

UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

Secretary of the Interior----- Cecil D. Andrus

Office of Hearings and Appeals----- David B. Graham, Director

Office of the Solicitor----- Leo M. Krulitz, Solicitor

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

EDITED BY

VERA E. BURGIN

BETTY H. PERRY



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PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1978 to December 31, 1978. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable Cecil D. Andrus, served as Secretary of the Interior during the period covered by this volume; Mr. James A. Joseph, served as Under Secretary; Ms. Joan Davenport, Messrs. Robert Herbst, Guy Martin, Larry Meierotto, Forrest Girard served as Assistant Secretaries of the Interior; Mr. Leo Krulitz, served as Solicitor. Mr. David B. Graham served as Director, Office of Hearings and Appeals.

This volume will be cited within the Department of the Interior as "85 I.D."



Cecil D. Andrus
Secretary of the Interior.

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ERRATA:

- Page 60—Right col., par. 2, line 9 correct to read: 77-1 BCA par. 12,298.
- Page 161—Title of Decision and running headings for pp. 161 through 165, correct to read: Island Creek Coal Co.
- Page 190—Left col., par. 5, line 2, correct 90 Stat. 2279 to read: 90 Stat. 2779.
- Page 255—Footnote 2, line 3 correct to read: 1914, 38 Stat. 686;
- Page 257—Footnote 5, line 1, correct to read: See 89 Stat. 1049 (Dec. 27, 1975).
- Page 269—Footnote 41, last line, correct to read: discussed at p. 270, *infra*.
- Page 272—Footnote 50, line 12, correct to read: 356 F. Supp. 148, 151 (D.C. Ha. 1973)
- Footnote 51, line 3, correct to read: Hawaii 1973).
- Page 318—Footnote 48A, line 17, correct to read: 411 U.S. 917 (1973); *McDade v. Morton*, 353
- Page 418—Left col., line 7, correct to read: 30 U.S.C. 226(e) (1970).
- Page 429—Footnote 6, line 2, correct to read: Trust, Inc. 544 F. 2d 1067 (10th Cir. 1976)

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Gabbs Exploration Co. v. Stewart L. Udall, Civil No. 219-61. Judgment for defendant, Dec. 1, 1961; aff'd., 315 F. 2d 37 (1963); *cert den.*, 375 U.S. 822 (1963).

Estate of Temens (Timens) Vivian Gardajee, 5 IBIA 113; 83 I.D. 216 (1976)

Confederated Tribes & Bands of the Yakima Indian Nation v. Thomas S. Kleppe, Secretary of the Interior, & Erwin Ray, Civil No. C-76-200, E.D. Wash. Suit pending.

Stanley Garthofner, Duvall Bros., 67 I.D. 4 (1960)

Stanley Garthofner v. Stewart L. Udall, Civil No. 4191-60. Judgment for plaintiff, Nov. 27, 1961; no appeal.

Estate of Gei-kaun-mah (Bert), 82 I.D. 408 (1975)

Juanita Geikaunmah Mammedaty & Imogene Geikaunmah Carter v. Rogers C. B. Morton, Secretary of the Interior, Civil No. CIV 75-1010-E, W.D. Okla. Judgment for defendant, 412 F. Supp. 283 (1973); no appeal.

General Excavating Co., 67 I.D. 344 (1960)

General Excavating Co. v. U.S., Ct. Cl. No. 170-62. Dismissed with prejudice Dec. 16, 1963.

Nelson A. Gerttula, 64 I.D. 225 (1957)

Nelson A. Gerttula v. Stewart L. Udall, Civil No. 685-60. Judgment for defendant, June 20, 1961; motion for rehearing denied, Aug. 3, 1961; aff'd., 309 F. 2d 653 (1962); no petition.

Charles B. Gonsales, et al., Western Oil Fields, Inc., et al., 69 L.D. 236 (1962)

Pan. American Petroleum Corp. & Charles B. Gonsales v. Stewart L. Udall, Civil No. 5246, D. N.M. Judgment for defendant, June 4, 1964; aff'd., 352 F. 2d 32 (10th Cir. 1965); no petition.

James C. Goodwin, 80 I.D. 7 (1973)

James C. Goodwin v. Dale R. Andrus, State Dir., Bureau of Land Management, Burton W. Silcock, Dir., Bureau of Land Management, & Rogers C. B. Morton, Secretary of the Interior, Civil No. C-5105, D. Colo. Dismissed, Nov. 29, 1975 (opinion); appeal dismissed, Mar. 9, 1976.

Gulf Oil Corp., 69 I.D. 30 (1962)

Southwestern Petroleum Corp. v. Stewart L. Udall, Civil No. 2209-62. Judgment for defendant, Oct. 19, 1962; aff'd., 325 F. 2d 633 (1963); no petition.

Guthrie Electrical Construction, 62 I.D. 280 (1955), IBCA-22 (Supp.) (Mar. 30, 1956)

Guthrie Electrical Construction Co. v. U.S., Ct. Cl. No. 129-58. Stipulation of settlement filed Sept. 11, 1958. Compromised offer accepted and case closed Oct. 10, 1958.

L. H. Hagood, et al., 65 I.D. 405 (1958)

Edwin Still, et al. v. U.S., Civil No. 7897, D. Colo. Compromise accepted.

Raymond J. Hansen, et al., 67 I.D. 362 (1960)

Raymond J. Hansen, et al. v. Stewart L. Udall, Civil No. 3902-60. Judgment for defendant, June 23, 1961; aff'd., 304 F. 2d 944 (1962); cert. den., 371 U.S. 901 (1962).

Robert Schulein v. Stewart L. Udall, Civil No. 4131-60. Judgment for defendant, June 23, 1961; aff'd., 304 F. 2d 944 (1962); no petition.

Billy K. Hatfield, et al. v. Southern Ohio Coal Co., 82 I.D. 289 (1975)

District 6 United Mine Workers of America, et al. v. U.S. Dept. of Interior Board of Mine Operations Appeals, No. 75-1704, U.S. Court of Appeals, D.C. Cir. Board's decision aff'd., 562 F. 2d 1260 (1977).

Jesse Higgins, Paul Gower & William Gipson v. Old Ben Coal Corp., 81 I.D. 423 (1974)

Jesse Higgins, et al. v. Cecil D. Andrus, No. 77-1363, United States Ct. of Appeals, D.C. Cir. Dismissed for lack of jurisdiction, June 20, 1977.

Kenneth Holt, an individual, etc., 68 I.D. 148 (1961)

Kenneth Holt, etc. v. U.S., Ct. Cl. No. 162-62. Stipulated judgment, July 2, 1965.

Hope Natural Gas Co., 70 I.D. 228 (1963)

Hope Natural Gas Co. v. Stewart L. Udall, Civil No. 2132-63.

Consolidated Gas Supply Corp. v. Stewart L. Udall, et al., Civil No. 2109-63. Judgment for defendant, Sept. 20, 1965; Per curiam decision, aff'd., Apr. 28, 1966; no petition.

Boyd L. Hulse v. William H. Griggs, 67 I.D. 212 (1960)

William H. Griggs v. Michael T. Solan, Civil No. 3741. D. Idaho. Stipulation for dismissal filed May 15, 1962.

Idaho Desert Land Entries—Indian Hill Group, 72 I.D. 156 (1965), *U.S. v. Ollie Mae Shearman, et al.—Idaho Desert Land Entries—Indian Hill Group*, 73 I.D. 386 (1966)

Wallace Reed, et al v. Dept. of the Interior, et al., Civil No. 1-65-86, D. Idaho. Order denying preliminary injunction, Sept. 3, 1965; dismissed, Nov. 10, 1965; amended complaint filed, Sept. 11, 1967.

U.S. v. Raymond T. Michener, et al., Civil No. 1-65-93, D. Idaho. Dismissed without prejudice, June 6, 1966.

U.S. v. Hood Corp., et al., Civil No. 1-67-97, S.D. Idaho.

Civil Nos. 1-65-86 & 1-67-97 consolidated. Judgment adverse to U.S., July 10, 1970; reversed, 480 F. 2d 634 (9th Cir. 1973); *cert. denied*, 414 U.S. 1064 (1973). Dismissed with prejudice subject to the terms of the stipulation, Aug. 30, 1976.

*Appeal of Inter*Helo, Inc.*, IBCA-713-5-68 (Dec. 30, 1969), 82 I.D. 591 (1975)

John Billmeyer, etc. v. U.S., Ct. Cl. No. 54-74. Remanded with instructions to admit evidence, May 30, 1975.

Interpretation of the Submerged Lands Act, 71 I.D. 20 (1964)

Floyd A. Wallis v. Stewart L. Udall, Civil No. 3089-63. Dismissed with prejudice, Mar. 27, 1968.

C. J. Iverson, 82 I.D. 386 (1975)

C. J. Iverson v. Kent Frizzell, Acting Secretary of the Interior & Dorothy D. Rupe, Civil No. 75-106-Blg, D. Mont. Stipulation for dismissal with prejudice, Sept. 10, 1976.

J. A. Terteling & Sons, 64 I.D. 466 (1957)

J. A. Terteling & Sons v. U.S., Ct. Cl. No. 114-59. Judgment for defendant, 390 F. 2d 926 (1968); remaining aspects compromised.

J. D. Armstrong Co., 63 I.D. 289 (1956)

J. D. Armstrong, Inc. v. U.S., Ct. Cl. No. 490-56. Plaintiff's motion to dismiss petition allowed, June 26, 1959.

M. G. Johnson, 78 I.D. 107 (1971), *U.S. v. Menzel G. Johnson*, 16 IBLA 234 (1974)

Menzel G. Johnson v. Rogers C. B. Morton, Secretary of the Interior, et al., Civil No. CN-LV-158, RDF, D. Nev. Judgment for defendant, Oct. 18, 1977; appeal filed Dec. 5, 1977.

Estate of San Pierre Kilkakhan (Sam E. Hill), 1 IBIA 299; 79 I.D. 583 (1972), 4 IBIA 242 (1975), 5 IBIA 12 (1976)

Christine Sam & Nancy Judge v. Thomas S. Kleppe, Secretary of the Interior, Civil No. C-76-14, E.D. Wash. Dismissed with prejudice.

Anquita L. Kluenter, et al., A-30483, Nov. 18, 1965

See Bobby Lee Moore, *et al.*

Leo J. Kottas, Earl Lutzenhiser, 73 I.D. 123 (1966)

Earl M. Lutzenhiser and Leo J. Kottas v. Stewart L. Udall, et al., Civil No. 1371, D. Mont. Judgment for defendant, June 7, 1968; *aff'd.*, 432 F. 2d 328 (9th Cir. 1970); no petition.

Max L. Krueger, Vaughan B. Connelly, 65 I.D. 185 (1958)

Max L. Krueger v. Fred A. Seaton, Civil No. 3106-58. Complaint dismissed by plaintiff, June 22, 1959.

W. Dalton La Rue, Sr., 69 I.D. 120 (1962)

W. Dalton La Rue, Sr. v. Stewart L. Udall, Civil No. 2784-62. Judgment for defendant, Mar. 6, 1963; *aff'd.*, 324 F. 2d 428 (1963); *cert. den.*, 376 U.S. 907 (1964).

L. B. Samford, Inc., 74 I.D. 86 (1967)

L. B. Samford, Inc. v. U.S., Ct. Cl. No. 393-67. Dismissed, 410 F. 2d 782 (1969); no petition.

Charles Lewellen, 70 I.D. 475 (1963)

Bernard E. Darling v. Stewart L. Udall, Civil No. 474-64. Judgment for defendant, Oct. 5, 1964; appeal voluntarily dismissed, Mar. 26, 1965.

Administrative Appeal of Ruth Pinto Lewis v. Superintendent of the Eastern Navajo Agency, 4 IBIA 147; 82 I.D. 521 (1975)

Ruth Pinto Lewis, Individually & as the Administratrix of the Estate of Ignacio Pinto v. Thomas S. Kleppe, Secretary of the Interior, & U.S., Civil No. CIV-76-223 M, D. N.M. Judgment for plaintiff, July 21, 1977; no appeal.

Milton H. Lichtenwalner, et al., 69 I.D. 71 (1962)

Kenneth McGahan v. Stewart L. Udall, Civil No. A-21-63, D. Alas. Dismissed on merits, Apr. 24, 1964; stipulated dismissal of appeal with prejudice, Oct. 5, 1964.

Merwin E. Liss, et al., 70 I.D. 231 (1963)

Hope Natural Gas Co. v. Stewart L. Udall, Civil No. 2132-63.

Consolidated Gas Supply Corp. v. Stewart L. Udall, et al., Civil No. 2109-63. Judgment for defendant, Sept. 20, 1965; per curiam dec., aff'd., Apr. 28, 1966; no petition.

Bess May Lutey, 76 I.D. 37 (1969)

Bess May Lutey, et al. v. Dept. of Agriculture, BLM, et al., Civil No. 1817, D. Mont. Judgment for defendant, Dec. 10, 1970; no appeal.

Elgin A. McKenna Executrix, Estate of Patrick A. McKenna, 74 I.D. 133 (1967)

Mrs. Elgin A. McKenna as Executrix of the Estate of Patrick A. McKenna, Deceased v. Udall, Civil No. 2001-67. Judgment for defendant, Feb. 14, 1968; aff'd., 418 F. 2d 1171 (1969); no petition.

Mrs. Elgin A. McKenna, Widow and Successor in Interest of Patrick A. McKenna, Deceased v. Walter J. Hickel, Secretary of the Interior, et al., Civil No. 2401, D. Ky. Dismissed with prejudice, May 11, 1970.

A. G. McKinnon, 62 I.D. 164 (1955)

A. G. McKinnon v. U.S., Civil No. 9433, D. Ore. Judgment for plaintiff, 178 F. Supp. 913 (1959); rev'd., 289 F. 2d 908 (9th Cir. 1961).

Estate of Elizabeth C. Jensen McMaster, 5 IBIA 61; 83 I.D. 145 (1976)

Raymond C. McMaster v. U.S., Dept. of the Interior, Secretary of the Interior & Bureau of Indian Affairs, Civil No. C76-129T, W.D. Wash. Dismissed, June 29, 1978.

Wade McNeil, et al., 64 I.D. 423 (1957)

Wade McNeil v. Fred A. Seaton, Civil No. 648-58. Judgment for defendant, June 5, 1959 (opinion); rev'd., 281 F. 2d 931 (1960); no petition.

Wade McNeil v. Albert K. Leonard, et al., Civil No. 2226, D. Mont. Dismissed, 199 F. Supp. 671 (1961); order, Apr. 16, 1962.

Wade McNeil v. Stewart L. Udall, Civil No. 678-62. Judgment for defendant, Dec. 13, 1963 (opinion); aff'd., 340 F. 2d 801 (1964); cert. den., 381 U.S. 904 (1965).

Marathon Oil Co., 81 I.D. 447 (1974), *Atlantic Richfield Co., Marathon Oil Co.*, 81 I.D. 457 (1974)

Marathon Oil Co. v. Rogers C. B. Morton, Secretary of the Interior, et al., Civil No. C 74-179, D. Wyo.

Marathon Oil Co. v. Rogers C. B. Morton, Secretary of the Interior, et al., Civil No. C 74-180, D. Wyo.

Atlantic Richfield Co. & Pasco, Inc. v. Rogers C. B. Morton, Secretary of the Interior, et al., Civil No. C 74-181, D. Wyo.

Actions consolidated; judgment for plaintiff, 407 F. Supp. 1301 (1975); aff'd., 556 F. 2d 982 (10th Cir. 1977).

Salvatore Megna, Guardian, Philip T. Garigan, 65 I.D. 33 (1958)

Salvatore Megna, Guardian etc. v. Fred A. Seaton, Civil No. 468-58. Judgment for plaintiff, Nov. 16, 1959; motion for reconsideration denied, Dec. 2, 1959; no appeal.

Philip T. Garigan v. Stewart L. Udall, Civil No. 1577 Tux., D. Ariz. Preliminary injunction against defendant, July 27, 1966; supplemental dec. rendered Sept. 7, 1966; judgment for plaintiff, May 16, 1967; no appeal.

Meva Corp., 76 I.D. 205 (1969)

Meva Corp. v. U.S., Ct. Cl. No. 492-69. Judgment for plaintiff, 511 F. 2d 548 (1975).

Duncan Miller, Louise Cuccia, 66 I.D. 388 (1959)

Louise Cuccia and Shell Oil Co. v. Stewart L. Udall, Civil No. 562-60. Judgment for defendant, June 27, 1961; no appeal.

Duncan Miller, 70 I.D. 1 (1963)

Duncan Miller v. Stewart L. Udall, Civil No. 931-63. Dismissed for lack of prosecution, Apr. 21, 1966; no appeal.

Duncan Miller, Samuel W. McIntosh, 71 I.D. 121 (1964)

Samuel W. McIntosh v. Stewart L. Udall, Civil No. 1522-64. Judgment for defendant, June 29, 1965; no appeal.

Duncan Miller, A-29231 (Feb. 5, 1963)

See Lucille S. West, *Duncan Miller, et al.*

Duncan Miller, A-30546 (Aug. 10, 1966), A-30566 (Aug. 11, 1966), and 73 I.D. 211 (1966)

Duncan Miller v. Udall, Civil No. C-167-66, D. Utah. Dismissed with prejudice, Apr. 17, 1967; no appeal.

Bobby Lee Moore, et al., 72 I.D. 505 (1965); *Anquita L. Kluentner, et al.*, A-30483 (Nov. 18, 1965)

Gary Carson Lewis, etc., et al. v. General Services Administration, et al., Civil No. 3253 S.D. Cal. Judgment for defendant, Apr. 12, 1965; aff'd., 377 F. 2d 499 (9th Cir. 1967); no petition.

Henry S. Morgan, et al., 65 I.D. 369 (1958)

Henry S. Morgan v. Stewart L. Udall, Civil No. 3248-59. Judgment for defendant, Feb. 20, 1961 (opinion); aff'd., 306 F. 2d 799 (1962); cert. den., 371 U.S. 941 (1962).

Morrison-Knudsen Co., Inc., 64 I.D. 185 (1957)

Morrison-Knudsen Co., Inc. v. U.S., Ct. Cl. No. 239-61. Remanded to Trial Commr., 345 F. 2d 833 (1965); Commr.'s report adverse to U.S. issued June 20, 1967; judgment for plaintiff, 397 F. 2d 826 (1968); part remanded to the Board of Contract Appeals; stipulated dismissal on Oct. 6, 1969; judgment for plaintiff, Feb. 17, 1970.

Glenn Munsey v. Smitty Baker Coal Co., Ralph Baker, Smitty Baker, & P & P Coal Co., 84 I.D. 336 (1977)

Glenn Munsey v. Cecil D. Andrus, No. 77-1619, United States Ct. of Appeals. D.C. Cir. Suit pending.

Navajo Tribe of Indians v. State of Utah, 80 I.D. 441 (1973)

Navajo Tribe of Indians v. Rogers C. B. Morton, Secretary of the Interior, Joan B. Thompson, Martin Ritvo & Frederick Fishman, members of the Board of Land Appeals, Dept. of the Interior, Civil No. C-308-73, D. Utah. Dismissed with prejudice, Jan. 4, 1979.

Richard L. Oelschlaeger, 67 I.D. 237 (1960)

Richard L. Oelschlaeger v. Stewart L. Udall, Civil No. 1481-60. Dismissed, Nov. 15, 1963; case reinstated, Feb. 19, 1964; remanded, Apr. 4, 1967; rev'd. & remanded with directions to enter judgment for appellant, 389 F. 2d 974 (1968); *cert. den.* 392 U.S. 909 (1968).

Oil and Gas Leasing on Lands Withdrawn by Executive Orders for Indian Purposes in Alaska, 70 I.D. 166 (1963)

Mrs. Louise A. Pease v. Stewart L. Udall, Civil No. 760-63, D. Alas. Withdrawn, Apr. 18, 1963.

Superior Oil Co. v. Robert L. Bennett, Civil No. A-17-63, D. Alas. Dismissed, Apr. 23, 1963.

Native Village of Tyonek v. Robert L. Bennett, Civil No. A-15-63, D. Alas. Dismissed, Oct. 11, 1963.

Mrs. Louise A. Pease v. Stewart L. Udall, Civil No. A-20-63, D. Alas. Dismissed, Oct. 29, 1963 (oral opinion); *aff'd.*, 332 F. 2d 62 (9th Cir. 1964); no petition.

George L. Gucker v. Stewart L. Udall, Civil No. A-39-63, D. Alas. Dismissed without prejudice, Mar. 2, 1964; no appeal.

Oil Resources, Inc., 28 IBLA 394; 84 I.D. 91 (1977)

Oil Resources, Inc. v. Cecil D. Andrus, Secretary of the Interior, Civil No. C-77-0147, D. Utah. Suit pending.

Old Ben Coal Corp., 81 I.D. 428, 436, 440 (1974)

Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, et al., Nos. 74-1654, 74-1655, 74-1656, United States Court of Appeals for the 7th Cir. Board's decision *aff'd.*, June 13, 1975; *reconsideration denied*, June 27, 1975.

Old Ben Coal Co., 82 I.D. 355 (1975)

United Mine Workers of America v. U.S. Interior Board of Mine Operations Appeals, No. 75-1852, United States Court of Appeals, D.C. Circuit. Vacated & remanded with instructions to dismiss as moot, June 10, 1977.

