

1. An oil and gas lease on land within the known geologic structure of a producing gas field which attains a minimum royalty status because of inclusion in the participating area of a producing gas unit but on which there is no producing or producible well and which is subsequently extended as a consequence of the termination of the unit reverts to a rental status and is subject to the automatic termination provision of the act of July 29, 1954.....

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2. To qualify as actual drilling operations sufficient to extend an oil and gas lease pursuant to section 4(d) of the Mineral Leasing Act Revision of 1960, drilling must be conducted in such a way as to be a serious effort which one seriously looking for oil and gas could be expected to make in that particular area, given existing knowledge of geologic and other factors normally considered when drilling for oil and gas.....

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3. Where the purpose of drilling a well is only to test shallow formations 500 feet deep, known to be fresh water aquifers in the area surrounding the well, where gas has been found within several miles only in formation below 7,000 feet, and the nearest production from the shallow formations is about 25 miles away, the drilling does not serve to extend the life of a lease that would otherwise expire.....

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4. An oil and gas lease is not entitled to a 2-year extension under section 4(d) of the Mineral Leasing Act Revision of 1960, which grants such an extension when the lessee has commenced "actual drilling operations" before the end of its term and is diligently prosecuting such operations at the end of the term, when prior to the expiration date of the lease the only acts undertaken by the lessee are acts preliminary to the actual drilling and the actual drilling is not commenced until after the lease has terminated.....

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1. A protest by a junior offeror in a drawing of simultaneously filed oil and gas lease offers which charges disqualification of a senior offeror because the senior offeror is married to another offeror so that neither was actually the sole party in interest in the separate offers filed is properly dismissed in the absence of any proof that either of the two offerors in question was not acting in his own behalf and that under the law of the State in which the land applied for lies a married person cannot hold or acquire property for his sole benefit without the other spouse's consent.....

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2. Although a junior offeror may have been the first qualified applicant for an oil and gas lease, if a lease was mistakenly issued to the senior offeror and it is assigned to a bona fide purchaser and the assignment is filed before the land office records show any action taken against the lease, the interests of the bona fide purchaser will be protected in accordance with the 1959 and 1960 amendments of the Mineral Leasing Act and the junior offeror's offer must be rejected.....

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3. Where an oil and gas lease is issued which erroneously omits a part of the land applied for which is available for leasing, and the land office simultaneously issues a decision which indicates that the omitted land is included in the lease, the omission will not be construed as a rejection of the offer as to the omitted land from which the offeror must appeal in order to preserve the priority of his offer, but the lease may be amended to include the omitted land notwithstanding the filing of a conflicting offer for the same land subsequent to the issuance of the lease but prior to the discovery of the omission.....

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1. A determination that land is within the undefined known geologic structure of a producing oil or gas field is, in effect, a withdrawal of that land from noncompetitive leasing, and where that determination is reflected by the records of the Bureau of Land Management, the land is unavailable for noncompetitive leasing and must be excluded in determining whether a lease offer complies with the requirements of 43 CFR 192.42 (d).....

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2. The phrase "known geologic structure of a producing oil and gas field" has been so long understood to include oil and gas fields which once produced and are still capable of production, although not currently producing, that the phrase as used in Rev. Stat. 2276 (a) (2) will be considered to have the same meaning, despite the fact that the word "producing" is used in the next paragraph of the statute to mean actual production.....

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- 5. The existence of a contract between a power company and the United States, acting through the Atomic Energy Commission, whereby the company agrees to construct a transmission line from its facilities to facilities of the Commission and the Commission agrees to provide a right-of-way across land under its jurisdiction in Los Alamos County, has no bearing upon and is not affected by conditions imposed by this Department upon a grant of a right-of-way for a portion of the line across public land under the jurisdiction of this Department in Sandoval County----- 427