Old Ben Coal Co., 84 I.D. 459 (1977)

United Mine Workers of America v. Cecil D. Andrus, No. 77-1840, United States Ct. of Appeals, D.C. Cir. Suit pending.

Appeal of Ounalashka Corp., 1 ANCAB 104; 83 I.D. 475 (1976)

Ounalashka Corp., for & on behalf of its Shareholders v. Thomas S. Kleppe, Secretary of Interior, & his successors & predecessors in office, et al., Civil No. A76-241 CIV, D. Alas. Suit pending.

Jack W. Parks v. L & M Coal Corp., 83 I.D. 710 (1976)

Jack W. Parks v. Thomas S. Kleppe, No. 76-2052, United States Ct. of Appeals, D.C. Cir. Voluntary dismissal, May 4, 1977.

Paul Jarvis, Inc., 64 I.D. 285 (1957)

Paul Jarvis, Inc. v. U.S., Ct. Cl. No. 40-58. Stipulated judgment for plaintiff, Dec. 19, 1958.

Peter Kiewit Sons' Co., 72 I.D. 415 (1965)

Peter Kiewit Sons' Co. v. U.S., Ct. Cl. 129-66. Judgment for plaintiff, May 24, 1968.

Curtis D. Peters, 80 I.D. 595 (1973)

Curtis D. Peters v. U.S., Rogers C. B. Morton, as Secretary of the Interior, Civil No. C-75-0201 RFP, N.D. Cal. Judgment for defendant, Dec. 1, 1975; no appeal.

City of Phoenix v. Alvin B. Reeves, et al., 81 I.D. 65 (1974)

Alvin B. Reeves, Genevieve C. Rippey, Leroy Reeves & Thelma Reeves, as heirs of A. H. Reeves, Deceased v. Rogers C. B. Morton, Secretary of the Interior, & The City of Phoenix, a municipal Corp., Civil No. 74-117 PHX-WPC, D. Ariz. Dismissed with prejudice, Aug. 9, 1974; reconsideration den., Sept. 24, 1974; no appeal.

Harold Ladd Pierce, 69 I.D. 14 (1962)

Duncan Miller v. Stewart L. Udall, Civil No. 1351-62. Judgment for defendant, Aug. 2, 1962; aff'd., 317 F. 2d 573 (1963); no petition.

Pocahontas Fuel Co., 83 I.D. 690 (1976)

Howard Mullins v. Cecil D. Andrus, No. 77-1087, United States Ct. of Appeals, D.C. Cir. Suit pending.

Pocahontas Fuel Co., 84 I.D. 489 (1977)

Pocahontas Fuel Co., Div. of Consolidation Coal Co., v. Cecil D. Andrus, No. 77-2239, United States Ct. of Appeals, 4th Cir. Suit pending.

Port Blakely Mill Co., 71 I.D. 217 (1964)

Port Blakely Mill Co. v. U.S., Civil No. 6205, W.D. Wash. Dismissed with prejudice, Dec. 7, 1964.

Estate of John S. Ramsey (Wap Tose Note) (Nez Perce Allottee No. 853, Deceased), 81 I.D. 298 (1974)

Clara Ramsey Scott. v. U.S. & Rogers C. B. Morton, Secretary of the Interior, et al., Civil No. 3-74-39, D. Idaho. Dismissed with prejudice, Aug. 11, 1975; no appeal.

Ray D. Bolander Co., 72 I.D. 449 (1965)

Ray D. Bolander Co. v. U.S., Ct. Cl. 51-66. Judgment for plaintiff, Dec. 13, 1968; subsequent Contract Officer's dec., Dec. 3, 1969; interim dec., Dec. 2, 1969; Order to Stay Proceedings until Mar. 31, 1970; dismissed with prejudice, Aug. 3, 1970.

Estate of Crawford J. Reed (Unallotted Crow No. 6412), 1 IBIA 326; 79 I.D. 621 (1972)

George Reed, Sr. v. Rogers C. B. Morton, et al., Civil No. 1105, D. Mont. Dismissed, June 14, 1973; no appeal.

Reliable Coal Corp., 1 IBMA 97; 79 I.D. 139 (1972)

Reliable Coal Corp. v. Rogers C. B. Morton, Secretary of the Interior, et al., No. 72-1477 United States Court of Appeals, 4th Cir. Board's decision aff'd., 478 F. 2d 257 (4th Cir. 1973).

Republic Steel Corp., 82 I.D. 607 (1975)

Republic Steel Corp. v. Interior Board of Mine Operations Appeals, No. 76-1041, United States Ct. of Appeals, D.C. Cir. Rev'd. & remanded, Feb. 22, 1978.

Richfield Oil Corp., 62 I.D. 269 (1955)

Richfield Oil Corp. v. Fred A. Seaton, Civil No. 3820-55. Dismissed without prejudice, Mar. 6, 1958; no appeal.

Hugh S. Ritter, Thomas M. Bunn, 72 I.D. 111 (1965), *Reconsideration denied* by letter decision dated June 23, 1967, by the Under Secretary.

Thomas M. Bunn v. Stewart L. Udall, Civil No. 2615-65. Remanded, June 28, 1966.

Estate of William Cecil Robedeaux, 1 IBIA 106, 78 I.D. 234 (1971), 2 IBIA 33, 80 I.D. 390 (1973)

Oneta Lamb Robedeaux, et al. v. Rogers C. B. Morton, Civil No. 71-646, D. Okla. Dismissed, Jan. 11, 1973.

Houston Bus Hill v. Rogers C. B. Morton, Civil No. 72-376, W.D. Okla. Judgment for plaintiff, Oct. 29, 1973; amended judgment for plaintiff, Nov. 12, 1973; appeal dismissed, June 28, 1974.

Houston Bus Hill & Thurman S. Hurst v. Rogers C. B. Morton, Secretary of the Interior, Civil No. 73-528-B, W.D. Okla. Judgment for plaintiff, Apr. 30, 1975; corrected judgment, May 2, 1975; per curiam dec., vacated & remanded, Oct. 2, 1975; judgment for plaintiff, Dec. 1, 1975.

Estate of Clark Joseph Robinson, 7 IBIA 74; 85 I.D. 294 (1978)

Rene Robinson, by & through her Guardian Ad Litem, Nancy Clifford v. Cecil Andrus, Secretary of the Interior, Gretchen Robinson, & Trixi Lynn Robinson Harris, Civil No. CIV-78-5097, D. S.D. Suit pending.

Rosebud Coal Sales Co., 37 IBLA 251; 85 I.D. 396 (1978)

Rosebud Coal Sales Co. v. Cecil D. Andrus, Secretary of the Interior, Frank Gregg, Director, Bureau of Land Management, & Maria B. Bohk, Chief, Land & Mining, Bureau of Land Management, Wyo., Civil No. C78-261, D. Wyo. Suit pending.

Richard W. Rowe, Daniel Gaudiane, 82 I.D. 174 (1975)

Richard W. Rowe, Daniel Gaudiane v. Stanley K. Hathaway, in his official capacity as Secretary of the Interior, Civil No. 75-1152. Judgment for defendant, July 29, 1976.

San Carlos Mineral Strip, 69 I.D. 195 (1962)

James Houston Bowman v. Stewart L. Udall, Civil No. 105-63. Judgment for defendant, 243 F. Supp. 672 (1965); aff'd., sub nom. *S. Jack Hinton, et al. v. Stewart L. Udall*, 364 F. 2d 676 (1966); cert. denied, 385 U.S. 878 (1966); supplemented by M-36767, Nov. 1, 1967.

Seal and Co., 68 I.D. 94 (1961)

Seal & Co. v. U.S., Ct. Cl. 274-62. Judgment for plaintiff, Jan. 31, 1964; no appeal.

Administrative Appeal of Sessions, Inc. (A Cal. Corp.) v. Vyola Olinger Ortner (Lessor), Lease No. PSL-33, Joseph Patrick Patencio (Lessor), Lease No. PSL-36, Larry Olinger (Lessor), Lease No. PSL-41, 81 I.D. 651 (1974)

Sessions, Inc. v. Rogers C. B. Morton, Secretary of the Interior, et al., Civil No. CV 74-3589 LTL, C.D. Cal. Dismissed with prejudice, Jan. 26, 1976.

Sessions, Inc. v. Rogers C. B. Morton, Secretary of the Interior, et al., Civil No. CV 74-3591 MML, C.D. Cal. Dismissed with prejudice, Jan. 26, 1976.

Sessions, Inc. v. Rogers C. B. Morton, Secretary of the Interior, et al., Civil No. CV 74-3590 FW, C.D. Cal. Dismissed with prejudice, Jan. 26, 1976.

Steve Shapiro v. Bishop Coal Co., 83 I.D. 59 (1976)

Bishop Coal Co. v. Thomas S. Kleppe, No. 76-1368, United States Ct. of Appeals, 4th Cir. Suit pending.

Shell Oil Co., A-30575 (Oct. 31, 1966), *Chargeability of Acreage Embraced in Oil & Gas Lease Offers*, 71 I.D. 337 (1964)

Shell Oil Co. v. Udall, Civil No. 216-67. Stipulated dismissal Aug. 19, 1968.

Sinclair Oil & Gas Co., 75 I.D. 155 (1968)

Sinclair Oil & Gas Co. v. Stewart L. Udall, Secretary of the Interior, et al., Civil No. 5277, D. Wyo. Judgment for defendant, sub nom. *Atlantic Richfield Co. v. Walter J. Hickel*, 303 F. Supp. 724 (1969); aff'd., 432 F. 2d 587 (10th Cir. 1970); no petition.

Charles T. Sink, 82 I.D. 535 (1975)

Charles T. Sink v. Thomas S. Kleppe, Secretary of the Interior—Mining Enforcement & Safety Administration (MESA), No. 75-1292, United States Ct. of Appeals for the 4th Cir. Vacated without prejudice to plaintiff's rights, 529 F. 2d 601 (4th Cir. 1975).

Southern Pacific Co., 76 I.D. 1 (1969)

Southern Pacific Co. v. Walter J. Hickel, Secretary of the Interior, Civil No. S-1274, D. Cal. Judgment for defendant, Dec. 2, 1970 (opinion); no appeal.

Southern Pacific Co., Louis G. Wedekind, 77 I.D. 177 (1970), 20 IBLA 365 (1975)

George C. Laden, Louis Wedekind, Mrs. Vern Lear, Mrs. Arda Fritz, & Helen Laden Wagner, heirs of George H. Wedekind, Deceased v. Rogers C. B. Morton, et al., Civil No. R-2858, D. Nev. On June 20, 1974, remanded for further agency proceedings as originally ordered in 77 I.D. 177; Dist. Ct. reserves jurisdiction; supplemental complaint filed, Aug. 1, 1975; judgment for defendant, Nov. 29, 1976; appeal filed Jan. 27, 1977.

Southwest Welding & Manufacturing Division, Yuba Consolidated Industries, Inc., 69 I.D. 173 (1962)

Southwest Welding v. U.S., Civil No. 68-1658-CC, C.D. Cal. Judgment for plaintiff, Jan. 14, 1970; appeal dismissed, Apr. 6, 1970.

Southwestern Petroleum Corp., et al., 71 I.D. 206 (1964)

Southwestern Petroleum Corp. v. Stewart L. Udall, Civil No. 5773, D. N.M. Judgment for defendant, Mar. 8, 1965; aff'd., 361 F. 2d 650 (10th Cir. 1966); no petition.

Standard Oil Co. of California, et al., 76 I.D. 271 (1969)

Standard Oil Co. of California v. Walter J. Hickel, et al., Civil No. A-159-69, D. Alas. Judgment for plaintiff, 317 F. Supp. 1192 (1970); aff'd., sub nom. *Standard Oil Co. of Cal. v. Rogers C. B. Morton, et al.*, 450 F. 2d 493 (9th Cir. 1971); no petition.

Standard Oil Co. of Texas, 71 I.D. 257 (1964)

California Oil Co. v. Secretary of the Interior, Civil No. 5729, D. N.M. Judgment for plaintiff, Jan. 21, 1965; no appeal.

James K. Tallman, 68 I.D. 256 (1961)

James K. Tallman, et al. v. Stewart L. Udall, Civil No. 1852-62. Judgment for defendant, Nov. 1, 1962 (opinion); rev'd., 324 F. 2d 411 (1963); *cert. granted*, 376 U.S. 961 (1964); Dist. Ct. aff'd., 380 U.S. 1 (1965); *rehearing denied*, 380 U.S. 989 (1965).

Texaco, Inc., 75 I.D. 8 (1968)

Texaco, Inc., a Corp. v. Secretary of the Interior, Civil No. 446-68. Judgment for plaintiff, 295 F. Supp. 1297 (1969); aff'd. in part & remanded, 437 F. 2d 636 (1970); aff'd. in part & remanded, July 19, 1972.

Texas Construction Co., 64 I.D. 97 (1957), *Reconsideration denied*, IBCA-73 (June 18, 1957)

Texas Construction Co. v. U.S., Ct. Cl. No. 224-58. Stipulated judgment for plaintiff, Dec. 14, 1961.

Estate of John Thomas, Deceased Cayuse Allottee No. 223 & Estate of Joseph Thomas, Deceased, Umatilla Allottee No. 877, 64 I.D. 401 (1957)

Joe Hayes v. Fred A. Seaton, Secretary of the Interior, Civil No. 859-581. Judgment for defendant, Sept. 18, 1958; aff'd., 270 F. 2d 319 (1959); *cert. denied*, 364 U.S. 814 (1960); *rehearing denied*, 364 U.S. 906 (1960).

Thor-Westcliffe Development, Inc., 70 I.D. 134 (1963)

Thor-Westcliffe Development, Inc. v. Stewart L. Udall, Civil No. 5343, D. N.M. Dismissed with prejudice, June 25, 1963.

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Richard K. Todd, et al., 68 I.D. 291 (1961)

Bert F. Dusing v. Stewart L. Udall, Civil No. 290-62. Judgment for defendant, July 17, 1962 (oral opinion); aff'd., 350 F. 2d 748 (1965); *cert. demed.*, 383 U.S. 912 (1966).

Atwood, et al. v. Stewart L. Udall, Civil Nos. 293-62-299-62, incl. Judgment for defendant, Aug. 2, 1962; aff'd., 350 F. 2d 748 (1965); no petition.

Appeal of Toke Cleaners, 81 I.D. 258 (1974)

Thom Properties, Inc., d/b/a Toke Cleaners & Launderers v. U.S., Department of the Interior, Bureau of Indian Affairs, Civil No. A3-74-99, D. N.D. Stipulation for dismissal & order dismissing case, June 16, 1975.

Estate of Phillip Tooisgah, 4 IBIA 189; 82 I.D. 541 (1975)

Jonathan Morris & Velma Tooisgah v. Thomas S. Kleppe, Secretary of the Interior, Civil No. CIV-76-0037-D, W.D. Okla. Suit pending.

Union Oil Co. Bid on Tract 228, Brazos Area, Texas Offshore Sale, 75 I.D. 147 (1968), 76 I.D. 69 (1969)

The Superior Oil Co., et al. v. Stewart L. Udall, Civil No. 1521-68. Judgment for plaintiff, July 29, 1968, modified, July 31, 1968; aff'd., 409 F. 2d 1115 (1969); dismissed as moot, June 4, 1969; no petition.

Union Oil Co. of California, Ramon P. Colvert, 65 I.D. 245 (1958)

Union Oil Co. of California v. Stewart L. Udall, Civil No. 3042-58. Judgment for defendant, May 2, 1960 (opinion); aff'd., 289 F. 2d 790 (1961); no petition.

Union Oil Co. of California, et al., 71 I.D. 169 (1964), 72 I.D. 313 (1965)

Penelope Chase Brown, et al. v. Stewart L. Udall, Civil No. 9202, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd., 406 F. 2d 759 (10th Cir. 1969); *cert. granted*, 396 U.S. 817 (1969); rev'd. & remanded, 400 U.S. 48 (1970); remanded to Dist. Ct., Mar. 12, 1971; judgment for plaintiff, 370 F. Supp. 108 (1973); vacated & remanded, Sept. 22, 1975; petition for rehearing *en banc* denied; *cert. denied*, June 21, 1976; remanded to the Dept. for further proceedings, Jan. 17, 1977.

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Barnette T. Napier, et al. v. Secretary of the Interior, Civil No. 8691, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd., 406 F. 2d 759 (10th Cir. 1969); *cert. granted*, 396 U.S. 817 (1969); rev'd. & remanded, 400 U.S. 48 (1970); remanded to Dist. Ct., Mar. 12, 1971; judgment for plaintiff, 370 F. Supp. 108 (1973); vacated & remanded, Sept. 22, 1975; petition for rehearing *en banc* denied; *cert. denied*, June 21, 1976; remanded to the Dept. for further proceedings, Jan. 17, 1977.

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The Oil Shale Corp., et al. v. Secretary of the Interior, Civil No. 8680, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd., 406 F. 2d 759 (10th Cir. 1969); *cert. granted*, 396 U.S. 817 (1969); rev'd. & remanded, 400 U.S. 48 (1970); remanded to Dist. Ct., Mar. 12, 1971; judgment for plaintiff, 370 F. Supp. 108 (1973); vacated & remanded, Sept. 22, 1975; petition for rehearing *en banc* denied; *cert. denied*, June 21, 1976; remanded to the Dept. for further proceedings, Jan. 17, 1977.

The Oil Shale Corp., et al. v. Stewart L. Udall, Civil No. 9465, D. Colo. Order to Close Files & Stay Proceedings, Mar. 25, 1967.

Joseph B. Umpleby, et al., v. Stewart L. Udall, Civil No. 8685, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd., 406 F. 2d 759 (10th Cir. 1969); *cert. granted*, 396 U.S. 817 (1969); rev'd. & remanded, 400 U.S. 48 (1970); remanded to Dist. Ct., Mar. 12, 1971; judgment for

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Union Oil Co. of California, 71 I.D. 287 (1964)

Union Oil Co. of California v. Stewart L. Udall, Civil No. 2595-64. Judgment for defendant, Dec. 27, 1965; no appeal.

Union Pacific R.R., 72 I.D. 76 (1965)

The State of Wyoming & Gulf Oil Corp. v. Stewart L. Udall, etc., Civil No. 4913, D. Wyo. Dismissed with prejudice, 255 F. Supp. 481 (1966); *aff'd.*, 379 F. 2d 635 (10th Cir. 1967); *cert. denied*, 389 U.S. 985 (1967).

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United Mine Workers of America v. Thomas S. Kleppe, No. 76-1377, United States Ct. of Appeals, 7th Cir. Board's decision *aff'd.*, 561 F. 2d 1258 (7th Cir. 1977).

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U.S. v. Alonzo A. Adams, et al., 64 I.D. 221 (1957), A-27364 (July 1, 1957)

Alonzo A. Adams, et al., v. Paul B. Witmer, et al., Civil No. 1222-57-Y, S.D. Cal. Complaint dismissed, Nov. 27, 1957 (opinion); *rev'd. & remanded*, 271 F. 2d 29 (9th Cir. 1958); on rehearing, appeal dismissed as to Witmer; petition for rehearing by Berriman denied, 271 F. 2d 37 (9th Cir. 1959).

U.S. v. Alonzo Adams, Civil No. 187-60-WM, S.D. Cal. Judgment for plaintiff, Jan. 29, 1962 (opinion); judgment modified, 318 F. 2d 861 (9th Cir. 1963); no petition.

U.S. v. E. A. & Esther Barrows, 76 I.D. 299 (1969)

Esther Barrows, as an individual & as Executrix of the Last Will of E. A. Barrows, Deceased v. Walter J. Hickel, Civil No. 70-215-CC, C.D. Cal. Judgment for defendant, Apr. 20, 1970; *aff'd.*, 447 F. 2d 80 (9th Cir. 1971).

U.S. v. J. L. Block, 80 I.D. 571 (1973)

J. L. Block v. Rogers Morton, Secretary of the Interior, Civil No. LV-74-9, BRT, D. Nev. Judgment for defendant, June 6, 1975; *rev'd. & remanded* with instructions to remand to the Secretary of the Interior, Mar. 29, 1977; no petition.

U.S. v. Lloyd W. Booth, 76 I.D. 73 (1969)

Lloyd W. Booth v. Walter J. Hickel, Civil No. 42-69, D. Alas. Judgment for defendant, June 30, 1970; no appeal.

U.S. v. Alice A. & Carrie H. Boyle, 76 I.D. 61, 318 (1969), *Reconsideration denied*, Jan. 22, 1970.

Alice A. & Carrie H. Boyle v. Rogers C. B. Morton, Secretary of the Interior, Civil No. Civ-71-491 Phx WEC, D. Ariz. Judgment for plaintiff, May 4, 1972; rev'd. & remanded, 519 F. 2d 551 (9th Cir. 1975); *cert. denied*, 423 U.S. 1033 (1975).

U.S. v. R. W. Brubaker, et al., A-30636 (July 24, 1968); 9 IBLA 281, 80 I.D. 261 (1973)

R. W. Brubaker, a/k/a Ronald W. Brubaker, B. A. Brubaker, a/k/a Barbara A. Brubaker, & William J. Mann, a/k/a W. J. Mann v. Rogers C. B. Morton, Secretary of the Interior, Civil No. 73-1228 EC, C.D. Cal. Dismissed with prejudice, Aug. 13, 1973; aff'd., 500 F. 2d 200 (9th Cir. 1974); no petition.