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- 1. State selections in satisfaction of a legislative grant of public land are preferred over conflicting private applications even though the State application may have been filed subsequent to the private application if the interval between the two filings is not so great as to indicate that the State failed to exercise reasonable diligence in exercising its selection right----- 126
- 2. The filing of a State selection application within six weeks after the filing of public sale applications for the same land evidences reasonable diligence by the State in the exercise of its selection right so that the State application merits consideration with the public sale applications and allowance unless such allowance would serve the public interest less effectively than allowance of the public sale applications----- 127

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- 1. The statutory grant of a 6-month preference period for the filing of State selection applications after every revocation of a withdrawal of public land within 10 years after August 27, 1958, is entirely consistent with the existent departmental policy of permitting the public interest in the satisfaction of a legislative grant of public land to a State to tip the scales in favor of the State in the Department's consideration of a State selection application and a conflicting application for the initiation of private rights in the land----- 127

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JURISDICTION OVER

- 1. By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the land department as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved----- 415

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1. Final determinations concerning the disclosure to contractors of records that the custodian of the records is unwilling to produce are, as a matter of general practice, made by the Solicitor where the disclosure sought is not connected with any pending contract appeal, and by the Board of Contract Appeals where the records are sought in connection with a pending contract appeal.----- 301
2. The phrase "prejudicial to the interests of the Government," as used in the statutes and regulations pertaining to disclosure of records of the Department of the Interior, ordinarily comprehends those documents as to which the Government possesses a privilege against disclosure under the law of evidence.----- 301
3. The question of whether particular documents, sought by a contractor for use in connection with a contract appeal, are within or without the scope of the Government's privilege against disclosure is a question that calls for the evaluation of such factors as: (1) the relevancy of the documents to the subject matter involved in the appeal; (2) the necessity of the documents for the proving of the appellant's case; (3) the seriousness of the danger to the public interests which disclosure of the documents would involve; (4) the presence in the documents of factual data, on the one hand, or of policy opinions, on the other; (5) the existence of confidential relationships which disclosure of the documents might unduly impair; and (6) the normal desirability of full disclosure of all facts in the possession of either party to the appeal.----- 301

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2. Where the owner of land contiguous to an isolated tract of public land offered for sale properly asserts a preference right to purchase the land, and then disposes of the contiguous land after the close of the period allowed for the assertion of preference-right claims and before he receives a cash certificate or patent for the isolated tract, he does not thereby lose his preference right to buy the isolated tract nor does his successor in title succeed to that preference right.----- 56
3. Where preference-right claimants fail to reimburse the applicant for a public sale for the costs of publication within the 10-day period after they are declared the purchasers or to file statements of citizenship, as provided by the Department's regulations, their bid is properly rejected and the land is properly awarded to the applicant.----- 56

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| 3. Pursuant to section 321 (b) of the Transportation Act of 1940 patent may be issued for railroad grant lands sold by the railroad if it is determined either (1) that the land was not mineral in character at the time of the sale and the purchaser was an innocent purchaser for value, even though the land is subsequently determined to be mineral in character, or (2) that although the land was mineral in character at the time of the sale the purchaser was not chargeable with actual or constructive notice of that fact. ----- | 224 |
| 4. When the Department of the Interior finds that public land within the place limits of a legislative grant-in-aid of the construction of a railroad is mineral in character and the railroad company challenges such finding, a hearing should be granted at which the Department has the obligation of making a prima facie case of mineral character whereupon the company has the burden of establishing nonmineral character by a preponderance of the evidence ----- | 224 |
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| 1. When the Federal Government owns land which is under the administration of the Secretary of the Interior as part of the National Wildlife Refuge System, the Secretary may make rules and regulations for the control and management of resident species of game on the land even though these regulations may be more restrictive than the hunting and fishing laws of the State within which the land is located. These rules and regulations take supremacy over State law where there is a conflict ----- | 469 |
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| 1. Where a mining contest was initiated by this Department and the contestees did not file an answer but brought an action to enjoin the proceedings in the Federal courts and secured a temporary restraining order against the proceedings, but failed to obtain a further stay after the district court dissolved the restraining order or otherwise to relieve themselves of the necessity of filing | |
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2. The requirement imposed by the Department's regulations on an applicant for a transmission line right-of-way that he agree to permit the Department to utilize surplus capacity in the line or to increase the capacity of the line for the transmission of power by the Department is valid..... 427
3. The existence of a contract between a power company and the United States, acting through the Atomic Energy Commission, whereby the company agrees to construct a transmission line from its facilities to facilities of the Commission and the Commission agrees to provide a right-of-way across land under its jurisdiction in Los Alamos County, has no bearing upon and is not affected by conditions imposed by this Department upon a grant of a right-of-way for a portion of the line across public land under the jurisdiction of this Department in Sandoval County..... 427