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Independent Quick Silver Co., an Oregon Corp. v. Stewart L. Udall, Civil No. 65-590, D. Ore. Judgment for defendant, 262 F. Supp. 583 (1966); appeal dismissed.

U.S. v. Richard Dean Lance, 73 I.D. 218 (1966)

Richard Dean Lance v. Stewart L. Udall, et al., Civil No. 1864, D. Nev. Judgment for defendant, Jan. 23, 1968; no appeal.

U.S. v. William A. McCall, Sr., The Dredge Corp., Estate of Olaf H. Nelson, Deceased, Small Tract Applicants Assoc., Intervenor, 78 I.D. 71 (1971)

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- California, State of (15 L.D. 10); overruled, 23 L.D. 423, 31 L.D. 335 (1902).
- California, State of (19 L.D. 585); vacated, 28 L.D. 57 (1899).
- California, State of (22 L.D. 428); overruled, 32 L.D. 34 (1903).
- California, State of (32 L.D. 346); vacated, 50 L.D. 628 (1924) (See 37 L.D. 499 and 46 L.D. 396).
- California, State of (44 L.D. 118); overruled, 48 L.D. 97, 98 (1921).
- California, State of (44 L.D. 468); overruled, 48 L.D. 97, 98 (1921).
- California, State of *v.* Moccettini (19 L.D. 359); overruled, 31 L.D. 335 (1902).
- 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 (1894).
- Call *v.* Swain (3 L.D. 46); overruled, 18 L.D. 373 (1894).
- Cameron Lode (13 L.D. 369); overruled so far as in conflict, 25 L.D. 518 (1897).
- Camplan *v.* Northern Pacific R.R. Co. (28 L.D. 118); overruled so far as in conflict, 29 L.D. 550 (1900).
- Case *v.* Church (17 L.D. 578); overruled, 26 L.D. 453 (1898).
- Case *v.* Kupferschmidt (30 L.D. 9); overruled so far as in conflict, 47 L.D. 406 (1920).
- Castello *v.* Bonnie (20 L.D. 311); overruled, 22 L.D. 174 (1896).
- Cate *v.* Northern Pacific Ry. Co. (41 L.D. 316); overruled so far as in conflict, 43 L.D. 60 (1914).
- Cawood *v.* Dumas (22 L.D. 585); vacated, 25 L.D. 526 (1897).
- Centerville Mining and Milling Co. (39 L.D. 80); no longer controlling, 48 L.D. 17 (1921).
- Central Pacific R.R. Co. (29 L.D. 589); modified, 48 L.D. 58 (1921).
- Central Pacific R.R. Co. *v.* Orr. (2 L.D. 525); overruled, 11 L.D. 445 (1890).
- Chapman *v.* Willamette Valley and Cascade Mountain Wagon Road Co. (13 L.D. 61); overruled, 20 L.D. 259 (1895).
- Chappell *v.* Clark (27 L.D. 334); modified, 27 L.D. 532 (1898).
- Chicago Placer Mining Claim (34 L.D. 9); overruled, 42 L.D. 453 (1913).
- Childress *v.* Smith (15 L.D. 89); overruled, 26 L.D. 453 (1898).
- Christofferson, Peter (3 L.D. 329); modified, 6 L.D. 284, 624.
- Clafin *v.* Thompson (28 L.D. 279); overruled, 29 L.D. 693 (1900).
- Claney *v.* Ragland (33 L.D. 550) (See 43 L.D. 485).
- Clark, Yulu S. (A-22852) Feb. 20, 1941, unreported; overruled so far as in conflict, 59 L.D. 258, 260 (1946).
- Clarke, C. W. (32 L.D. 233); overruled so far as in conflict, 51 L.D. 51 (1925).
- Cline *v.* Urban (29 L.D. 96); overruled, 46 L.D. 492 (1918).
- Clipper Mining Co. (22 L.D. 527); no longer followed in part, 67 L.D. 417 (1960).
- Clipper Mining Co. *v.* Eli Mining and Land Co. et al. (33 L.D. 660); no longer followed in part, 67 L.D. 417 (1960).
- Cochran *v.* Dwyer (9 L.D. 478) (See 39 L.D. 162, 225 (1910)).
- Coffin, Edgar A. (33 L.D. 245); overruled so far as in conflict, 52 L.D. 153 (1927).
- Coffin, Mary E. (34 L.D. 564); overruled so far as in conflict, 51 L.D. 51 (1925).
- Colorado, State of (7 L.D. 490); overruled, 9 L.D. 408 (1889).
- Computation of Royalty Under Sec. 15, 51 L.D. 283 (1925), overruled, Solicitor's Opinion—Response to Feb. 17, 1976, Request from the

- General Accounting Office: Interpretation of Mineral Leasing Act of 1920, and Outer Continental Shelf Lands Act Royalty Clause, M-36888 (Oct. 4, 1976), 84 I.D. 54 (1977).
- Condict, W. C. (A-23366) June 24, 1942. unreported; overruled so far as in conflict, 59 I.D. 258-260 (1946).
- Cook, Thomas C. (10 L.D. 324) (See 39 L.D. 162, 225 (1910)).
- Cooke v. Villa (17 L.D. 210); vacated, 19 L.D. 442 (1894).
- Cooper, John W. (15 L.D. 285); overruled, 25 L.D. 113 (1897).
- Copper Bullion and Morning Star Lode Mining Claims (35 L.D. 27); distinguished insofar as it applies to *ex parte* cases, 39 L.D. 574 (1911).
- Copper Glance Lode (29 L.D. 542); modified so far as in conflict, 55 I.D. 348 (1935).
- Cornlis v. Northern Pacific R.R. Co. (23 L.D. 265); vacated, 26 L.D. 652 (1898).
- Cornell v. Chilton (1 L.D. 153); overruled, 6 L.D. 483 (1888).
- Cowles v. Huff (24 L.D. 81); modified, 28 L.D. 515 (1899).
- Cox, Allen H. (30 L.D. 90, 468); vacated, 31 L.D. 114 (1901).
- Crowston v. Seal (5 L.D. 213); overruled, 18 L.D. 586 (1894).
- Culligan v. State of Minnesota (34 L.D. 22); modified, 34 L.D. 151 (1905).
- Cunningham, John (32 L.D. 207); modified; 32 L.D. 456 (1904).
- Dailey Clay Products Co. (48 L.D. 429, 431); overruled so far as in conflict, 50 L.D. 656 (1924).
- Dakota Central R.R. Co. v. Downey (8 L.D. 115); modified, 20 L.D. 131 (1895).
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- Davis, Heirs of (40 L.D. 573); overruled, 46 L.D. 110 (1917).
- DeLong v. Clarke (41 L.D. 278); modified so far as in conflict, 45 L.D. 54 (1916).
- Dempsey, Charles H. (42 L.D. 215); modified, 43 L.D. 300 (1914).
- Dennison and Willits (11 C.L.O. 261); overruled so far as in conflict, 26 L.D. 122 (1898).
- Deseret Irrigation Co. v. Sevier River Land and Water Co. (40 L.D. 463); overruled, 51 L.D. 27 (1925).
- Devoe, Lizzie A. (5 L.D. 4); modified, 5 L.D. 429 (1887).
- Dierks, Herbert (36 L.D. 367); overruled by the unreported case of Thomas J. Guigham, Mar. 11, 1909.
- Dixon v. Dry Gulch Irrigation Co. (45 L.D. 4); overruled, 51 L.D. 27 (1925).
- Douglas and Other Lodes (34 L.D. 556); modified, 43 L.D. 128 (1914).
- Downman v. Moss (19 L.D. 526); overruled, 25 L.D. 82 (1897).
- 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 (1908).
- Dyche v. Beleele (24 L.D. 494); modified, 43 L.D. 56 (1914).
- Dysart, Francis J. (23 L.D. 282); modified, 25 L.D. 188 (1897).
- Eastern Associated Coal Corp., 3 IBMA 331, 81 I.D. 567, 1974-75 OSHD par. 18,706 (1974); overruled in part by Alabama By-Products Corp. (On Recon.), 7 IBMA 85, 83 I.D. 574 (1976); overruled in part by Zeigler Coal Co., 7 IBMA 280, 84 I.D. 127 (1977).
- Eastern Associated Coal Corp., 5 IBMA 185, 82 I.D. 506, 1975-76 OSHD par. 20,041 (1975); set aside in part on reconsideration, 7 IBMA 14, 83 I.D. 425 (1976).
- Easton, Francis E. (27 L.D. 600); overruled, 30 L.D. 355 (1900).
- East Tintic Consolidated Mining Co. (on Rehearing) (41 L.D. 255); vacated, 43 L.D. 80 (1914).
- Elliot v. Ryan (7 L.D. 322); overruled, 8 L.D. 10 (1889) (See 9 L.D. 360).

- El Paso Brick Co. (37 L.D. 155); overruled so far as in conflict, 40 L.D. 199 (1911).
- Elson, William C. (6 L.D. 797); overruled, 37 L.D. 330.
- Eklutna, Appeal of, 1 ANCAB 190, 83 I.D. 619 (1976), modified, Valid Existing Rights under the Alaska Native Claims Settlement Act, Sec. Order No. 3016, 85 I.D. 1 (1978)
- Emblen *v.* Weed (16 L.D. 28); modified, 17 L.D. 220 (1893).
- Epley *v.* Trick (8 L.D. 110); overruled, 9 L.D. 360.
- Erhardt, Finsans (36 L.D. 154); overruled, 38 L.D. 406 (1910).
- Esping *v.* Johnson (37 L.D. 709); overruled, 41 L.D. 289 (1912).
- Ewing *v.* Rickard (1 L.D. 146); overruled, 6 L.D. 483 (1888).
- Falconer *v.* Price (19 L.D. 167); overruled, 24 L.D. 264 (1897).
- Fargo No. 2 Lode Claims (37 L.D. 404); modified, 43 L.D. 128; overruled so far as in conflict, 55 I.D. 348 (1935).
- Farrill, John W. (13 L.D. 713); overruled so far as in conflict, 52 L.D. 472, 473 (1928).
- Febes, James H. (37 L.D. 210); overruled, 43 L.D. 183 (1914).
- Federal Shale Oil Co. (53 I.D. 213); overruled so far as in conflict, 55 I.D. 287, 290 (1935).
- Ferrell *v.* Hoge (18 L.D. 81); overruled, 25 L.D. 351 (1897).
- Fette *v.* Christiansen (29 L.D. 710); overruled, 34 L.D. 167 (1905).
- Field, William C. (1 L.D. 68); overruled so far as in conflict, 52 L.D. 472, 473 (1928).
- Filtrol Co. *v.* Brittan and Echart (51 L.D. 649); distinguished, 55 I.D. 605 (1936).
- Fish, Mary (10 L.D. 606); modified, 13 L.D. 511 (1891).
- Fisher *v.* Heirs of Rule (42 L.D. 62, 64); vacated, 43 L.D. 217 (1914).
- Fitch *v.* Sioux City and Pacific R.R. Co. (216 L. and R. 184); overruled, 17 L.D. 43 (1893).
- Fleming *v.* Bowe (13 L.D. 78); overruled, 23 L.D. 175 (1896).
- Florida Mesa Ditch Co. (14 L.D. 235); overruled, 27 L.D. 421 (1898).
- Florida Railway and Navigation Co. *v.* Miller (3 L.D. 324); modified, 6 L.D. 716; overruled, 9 L.D. 237 (1889).
- Florida, State of (17 L.D. 355); reversed, 19 L.D. 76 (1894).
- Florida, State of (47 L.D. 92, 93); overruled so far as in conflict, 51 L.D. 291 (1925).
- Forgeot, Margaret (7 L.D. 280); overruled, 10 L.D. 629 (1890).
- Fort Boise Hay Reservation (6 L.D. 16); overruled, 27 L.D. 505 (1898).
- Franco Western Oil Co., 65 I.D. 316, modified, 65 I.D. 427 (1958).
- Freeman Coal Mining Co., 3 IMBA 434, 81 L.D. 723, 1974-1975 OSHD par. 19,177 (1974); overruled in part, Zeigler Coal Co., 7 IBMA 280, 84 I.D. 127 (1977).
- Freeman, Flossie (40 L.D. 106); overruled, 41 L.D. 63 (1912).
- Freeman *v.* Summers, 52 L.D. 201 (1927), is overruled; United States *v.* Winegar, Frank W. et al., 16 IBLA 112, 81 I.D. 370 (1974).
- Freeman *v.* Texas and Pacific Ry. Co. (2 L.D. 550); overruled, 7 L.D. 13, 18 (1888).
- Fry, Silas A. (45 L.D. 20); modified, 51 L.D. 581 (1926).
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- Galliher, Maria (8 C.L.O. 137); overruled, 1 L.D. 57 (1880).
- Gallup *v.* Northern Pacific Ry. Co. (unpublished); overruled so far as in conflict, 47 L.D. 303, 304 (1920).
- 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 (1886).
- Garvey *v.* Tuiska (41 L.D. 510); modified, 43 L.D. 229 (1914).
- Gates *v.* California and Oregon R.R. Co. (5 C.L.O. 150); overruled, 1 L.D. 336, 342 (1882).
- Gauger, Henry (10 L.D. 221); overruled, 24 L.D. 81 (1887).
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- 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 (1947).
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- Gowdy *v.* Connell (27 L.D. 56); vacated, 28 L.D. 240 (1899).
- Gowdy *v.* Gilbert (19 L.D. 17); overruled, 26 L.D. 453 (1898).
- Gowdy *v.* Kismet Gold Mining Co. (22 L.D. 624); modified, 24 L.D. 191 (1897).
- Gramplan Lode (1 L.D. 544); overruled, 25 L.D. 495 (1897).
- Gregg *v.* State of Colorado (15 L.D. 151); vacated, 30 L.D. 310 (1900).
- Grinnel *v.* Southern Pacific R.R. Co. (22 L.D. 438); vacated, 23 L.D. 489 (1896).
- Ground Hog Lode *v.* Parole and Morning Star Lodes (8 L.D. 430); overruled, 34 L.D. 568 (See R.R. Rousseau, 47 L.D. 590 (1920)).
- Guidney, Alcide (8 C.L.O. 157); overruled, 40 L.D. 399 (1912).
- Gulf and Ship Island R.R. Co. (16 L.D. 236); modified, 19 L.D. 534 (1894).
- Gustafson, Olof (45 L.D. 456); modified, 46 L.D. 442 (1918).
- Gwyn, James R. (A-26806) Dec. 17, 1953, unreported; distinguished, 66 I.D. 275 (1959).
- Hagood, L. N., 65 I.D. 405 (1958); overruled, Beard Oil Co., 1 IBLA 42, 77 L.D. 166 (1970).
- Halvorson, Halvor K. (39 L.D. 456); overruled, 41 L.D. 505 (1912).
- Hansbrough, Henry C. (5 L.D. 155); overruled, 29 L.D. 59 (1899).
- Hardee, D. C. (7 L.D. 1); overruled so far as in conflict, 29 L.D. 698 (1900).
- Hardee *v.* United States (8 L.D. 391; 16 L.D. 499); overruled so far as in conflict, 29 L.D. 698 (1900).
- Hardin, James A. (10 L.D. 313); revoked, 14 L.D. 233 (1892).
- Harris, James G. (28 L.D. 90); overruled, 39 L.D. 93 (1910).
- Harrison, W. R. (19 L.D. 299); overruled, 33 L.D. 539 (1905).
- Hart *v.* Cox (42 L.D. 592); vacated, 260 U.S. 427 (See 49 L.D. 413 (1923)).
- Hastings and Dakota Ry. Co. *v.* Christenson (22 L.D. 257); overruled, 28 L.D. 572 (1899).
- Hausman, Peter A. C. (37 L.D. 352); modified, 48 L.D. 629 (1922).
- Hayden *v.* Jamison (24 L.D. 403); vacated, 26 L.D. 373 (1898).
- Haynes *v.* Smith (50 L.D. 208); overruled so far as in conflict, 54 I.D. 150 (1933).
- Heilman *v.* Syverson (15 L.D. 184); overruled, 23 L.D. 119 (1896).
- Heinzman *v.* Letrodec's Heirs (28 L.D. 497); overruled, 38 L.D. 253 (1909).
- Heirs of Davis (40 L.D. 573); overruled, 46 L.D. 110 (1917).
- Heirs of Mulnix, Philip (33 L.D. 331); overruled, 43 L.D. 532 (1915).
- Heirs of Stevenson *v.* Cunningham (32 L.D. 650); overruled so far as in conflict, 41 L.D. 119 (1912) (See 43 L.D. 196).
- Heirs of Talkington *v.* Hempffling (2 L.D. 46); overruled, 14 L.D. 200 (1892).
- Heirs of Vradenburg *v.* Orr (25 L.D. 323); overruled, 38 L.D. 253 (1909).
- Helmer, Inkerman (34 L.D. 341); modified, 42 L.D. 472 (1913).
- 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 (1914) (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 (1910).

- Hensel, Ohmer V. (45 L.D. 557); distinguished, 66 I.D. 275 (1959).
- Herman v. Chase (37 L.D. 590); overruled, 43 L.D. 246 (1914).
- Herrick, Wallace H. (24 L.D. 23); overruled, 25 L.D. 113 (1897).
- Hickey, M. A. (3 L.D. 83); modified, 5 L.D. 256.
- Hildrath, Henry (45 L.D. 464); vacated, 46 L.D. 17 (1917).
- Hindman, Ada I. (42 L.D. 327); vacated in part, 43 L.D. 191 (1914).
- Hoglund, Svan (42 L.D. 405); vacated, 43 L.D. 538 (1914).
- Holbeck, Halvor F., A-30376 (Dec. 2, 1965); overruled, 79 I.D. 416 (1972).
- Holden, Thomas A. (16 L.D. 493); overruled, 29 L.D. 166 (1899).
- Holland, G. W. (6 L.D. 20); overruled, 6 L.D. 639; 12 L.D. 433, 436 (1891).
- Holland, William C. (M-27696); decided Apr. 26, 1934; overruled in part, 55 I.D. 215, 221 (1935).
- Hollensteiner, Walter (38 L.D. 319); overruled, 47 L.D. 260 (1919).
- Holman v. Central Montana Mines Co. (34 L.D. 568); overruled so far as in conflict, 47 L.D. 590 (1920).
- Hon v. Martinas (41 L.D. 119); modified, 43 L.D. 196, 197 (1914).
- Hooper, Henry (6 L.D. 624); modified, 9 L.D. 86, 284 (1899).
- Howard v. Northern Pacific R.R. Co. (23 L.D. 6); overruled, 28 L.D. 126 (1899).
- Howard, Thomas (3 L.D. 409) (See 39 L.D. 162, 225 (1910)).
- Howell, John H. (24 L.D. 35); overruled, 28 L.D. 204 (1899).
- Howell, L. C. (39 L.D. 92); in effect overruled (See 39 L.D. 411 (1910)).
- Hoy, Assignee of Hess (46 L.D. 421); overruled, 51 L.D. 287 (1925).
- Hughes v. Greathead (43 L.D. 497); overruled, 49 L.D. 413 (1923) (See 260 U.S. 427).
- Hull v. Ingle (24 L.D. 214); overruled, 30 L.D. 258 (1900).
- Huls, Clara (9 L.D. 401); modified, 21 L.D. 377 (1895).
- Humble Oil & Refining Co. (64 I.D. 5); distinguished, 65 I.D. 316 (1958).
- Hunter, Charles H. (60 I.D. 395); distinguished, 63 I.D. 65 (1956).
- Hurley, Bertha C. (TA-66 (Ir.)), Mar. 21, 1952, unreported; overruled, 62 I.D. 12 (1955).
- Hyde, F. A. (27 L.D. 472); vacated, 28 L.D. 284 (1899).
- Hyde, F. A. (40 L.D. 284); overruled, 43 L.D. 381 (1914).
- Hyde v. Warren (14 L.D. 576, 15 L.D. 415) (See 19 L.D. 64 (1894)).
- Ingram, John D. (37 L.D. 475) (See 43 L.D. 544 (1914)).
- Inman v. Northern Pacific R.R. Co. (24 L.D. 318); overruled, 28 L.D. 95 (1899).
- Instructions (4 L.D. 297); modified, 24 L.D. 45 (1897).
- Instructions (32 L.D. 604); overruled so far as in conflict, 50 L.D. 628; 53 I.D. 365; Lillian M. Peterson (A-20411), Aug. 5, 1937, unreported (See 59 I.D. 282, 286).
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- Interstate Oil Corp. & Frank O. Chittenden (50 L.D. 262); overruled so far as in conflict, 53 I.D. 228 (1930).
- Iowa Railroad Land Co. (23 L.D. 79); (24 L.D. 125); vacated, 29 L.D. 79 (1899).
- Jacks v. Belard (29 L.D. 369); vacated, 30 L.D. 345 (1900).
- Johnson v. South Dakota (17 L.D. 411); overruled so far as in conflict, 41 L.D. 21, 22 (1912).
- Jones, James A. (3 L.D. 176); overruled, 8 L.D. 448 (1889).
- Jones v. Kennett (6 L.D. 688); overruled, 14 L.D. 429 (1892).
- Kackmann, Peter (1 L.D. 86); overruled, 16 L.D. 463, 464 (1893).
- Kanawha Oil & Gas Co., Assignee (50 L.D. 639); overruled so far as in conflict, 54 I.D. 371 (1934).