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- 1. A tramroad right-of-way granted under the act of January 21, 1895, as amended, 43 U.S.C., sec. 956 (1958), creates no interest in the land. It is a mere permit to use the land, revocable at the discretion of the Secretary----- 415

ACT OF MARCH 4, 1911

- 1. An applicant for an amended transmission line right-of-way under the act of March 4, 1911, is properly required to file the stipulation required by the Department's regulations agreeing to permit the Department to utilize surplus capacity in the line or to increase the capacity of the line for the transmission of power by the Department ----- 405
- 2. The requirement imposed by the Department's regulations on an applicant for a transmission line right-of-way that he agree to permit the Department to utilize surplus capacity in the line or to increase the capacity of the line for the transmission of power by the Department is valid----- 427
- 3. The existence of a contract between a power company and the United States, acting through the Atomic Energy Commission, whereby the company agrees to construct a transmission line from its facilities to facilities of the Commission and the Commission agrees to provide a right-of-way across land under its jurisdiction in Los Alamos County, has no bearing upon and is not affected by conditions imposed by this Department upon a grant of a right-of-way for a portion of the line across public land under the jurisdiction of this Department in Sandoval County----- 427

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- 1. A tramroad right-of-way granted under the act of January 21, 1895, as amended, 43 U.S.C., sec. 956 (1958), creates no interest in the land. It is a mere permit to use the land, revocable at the discretion of the Secretary----- 415

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- 1. A petition for rehearing was properly denied for untimeliness under 25 CFR 15.17 by an Examiner of Inheritance when it was mailed by the petitioner's attorney on the last day of the 60-day period provided by the regulation but was not received by the Superintendent until after the expiration date----- 203

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- 1. The Board of Contract Appeals has authority to apply equitable principles in determining matters over which it has jurisdiction. It has authority to direct contract administration action by the contracting officer if the contractor has a substantive right to such action, and if such action pertains to a matter over which the Board has jurisdiction. Its powers and those of the Office of the Survey and Review complement each other----- 61
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- 2. The timeliness of an appeal is governed by the period of time elapsed between the date when the findings of fact and decision were received by the contractor and the date when the notice of appeal was mailed or otherwise furnished to the contracting officer. The day on which the findings of fact and decision were received by the contractor is not included in the computation..... 68

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- 1. To establish the mineral character of railroad grant land it must be shown that known conditions on the critical date are such as reasonably to engender the belief that the land contains mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end..... 224
- 2. The question of whether particular documents, sought by a contractor for use in connection with a contract appeal, are within or without the scope of the Government's privilege against disclosure is a question that calls for the evaluation of such factors as: (1) the relevancy of the documents to the subject matter involved in the appeal; (2) the necessity of the documents for the proving of the appellant's case; (3) the seriousness of the danger to the public interests which disclosure of the documents would involve; (4) the presence in the documents of factual data, on the one hand, or of policy opinions, on the other; (5) the existence of confidential relationships which disclosure of the documents might unduly impair; and (6) the normal desirability of full disclosure of all facts in the possession of either party to the appeal..... 301
- 3. Evidence submitted outside a hearing in a contest case cannot be considered in deciding the case on the merits but can be considered to determine whether or not a further hearing is warranted..... 369