- Keating Gold Mining Co., Montana Power Co., Transferee, 52 L.D. 671 (1929), overruled in part, Arizona Public Service Co., 5 IBLA 137, 79 I.D. 67 (1972).
- Kemp, Frank A. (47 L.D. 560); overruled so far as in conflict, 60 I.D. 417, 419 (1950).
- Kemper v. St. Paul & Pacific R.R. Co. (2 C.L.L. 805); overruled, 18 L.D. 101 (1894).
- Kilner, Harold E. (A-21845); Feb. 1, 1939, unreported; overruled so far as in conflict, 59 I.D. 258, 260 (1946).
- King v. Eastern Oregon Land Co. (23 L.D. 579); modified, 30 L.D. 19 (1900).
- Kinney, E. C. (44 L.D. 580); overruled so far as in conflict, 53 I.D. 228 (1930).
- Kinsinger v. Peck (11 L.D. 202) (See 39 L.D. 162, 225 (1910)).
- Kiser v. Keech (7 L.D. 25); overruled, 23 L.D. 119 (1896).
- Knight, Albert B. (30 L.D. 227); overruled, 31 L.D. 64 (1901).
- Knight v. Heirs of Knight (39 L.D. 362, 491); 40 L.D. 461; overruled, 43 L.D. 242 (1914).
- Kniskern v. Hastings & Dakota R.R. Co. (6 C.L.O. 50); overruled, 1 L.D. 362 (1883).
- Kolberg, Peter F. (37 L.D. 453); overruled, 43 L.D. 181 (1914).
- Krighaum, James T. (12 L.D. 617); overruled, 26 L.D. 448 (1898).
- Krushnic, Emil L. (52 L.D. 282, 295); vacated, 53 I.D. 42, 45 (1930) (See 280 U.S. 306).
- Lackawanna Placer Claim (36 L.D. 36); overruled, 37 L.D. 715 (1909).
- La Follotte, Harvey M. (26 L.D. 453); overruled so far as in conflict, 59 I.D. 416, 422 (1947).
- Lamb v. Ullery (10 L.D. 528); overruled, 32 L.D. 331 (1903).
- Largent, Edward B. (13 L.D. 397); overruled so far as in conflict, 42 L.D. 321 (1913).
- Larson, Syvert (40 L.D. 69); overruled, 43 L.D. 242 (1914).
- Lasselle v. Missouri, Kansas & Texas Ry. Co. (3 C.L.O. 10); overruled, 14 L.D. 278 (1892).
- Las Vegas Grant (13 L.D. 646; 15 L.D. 58); revoked, 27 L.D. 683 (1898).
- Laughlin, Allen (31 L.D. 256); overruled, 41 L.D. 361 (1912).
- Laughlin v. Martin (18 L.D. 112); modified, 21 L.D. 40 (1895).
- Law v. State of Utah (29 L.D. 623); overruled, 47 L.D. 359 (1920).
- Layne & Bowler Export Corp., IBCA-245 (Jan. 18, 1961), 68 I.D. 33, overruled in so far as it conflicts with Schweigert, Inc. v. United States, Court of Claims, No. 26-66 (Dec. 15, 1967), and Galland-Henning Manufacturing Company, IBCA-534-12-65 (Mar. 29, 1968).
- Lemmons, Lawson H. (19 L.D. 37); overruled, 26 L.D. 389 (1898).
- Leonard, Sarah (1 L.D. 41); overruled, 16 L.D. 463, 464 (1893).
- Liability of Indian Tribes for State Taxes Imposed on Royalty Received from Oil and Gas Leases, 58 I.D. 535 (1943); superseded to extent it is inconsistent with Solicitor's Opinion—Tax Status of the Production of Oil and Gas from Leases of the Ft. Peck Tribal Lands Under the 1938 Mineral Leasing Act, M-36896, 84 I.D. 905 (1977).
- Lindberg, Anna C. (3 L.D. 95); modified, 4 L.D. 299 (1885).
- Linderman v. Wait (6 L.D. 689); overruled, 13 L.D. 459 (1891).
- Linhart v. Santa Fe Pacific R.R. Co. (36 L.D. 41); overruled, 41 L.D. 284 (See 43 L.D. 536 (1914)).
- Liss, Merwin E., Cumberland & Allegheny Gas Co., 67 I.D. 385 (1960), is overruled, 80 I.D. 395 (1973).
- Little Pet Lode (4 L.D. 17); overruled, 25 L.D. 550 (1897).
- Lock Lode (6 L.D. 105); overruled so far as in conflict, 26 L.D. 123 (1898).
- Lockwood, Francis A. (20 L.D. 361); modified, 21 L.D. 200 (1895).
- Lonergan v. Shockley (33 L.D. 238); overruled so far as in conflict, 34 L.D. 314; 36 L.D. 199 (1907).

- Louisiana, State of (8 L.D. 126); modified, 9 L.D. 157 (1889).
- Louisiana, State of (24 L.D. 231); vacated, 26 L.D. 5 (1898).
- Louisiana, State of (47 L.D. 366); overruled so far as in conflict, 51 L.D. 291 (1925).
- Louisiana, State of (48 L.D. 201); overruled so far as in conflict, 51 L.D. 291 (1925).
- Lucy B. Hussey Lode (5 L.D. 93); overruled, 25 L.D. 495 (1897).
- Luse, Jeanette L. (61 I.D. 103); distinguished by Richfield Oil Corp., 71 I.D. 243 (1964).
- Luton, James W. (34 L.D. 468); overruled so far as in conflict, 35 L.D. 102 (1906).
- Lyman, Mary O. (24 L.D. 493); overruled so far as in conflict, 43 L.D. 221 (1914).
- Lynch, Patrick (7 L.D. 33); overruled so far as in conflict, 13 L.D. 713 (1891).
- Mabel Lode, 26 L.D. 675, distinguished; 57 I.D. 63 (1939).
- Madigan, Thomas (8 L.D. 188); overruled, 27 L.D. 448 (1898).
- Maginnis, Charles P. (31 L.D. 222); overruled, 35 L.D. 399 (1907).
- Maginnis, John S. (32 L.D. 14); modified (42 L.D. 472 (1913)).
- Maher, John M. (34 L.D. 342); modified, 42 L.D. 472 (1913).
- Mahoney, Timothy (41 L.D. 129); overruled, 42 L.D. 313 (1913).
- Makela, Charles (46 L.D. 509); extended, 49 L.D. 244 (1922).
- Makemson v. Snider's Heirs (22 L.D. 511); overruled, 32 L.D. 650 (1904).
- Malone Land & Water Co. (41 L.D. 138); overruled in part, 43 L.D. 110 (1914).
- Maney, John J. (35 L.D. 250); modified, 48 L.D. 153 (1921).
- Maple, Frank (37 L.D. 107); overruled, 43 L.D. 131 (1914).
- Martin v. Patrick (41 L.D. 284); overruled, 43 L.D. 536 (1914).
- Mason v. Cromwell (24 L.D. 248); vacated, 26 L.D. 369 (1898).
- Masten, E. C. (22 L.D. 337); overruled, 25 L.D. 111 (1897).
- Mather v. Hackley's Heirs (15 L.D. 487); vacated, 19 L.D. 48 (1894).
- Maughan, George W. (1 L.D. 25); overruled, 7 L.D. 94 (1888).
- Maxwell and Sangre de Cristo Land Grants (46 L.D. 301); modified, 48 L.D. 87, 88 (1921).
- McBride v. Secretary of the Interior (8 C.L.O. 10); modified, 52 L.D. 33 (1927).
- McCalla v. Acker (29 L.D. 203); vacated, 30 L.D. 277 (1900).
- McCord, W. E. (23 L.D. 137); overruled to extent of any possible inconsistency, 56 I.D. 73 (1937).
- McCornick, Williams S. (41 L.D. 661, 666); vacated, 43 L.D. 429 (1914).
- McCraney v. Heirs of Hayes (33 L.D. 21); overruled so far as in conflict, 41 L.D. 119 (1912) (See 43 L.D. 196).
- McDonald, Roy (34 L.D. 21); overruled, 37 L.D. 285 (1908).
- McDonogh School Fund (11 L.D. 378); overruled, 30 L.D. 616 (1901) (See 35 L.D. 399).
- McFadden v. Mountain View Mining & Milling Co. (26 L.D. 530); vacated, 27 L.D. 358 (1898).
- McGee, Edward D. (17 L.D. 285); overruled, 29 L.D. 166 (1899).
- McGrann, Owen (5 L.D. 10); overruled, 24 L.D. 502 (1897).
- McGregor, Carl (37 L.D. 693); overruled, 38 L.D. 148 (1909).
- McHarry v. Stewart (9 L.D. 344); criticized and distinguished, 56 I.D. 340 (1938).
- McKernan v. Bailey (16 L.D. 368); overruled, 17 L.D. 494 (1893).
- 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 (1913)).
- McMicken, Herbert (10 L.D. 97); (11 L.D. 96); distinguished, 58 I.D. 257, 260 (1942).
- McNamara v. State of California (17 L.D. 296); overruled, 22 L.D. 666 (1896).

- McPeck v. Sullivan (25 L.D. 281); overruled, 36 L.D. 26 (1907).
- Mead, Robert E., 62 I.D. 111 (1955); overruled, Jones-O'Brien, Inc., 1 Sec 13, 85 I.D. 89 (1978).
- Mee v. Hughart (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. 659, 660 (1923).
- Meeboer v. Heirs of Schut (35 L.D. 335); overruled so far as in conflict, 41 L.D. 119 (1912) (See 43 L.D. 196).
- Mercer v. Buford Townsite (35 L.D. 119); overruled, 35 L.D. 649 (1907).
- Meyer v. Brown (15 L.D. 307) (See 39 L.D. 162, 225 (1910)).
- Meyer, Peter (6 L.D. 639); modified, 12 L.D. 436 (1891).
- Midland Oilfields Co. (50 L.D. 620); overruled so far as in conflict, 54 I.D. 371 (1934).
- Mikesell, Henry D., A-24112 (Mar. 11, 1946); *rehearing denied* (June 20, 1946), overruled to extent inconsistent, 70 I.D. 149 (1963).
- Miller, D., 60 I.D. 161; overruled in part, 62 I.D. 210.
- Miller, Duncan, A-29760 (Sept. 18, 1963), overruled, 79 I.D. 416 (1972).
- Miller, Duncan, A-30742 (December 2, 1966), overruled, 79 I.D. 416 (1972).
- Miller, Duncan, A-30722 (April 14, 1967), overruled, 79 I.D. 416 (1972).
- Miller, Duncan, 6 IBLA 283 (1972); overruled to extent inconsistent, Jones-O'Brien, Inc., 1 Sec 13, 85 I.D. 89 (1978).
- Miller, Edwin J. (35 L.D. 411); overruled, 43 L.D. 181 (1914).
- Miller v. Sebastian (19 L.D. 288); overruled, 26 L.D. 448 (1898).
- Milner & North Side R.R. Co. (36 L.D. 488); overruled, 40 L.D. 187.
- Milton v. Lamb (22 L.D. 339); overruled, 25 L.D. 550 (1897).
- Milwaukee, Lake Shore & Western Ry. Co. (12 L.D. 79); overruled, 29 L.D. 112 (1899).
- Miner v. Marriott (2 L.D. 709); modified, 28 L.D. 224 (1899).
- Minnesota & Ontario Bridge Company (30 L.D. 77); no longer followed, 50 L.D. 359 (1924).
- Mitchell v. Brown (3 L.D. 65); overruled, 41 L.D. 396 (1912) (See 43 L.D. 520).
- Monitor Lode (18 L.D. 358); overruled, 25 L.D. 495 (1897).
- Monster Lode (35 L.D. 493); overruled so far as in conflict, 55 I.D. 348 (1935).
- Moore, Charles H. (16 L.D. 204); overruled, 27 L.D. 481-2 (1898).
- Morgan v. Craig (10 C.L.O. 234); overruled, 5 L.D. 303 (1886).
- Morgan, Henry S., 65 I.D. 369; overruled to extent inconsistent, 71 I.D. 22 (1964).
- Morgan v. Rowland (37 L.D. 90); overruled, 37 L.D. 618 (1909).
- Moritz v. Hinz (36 L.D. 450); vacated, 37 L.D. 382 (1909).
- Morrison, Charles S. (36 L.D. 126); modified, 36 L.D. 319 (1908).
- Morrow v. State of Oregon *et al.* (32 L.D. 54); modified, 33 L.D. 101 (1904).
- 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 (1908).
- Mountain Fuel Supply Company, A-31053 (Dec. 19, 1969), overruled, 79 I.D. 416 (1972).
- Mt. Whitney Military Reservation (40 L.D. 315 (1911)) (See 43 L.D. 33).
- Muller, Ernest (46 L.D. 243); overruled, 48 L.D. 163 (1921).
- Muller, Esberne K. (39 L.D. 72); modified, 39 L.D. 360 (1910).
- Mulnix, Philip, Heirs of (33 L.D. 331); overruled, 43 L.D. 532 (1915).
- Munsey, Glenn, Earnest Scott and Arnold Scott v. Smitty Baker Coal Co., Inc., 1 IBMA 144, 162 (Aug. 8, 1972), 79 I.D. 501, 509, distinguished, 80 I.D. 251 (1973).
- Myll, Clifton O., 71 I.D. 458 (1964); as supplemented, 71 I.D. 486 (1964), vacated, 72 I.D. 536 (1965).

- National Livestock Co. and Zack Cox, I.G.D. 55 (1938), is overruled, United States v. Maher, Charles, 5 IBLA 209, 79 I.D. 109 (1972).
- Naughton, Harold J., 3 IBLA 237, 78 I.D. 300 (1971); Schweite, Helena M., 14 IBLA 305 (Feb. 1, 1974) is distinguished by Kristeen J. Burke, Joe N. Melovedoff, Victor Melovedoff, 20 IBLA 162 (May 5, 1975).
- Nebraska, State of (18 L.D. 124); overruled, 28 L.D. 358 (1899).
- Nebraska, State of v. Dorrington (2 C.L.L. 647); overruled, 26 L.D. 123 (1898).
- Neilsen v. Central Pacific R.R. Co. (26 L.D. 252); modified, 30 L.D. 216 (1900).
- Newbanks v. Thompson (22 L.D. 490); overruled, 29 L.D. 108 (1899).
- Newton, Robert C. (41 L.D. 421); overruled so far as in conflict, 43 L.D. 364 (1914).
- New Mexico, State of (46 L.D. 217); overruled, 48 L.D. 97 (1921).
- New Mexico, State of (49 L.D. 314); overruled, 54 I.D. 159 (1933).
- Newton, Walter (22 L.D. 322); modified, 25 L.D. 188 (1897).
- New York Lode & Mill Site (5 L.D. 513); overruled, 27 L.D. 373 (1893).
- Nickel, John R. (9 L.D. 388); overruled, 41 L.D. 129 (1912) (See 42 L.D. 313).
- Northern Pacific R.R. Co. (20 L.D. 191); modified, 22 L.D. 234; overruled so far as in conflict, 29 L.D. 550 (1900).
- Northern Pacific R.R. Co. (21 L.D. 412, 23 L.D. 204; 25 L.D. 501; overruled, 53 I.D. 242 (See 26 L.D. 265; 33 L.D. 426; 44 L.D. 218 (1915); 117 U.S. 435).
- Northern Pacific R.R. Co. v. Bowman (7 L.D. 238); modified, 18 L.D. 224 (1894).
- Northern Pacific R.R. Co. v. Burns (6 L.D. 21); overruled, 20 L.D. 191 (1895).
- Northern Pacific R.R. Co. v. Loomis (21 L.D. 395); overruled, 27 L.D. 464 (1898).
- Northern Pacific R.R. Co. v. Marshall (17 L.D. 545); overruled, 28 L.D. 174 (1899).
- Northern Pacific R.R. Co. v. Miller (7 L.D. 100); overruled so far as in conflict, 16 L.D. 229 (1893).
- Northern Pacific R.R. Co. v. Sherwood (28 L.D. 126); overruled so far as in conflict, 29 L.D. 550 (1900).
- Northern Pacific R.R. Co. v. Symons (22 L.D. 686); overruled, 28 L.D. 95 (1899).
- Northern Pacific R.R. Co. v. Urquhart (8 L.D. 365); overruled, 28 L.D. 126 (1899).
- Northern Pacific R.R. Co. v. Walters (13 L.D. 230); overruled so far as in conflict, 49 L.D. 391 (1922).
- Northern Pacific R.R. Co. v. Yantis (8 L.D. 58); overruled, 12 L.D. 127 (1891).
- Northern Pacific Ry. Co. (48 L.D. 573); overruled so far as in conflict, 51 L.D. 196 (1925) (See 52 L.D. 58 (1927)).
- Nunez, Roman C. & Serapio (56 I.D. 363); overruled so far as in conflict, 57 I.D. 213.
- Nyman v. St. Paul, Minneapolis, & Manitoba Ry. Co. (5 L.D. 396); overruled, 6 L.D. 750 (1888).
- O'Donnell, Thomas J. (28 L.D. 214); overruled, 35 L.D. 411 (1907).
- Oil and Gas Privilege and License Tax, Ft. Peck Reservation, Under Laws of Montana, M-36318 (Oct. 13, 1955); is *superseded* to the extent that it is *inconsistent* with, Solicitor's Opinion—Tax Status of the Production of Oil and Gas From Lease of the Ft. Peck Tribal Lands Under the 1938 Mineral Leasing Act, M-36896, 84 I.D. 905 (1977).
- Olson v. Traver *et al.* (26 L.D. 350, 628); overruled so far as in conflict, 29 L.D. 480; 30 L.D. 382 (1900).
- Opinion A.A.G. (35 L.D. 277); vacated, 36 L.D. 342 (1908).
- Opinion of Acting Solicitor, June 6, 1941; overruled so far as inconsistent, 60 I.D. 333 (1949).

- Opinion of Acting Solicitor, July 30, 1942; overruled so far as in conflict, 58 I.D. 331 (1943) (See 59 I.D. 346, 350).
- Opinion of Associate Solicitor, Oct. 22, 1947 (M-34999); distinguished, 68 I.D. 433 (1961).
- Opinion of Associate Solicitor, M-36463, 64 I.D. 351 (1957); overruled, 74 I.D. 165 (1967).
- Opinion of Associate Solicitor, M-36512 (July 29, 1958); overruled to extent inconsistent, 70 I.D. 159 (1963).
- Opinion of Chief Counsel, July 1, 1914 (43 L.D. 339); explained, 68 I.D. 372 (1961).
- Opinion of Deputy Assistant Secretary (Dec. 2, 1966), affirming Oct. 27, 1966, is *superseded* to the extent that it is *inconsistent* with Solicitor's Opinion—Tax Status of the Production of Oil and Gas From Leases of the Ft. Peck Tribal Lands Under the 1938 Mineral Leasing Act, M-36896, 84 I.D. 905 (1977).
- Opinion of Secretary, 75 I.D. 147 (1968); vacated, 76 I.D. 69 (1969).
- Opinion of Solicitor, Oct. 31, 1917 (D-40462); overruled so far as inconsistent, 58 I.D. 85, 92, 96 (1942).
- Opinion of Solicitor, Feb. 7, 1919 (D-44083); overruled, Nov. 4, 1921 (M-6397) (See 58 I.D. 158, 160 (1942)).
- Opinion of Solicitor, Aug. 8, 1933 (M-27499); overruled so far as in conflict, 54 I.D. 402 (1934).
- Opinion of Solicitor, June 15, 1934 (54 I.D. 517 (1934)); overruled in part, Feb. 11, 1957 (M-36410).
- Opinion of Solicitor, Oct. 25, 1934, 55 I.D. 14, overruled so far as inconsistent, 77 I.D. 49 (1970).
- Opinion of Solicitor, M-28198 (Jan. 8, 1936), finding *inter alia*, that the Indian Title to Certain Lands within the Ft. Yuma Indian Reservation has been Extinguished, is well founded and is affirmed, Solicitor's Opinion, M-36886, 84 I.D. 1 (1977).
- Opinion of Solicitor, May 8, 1940 (57 I.D. 124); overruled in part, 58 I.D. 562, 567 (1943).
- Opinion of Solicitor, Aug. 31, 1943 (M-33133), distinguished, 58 I.D. 726, 729 (1944).
- Opinion of Solicitor, May 2, 1944 (58 I.D. 680); distinguished, 64 I.D. 141.
- Opinion of Solicitor, M-34326, 59 I.D. 147 (1945); overruled in part, Solicitor's Opinion, M-36887, 84 I.D. 72 (1977).
- Opinion of Solicitor, Oct. 22, 1947 (M-34999); distinguished, 68 I.D. 433 (1961).
- Opinion of Solicitor, Mar. 28, 1949 (M-35093); overruled in part, 64 I.D. 70 (1957).
- Opinion of the Solicitor, 60 I.D. 436 (1950); will not be followed to the extent that it conflicts with these views, 72 I.D. 92 (1965).
- Opinion of Solicitor, M-36051 (Dec. 7, 1950), modified; Solicitor's Opinion, M-36863, 79 I.D. 513 (1972).
- Opinion of Solicitor, M-36241 (Sept. 22, 1954), overruled as far as inconsistent with,—Criminal Jurisdiction on Seminole Reservations in Fla., M-36907, 85 I.D. 433 (1978).
- Opinion of Solicitor, Jan. 19, 1956 (M-36378); overruled to extent inconsistent, 64 I.D. 57 (1957).
- Opinion of Solicitor, June 4, 1957 (M-36443); overruled in part, 65 I.D. 316 (1958).
- Opinion of Solicitor, July 9, 1957 (M-36442); withdrawn and superseded, 65 I.D. 386, 388 (1958).
- Opinion of Solicitor, Oct. 30, 1957, 64 I.D. 393 (M-36429); no longer followed, 67 I.D. 366 (1960).
- Opinion of Solicitor, 64 I.D. 351 (1957); overruled, M-36706, 74 I.D. 165 (1967).
- Opinion of Solicitor, 64 I.D. 435 (1957); will not be followed to the extent that it conflicts with these views, M-36456 (Supp.) (Feb. 18, 1969), 76 I.D. 14 (1969).