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- 1. A determination of the invalidity of a mining claim by the manager of a land office is proper in a Government contest when the claimant fails to answer within the period allowed by the departmental rules of practice; it is no excuse that the contestee has brought an action in the Federal district court to enjoin the contest proceedings and secured a temporary restraining order when thereafter the restraining order is dissolved and, although the contestee appeals to the circuit court, he fails to have the injunction restored or a new one granted..... 434

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1. When the Department of the Interior finds that public land within the place limits of a legislative grant-in-aid of the construction of a railroad is mineral in character and the railroad company challenges such finding, a hearing should be granted at which the Department has the obligation of making a prima facie case of mineral character whereupon the company has the burden of establishing nonmineral character by a preponderance of the evidence.....
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1. A determination of the invalidity of a mining claim by the manager of a land office is proper in a private contest when the claimant fails to answer within the period allowed by the departmental rules of practice; it is no excuse that the contestee has brought an action in the Federal district court to enjoin the contest proceedings and secured a temporary restraining order when thereafter the restraining order is dissolved and, although the contestee appeals to the circuit court, he fails to have the injunction restored or a new one granted.....
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MINERAL LANDS

1. Since sections 2275 and 2276 of the Revised Statutes, as amended, permit a State to select mineral lands as indemnity for numbered school sections if the land for which indemnity is being sought was mineral in character, Arizona may select school indemnity land which is mineral in character if such land is selected as indemnity for mineral sections lost to the State prior to survey.----- 49
2. Where the Geological Survey classifies both selected and base lands in an indemnity selection as mineral, the State is entitled to the indemnity land without a reservation in the United States under the act of July 17, 1914, of minerals designated in the act.----- 49
3. Where a State has appealed to the Secretary from a requirement that it file a mineral waiver for selected school indemnity land reported to be prospectively valuable for oil and gas and the regulation requiring such waiver is amended to eliminate the requirement, the case will be remanded for further processing under the amended regulation.----- 49
4. The date as of which the determination is to be made whether public land is eligible for selection as school land indemnity is the date on which the State has complied with all the requirements of the statute and regulations, including publication, and not the date when the State selection is filed.----- 392
5. As a result of the general withdrawals accomplished by Executive Orders Nos. 6910 and 6964 and the provisions of section 7 of the Taylor Grazing Act, a State's application for indemnity school lands is a petition to classify the lands as suitable for State selection and until classification the lands are not available for selection.----- 392
6. School land indemnity selections for lands within the known geologic structure of a producing oil and gas field, unless the lost lands are similarly situated, or for lands in a producing or producible lease, must be rejected, and the date of determination as to whether the selected lands are in the known geologic structure of a producing oil and gas field or are in a producing or producible lease is the date when the State has complied with all requirements for making a selection.----- 393
7. The phrase "known geologic structure of a producing oil and gas field" has been so long understood to include oil and gas fields which once produced and are still capable of production, although not currently producing, that the phrase as used in Rev. Stat. 2276(a) (2) will be considered to have the same meaning, despite the fact that the word "producing" is used in the next paragraph of the statute to mean actual production.----- 393
8. Land in any lease of a unit agreement which is in a participating area is to be considered as land in a producing or producible status so that all lands subject to that lease, whether in the unit or participating area, are not eligible for selection by a State as school indemnity lands.----- 393

SCHOOL LANDS—Continued

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MINERAL LANDS—Continued

9. If a State offers mineral land as base for an indemnity selection of land which is both valuable for oil shale and valuable for oil or gas and is situated within the known geologic structure of a producing oil or gas field (and the base land is not so situated) or is included in a producing or producible oil and gas lease, the State may obtain the selected land, including the oil shale deposits, upon consenting to a reservation to the United States of the oil and gas in the selected land----- 393

SECRETARY OF THE INTERIOR

1. The authority to regulate hunting and fishing on Federally owned land has been delegated to the Secretary of the Interior by specific legislation ----- 469

SMALL TRACT ACT**CLASSIFICATION**

1. Land embraced in unpatented mining claims which display no indications of abandonment is properly classified as not suitable for small tract purposes----- 199

STATE EXCHANGES**GENERALLY**

1. Where after an application for a State exchange is filed it appears that the selected lands are covered by apparently valid mining claims, the State, if it denies the validity of the claims, is to be allowed a hearing on the issue of whether or not the claims are valid ----- 199

STATE LAWS

1. A protest by a junior offeror in a drawing of simultaneously filed oil and gas lease offers which charges disqualification of a senior offeror because the senior offeror is married to another offeror so that neither was actually the sole party in interest in the separate offers filed is properly dismissed in the absence of any proof that either of the two offerors in question was not acting in his own behalf and that under the law of the State in which the land applied for lies a married person cannot hold or acquire property for his sole benefit without the other spouse's consent.----- 121

STATE SELECTIONS

1. State selections in satisfaction of a legislative grant of public land are preferred over conflicting private applications even though the State application may have been filed subsequent to the private application if the interval between the two filings is not so great as to indicate that the State failed to exercise reasonable diligence in exercising its selection right----- 126
2. The filing of a State selection application within six weeks after the filing of public sale applications for the same land evidences reasonable diligence by the State in the exercise of its selection right so that the State application merits consideration with the public sale applications and allowance unless such allowance would serve the public interest less effectively than allowance of the public sale applications----- 127

STATE SELECTIONS—Continued

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|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| 3. The statutory grant of a 6-month preference period for the filing of State selection applications after every revocation of a withdrawal of public land within 10 years after August 27, 1958, is entirely consistent with the existent departmental policy of permitting the public interest in the satisfaction of a legislative grant of public land to a State to tip the scales in favor of the State in the Department's consideration of a State selection application and a conflicting application for the initiation of private rights in the land ----- | 127 |
| 4. The period of delay in the filing of a State selection application by which the diligence of a State in exercising its selection right is measured runs from the time an application for the acquisition of private rights in public land is filed until the State selection application is filed ----- | 127 |

STATUTORY CONSTRUCTION

GENERALLY

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|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| 1. While both the Indian Allotment Act of 1887, 24 Stat. 388, and the Alaska Allotment Act, 34 Stat. 197, as amended, 70 Stat. 954, are representative of the method which was used to grant land to "uncivilized" persons in the late nineteenth and early twentieth centuries, the specific requirements of the numerous allotment statutes enacted during that time vary according to the particular situations which they were intended to meet and the two acts should not be read <i>in pari materia</i> to impose identical requirements on applicants under each statute ----- | 340 |
| 2. The effect of the enactment of Departmental regulations in the 1956 amendment to the Alaska Allotment Act, 70 Stat. 954, was to make mandatory under the statute the determination of use and occupancy which, prior to the 1956 amendment, had been discretionary except where the claim of a preference right was involved, but the amendment did not bind the Department to the exclusive consideration of the specific elements of proof which, though listed in the regulations, were not made a part of the amendment ----- | 341 |
| 3. Where a federal statute provides that the reclamation laws shall govern the construction, operation, and management of project works, the excess land provisions of the reclamation laws are thereby carried into effect unless the terms of the statute provide otherwise ----- | 496 |
| 4. The language of section 1 of the Boulder Canyon Project Act (45 Stat. 1057; 43 U.S.C. sec. 617) does not by its plain terms create or recognize a water right ----- | 497 |
| 5. Where Congress has deemed it proper to waive or modify the excess land laws in certain projects, it has always found it appropriate to enact positive legislation setting forth the exemption or other modification in unmistakable terms ----- | 498 |
| 6. Statutes which grant privileges or relinquish rights of the public are to be strictly construed against the grantee ----- | 498 |