- Opinion of Solicitor, July 29, 1958 (M-36512); overruled to extent inconsistent, 70 I.D. 159 (1963).
- Opinion of Solicitor, Oct. 27, 1958 (M-36531); overruled, 69 I.D. 110 (1962).
- Opinion of Solicitor, July 20, 1959 (M-36531, Supp.); overruled, 69 I.D. 110 (1962).
- Opinion of Solicitor, 68 I.D. 433 (1961); distinguished and limited, 72 I.D. 245 (1965).
- Opinion of Solicitor, M-36767 (Nov. 1, 1967) (supplementing, M-36599), 69 I.D. 195 (1962).
- Opinion of Solicitor, M-36735 (Jan. 31, 1968, is reversed and withdrawn, Relocation of Flathead Irrigation Project's Kerr Substation and Switchyard, M-36735 (Supp.), 83 I.D. 346 (1976).
- Opinions of Solicitor, Sept. 15, 1914, and Feb. 2, 1915; overruled, Sept. 9, 1919 (D-43035, May Caramony) (See 58 I.D. 149, 154-156 (1942)).
- Oregon and California RR. Co. v. Puckett (39 L.D. 169); modified, 53 I.D. 264 (1931).
- Oregon Central Military Wagon Road Co. v. Hart (17 L.D. 480); overruled, 18 L.D. 543 (1894).
- Owens v. State of California (22 L.D. 369; overruled, 38 L.D. 253 (1909).
- Pace v. Carstarphen (50 L.D. 369); distinguished, 61 I.D. 459 (1954);
- Pacific Slope Lode (12 L.D. 686); overruled so far as in conflict, 25 L.D. 518 (1897).
- Page, Ralph, 8 IBLA 435 (Dec. 22, 1972), explained; Sam Rosetti, 15 IBLA 288, 81 I.D. 251 (1974).
- Papina v. Alderson (1 B.L.P. 91); modified, 5 L.D. 256 (1886).
- Patterson, Charles E. (3 L.D. 260); modified, 6 L.D. 264, 626.
- Paul Jarvis, Inc., Appeal of (64 I.D. 285); distinguished, 64 I.D. 388 (1957).
- Paul Jones Lode (28 L.D. 120); modified, 31 L.D. 359 overruled, 57 I.D. 63 (1939).
- Paul v. Wiseman (21 L.D. 12); overruled, 27 L.D. 522 (1898).
- Pecos Irrigation and Improvement Co. (15 L.D. 470); overruled, 18 L.D. 168, 268 (1894).
- Pennock, Belle L. (42 L.D. 315); vacated, 43 L.D. 66 (1914).
- Perry v. Central Pacific R.R. Co. (39 L.D. 5); overruled so far as in conflict, 47 L.D. 303, 304 (1920).
- Phebus, Clayton (48 L.D. 128); overruled so far as in conflict, 50 L.D. 281; overruled to extent inconsistent, 70 I.D. 159 (1963).
- Phelps, W. L. (8 C.L.O. 139); overruled, 2 L.D. 854 (1884).
- Phillips, Alonzo (2 L.D. 321); overruled, 15 L.D. 424 (1892).
- Phillips v. Breazcaale's Heirs (19 L.D. 573); overruled, 39 L.D. 93 (1910).
- Phillips, Cecil H., A-30851 (Nov. 16, 1967), overruled, 79 I.D. 416 (1972).
- Phillips, Vance W., 14 IBLA 79 (Dec. 11, 1973) is modified by Vance W. Phillips and Aelisa A. Burnham, 19 IBLA 211 (Mar. 21, 1975).
- Pieper, Agnes C. (35 L.D. 459); overruled, 43 L.D. 374 (1914).
- Pierce, Lewis W. (18 L.D. 328); vacated, 53 I.D. 447; overruled so far as in conflict, 59 I.D. 416, 422 (1947).
- Pietkiewicz v. Richmond (29 L.D. 195); overruled, 37 L.D. 145 (1908).
- Pike's Peak Lode (10 L.D. 200); overruled in part, 20 L.D. 204, 48 L.D. 523 (1922).
- Pike's Peak Lode (14 L.D. 47); overruled, 20 L.D. 204, 48 L.D. 523 (1922).
- Popple, James (12 L.D. 433); overruled, 13 L.D. 588 (1891).
- Powell, D. C. (6 L.D. 302); modified, 15 L.D. 477 (1892).
- Prange, Christ C. & William C. Braasch (48 L.D. 488); overruled so far as in conflict, 60 I.D. 417, 419 (1950).
- Premo, George (9 L.D. 70) (See 39 L.D. 162, 225 (1910).
- Prescott, Henrietta P. (46 L.D. 486); overruled, 51 L.D. 287 (1925).

- Pringle, Wesley (13 L.D. 519); overruled, 29 L.D. 599 (1900).
- Provensal, Victor H. (30 L.D. 616); overruled, 35 L.D. 399 (1907).
- Prue, Widow of Emanuel (6 L.D. 436); vacated, 33 L.D. 409 (1905).
- Pugh, F. M. (14 L.D. 274); in effect vacated, 232 U.S. 452.
- Puyallup Allotment (20 L.D. 157); modified, 29 L.D. 628 (1900).
- Ramsey, George L., Heirs of Edwin C. Philbrick (A-16060), Aug. 6, 1931, unreported; recalled and vacated, 58 I.D. 272, 275, 290 (1942).
- Rancho Alisal (1 L.D. 173); overruled, 5 L.D. 320 (1886).
- Ranger Fuel Corp., 2 IBMA 163 (July 17, 1973), 80 I.D. 708; Set aside by Memorandum Opinion and Order Upon Reconsideration in Ranger Fuel Corp., 2 IBMA 186 (Sept. 5, 1973), 80 I.D. 604.
- Rankin, James D. (7 L.D. 411); overruled, 35 L.D. 32 (1906).
- Rankin, John M. (20 L.D. 272); reversed, 21 L.D. 404 (1895).
- Rayburn, Ethel Cowgill, A-28866 (Sept. 6, 1962) is modified by T. T. Cowgill, 19 IBLA 274 (Apr. 7, 1975).
- Rebel Lode (12 L.D. 683); overruled, 20 L.D. 204; 48 L.D. 523 (1922).
- Reed v. Buffington (7 L.D. 154); overruled, 8 L.D. 110 (1889) (See 9 L.D. 360).
- Regione v. Rosseler (40 L.D. 93); vacated, 40 L.D. 420 (1912).
- Reid, Bettie H., Lucille H. Pipkin (61 I.D. 1); overruled, 61 I.D. 355 (1954).
- Reliable Coal Corp., 1 IBMA 50, 78 I.D. 199 (1971) distinguished, Zeigler Coal Corporation, 1 IBMA 71, 78 I.D. 362 (1971).
- Relocation of Flathead Irrigation Project's Kerr Substation and Switchyard, M-36735 (Jan. 31, 1968); is reversed and withdrawn, M-36735 (Supp.), 83 I.D. 346 (1976).
- Rialto No. 2 Placer Mining Claim (34 L.D. 44); overruled, 37 L.D. 250 (1908).
- Rico Town Site (1 L.D. 556); modified 5 L.D. 256 (1886).
- Rio Verde Canal Co. (26 L.D. 381); vacated, 27 L.D. 421 (1898).
- Roberts v. Oregon Central Military Road Co. (19 L.D. 591); overruled, 31 L.D. 174 (1901).
- Robinson, Stella G. (12 L.D. 443); overruled, 13 L.D. 1 (1891).
- Rogers v. Atlantic & Pacific R.R. Co. (6 L.D. 565); overruled so far as in conflict, 8 L.D. 165 (1889).
- Rogers, Fred B. (47 L.D. 325); vacated, 53 I.D. 649 (1932).
- Rogers, Horace B. (10 L.D. 29); overruled, 14 L.D. 321 (1892).
- Rogers v. Lukens (6 L.D. 111); overruled, 8 L.D. 110 (1889) (See 9 L.D. 360).
- Romero v. Widow of Knox (48 L.D. 32); overruled so far as in conflict, 49 L.D. 244 (1922).
- Roth, Gottlieb (50 L.D. 196); modified, 50 L.D. 197 (1924).
- Rough Rider and Other Lode Claims (41 L.D. 242, 255); vacated, 42 L.D. 584 (1913).
- St. Clair, Frank (52 L.D. 597); modified, 53 I.D. 194 (1930).
- St. Paul, Minneapolis & Manitoba Ry. Co. (8 L.D. 255); modified, 13 L.D. 354 (1891) (See 32 L.D. 21).
- St. Paul, Minneapolis & Manitoba Ry. Co. v. Fogelberg (29 L.D. 291); vacated, 30 L.D. 191 (1900).
- St. Paul, Minneapolis & Manitoba Ry. Co. v. Hagen (20 L.D. 249); overruled, 25 L.D. 86 (1897).
- Salsberry, Carroll (17 L.D. 170); overruled, 39 L.D. 93 (1910).
- Sangre de Cristo and Maxwell Land Grants (46 L.D. 301); modified, 48 L.D. 88 (1921).
- Santa Fe Pacific R.R. Co. v. Peterson (39 L.D. 442); overruled, 41 L.D. 383 (1912).
- Satisfaction Extension Mill Site (14 L.D. 173 (1892)) (See 32 L.D. 128).
- Sayles, Henry P. (2 L.D. 88); modified, 6 L.D. 797 (1888) (See 37 L.D. 330).
- Schweite, Helena M., 14 IBLA 305 (Feb. 1, 1974); Naughton, Harold J., 3

- IBLA 237, 78 I.D. 300 (1971) is distinguished by Kristeen J. Burke, Joe N. Melovedoff, Victor Melovedoff, 20 IBLA 162 (May 5, 1975).
- Schweitzer *v.* Hilliard (19 L.D. 294); overruled so far as in conflict, 26 L.D. 639 (1898).
- 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 I.D. 416, 422 (1947).
- Shale Oil Co. overruled so far as in conflict, (See 55 I.D. 287 (1935)).
- Shanley *v.* Moran (1 L.D. 162); overruled, 15 L.D. 424 (1892).
- Shillander, H. E., A-30279 (Jan. 26, 1965), overruled, 79 I.D. 416 (1972).
- Shineberger, Joseph (8 L.D. 231); overruled, 9 L.D. 202 (1889).
- Silver Queen Lode (16 L.D. 186); overruled, 57 I.D. 63 (1939).
- Simpson, Lawrence W. (35 L.D. 399, 609); modified, 36 L.D. 205 (1907).
- Simpson, Robert E., A-4167 (June 22, 1970); overruled to extent inconsistent, United States *v.* Union Carbide Corp., 31 IBLA 72, 84 I.D. 309 (1977).
- Sipchen *v.* Ross (1 L.D. 634); modified, 4 L.D. 152 (1885).
- Smead *v.* Southern Pacific R.R. Co. (21 L.D. 432); vacated, 29 L.D. 135 (1899).
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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

VALID EXISTING RIGHTS UNDER THE ALASKA NA- TIVE CLAIMS SETTLE- MENT ACT*

SECRETARIAL ORDER NO.
3016

Dec. 14, 1977

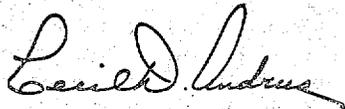
SUBJECT: VALID EXISTING RIGHTS UNDER THE ALASKA NATIVE CLAIMS SETTLEMENT ACT.

Sec. 1 Purpose. The purpose of this Order is to resolve for the future certain specific questions which have arisen in the implementation of that Act.

Sec. 2 Policy. By this Order I hereby adopt the memorandum from the Solicitor dated Nov. 28, 1977 (copy attached), as the position of the Department on the subject of valid existing rights under the Alaska Native Claims Settlement Act. I conclude that if prior to the passage of the Alaska Native Claims Settlement Act (ANCSA) lands which were tentatively approved for state selection were conveyed by the State of Alaska to municipalities or boroughs, leased by the State with an option to buy under Alaska Stat.

§ 38.05.077, or patented by the State under Alaska Stat. § 38.05.077, valid existing rights were created within the meaning of ANCSA. I also conclude that land covered by such a lease from the State should be included in any conveyance to a Native corporation, but the option to buy will be enforceable by the lessee against the Native corporation. The Bureau of Land Management should identify any third party interests created by the State, as reflected by the land records of the State of Alaska, Division of Lands, and serve notice on all parties of each other's possible interests, but this Department should not adjudicate these interests. This Order is not intended to disturb any administrative determination contained in a final decision previously rendered by any duly authorized Departmental official.

Sec. 3 Effective Date. This Order is effective immediately and shall remain in effect until June 1, 1979 at which time it will be converted into the Departmental Manual.



Secretary of the Interior.

*Not in Chronological Order.

**VALID EXISTING RIGHTS UNDER
THE ALASKA NATIVE CLAIMS
SETTLEMENT ACT**

Alaska: Statehood Act—Alaska Native Claims Settlement Act: Generally—Alaska Native Claims Settlement Act: Native Village Land Selections: Generally

Lands tentatively approved for state selection and conveyed by the state to municipalities or boroughs prior to enactment of ANCSA are not available for native selection under ANCSA.

Alaska: Statehood Act—Alaska Native Claims Settlement Act: Generally—Alaska Native Claims Settlement Act: Native Village Land Selections: Generally

Lands tentatively approved for state selection and leased by the state to individuals with an option to buy will, if selected by a Native corporation, be included in the interim conveyance with the provision that the option to buy may be exercised against the Native corporation. Where the option has been exercised against the state and a state patent issued prior to the enactment of ANCSA, the land will be excluded from interim conveyance to the Native corporation.

Alaska: Statehood Act—Alaska Native Claims Settlement Act: Generally—Alaska Native Claims Settlement Act: Native Village Land Selections: Generally—Alaska Native Claims Settlement Act: Administrative Procedure: Interim Conveyance

Third party rights created by the state in lands selected by natives under ANCSA should be identified by BLM in the decision to issue interim conveyance if possible, but need not be adjudicated.

Alaska: Statehood Act—Alaska Native Claims Settlement Act: Generally—Alaska Native Claims Settlement Act:

Native Village Land Selections: Generally—Alaska Native Claims Settlement Act: Administrative Procedure: Interim Conveyance

ANCSA and the implementing regulations draw a basic distinction between valid existing rights leading to the acquisition of title and those of a temporary nature, requiring exclusion of the former from the interim conveyance but inclusion of the latter with provisions protecting the third parties rights for the duration of his interest. The statute and the implementing regulations do not distinguish, in protecting rights leading to the acquisition of title between those arising under federal law and those arising under state law.

Appeal of Eklutna, 1 ANCAB 190, 83 I.D. 619 (1976), modified; Appeals of the State of Alaska and Seldovia Native Association, Inc., 2 ANCAB 1, 84 I.D. 349 (1977), modified.

Nov. 28, 1977

MEMORANDUM

TO: SECRETARY OF THE INTERIOR.

FROM: SOLICITOR.

SUBJECT: VALID EXISTING RIGHTS UNDER THE ALASKA NATIVE CLAIMS SETTLEMENT ACT

Certain questions have arisen in connection with the implementation of the Alaska Native Claims Settlement Act (ANCSA),¹ including an issue on which there is apparently a conflict between a decision by the

¹ 43 U.S.C. §§ 1601-1629 (1974).

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December 14, 1977

Interior Board of Land Appeals (IBLA) ² and two decisions issued by the Alaska Native Claims Appeal Board (ANCAB).³

To the extent that the opinions have created uncertainty as to the Department's policy and legal position with respect to the implementation of ANCSA, the policy and legal position should be clarified.

ISSUES PRESENTED

1. Are lands which were tentatively approved for State selection available for conveyance to Native corporations when they are located within the area withdrawn for Native selection by sec. 11(a)(2) of the ANCSA if prior to the enactment of ANCSA the lands had been—

a. conveyed by the State to municipalities or boroughs?

b. leased with an option to buy by the State to individuals under the State's "open to entry" program?

c. patented by the State to individuals under the State's "open to entry" program?

2. If "open to entry" leases are "valid existing rights" should the land be excluded from the conveyance to Natives or should it be included in the conveyance as a "subject to" interest?

3. To what extent does ANCSA require the Department to determine whether third party rights acquired under State laws are valid?

CONCLUSION

1. I conclude that all three of the third party interests identified above are "valid existing rights" within the meaning of ANCSA.

2. I conclude that the land covered by an "open to entry" lease should not be excluded from the Natives' conveyance but that the option to buy will be enforceable by the lessee against the Native corporation.

3. I conclude that the validity of third party interests which were created by the State should be identified if possible to put all interested parties on notice, but need not be adjudicated.

DISCUSSION

From the time the United States acquired possession of Alaska from Russia, Congress recognized in a general way the claims of Alaska Natives to the land they had used and occupied. Thus in 1884 Congress declared: "The Indians * * * 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." Act of May 17, 1884 (23 Stat. 24).

At the time of the Alaska Statehood Act, July 7, 1958 (72 Stat. 339), Congress recognized that these aboriginal claims would be a potential cloud on the land conveyances to the State and would have to be addressed by Congress. Sec. 4 of the

² State of Alaska, 19 IBLA 178 (1975).

³ Appeal of Eklutna, 1 ANCAB 190, 83 I.D. 619 (1976); Appeals of the State of Alaska and Seldovia Native Association, Inc., 2 ANCAB 1, 84 I.D. 349 (1977).

Statehood Act provides in pertinent part:

[T]he * * * State and its people * * * forever disclaim all right and title * * * to any lands * * * which may be held by any Indians, Eskimos, or Aleuts * * * such lands * * * remain under the absolute jurisdiction * * * of the United States until disposed of under its authority, * * *.

The legislation addressing the land claims of Alaska Natives came in 1971, thirteen years after the Statehood Act. During the thirteen-year interim the State received patent to about 4.8 million acres and "tentative approval" to about 7.7 million acres or more. It had filed selections on an additional 15 million on which no federal action had been taken.

The concept of tentative approval comes from sec. 6(g)⁴ of the Statehood Act which states in pertinent part:

* * * Following the selection of lands by the State and the tentative approval of such selection by the Secretary of the Interior * * * but prior to the issuance of final patent, the State is hereby authorized to execute conditional leases and to make conditional sales of such selected lands. * * *

The implementing regulations (43 CFR 2627.3(d)) provide that "tentative approval" will be issued only "after determining that there is no bar to passing legal title * * * other than the need for survey of the lands or for the issuance of patent or both."

By the time ANCSA was enacted the State had created several types of third party interests on land to

which it had received tentative approval. Among these were conveyances to boroughs and municipalities under State Statute A.S. § 29-18.190, and conveyances by the State under its "open to entry" program A.S. § 38.05.077, as well as mineral leases, timber sales contracts, free use permits, water rights certificates and others.

The determination of whether these rights survive Native selection under ANCSA could begin with an analysis of the nature of the State's title to tentatively approved lands. It is argued that the State's title is a vested title subject only to being voided if Native occupancy could be proved. *Edwardson v. Morton*, 369 F. Supp. 1359 (D.D.C. 1973) is cited both for and against this proposition. It was also argued during the debates which preceded ANCSA that the State's tentatively approved selections, being vested rights, could not be used by Congress to settle the aboriginal claims without compensation to the State. If the protection which the third party grantees received is to be found in common law property principles outside of ANCSA, these exceedingly complex questions would have to be resolved. Since I conclude that protection of third party interests created by the State is provided in ANCSA, I need not determine whether such persons are also protected by principles outside of ANCSA.

A fundamental principle of ANCSA is that "All conveyances made pursuant to this Act shall be

⁴ Set forth in full in Appendix A, p. 9.

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subject to valid existing rights.”⁵ In addition, the sections withdrawing land for Native selection (Sec. 11(a), 16(a)) expressly provide that the withdrawal is “subject to valid existing rights.” The revocation of prior reserves created for Natives is also “subject to valid existing rights” (Sec. 19(a)).

Although the phrase “valid existing rights” is not specifically defined in sec. 3 “Definitions”, both the statute and the legislative history offer guidance as to its meaning.

Sec. 14(g) of the Act, Dec. 18, 1971 (85 Stat. 704) provides in pertinent part:

* * * Where prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under sec. 6(g) of the Alaska Statehood Act) has been issued * * * the patent shall contain provisions making it subject to the lease, contract (etc.) * * *

Sec. 22(b)⁶ directs the Secretary “to promptly issue patents to all persons who have made a lawful entry on the public lands in compliance with the public land laws for the purpose of gaining title to homesteads, headquarters sites, trade and manufacturing sites, or small tract sites * * * and who have fulfilled all the requirements of law prerequisite to obtaining a patent.”

Sec. 22(c)⁷ protects persons who have initiated valid mining claims or locations in their possessory

rights if they have met the requirements of the mining laws.

By regulation the Department has construed secs. 14(g) and 22(b) and provided the mechanism for implementing them. 43 CFR 2650.3-1(a) provides:

Pursuant to secs. 14(g) and 22(b) of the act, all conveyances issued under the act shall exclude any lawful entries or entries which have been perfected under, or are being maintained in compliance with, laws leading to the acquisition of title, but shall include land subject to valid existing rights of a temporary or limited nature such as those created by leases (including leases issued under sec. 6(g) of the Alaska Statehood Act), contracts, permits, rights-of-way, or easements.

This regulation makes a basic distinction between rights “leading to acquisition of title” and “rights of a temporary nature.” The former are excluded from the conveyance, the latter are included but protected for the duration of the interest.

It has been argued that the statute and the regulations also distinguish, in rights leading to the acquisition of title between those created under Federal law and those created by State law, protecting only the former. I do not agree for several reasons.

First, the authority of the State to create third party interests in tentatively approved lands comes from sec. 6(g) of the Statehood Act, quoted in pertinent part above. Although the State has exercised this authority through State legislation defining the terms on which persons may acquire leases, etc., the Con-

⁵ Sec. 14(g), 43 U.S.C. § 1613(g) (1974), set forth in full in Appendix A, p. 9.

⁶ 43 U.S.C. § 1621(b) (1974), set forth in full in Appendix A, p. 9.

⁷ 43 U.S.C. § 1621(c) (1974), set forth in full in Appendix A, p. 9.

gress, in ANCSA, clearly considered such leases to be issued under Federal law, namely the Statehood Act. Sec. 11(a)(2) for example withdraws T.A.'d land "from the creation of third party interests by the State under the Alaska Statehood Act." Sec. 14(g) as already stated refers to leases "issued under section 6(g) of the Alaska Statehood Act." Therefore, it was appropriate that 43 CFR 2650.3-1(a) does not limit its scope to entries maintained under *Federal laws* leading to the acquisition of title, but says simply "laws leading to the acquisition of title."

Second, I do not believe the listing of the rights to be protected was intended to be limiting but rather was *ejusdem generis*. The regulation already quoted (43 CFR 2650.3-1 (a)) precedes its list with "such as those created by * * *" indicating clearly that the list was not exhaustive. Furthermore, there is no logical reason why Congress would have intended to protect rights of municipalities or individuals leading to the acquisition of title under such Federal laws as the Townsite Act or the Homestead Act but not intended to protect the same municipality or individual when the law under which the rights are being perfected is a State law.

It is my conclusion, therefore, that the Department's regulations have construed "valid existing rights" under ANCSA to include rights perfected or maintained under state as well as federal laws leading to the acquisition of title.

This conclusion is reinforced by the provisions of sec. 11(a)(2) which provides that the withdrawal of State selected and T.A.'d lands is from "all forms of appropriation under the public land laws, including the mining and mineral leasing laws, *and from the creation of third party interests by the State under the Alaska Statehood Act.*" The italicized language reveals that third party interests created by the State are considered to have been created "under" the Statehood Act, which is a Federal statute. Also by withdrawing the land from the future creation of third party interests by the State, there is a strong implication that third party interests already created were considered "valid existing rights." Finally, the fact that the lands are withdrawn from appropriations under the mining laws makes it clear that "valid existing rights" as used in section 11(a)(2) contemplates rights leading to the acquisition of title as well as those of a temporary nature.

The fact that Congress expressly referred only to leases issued by the State is not persuasive evidence that Congress intended no other state created interests to be protected. The reason for Congress' special emphasis on state leases is entirely understandable.

The House Committee report reflects Congress' concern that a lease issued by the State which on its terms was conditional on the issuance of a patent to the State not be terminated by virtue of the Native

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selection. H.R. Report No. 92-523, 92d Cong., 1st Sess. (1971), p. 9.

It is well-known that ANCSA was the subject of intense concern to the soil and gas industry which had mineral leases on State selected lands.⁸ It is therefore not surprising that Congress paid special attention to State issued leases. But that is not to say that Congress was unaware of or unconcerned with State issued patents, which were equally conditional on the issuance of a Federal patent to the State. Thus the House Committee report, *supra*, states: "Sec. 11(i) protects all valid rights * * *." If it had intended to protect only leases or only rights of a temporary nature the use of the word "all" would seem inappropriate.

The State "open to entry" leasing program, A.S. 38.05.077, provides for the issuance to qualified applicants of a five-year lease (renewable for five years) to not more than five acres of State land classified as "open to entry."

It further provides:

(4) Before a person may purchase the parcel of land upon which he has entered he shall have a survey made of the entry * * *.

* * * * *

(6) When the entry has been made upon land that has been selected by the State and upon which the State has not

received tentative approval or patent, the entry shall be approved only on the basis of a renewable lease. When tentative approval or patent has been received by the State, the lessee may relinquish his lease and acquire patent to the entry by negotiated purchase upon the terms and conditions provided for in this section.

The program contemplated here is a lease with an option to buy at a negotiated price. It is a lease which could at the election of the lessee lead to the acquisition of title. Since sec. 6(i) of the Alaska Statehood Act prohibits the State from conveying minerals, the option to buy pertains to the surface interest only.

Under the analysis set forth above, third-party interests created by the State are protected regardless of whether they are of a temporary nature or lead to the acquisition of title. However, for purposes of 43 CFR 2650.3-1(a), it must be determined whether land covered by an open to entry lease should be excluded from the conveyance, or whether it should be included in the conveyance which would be issued "subject to the lease."

It is my conclusion that the open to entry lease should be treated as a lease for purposes of 43 CFR 2650.3-1 and 2650.4-1, and that the option to purchase may be exercised against the Native corporation. This conclusion is based on the fact that the document which the State has issued is termed a "lease," and at the time of the conveyance, it

⁸ See, for example, the dissenting view of Congressman Saylor appended to House Committee Report No. 92-523, 92d Congress, 1st Sess. (1971), at p. 51.

cannot be determined with certainty whether the option to buy will be exercised. Sec. 14(g) of ANCSA specifically provides that "the rights of the lessee * * * to the complete enjoyment of all rights, privileges and benefits" are to be protected in the conveyance, and that the Natives shall succeed to the interests of the State as lessor. By including the land in the conveyance the land will remain with the Native corporation and not revert to the State if the lessee declines to exercise his option to purchase or if the lease turns out to be invalid for some reason. Moreover the mineral interest will remain with the Native corporation in event, and the corporation will receive the proceeds of the sale if the option is exercised.

If an open to entry lessee exercises his option to purchase after the conveyance has been issued to the Native corporation and the Native corporation conveys the land to him, the acreage so conveyed will have been charged against the corporation. But since the corporation will have received the minerals and the purchase price for the surface estate, a credit for the acreage conveyed would not be appropriate.

The final issue for resolution is to what extent the law and regulations require the Department to identify and determine the validity of (adjudicate) third party valid existing rights.

Clearly the administrative act of listing an interest as a valid exist-

ing right or of failing to list it does not create or extinguish the right. Because of this the ultimate validity of all interests may require court litigation.

Nevertheless it is appropriate for BLM to determine in the first instance the validity of those interests which are created by Federal law since BLM is in most cases the agency charged with the administration of those laws. It is also appropriate for BLM to identify any interests which appear on the State land records and to serve notice on all parties of each other's possible interests. It was for this reason that the Department promulgated 43 CFR 2650.7(d) requiring that decisions of BLM proposing to convey lands under ANCSA shall be served "on all known parties of record who claim to have a property interest or other valid existing right in the land affected by the decision." Neither the Department's regulations nor ANCSA require the Department to determine whether third-party interests created by the State are valid under the applicable State law and regulations. The Department is not an appropriate forum to adjudicate these interests. If the State created interest is valid on its face it should be deemed valid for purposes of the conveyance document.

LEO KRULITZ,
Solicitor.

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APPENDIX A

ALASKA NATIVE CLAIMS
SETTLEMENT ACTWITHDRAWAL OF
PUBLIC LANDS

"Sec. 11. (a) (1) The following public lands are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act, as amended:

"(A) The lands in each township that encloses all or part of any Native village identified pursuant to subsection (b);

"(B) The lands in each township that is contiguous to or corners on the township that encloses all or part of such Native village; and

"(C) The lands in each township that is contiguous to or corners on a township containing lands withdrawn by paragraph (B) of this subsection.

"The following lands are excepted from such withdrawal: lands in the National Park System and lands withdrawn or reserved for national defense purposes other than Naval Petroleum Reserve Numbered 4.

"(2) All lands located within the townships described in subsection (a) (1) hereof that have been se-

lected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from the creation of third party interests by the State under the Alaska Statehood Act."

CONVEYANCE OF LANDS

"Sec. 14.

"(g) All conveyances made pursuant to this Act shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. Upon issuance of the patent, the patentee shall succeed and become entitled to any and all interests of the State or the United States as lessor, contractor, permitter, or grantor, in any such leases, contracts, permits, rights-of-way, or easements covering the estate patented, and a lease

issued under section 6(g) of the Alaska Statehood Act shall be treated for all purposes as though the patent had been issued to the State. The administration of such lease, contract, permit, right-of-way, or easement shall continue to be by the State or the United States, unless the agency responsible for administration waives administration. In the event that the patent does not cover all of the land embraced within any such lease, contract, permit, right-of-way, or easement, the patentee shall only be entitled to the proportionate amount of the revenues reserved under such lease, contract, permit, right-of-way, or easement by the State or the United States which results from multiplying the total of such revenues by a fraction in which the numerator is the acreage of such lease, contract, permit, right-of-way, or easement which is included in the patent and the denominator is the total acreage contained in such lease, contract, permit, right-of-way, or easement."

MISCELLANEOUS

"Sec. 22. (a) None of the revenues granted by sec. 6, and none of the lands granted by this Act to the Regional and Village Corporation and to Native groups and individuals shall be subject to any contract which is based on a percentage fee of the value of all or some portion of the settlement granted by this Act. Any such contract shall not be enforceable against any Native as defined by this Act or any Regional or Village Corporation and the

revenues and lands granted by this Act shall not be subject to lien, execution or judgment to fulfill such a contract.

"(b) The Secretary is directed to promptly issue patents to all persons who have made a lawful entry on the public lands in compliance with the public land laws for the purpose of gaining title to homesteads, headquarters sites, trade and manufacturing sites, or small tract sites (43 U.S.C. 682), and who have fulfilled all requirements of the law prerequisite to obtaining a patent. Any person who has made a lawful entry prior to Aug. 31, 1971, for any of the foregoing purposes shall be protected in his right of use and occupancy until all the requirements of law for a patent have been met even though the lands involved have been reserved or withdrawn in accordance with Public Land Order 4582, as amended, or the withdrawal provisions of this Act: *Provided*, That occupancy must have been maintained in accordance with the appropriate public land law: *Provided further*, That any person who entered on public lands in violation of Public Land Order 4582, as amended, shall gain no rights.

"(c) On any lands conveyed to Village and Regional Corporations, any person who prior to Aug. 31, 1971, initiated a valid mining claim or location under the general mining laws and recorded notice of said location with the appropriate State or local office shall be protected in his possessory rights, if all requirements of the general mining laws are complied with, for a period of five years and may, if all require-

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ments of the general mining laws are complied with, proceed to patent."

*ALASKA STATEHOOD ACT**Sec. 6, As Amended*

"(g) Except as provided in subsection (a), all lands granted in quantity to and authorized to be selected by the State of Alaska by this Act shall be selected in such manner as the laws of the State may provide, and in conformity with such regulations as the Secretary of the Interior may prescribe. All selections shall be made in reasonably compact tracts, taking into account the situation and potential uses of the lands involved, and each tract selected shall contain at least five thousand seven hundred and sixty acres unless isolated from other tracts open to selection or, in the case of selections under subsection (a) of this section, one hundred and sixty acres. The authority to make selections shall never be alienated or bargained away, in whole or in part, by the State. Upon the revocation of any order of withdrawal in Alaska, the order of revocation shall provide for a period of not less than ninety days before the date on which it otherwise becomes effective, if subsequent to the admission of Alaska into the Union, during which period the State of Alaska shall have a preferred right of selection, subject to the requirements of this Act, except as against prior existing

valid rights or as against equitable claims subject to allowance and confirmation. Such preferred right of selection shall have precedence over the preferred right of application created by section 4 of the Act of September 27, 1944 (58 Stat. 748; 43 U.S.C., sec. 282), as now or hereafter amended, but not over other preference rights now conferred by law. Where any lands desired by the State are unsurveyed at the time of their selection, the Secretary of the Interior shall survey the exterior boundaries of the area requested without any interior subdivision thereof and shall issue a patent for such selected area in terms of the exterior boundary survey; where any lands desired by the State are surveyed at the time of their selection, the boundaries of the area requested shall conform to the public land subdivisions established by the approval of the survey. All lands duly selected by the State of Alaska pursuant to this Act shall be patented to the State by the Secretary of the Interior. Following the selection of lands by the State and the tentative approval of such selection by the Secretary of the Interior or his designee, but prior to the issuance of final patent, the State is hereby authorized to execute conditional leases and to make conditional sales of such selected lands. As used in this subsection, the words 'equitable claims subject to allowance and confirmation' include, without limitation, claims of holders of per-

mits issued by the Department of Agriculture on lands eliminated from national forests, whose permits have been terminated only because of such elimination and who own valuable improvements on such lands."

**APPEAL OF SYSTEMS
TECHNOLOGY ASSOCIATES, INC.**

IBCA-1108-4-76

Decided *January 19, 1978*

Contract No. 68-01-2782, Environmental Protection Agency.

Sustained.

1. Contracts: Performance or Default: Breach—Contracts: Performance or Default: Excusable Delays—Contracts: Performance or Default: Impossibility of Performance

Where the Government obligates substantial funds to buy equipment and services but allows an option to extend the lease for computers that are essential for full performance of the contract to lapse and then fails to obligate funds to buy or lease these computers, the Government has prevented performance of the critical part of the contract and the contractor is justified in stopping work.

2. Contracts: Construction and Operation: Waiver and Estoppel—Contracts: Disputes and Remedies: Burden of Proof—Contracts: Disputes and Remedies: Termination for Default—Contracts: Performance or Default: Excusable Delays—Contracts: Performance or Default: Waiver and Estoppel—Evidence: Burden of Proof—Rules of Practice: Appeals: Burden of Proof—Rules of Practice: Witnesses

The Government, after waiver of the original delivery schedule, has the burden of proof that the unilaterally established new schedule is reasonable under all the

circumstances existing at the time of the reestablishment, which, however, it failed to show.

APPEARANCES: Mr. Edward F. Canfield, Attorney at Law, Casey, Scott & Canfield, Washington, D.C., for the appellant; Mr. Donnell L. Nantkes, Government Counsel, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE STEELE

INTERIOR BOARD OF CONTRACT APPEALS

Table of Contents of Opinion

<i>Sec. No.</i>	<i>Topic</i>
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2.	Introduction—An appeal from a default termination.
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4.	The history of the contract. Findings of fact and conclusions of law. Part I—In general—the contract requirements. Part II—Change orders, including mod. 5. Part III—STA's incurrence of costs of performance. Part IV—Change order negotiations fail. Part V—STA's attempts to obtain the computers. Part VI—The EPA—STA attempts to reestablish an obligation to lease the computers. Part VII—Contractual status at the time of the termination.
5.	Decision, analysis, conclusions of law. The appeal is sustained. Part I—The Government frustrated performance by failing to timely buy or extend the lease on the computers.

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<i>Sec. No.</i>	<i>Topic</i>
Part II—	The Government waived the original delivery schedule, and failed to carry its burden of proof that the new schedule it attempted to establish was reasonable for it and STA under the circumstances then existing.
Part III—	Mod. 5 was a change order which required equitable adjustments in schedule and price.
Part IV—	The contract is terminated for the convenience of the Government and the contracting officer must now equitably adjust the contract price under the second sentence of paragraph 11(e) of the Default clause.

**1. SUMMARY OF DECISION.
THE APPEAL IS SUSTAINED.**

The contractor, Systems Technology Associates, Inc. (STA), and the Government, Environmental Protection Agency (EPA), agreed by an Aug. 15, 1974, contract that STA would: (1) lease with an option to buy and deliver and install at a specified EPA facility computers and auxiliary equipment (with an approximate value of \$1.8 million); (2) buy, deliver, sell, and install other computer equipment (with an approximate value of \$300,000); (3) prepare and deliver computer "software" for the above equipment; (4) prepare and deliver manuals, acceptance test plans, site documentation and progress reports; (5) provide training on the system; and (6) provide maintenance on the computers, when installed, for 1 month. The parties agreed that the Government was buying all the

equipment and services except the computers (and auxiliary equipment) which would be leased by the Government from the date of installation and acceptance for 1 month. The contract provided that when the Government obtained more funds it had the right to extend the lease period by lease extension accomplished on or before the end of June 1975 or to buy the computers. The funds obligated by the contract were \$1,302,993. The "delivery date" for the equipment was on or before May 30, 1975.

The contractor commenced performance and on May 1, 1975, the Government issued a change order changing the computer from a Sigma 5 to a Sigma 6. Thereafter the parties agreed to substitute a Xerox 500 for the Sigma 6. The parties could not agree on the price or schedule adjustments resulting from the change order and the Government failed to extend the lease period for the computers or exercise its option to buy them. Intense negotiations at the end of 1975 failed to result in the obligation of funds to lease (or buy) the computers which were essential to the system and appellant stopped work and the contract was terminated for default on Mar. 1976.

We decide that the Government's failure to exercise its options to either buy the computers or to timely extend the lease thereof caused STA to fail to complete its contract with Xerox to obtain the computers and thus the default termination was improper and must be, and hereby is, converted to a termina-

tion for the convenience of the Government. We further conclude that the Government waived the original performance dates and failed to reestablish new reasonable performance dates so that we also hold that the default termination was premature. Finally we decide that the Government is now obligated to equitably adjust the contract price under the second sentence of clause 11(e)—the Default clause. The claims for various constructive change orders are denied without prejudice and remanded to the contracting officer.

2. INTRODUCTION—AN APPEAL FROM A DEFAULT TERMINATION.

This is an appeal from the default termination of a complex contract for the delivery of computer equipment and computer services.

The parties have agreed that they do not herein ask the Board to decide quantum (1 Tr. 3).

The hearing on the appeal was conducted by Administrative Judge Vasiloff who is no longer a member of this Board.

3. THE CONTENTIONS OF THE PARTIES. THE APPELLANT SAYS THE GOVERNMENT PREVENTED PERFORMANCE. THE GOVERNMENT SAYS THAT APPELLANT ABANDONED PERFORMANCE. THE ISSUES IN THE APPEAL.

The Government contends that the contract was properly termi-

nated for default because the appellant had anticipatorily repudiated it. (Government's Posthearing Brief, pp. 43-45.) Alternatively the Government says that the appellant's failure to meet the Government's unilaterally reestablished, allegedly reasonable, delivery schedule was proper ground for the default termination (Government's Posthearing Brief, pp. 38-42).

The appellant, on the other hand, says that the contract in practice was divided into two parts, one for major computer hardware (and its software) and the second for the balance of the hardware, software, documentation and training. According to the appellant, the default termination was improper because the Government never funded the major computer hardware portion, thereby making performance of the contract impossible (Appellant's brief dated May 5, 1977, pp. 10-15).

A second issue inherent in the dispute is the effect of Change Order 5 on the rights and duties of the parties. This change order, as implemented, changed the major item of computer equipment. The appellant says this was a normal change order which required the Government to equitably increase the contract price and to equitably adjust (extend) the delivery/performance schedule (Appellant's May 5, 1977, brief, pp. 17-19). The Government disputes this (Government's Posthearing Brief, pp. 33-37), and argues that the change could not legally increase the contract price because of a special provision called Article 53,

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Equipment Substitution (which arguably said in effect: if the contractor substitutes equipment to meet the goals of the specifications, this substitution can only result in a downward adjustment in price). Finally, the Government says that the delivery schedule was properly adjusted by the contracting officer, and that when the contractor failed to meet this adjusted schedule, it was properly terminated for default under paragraph (a) (i) of the default clause of Standard Form 32, 1969 Edition (tab 69, Tr. 22, 23).

In its May 5, 1977, posthearing brief (at pp. 19-27), the appellant also makes claim for several constructive change orders such as: (1) acceleration due to improper negotiating techniques relative to Change Order 5 (pp. 19-22); (2) improper direction to do work after the expiration of the contract (p. 26); (3) added work, as more software was required by Change Orders No. 1 and No. 5 (pp. 23-25); and (4) excessive administrative cost due to improper attempts to levy a penalty against the contractor (pp. 25-26). *See also* Appellant's "Pre-Trial Statement."