STATUTORY CONSTRUCTION—Continued

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ADMINISTRATIVE CONSTRUCTION

1. The departmental regulation, currently found at 43 CFR 230.70, which provides that section 5 of the Act of June 17, 1902 (32 Stat. 388, 389; 43 U.S.C. sec. 431), does not prevent the recognition of a vested water right for more than 160 acres and the protection of same by allowing the continued flowing of the water covered by the right through works constructed by the Government under appropriate regulations and charges, applies only to special situations where existing physical facilities or water rights are acquired under the authority of section 10 of the 1902 Act (32 Stat. 389, 390; 43 U.S.C. sec. 373) for incorporation in a project and where the lands to which the water right appertains are not included within that project. This regulations was intended as a codification of the Opinion of Assistant Attorney General, 34 L.D. 351 (January 6, 1906)----- 497

LEGISLATIVE HISTORY

1. The legislative history of section 2(f) of the Bonneville Project Act as amended on October 23, 1945 (59 Stat. 546, 16 U.S.C. 832a(f)), expresses an intent on the part of Congress to authorize the Bonneville Power Administrator to conduct his affairs in a matter which equates his authority with that of private business enterprises----- 316
2. The legislative history of the Boulder Canyon Project Act (45 Stat. 1057, 1066; 43 U.S.C. secs. 617-617t) does not reveal that Congress intended to exempt, by implication or otherwise, the private lands within Imperial Valley from the federal excess land laws----- 497

SUBMERGED LANDS ACT

GENERALLY

1. The Departmental decision in *Henry S. Morgan, Floyd A. Wallis, et al.*, BLM-A-036376 (1956), affirmed by the Secretary of the Interior, 65 I.D. 369 (1958), is overruled to the extent that it is inconsistent or in conflict with the conclusion reached in the opinion of the Solicitor General issued December 20, 1963----- 20
2. The Submerged Lands Act of May 22, 1953, 67 Stat. 29; 43 U.S.C., sec. 1301 *et seq.*, released to the States any former title of the United States to lands which were formerly beneath navigable waters as defined in section 2(a) of the Act, but which emerged as islands through natural processes within the boundaries of the States before the effective date of the Act----- 20
3. Lands which are "made" as that term is used in section 2(a)(3) of the Submerged Lands Act of May 22, 1953, 67 Stat. 29; 43 U.S.C., sec. 1301 *et seq.*, include lands which are formed by natural processes as well as those which are man made----- 20
4. The Submerged Lands Act (act of May 22, 1953, c. 65, 67 Stat. 29, 43 U.S.C. 1301-1315) relinquished any former title of the United States to lands naturally made as islands, which formerly were "lands beneath navigable waters," as that phrase is defined in the act. Title to accretions to public lands of the United States was not affected by the act----- 22
5. The ruling of the Bureau of Land Management of the Department of the Interior in the case of *Floyd A. Wallis* (BLM-A-036376), as affirmed by the Secretary of the Interior (65 I.D. 369 (1958)), to the contrary is erroneous and should be revoked----- 22

SURFACE RESOURCES ACT

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VERIFIED STATEMENT

1. The purchaser under a contract of sale of an undivided two-thirds interest in a mining claim may file the verified statement required of a mining claimant by section 5 (a) of the act of July 23, 1955...

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SURVEYS OF PUBLIC LANDS**GENERALLY**

1. A description in an oil and gas lease offer for acquired land of land in a right-of-way which is excluded from the land applied for is insufficient where the right-of-way is described only by giving the course and distance of the center line and the width of the right-of-way and by tying the description to a quarter-quarter section corner.....

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TAYLOR GRAZING ACT**CLASSIFICATION**

1. State selections in satisfaction of a legislative grant of public land are preferred over conflicting private applications even though the State application may have been filed subsequent to the private application if the interval between the two filings is not so great as to indicate that the State failed to exercise reasonable diligence in exercising its selection right.....
2. The filing of a State selection application within six weeks after the filing of public sale applications for the same land evidences reasonable diligence by the State in the exercise of its selection right so that the State application merits consideration with the public sale applications and allowance unless such allowance would serve the public interest less effectively than allowance of the public sale applications.....
3. As a result of the general withdrawals accomplished by Executive Orders Nos. 6910 and 6964 and the provisions of sec. 7 of the Taylor Grazing Act, a State's application for indemnity school lands is a petition to classify the lands as suitable for State selection and until classification the lands are not available for selection.....

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TIMBER SALES AND DISPOSALS

1. Where damages for default by a bidder in a timber sale have been liquidated by the parties in the amount of a deposit submitted with the bid, such liquidated damages are for assessment as measuring the extent of the bidder's obligation in the matter without the necessity of inquiring into the question of the actual damages incurred.....

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TORTS**GENERALLY**

1. The United States can be held liable under the Federal Tort Claims Act only if the individual whose alleged act or omission led to a claim against the Government is an employee of the United States. Hence, any question concerning that individual's employment is a threshold issue and must be considered at the outset.....

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TORTS—Continued

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GENERALLY—Continued

- 2. The fact that the United States supplies materials, personnel, and funds for a project, carried out in cooperation with other organizations, does not make the project a joint adventure, unless there was either an express or implied contract by which the United States undertook to bind itself to the consequences of a joint adventure..... 196
- 3. The immunity granted to the United States by 33 U.S.C. 702c from liability of any kind for any damage from or by floods or flood waters at any place is available to the United States as a defense in suits brought under the Federal Tort Claims Act..... 238
- 4. The Flood Control Act, 33 U.S.C. 702c, is an immunity statute. Such a statute is necessary, and therefore applicable, only where there would be a liability without it..... 238

AIRCRAFT

- 1. As a general rule, under Federal law and State laws, pre-flight waivers of liability, in the form used by the Bureau of Reclamation, obtained by the United States from nonofficial passengers on Government aircraft will be upheld, except as against willful misconduct or gross negligence..... 493

AMOUNT OF DAMAGES

- 1. Upon the presentation of proper proof, an award of damages to one injured through the negligence of another may include an allowance for loss of wages and for pain and suffering..... 48
- 2. As a general rule, any payment to an injured party from a collateral source is not deductible from an award made to the injured party against one who negligently caused the injury..... 48

CONFLICTS OF LAW

- 1. The fact of whether an individual is or is not an employee of the United States is a Federal question to be determined under Federal law. The scope of the individual's employment is a question to be determined under the law of the pertinent State..... 196
- 2. In view of the state of the authorities, it is not possible to state with certainty whether State or Federal law will ultimately be accepted as governing the effectiveness of pre-flight waivers of liability obtained by the United States from nonofficial passengers on Government aircraft..... 493

DISCRETIONARY FUNCTIONS

- 1. A decision not to place culverts under an irrigation lateral, made at the policy and planning level, when no danger from this method of construction is apparent or realized, and a contrary decision would affect the feasibility of the project, is a discretionary act within the meaning of the discretionary function exception of the Federal Tort Claims Act..... 237

PERSONAL INJURY OR DEATH

- 1. In wrongful death actions brought under derivative type statutes, pre-flight waivers of liability executed by the decedent have been given the same effect as they would have been given in an action brought by the decedent while still alive..... 493

TORTS—Continued

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PERSONAL INJURY OR DEATH—Continued

2. In wrongful death actions brought under nonderivative type statutes, pre-flight waivers of liability executed by the decedent may be held not to bar the right of action, on the theory that the decedent could not give away something which did not belong to him..... 493

SCOPE OF EMPLOYMENT

1. The fact of whether an individual is or is not an employee of the United States is a Federal question to be determined under Federal law. The scope of the individual's employment is a question to be determined under the law of the pertinent State..... 196

TRESPASS

1. Electric transmission line easement which gives the grantee the right to maintain and keep parcel of land "at all times free and clear of trees and brush" includes right to spray small natural growth conifers which have not reached such height as to threaten physical or electrical contact with the conductor or which have not reached such density as to block maintenance access along the right-of-way..... 217
2. The owner of an electric transmission line easement may fully use the rights granted by the easement, including rights necessarily implied or incidental thereto..... 217
3. The owner of electric transmission line easement is not limited in maintenance of the easement to those methods known or generally practiced at the time of acquisition but may use methods of maintenance reasonably necessary under existing conditions..... 217