There are other "minor" contentions of the parties which were raised in the Answer and Complaint.

We conclude that the only issue that we need presently decide is whether or not the contract was properly terminated for default. In deciding this issue we will consider any evidence of excusable (or Government caused) delay such that the default termination was (or was

not) premature. We decide that the appellant did not anticipatorily repudiate the contract and that the default termination was therefore improper. Finally, we suggest the appropriate standard for relief as the parties have stated different views at different times on this topic (*cf.* Complaint, pp. 10-11, and Answer, pp. 5-6, with appellant's May 5, 1977, brief, p. 9, Government's Rebuttal Brief, p. 3.)

4. THE HISTORY OF THE CONTRACT. FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Part I—In General

4.1 The parties entered into a negotiated, firm, fixed price contract on Aug. 15, 1974 (Tab 1). The contract was for the provision of computed services and equipment for a system to record and analyze automotive emissions at EPA's Ann Arbor, Michigan, facility. The contract price was \$1,302,993.

4.2 EPA had insufficient funds to buy all the equipment that was necessary to make the proposed system work so the contract in effect provided that STA would obtain, deliver, and install the brain of the system, the three "CPU's" (hereafter also called "computers") (and auxiliary equipment) before May 1975 and the Government would lease these for 1 month at a cost of \$32,911.

4.3 The parties expected that EPA would before June 30, 1975, obtain the necessary funds to buy

this equipment at an additional price of approximately \$1.8 million or at least would obtain sufficient funds to extend the lease of the equipment.

4.4 In addition to above discussed equipment (called "table I" equipment) the contract required STA to buy, sell, and deliver "table III" equipment (worth about \$300,000) to EPA and to design and deliver computer "software" for the whole system (this alone was a considerable task), and make and deliver manuals, provide training to EPA personnel on the equipment and the system, furnish and acceptance test plan and site documentation, and progress reports and provide maintenance for the system for 1 month.

4.5 The contract's technical requirements were stated in a performance specification.

4.6 The contract required that the equipment be delivered, installed, and operational on or before May 30, 1975 (Art. IIIA).

4.7 EPA was obligated to make progress payments and pay STA \$1,260,367 for everything except table I equipment—the computers and their auxiliary equipment—and to lease the table I equipment for the month of June 1975 at a rent of \$32,911 with an added maintenance charge of \$9,715.

Part II—Change Orders Including Mod. 5

4.8 The contractor commenced performance. It entered into an agreement with Xerox effective Dec. 18, 1973, to obtain the necessary computers and auxiliary equip-

ment (AX 61—Appellant's Exhibit 61, 1 Tr. 33). It also made financial arrangements to cover its estimated needs for cash in excess of that to be provided by progress payments from the Government (1 Tr. 34).

4.9 On Oct. 25, 1974, the parties signed Mod. 1 which altered the specifications and the hardware and thereby changed the software (1 Tr. 40-42, 89; 1 Tr. 57).

4.10 After various further discussions, on May 1, 1975, the Government issued a change order (Mod. 5) which inserted new appendixes to the specifications and thereby changed the "hardware" and "software." The inserted table I required a Sigma 6 computer instead of the previously required Sigma 5. STA responded, as it had been requested to by Mod. 5, by proposing three different computers, and by analyzing the technical, schedule, and cost effects thereof. One proposed alternative was Xerox 550 computers (Appeal file tab. 22). The letter in enclosure 6 thereto proposed a schedule in a bar chart. The bar chart is not clear to us, without testimony. Nevertheless par. 8 of enclosure 7 of Tab. 22, which is entitled "Delivery Schedule Assumptions," assumes delivery of one computer by Aug. 15, 1975, one by Oct. 15, 1975, and the last by Mar. 1, 1976.

4.11 EPA also said that it was accepting the Xerox 550 computers because the Sigma 5 and its RMB-LOS did not exist or would not meet the contract performance requirements (EPA letter, May 12, 1975; Tab. 20). The Government analyzed the proposals and decided the

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Xerox 550 was best for the Government (Tab. 23).

4.12 On June 17, 1975, the Government by letter said it would accept Xerox 550 computers but that it did not thereby accept the proposed schedule or price increase (Tab. 24).

Part III—STA's Incurrence of Costs of Performance

4.13 STA incurred cost under the contract and invoiced the Government for progress payments. The cost for Aug. 1974 was \$32,034.52

and the Government made progress payments at 75 percent, so that the contractor's cost incurred under the contract by Mar. 6, 1976, was \$1,373,422.46 and the amount of progress payments made by EPA to STA was \$1,150,278.92 (AX 60).

4.14 The appellant claimed progress payments and the Government, presumably having made the determination of "validity" required by Article 25 C. (2), or having waived said opportunity, made payments as follows (all per Appellant's Exhibit 60).

No.	Date of request	Date of payment	Amount of payment
1	Aug. 29, 1974	Oct. 15, 1974	\$24, 025. 89
2	Sept. 20, 1974	Oct. 15, 1974	18, 320. 84
3	Oct. 21, 1974	Nov. 19, 1974	*49, 979. 90
4	Nov. 9, 1974	Dec. 9, 1974	*76, 034. 84
5	Dec. 13, 1974	Jan. 7, 1975	31, 887. 22
6	Jan. 14, 1975	Feb. 10, 1975	*43, 225. 53
7	Unknown	Feb. 10, 1975	*155, 008. 06
8	Jan. 27, 1975	Unknown	32, 598. 07
9	Feb. 1, 1975	Mar. 21, 1975	68, 649. 97
10	Mar. 7, 1975	Mar. 24, 1975	**65, 235. 18
***1	Apr. 7, 1975	May 5, 1975	*63, 289. 92
12	May 5, 1975	Unknown ¹	² 53, 676. 68
13	June 9, 1975	Unknown ¹	² 38, 481. 78
14	July 7, 1975	Unknown	² 58, 854. 26
15	Aug. 1, 1975	Aug. 22, 1975	46, 542. 85
16	Sept. 2, 1975	Sept. 22, 1975	*40, 972. 83
17	Sept. 20, 1975	Unknown	49, 825. 26
18	Oct. 18, 1975	Nov. 12, 1975	*47, 891. 61
19	Nov. 15, 1975	Dec. 15, 1975	36, 356. 12
20	Dec. 3, 1975	Jan. 5, 1976	15, 843. 66
21	Dec. 22, 1975	Jan. 16, 1976	54, 144. 83
22	Jan. 20, 1976	Mar. 5, 1976	33, 356. 61
***3	Feb. 18, 1976	Mar. 5, 1976	43, 288. 09
24	Mar. 15, 1976	Unknown	17, 130. 17
25?	Unknown	Not paid?	256, 565. 08

*This is the amount paid taking the prompt payment discount.

**Amount of discount taken is not shown.

***Apparently an erroneous number.

¹ Voucher does *not* have annotation indicating that payment was made but later requests indicate that payment was in fact made.

² Question mark indicates that the record is not clear as to whether the prompt payment discount was taken.

The above-listed progress payment requests were for 75 percent of costs incurred by STA through progress payment request number 6, thereafter the requests were for 85 percent of incurred costs.

Part IV—Change Order Negotiations Fail

4.15 From May 1, 1975, until Mar. 1976, the parties had several negotiating conferences and wrote numerous pieces of correspondence. The major emphasis therein was on the proper dollar amount of the equitable adjustment. The Government claimed that all delays were STA's fault, that the Government had suffered approximately \$.5 million in damages and that STA was not entitled to most of its allegedly increased costs because of the terms of Article 53, Equipment Substitution. STA also advised the Government on several occasions that money was needed to keep alive STA's agreement with Xerox that

was to provide the 550's. *E.g.*, Tabs 31, 40, 41, 42, 44, 47, 48, 49, 50, 51, 52, 53-56. The parties failed to reach an agreement on adjustment to contract price or schedule due to Change Order No. 5.

4.16 The Government by letter dated Jan. 23, 1976 (Tab. 57), acknowledged that Change Order No. 5 had an impact on the delivery schedule, agreed that the computers were necessary to complete the contract, indicated the Government's view that the contractor was in default but said that the Government would accept delivery of three computers, two on Feb. 20, 1976, and one on July 1, 1976 (AX-65 sheet 1 and 3; AX-66 sheet 1; GX-C, p. 2; GX-H, pp. 1 and 4). (It also purported to establish a schedule for delivery or performance of other items of the contract.)

4.17 The Government, by a letter dated Feb. 19, 1976, attempted to establish a new delivery schedule as follows:

Item No.	Equipment or service	Delivery date
0	1 CPU plus other equipment	Mar. 5, 1976
1A	do	Do.
2A	do	Mar. 15, 1976
3A	Software	May 27, 1976
4B	Manuals	Apr. 27, 1976

(AX-53; GX-C, p. 2; GX-H, pp. 1 and 4; AX-66, p. 1.)

Part V—STA's Attempts to Obtain the Computers

4.18 Effective Dec. 18, 1973, STA and Xerox entered into an "Orig-

inal Equipment Manufacturer's Purchase Agreement" (sometimes called "OEM") number M507. This provided that STA would buy and Xerox would sell certain listed equipment at stated prices if subsequent purchase orders are negoti-

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ated (as to schedules) (AX 61). In 1974 STA negotiated with Xerox to obtain three Sigma 5 CPU's (model 8210C) with delivery schedules as follows: one by Nov. 15, 1974, and two more by Mar. 15, 1975 (with associated equipment). (STA letter dated Aug. 9, 1974, in "Response to Request for Production of Documents dated Nov. 29, 1976, No. 4," apparently made part of the appeal file by agreement; Appellant's "Pre-Trial Statement.")

STA placed purchase order No. 13358 on Mar. 12, 1975. It was for two Sigma 5 CPU's (model 8210C) at a unit price of \$111,000, sub-total \$222,000, and other equipment for a Phase I and Phase II total of \$862,890.50, and optional Phase III (irrelevant) equipment of \$502,024.80, in a total face amount of \$1,364,915.30. Delivery of the two CPU's was "not later than Sept. 15, 1975." (P.O. 13358 Mar. 12, 1975, "Response * * * No. 1.")

4.19 STA ordered the 550's from Xerox about June 1975 (2 Tr. 4, STA letter to Xerox dated May 15, 1975, and Xerox letter dated May 22, 1975, both part of "Response to Request for Production of Documents dated Nov. 29, 1976, No. 1" apparently made part of the appeal record by agreement of counsel—see page 8, par. 5 of appellant's "Pre-Trial Statement" undated but filed with the Board on Mar. 10, 1977). In its May 22, 1975, letter, Xerox said that shipment of one 550 could be made by Sept. 30, 1975, and two 550's by Nov. 30, 1975. In a letter dated June 2, 1975, Xerox said one

550 could be delivered Aug. 30, 1975. STA ordered the 550's by its Change Order Nos. 2 and 3 dated June 9, 1975.

4.20 On Jan. 23, 1976, Xerox notified STA that the equipment would be shipped between Feb. 20 and Mar. 5, 1976, and that \$121,285.16 must be paid to Xerox prior to shipment and \$1,121,887.73 must be paid to Xerox within 30 days after acceptance by EPA or 90 days after delivery whichever is sooner, and a subordination agreement must be signed so that Xerox has clear title to the equipment until it is paid for in full. On Feb. 3, 1976, Xerox told STA that it would accept Feb. 27, 1976, as the final date for first shipment if STA fulfilled all necessary payment conditions (mentioned above) by Feb. 20. STA did not meet those conditions. On June 29, 1976, Xerox notified STA that STA was in default of its purchase order and Xerox therefore demanded \$1,848,419.73.

Part VI—The EPA-STA Attempts to Re-establish an Obligation to Buy or Lease the Computers

4.21 Concurrently STA and EPA had corresponded about the buy or lease options for the table I computers as indicated below.

4.22 We do not know what the parties said to each other prior to award as to the financial strength of STA or how it planned to obtain credit (assuming as we do that it needed to obtain credit, see STA letter of Nov. 14, 1977, p. 6, Tab. 4). However, after award, STA told

EPA several times that funds were needed to obtain the CPU's and that Xerox would retain title to "its" equipment until it was fully paid therefor. For example, on Aug. 20, 1975, Xerox told this to EPA in a letter and EPA acknowledged same (Tab 30). On Sept. 12, 1975, STA told EPA by letter that the lease option had expired on June 30, that there were no funds in the contract for lease or purchase of Xerox equipment, that Xerox was ready to ship the equipment for the contract but would not do so until payment was made, that STA was no longer able to finance the contractual agreement, and that the only way out that STA saw was for EPA to come up with the money and exercise the purchase options (Tab 31). (However, the Board reads Article V A as only allowing the Government to buy leased equipment prior to June 30, 1975, unless prior to the lease was properly extended. Thus either STA was in error in its interpretation of the purchase option or was really suggesting a bilateral agreement under Article 10(B)). STA reiterated this position in a Sept. 23, 1975 letter (Tab 33). The Government responded with a proposed Mod. 10 that extended the CPU rental period from "the effective date of rental initiation * * * and continue for a period of one (1) year" (Tab 36). STA returned this unsigned and pointed out that the lease option had already expired, and that the proposed Mod. did not cite funds, nor state rental or maintenance rates. STA suggested other changes

(Tab 36). On October 1, 1975, STA again alerted EPA (Tab 37). On Oct. 31, 1975, STA proposed two alternative methods to obtain the CPU's. Both proposals would expire unless accepted by close of business Nov. 10, 1975 (Tab 40). On Nov. 12, 1975, EPA in a long letter reviewed the negotiations resulting from the Mod. 5 change order, made a "final offer," and concluded (erroneously) that it understood that it could have several more weeks to select one of the two alternatives proposed by STA on Oct. 31. It said "EPA will select one of the two alternatives" (Tab 42). STA replied and reviewed the contract history and situation in a long Nov. 17, 1975, letter, and, in effect, rejected EPA's Mod. 5 final offer (Tab 44). EPA did not issue a final decision on Mod. 5 as it had said it would in its Nov. 12 letter, but instead wrote its Dec. 8, 1975, letter (Tab 47), which again acknowledged that Mod. 5 was a change order and professed not to understand how lack of agreement on the contract price could affect performance of the contract (Tab 47). STA replied by a letter dated Dec. 10 and said in part as follows:

STA cannot meet the agreed-to schedule without the Xerox 550 computers and associated interface equipment. At the present time, and since June 30, 1975, there has been no contract vehicle or obligation of funds by the Government for the acquisition of the computer equipment.

* * * * *

[I]t is unrealistic to threaten default to STA for non-performance on the contract when the burden of performance

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lies with the Government to provide adequate financing for the system contracted for.

(Tab 48).

4.24 On Dec. 18, STA advised EPA that STA's offer in its Oct. 31 letter had expired on Nov. 10 and that EPA's Nov. 12 letter was too late to be a timely acceptance. STA enclosed a letter from Citi-Corp (not part of our Tab 49) notifying STA of the expiration of the credit arrangements but saying that new credit might be arranged if EPA gave (1) accounting and appropriation data and (2) the total funds obligated for the first year's lease (Tab 49). On Jan. 9, 1976, EPA "directed" STA to obtain the computers "pursuant to the terms and conditions of the subject contract." Next EPA issued a Mod. 13 under the changes clause purporting to extend the lease period for 1 year (Tab 14). STA returned it saying it was unauthorized by the changes clause (Tabs 51 and 54). EPA agreed and said the Mod. had been issued in error and was rescinded (Tab 56). On Jan. 16, 1976, STA offered a new proposal with equipment priced at \$1,471,211.10 for Phases I and II, and said that 10 percent thereof was needed as advance lease payments (Tab 52). It also enclosed a proposed revised Article 11 and 12, and a new schedule. On Jan. 22, STA supplied the new proposed price for the required maintenance contract (Tab 55). EPA replied by a letter dated January 23, 1976, *directing* STA

to obtain the computers and purporting to unilaterally establish a new delivery schedule. It also said "it is mutually agreed that delivery of the Xerox 550 computers to the EPA Ann Arbor facility is a necessary condition to enable you to successfully pursue completion of the contract" (Tab 57). And the letter then said "since the initiation of the required rental period has not yet occurred [because the computers had not been obtained or installed], the June 30, 1975, expiration date for the rental period has become nugatory and we will deem the contract to provide for expiration thirty (30) days after initiation of the rental period." But the letter said nothing about being a final decision nor about money. STA questioned this letter (Tabs 58 and 60). EPA replied on Feb. 11, 1976, as follows:

It is the desire of the Government to currently contract for the first option year of equipment rental and maintenance under Contract 68-01-2782. Upon the conclusion of negotiations of proposed Modification No. 13 to Contract 68-01-2782, it is EPA's intent to fund this requirement initially in the amount of \$150,000 which is presently reserved as follows:

Currently Obligated (Article		
22.C of Contract 68-01-2782) -	\$ 42, 626	
68X0108 E00725 613556EDD2		
31.12 -----		90, 000
68X0108 E00919 613556EDD2		
31.12 -----		17, 374
		<hr/>
		\$150, 000

(Tab 61.) STA replied by letter dated Feb. 19 (Tab 62) and concluded by saying that "we are on

notice that the modification is deficient in funding and the modification as a basis for securing equipment financing is probably inadequate. [STA] is forced to suspend work until some forthright guidance and clarification is forthcoming***."

4.25 STA thereby said that proposed Mods. 13 (different from the prior Mod. 13) and 14 were insufficient to obligate funds. (The proposed mods are appellant's documents tab 55.) One (of several) proposed Mod. 13 (all unsigned) proposed a rental rate for item 1 (the three CPU's and associated equipment) at \$45,621 a month or \$547,452 a year (for the first year) and said that there was \$140,285 of "funds available" and that "work*** shall not result in cost in excess of the limitation of current funding of \$140,285 of equipment lease/rental***." Next EPA issued a show cause letter for alleged lack of documentation (Tab 64)

and STA responded by a Mar. 8, 1976, letter, which concluded as follows:

The failure of the Government to provide the expected obligation of funds and modification of delivery dates, or to challenge STA's refutation of its stated position concerning the expired contract, leaves this Contractor no alternative other than to bring the program to an orderly close and assess the Government all charges properly due it. Any action to the contrary, as we have been advised by counsel's [sic] opinion, reference (c), would be to proceed at our own peril. This position was outlined in our meeting of March 3, 1976, and continues to be our position unless the Government is prepared to make the necessary adjustment to obligation of funds, terms and conditions, delivery schedules, and technical objectives. (Tab. 66.)

Part VII—Contractual Status at the Time of the Termination

4.26 As of Mar. 8, 1976, STA had performed the following parts of the contract as modified through Mod. 12.

Item	Work	Yes	No	Source
1.....	3 CPU's.....		No.....	—
1.....	Phase I and II table 1 (all equipment except CPU's).		No as to 6 pages of computer equipment.	2 Tr. 196.
2.....	All Phase I and II Table 3 equipment.		do.....	Do.
3A.....	General purpose Phase II software except 3B.	Yes 80 pct.....		2 Tr. 146.
3B.....	Phase I software.....	do.....		Do.
4A.....	Manuals.....	Yes 100 pct.....		2 Tr. 144 ex. 62.
4B.....	Manuals.....	Yes.....		Do.
5.....	Training.....		No.....	—
6.....	Acceptance test plan.....		No.....	—

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Item	Work	Yes	No	Source
7	Site documentation		No	—
8	Progress reports	Yes		Ex. 62.
9	Maintenance		No	—

Additional Work

Ground system Mod. 7	Yes		Ex. 62 2 Tr. 143.
Design and prototype Mod. 7.	Yes		Do.
Drawings Mod. 8	Yes		Do.
38 Relay modules Mod. 8	Yes		Do.
Prototype circuit boards Mod. 9.	Yes		Do.
Engineering support Mod. 10.	Yes		Do.
Control panels, etc. Mod. 12.	Yes		Do.

4.27 On Mar. 8, 1976, the Government issued a letter terminating the contract for default saying in part as follows:

You have, without legal excuse, failed to deliver the Xerox 550 computers to the Environmental Protection Agency (EPA) Mobile Service Air Pollution Control Laboratory by Mar. 5, 1976, as required by Contract No. 68-01-2782 of Aug. 15, 1974, and the Agency's extension thereof, dated Feb. 19, 1976. Further you unequivocally repudiated further performance under the contract in a meeting held Mar. 3, 1976 in the office of the Director of the EPA Contracts Management Division. Effective immediately, Contract No. 68-01-2782 is therefore terminated for default and your right to proceed further with the performance of the contract has ceased * * *.

(Tab 69).

5. *DECISION, ANALYSIS, CONCLUSIONS OF LAW. THE APPEAL IS SUS-TAINED.*

Part I—The Government Frustrated Performance by Failing to Timely Buy or Extend the Lease for the Computers

[1] Our ultimate conclusions of law are as follows:

(1) The parties signed the contract with the expectation that STA would obtain and install the computers before May 30, 1975, and that EPA would lease them for 1 month, *and that*

(2) EPA would exercise its Article 10 option to extend the computer (table 1) rental option (in the month of June 1975) by giving pre-

liminary notice May 31, 1975 (Art. 10A), and sign and deliver a SF30 before June 30, 1975 (Art. VA and 10(B)), or that

(3) EPA would, during June 1975 or during a properly unilaterally extended lease period (or one later extended by mutual agreement), buy the computers taking a rental credit of 80 percent for the rent for months 1-12 and 40 percent of the rent paid during the 13th and subsequent months.