TRESPASS**GENERALLY**

1. Occupancy of public lands, without authority after expiration or termination of a right-of-way permit constitutes a trespass..... 415

UNITED STATES

1. The United States, not having intervened as a party and not being suable without its consent, is not bound by either the finding, the decision, of the final judgment of a state court in proceedings held to confirm a repayment contract..... 498

WATER AND WATER RIGHTS**GENERALLY**

1. Nothing in the Reclamation Act of 1902 (32 Stat. 388) or its legislative history suggests that private landowners with water rights could participate in a project, pay their share of its cost, but be exempt from acreage limitation..... 497
2. Neither the existence nor nonexistence of a vested water right is itself determinative of whether the excess land laws are applicable in any given case..... 497

WATER COMPACTS AND TREATIES

1. The Bonneville Power Administrator, acting for and on behalf of the United States Entity designated pursuant to the Canadian Treaty, is carrying out the directives of Article VIII of the Treaty and the Exchange of Notes made pursuant thereto in executing the Canadian Entitlement Exchange Agreements..... 316

WITHDRAWALS AND RESERVATIONS

RECLAMATION WITHDRAWALS

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- 1. Land withdrawn for reclamation purposes can be opened to location under the mining laws only where the land is known or believed to be valuable for minerals; consequently, nonmineral land in a reclamation withdrawal cannot, in the absence of other considerations, be opened for location of a mill site, which is locatable only on nonmineral land..... 140
- 2. In opening reclamation withdrawn land to mining location it is necessary that each 10-acre subdivision be mineral in character but it is not required that every acre of the 10-acre tract be mineral in character; consequently where a tract of land is open to mining location and part of the land is nonmineral in character, that part of the land can be included in a mill site..... 141

EXECUTIVE ORDER 6910

- 1. As a result of the general withdrawals accomplished by Executive Orders Nos. 6910 and 6964 and the provisions of sec. 7 of the Taylor Grazing Act, a State's application for indemnity school lands is a petition to classify the lands as suitable for State selection and until classification the lands are not available for selection.... 392

EXECUTIVE ORDER 6964

- 1. As a result of the general withdrawals accomplished by Executive Orders Nos. 6910 and 6964 and the provisions of sec. 7 of the Taylor Grazing Act, a State's application for indemnity school lands is a petition to classify the lands as suitable for State selection and until classification the lands are not available for selection.... 392

WORDS AND PHRASES

- 1. Lands which are "made" as that term is used in section 2(a) (3) of the Submerged Lands Act of May 22, 1953, 67 Stat. 29; 43 U.S.C., sec. 1301 *et seq.*, include lands which are formed by natural processes as well as those which are man made..... 20
- 2. "Available for leasing," as used in 43 CFR 192, 42(d) and decisions interpreting that regulation, means lands which are available for noncompetitive leasing under the Mineral Leasing Act..... 92
- 3. *Actual drilling operations.* The term "actual drilling operations" as used in section 4(d) of the Mineral Leasing Act Revision of 1960 means the actual boring of a well with drilling equipment and does not include such preparatory work as grading roads and well sites and moving equipment on the lease..... 263
- 4. Congress has frequently used the word "homestead" in connection with the allotment of land to Indians to indicate merely that the land allotted was to be subject to special status and the use of the word "homestead" in the Alaska Allotment Act, 34 Stat. 197, as amended, 70 Stat. 954, is not necessarily indicative of an intention to superimpose the requirements of the general homestead laws on the express requirements of the Alaska statute..... 340
- 5. *Title, Fish and Wildlife.* Such title as a State may hold to wild animals is a trust interest for the benefit of its citizens, not a possessory title..... 469
- 6. *Entry.* An "entry," within the meaning of the act of September 5, 1914, permitting a second homestead entry where a prior entry has been lost for reasons beyond the control of the entryman, includes the filing of an allowable homestead application in Alaska which is withdrawn by the applicant before it is allowed..... 477