(4) EPA did not exercise its option under Article 10 to extend the computer lease period.

(5) The time when the Government could unilaterally exercise its option to extend the computer lease expired July 1, 1975.

(6) The parties by early Mar. 1976 failed to conclude a bilateral agreement to revive the Government's right to lease (and buy) the computers (and other table 1 equipment).

(7) Neither Mod. 1 nor Mod. 5 were the preliminary notice nor the exercise of the option to extend the lease period of the computers.

(8) Nothing EPA did after June 1975 constituted an exercise of the option to extend the lease period of the computers.

(9) STA acted reasonably in continuing performance until Mar. 1976 in the expectation that EPA would obtain funds and enter into a bilateral supplemental agreement under Article 10(B) and thereby establish new rights and duties with respect to lease of computers.

(10) STA was justified in stopping work under the contract in Mar. 1976. *Cf. Seven Sciences*, ASBCA No. 21079 (Aug. 30, 1977), 77-2 BCA par. 12,730; and cases cited in *National Tire Company, Inc.*, ASBCA No. 18739 (July 16, 1975), 75-2 BCA par. 11,400 at 54,282; *G. W. Galloway Co.*, ASBCA No. 17436 (June 30, 1977), 77-2 BCA par. 12,640 at 61,298; *Restatement of the Law of Contracts* (1932) Sec. 288 pp. 426, 427; 17A C.J.S. *Contracts*, §§ 422(1), 422(2), fn. 74, § 424, § 452, § 456c; *cf.* also 17A C.J.S. *Contracts*, § 578, fn. 71.15, § 461, §§ 610, 614, 463(2), 464, 468, 473, 505B; *Williston on Contracts* 3d edition, secs. 677, 677A, 677B; Corbin, *Contracts*, 1962 edition, sections 1252, 1255, 1256, 1257, 1264, 1320, 1322, 1323; *Ned C. Hardy*, AGBCA No. 74-111 (Nov. 11, 1977); 77-2 BCA par. 12,848; *cf.*, *C. W. Schmid v. United States*, 173 Ct. Cl. 302 (1965).

[2] *Part II—The Government Waived the Original Delivery Schedule, and Failed to Carry its Burden of Proof That the New Schedule it Attempted to Establish Was Reasonable for it and STA Under the Circumstances Then Existing.*

We reach the following conclusions of law in regard to the delivery or performance schedule aspect of this case.

(11) The Government waived the original performance schedule. *AMECOM Division, Litton Sys-*

January 19, 1978

tems, Inc., ASBCA No. 19687 (Jan. 21, 1977), 77-1 BCA par. 12,329 at p. 59,567; *Wickes Industries, Inc.*, ASBCA No. 17376 (Mar. 12, 1975), 75-1 BCA par. 11,180 at p. 53,259-60; *Clavier Corporation*, ASBCA No. 19144 (Apr. 15, 1975), 75-1 BCA par. 11,241 at pp. 53,505-6.

(12) EPA had the burden of proof to establish that the schedule it sought to establish by its Feb. 19, 1976, letter was reasonable considering all the circumstances existing for EPA and STA at that time. See cases cited in the preceding paragraph. The Government might have tried to carry this burden by putting on one or more fact and expert witnesses. Ideally a good computer expert with thorough familiarity with the facts of this contract history could have testified as to the parties' duties under the contract as awarded, the effect on those duties occasioned by modifications 1 and 5, the validity or lack thereof, in his opinion, of appellant's claims for time extensions, and the reasonableness of the schedule established by the contracting officer in his Feb. 19, 1976, letter. This would have been the direct way to establish the reasonableness of the schedule. However, no witness so testified. Thus, the Board is left to weigh the Government's arguments that because appellant once proposed a schedule (in May 1975) its "acceptance" in Jan. 1976 (Tab 57) and February 1976 (appellant's document 53), 9 months later was reasonable (2 Tr. 29). This is not self-evident. The

May 1975 proposal contained schedule/performance assumptions. The Government never addresses the reasonableness of these assumptions. No Government witnesses testified as to the reasonableness of that schedule as of February 1976 and the appellant's witness testified that the schedule was not reasonable (2 Tr. 83, 173, 174).

(13) The Government very clearly failed to carry its burden of proof that the new schedule was reasonable.

Part III—Mod. 5 Was a Change Order Which Required Equitable Adjustments in Schedule and Price

There is an inferential argument in this appeal that Mod. 5 was not a change order but should have been a mere acceptance of an equipment substitution at no increase in price and with no extension of the performance schedule. We state our conclusions on this issue to lay to rest these thoughts.

(14) Mod. 5 was a unilateral change order issued under the changes clause and obligated the Government to equitably adjust the performance schedule and the contract price. We reach this conclusion for two reasons. Firstly, the Government issued the mod. in change order format. Presumably this was done by responsible trained contracts personnel. Thus the conduct of the parties prior to a dispute has great weight in assisting the Board to determine the proper in-

terpretation of their contractual rights and duties. *Julius Petrofsky d/b/a Petrof Trading Co. v. United States*, 203 Ct. Cl. 347, 361 (1973); *Florida Builders, Inc.*, ASBCA No. 8728 (Sept. 30, 1963), 1963 BCA par. 3886 at 19,290; Nash, *Government Contract Changes* (1975) Fed. Pub. Inc., pp. 221, 222, 225. Secondly, it is clear that a standard clause, the changes clause, will not easily be varied by a non-standard clause, e.g., Article 53 "Equipment Substitution" *Bethlehem Steel Corp.*, ASBCA No. 13341 (Nov. 19, 1971), 72-1 BCA par. 9186 at 42,588 and the cases cited therein. Some of the activities of the parties from Aug. 1974 to May 1, 1975, indicate changing concepts of what was readily available and what was desired by the Government. Thus while it is possible that the Government could have during this period insisted that it would allow no change in the performance requirements and would invoke Article 53 if STA proposed different hardware, the Government did not do this but instead exercised its contractual right to issue a change order. Upon doing so it obligated itself to equitably adjust either or both the schedule and the contract price because of changes thereto caused by the change order. The Government still has this obligation.

Part IV—The Contract is Terminated for the Convenience of the Government and the Contracting Officer Must Now Equitably Adjust the Contract Price Under

the Second Sentence of Paragraph 11(e) of the Default Clause

Because the parties have expressed different views at different times about the relief provided in the contract if we hold that the default termination was improper (as we herein do), we state our conclusions on this issue.

(15) The preamble to the termination for convenience (T/C) clause makes it not applicable to the present contract which is over \$100,000.

(16) Thus by the terms of the second sentence of par. 11(e) of the default clause the Government must now equitably adjust the contract "to compensate for * * * [the] termination."

(17) The contractor's claims for other constructive changes need not be, and are not, decided by us but are remanded to the contracting officer for consideration when he equitably adjusts the contract by reason of the termination. In any event, the parties may have recourse to the disputes procedures if these matters cannot be amicably resolved.

(18) The appeal is sustained.

GEORGE S. STEELE, JR.

Administrative Judge.

WE CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

G. HERBERT PACKWOOD,
Administrative Judge.

APPEAL OF DONALD A. WATSON

2 AN CAB 289

Decided February 2, 1978

Appeal from the Decision of the Alaska State Office, Bureau of Land Management #AA-8592, dated June 3, 1976, rejecting a primary place of residence selection of Donald A. Watson, under § 14(h)(5) of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), as amended, 89 Stat. 1145 (1976).

Decision of the Bureau of Land Management # AA-8592, dated June 3, 1976, affirmed Feb. 2, 1978.

1. Alaska Native Claims Settlement Act: Primary Place of Residence: Criteria

In order to establish a primary place of residence there must be evidence that the applicant resided on the tract applied for as his primary place of residence on a regular or seasonal basis for a substantial period of time.

APPEARANCES: Chaney Croft, Esq., Croft, Thurlow & Loutrel, 425 G Street, Suite 710, Anchorage, Alaska 99501, for the appellant Donald A. Watson; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, 510 L Street, Suite 408, Anchorage, Alaska 99501, for the State Director, Bureau of Land Management.

*OPINION BY
ALASKA NATIVE CLAIMS
APPEAL BOARD*

The Alaska Native Claims Appeal Board, pursuant to delegation

of authority in the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), as amended, 89 Stat. 1145 (1976), and the implementing regulations in 43 CFR Part 2650, as amended, 41 FR 14734 (Apr. 7, 1976), and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions, and decisions affirming the Decision of the State Director, Bureau of Land Management # AA-8592 (hereinafter the State Director).

Pursuant to the regulations in 43 CFR Part 2650, as amended, the State Director is the officer of the United States Department of the Interior who is authorized to make final decisions on behalf of the Secretary on land selections under the Alaska Native Claims Settlement Act, subject to appeal to this Board.

On Dec. 14, 1973, Donald A. Watson filed an application for a primary place of residence under § 14(h)(5) of the Alaska Native Claims Settlement Act of Dec. 18, 1971 (85 Stat. 688). This provision of ANCSA provides as follows:

The Secretary may convey to a Native, upon application within two years from the date of enactment of this Act, the surface estate in not to exceed 160 acres of land occupied by the Native as a primary place of residence on Aug. 31, 1971. Determination of occupancy shall be made by the Secretary, whose decision shall be final. The subsurface estate in such lands shall be conveyed to the appropriate Regional Corporations;

[85 Stat. 705]

In his application appellant stated that he had occupied this tract as a primary place of residence

from May of 1970 to the date of the application, except for about three months each year when he resided at 104 E. 53d Avenue, Anchorage, Alaska.

On Mar. 12, 1974, the Chief Adjudicator of the Alaska State Office issued a notice requiring appellant to submit evidence of improvements in support of his claim. On Mar. 28, 1974, appellant sent a letter to the Bureau of Land Management stating:

* * * that a building 8' x 10' is constructed on the property also have cleared out underbrush and fallen trees in this area.

I have occupied this property for the past 5 years in the summer time for fishing, gardening, and berry picking and in the winter I run a trapline in this area.

On May 6, 1974, James B. Monnie, Refuge Manager, Kenai National Moose Range prepared a statement entitled "re. Native Applications for Primary Place of Residence, Kenai National Moose Range." Mr. Monnie stated that land described in appellant's application was within the Kenai National Moose Range and as to appellant's application stated as follows:

Donald A. Watson—AA8592—An old cabin is located near the southwest corner of this described property. This cabin has been there for many years and the Kenai (B-1) quadrangle of 1950 shows this cabin. How long it existed at that site before 1950 is unknown. However, the cabin is not inhabitable as a primary place of residence. It has a dirt floor; no doors or windows in the openings which are for that purpose, the roof is mostly deteriorated and partly missing

with some torn plastic patched over the holes. Nothing is inside the cabin in the way of furniture or personal belongings. The cabin is empty. This building could not be a primary place of residence during all of these years as it is uninhabitable for extended periods of time. It could possibly be used as a temporary shelter by hunters or fishermen. No other buildings exist on this tract.

On June 27, 1975, Gary Rasmussen, Realty Specialist for the Bureau of Indian Affairs, made a field examination of land included in the primary place of residence applications of appellant and others. Present were several members of the Watson family including Donald Watson, the father of appellant Donald A. Watson. Appellant was not present. In issuing a report on this examination, Mr. Rasmussen stated that Donald Watson owned a five acre tract near the tracts applied for as primary places of residence by Donald A. Watson, Russell Watson, Donald Watson, and Teresa Neitz. On this tract of land owned by Donald Watson, was a two bedroom cabin of recent construction, smokehouse, outhouse and garden.

As to the tract of land applied for by appellant, Mr. Rasmussen stated as follows:

On the lands applied for by Donald A. Watson, we located a small dilapidated old cabin. This cabin is not usable in its present condition. There were no signs of use in recent years. The door was missing, the roof was collapsing, there were no personal belongings or furniture inside.

No other improvements were located on any of the four parcels.

Donald Watson stated that each winter they ran a trap line which covered an area much larger than the area covered

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by the four applications. He showed us where traps had been set at various places on the subject lands. Each trap site we observed was next to a large tree and easily recognizable. Bait wires were still hanging from tree limbs and bent rusty nails which had anchored the traps were found in or near the base of the trees.

This field report concluded that all members of the Watson family were using the same set improvements which were located on land owned by Donald Watson, appellant's father. The report further concluded that appellant's use of the land for which he applied as a primary place of residence was casual and occasional.

On June 3, 1976, the State Office, Bureau of Land Management, issued Decision # AA-8592, rejecting an application for a primary place of residence under § 14(h)(5) of the Alaska Native Claims Settlement Act of Dec. 18, 1971, filed by Donald A. Watson on Dec. 14, 1973. This decision, stated in pertinent part:

* * * * *

Mr. Donald A. Watson does not meet the statutory nor regulatory requirements for a primary place of residence. Therefore, his application must be, and is hereby rejected for the following reasons.

Departmental regulations 43 CFR 2653.8-2(a) and (c) states:

(a) Casual or occasional use will not be considered as occupancy sufficient to make the tract applied for a primary place of residence.

(c) Must have evidence of permanent or seasonal occupancy for substantial periods of time.

* * * * *

On July 15, 1976, appellant filed his Notice of Appeal and subse-

quent to such filing, filed his Brief in Support of Appeal. No request was made for a hearing pursuant to 43 CFR 4.911(c) on any matters in this appeal.

A primary place of residence is defined in the regulations in 43 CFR 2653.0-5(d):

"Primary place of residence" means a place comprising a primary place of residence of an applicant on Aug. 31, 1971, at which he regularly resides on a permanent or seasonal basis for a substantial period of time.

Further regulations in 43 CFR 2653.8-2 set forth the criteria for establishing a primary place of residence. This regulation states as follows:

(a) *Periods of occupancy.* Casual or occasional use will not be considered as occupancy sufficient to make the tract applied for a primary place of residence.

(b) *Improvements constructed on the land.*

(1) Must have a dwelling.

(2) May include associated structures such as food cellars, drying racks, caches etc.

(c) *Evidence of occupancy.* Must have evidence of permanent or seasonal occupancy for substantial periods of time. (Italics supplied.)

Appellant contends that he has met all of the requirements necessary to establish a primary place of residence. In his Brief in Support of Appeal, he stated that the fact that the Bureau of Indian Affairs field examiners found evidence of trap lines in places pointed out by appellant's father and the fact that they found an old "trapper's cabin" on the selected land is proof that he used and occupied the land. To help

support his contention that he occupied the lands, appellant also had his father summarize the time spent by the family at the location. His father stated that the family spent time at the location starting in 1961, that they built a home in 1970, and that in 1971 they spent approximately eight months at the location finishing the interior of the house, maintaining a smokehouse, doing gardening work in the summer and trapping in the winter. He further stated that they used the land in 1972 and 1973.

Appellant also contends in his Brief in Support of Appeal that year-round occupancy is not required to establish a primary place of residence and the fact that he has a more modern and substantial dwelling in another location is not relevant in establishing a primary place of residence.

The field report of the Bureau of Indian Affairs confirmed the fact that there was a house, smokehouse and garden located in the vicinity of the land claimed by appellant. These improvements, however, were found not to be located on the land applied for by appellant as a primary place of residence. All of these improvements were located on land within U.S. Survey 3141, which is owned by appellant's father and which is not a part of appellant's primary place of residence claim.

The only improvements or signs of use and occupancy on the land appellant seeks was some evidence of a trap line and the existence of

a cabin. The BIA field examination found the cabin to be a dilapidated old log structure with missing doors and windows and a collapsing room. No personal belongings or furniture were found inside the cabin and there were no signs of recent occupancy. These facts were confirmed by an earlier inspection of the land in appellant's application made by the Refuge Manager of the Kenai National Moose Range. The report made on this inspection by the Refuge Manager stated that this cabin had been in existence in 1950, was vacated many years ago, and was in an extremely deteriorated condition.

At no time does appellant specifically state that he resided in the dilapidated cabin which is located on the land in his application. Furthermore, in his Brief in Support of Appeal, he refers to the structure as a "trapper's cabin" rather than his primary place of residence.

The only other sign of use or occupancy of the land for which appellant has applied, which was discovered in the field investigation of the Bureau of Indian Affairs, was sign of a recent trap line. This trap line, according to the field report, covered an area much larger than the areas sought by appellant and other members of his family. While the existence of this trap line could substantiate appellant's claim that he did use the land, such evidence does not show that appellant in fact occupied this tract of land for substantial periods of time as a place of residence.

The field report on this application did not find any evidence that appellant had resided on this tract on a regular or seasonal basis as his primary place of residence. Appellant, in his Brief in Support of Appeal, did not give any further evidence of occupancy of this tract of land. On the contrary, the evidence shows that appellant and his family had built a house and smokehouse, done gardening, and resided on property owned by appellant's father which was located near the property which appellant claims.

[1] The fact that appellant's father owns land and had a dwelling in the vicinity of appellant's primary place of residence claim is not sufficient to validate appellant's claim. In order to establish a primary place of residence there must be evidence that the applicant regularly resided on the tract applied for as his primary place of residence on a regular or seasonal basis for a substantial period of time. Although there appears to be regular and seasonal occupancy of the tract of land which is owned by appellant's father, the evidence does not show that appellant has occupied the tract of land for which he applied as his primary place of residence on a regular or seasonal basis for a substantial period of time as required by 43 CFR 2653.8-2(c) and 43 CFR 2653.0-5(d). The evidence shows that the use of the tract of land for which appellant has applied is only casual and occasional which is not sufficient to make the tract applied for a primary place

of residence. (43 CFR 2653.8-2 (a)).

Based on the above findings, this Board, therefore, affirms the Decision of the Bureau of Land Management in rejecting the application of appellant.

Having affirmed the Decision of the Bureau of Land Management of June 3, 1976, on the above grounds, the Board finds that the remaining issues raised on appeal are not dispositive of the appeal and the Board in its discretion declines to rule on such issues.

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
*Chairman, Alaska Native
Claims Appeal Board.*

ABIGAIL F. DUNNING,
Board Member.

LAWRENCE MATSON,
Board Member.

ESTATE OF DOROTHY SHELDON

7 IBIA 11

Decided *February 7, 1978*

Appeal from a decision denying petition for rehearing.

Reversed in part, modified and remanded.

1. Indian Probate: Wills: Disapproval of Wills—425.11

Regardless of scope of Administrative Law Judge's authority to grant or with-

hold approval of the will of an Indian under statute, there is not vested in the Judge the power to revoke or rewrite a will or a part thereof which reflects a rational testamentary scheme disposing of trust or restricted property.

2. Indian Probate: Wills: Generally—425.0

There is a strong presumption that one who takes the time to write a will does not intend to die intestate.

3. Indian Probate: Wills: Construction of—425.7

In construing a will, the court is faced with the situation as it existed when the will was drawn and must consider all surrounding circumstances, the objects sought to be obtained and endeavor to determine what was in the testator's mind when he made the bequests, and the court must not make a new will for testator or testatrix or warp his language in order to obtain a result which the court might feel to be right.

It is well established that, in construing a will the courts will seek for and give effect to the intent, scheme, or plan of the testator, if it be lawful.

The intent must be gathered when possible from the words of the will, construed in their natural and obvious sense.

4. Indian Probate: Indian Reorganization Act of June 18, 1934: Generally—270.0

The Act recognizes two classes of persons who may take testator's lands by devise, that is, any member of the Tribe having jurisdiction over such lands and legal heirs of the testator or testatrix.

5. Indian Probate: Indian Reorganization Act of June 18, 1934: Construction of Section 4—270.1

"Any heir of such member" as used in sec. 464 means those who would, in the absence of a will, have been entitled to share in the estate.

APPEARANCES: Lewis A. Bell, Esq., Bell, Ingram & Rice, for appellant, Gwendolyn (Young) Hatch.

*OPINION BY
ADMINISTRATIVE JUDGE
SABAGH*

*INTERIOR BOARD OF
INDIAN APPEALS*

Effie Dorothy Sheldon, herein-after referred to as decedent, died testate Jan. 18, 1976. The record discloses decedent as "No. 536 on 1965 Tulalip Roll" in the *Data For Heirship Finding and Family History* prepared on July 30, 1976, by Randolph E. Williams, Probate Clerk, Western Washington Agency, Bureau of Indian Affairs.

In his Order Approving Will and Decree of Distribution dated Jan. 13, 1977, Administrative Law Judge Robert C. Snashall, decreed the following:

IT IS HEREBY ORDERED that testatrix' Last Will and Testament dated Sept. 5, 1967, be, and the same is, approved and Superintendent of the Western Washington Indian Agency shall, after payment of costs of administration and subject to allowed claims cause to be made a distribution of the trust estate in accordance with said Last Will and Testament as devised or bequeathed in Clause: SECOND (to GWENDOLYN YOUNG HATCH, an undivided 7/9 and to MELVIN SHELDON, SR. and ROSE MARIE LEWIS, an undivided 1/9 each ***).

Judge Snashall found that had the decedent died intestate, her heirs at law in accordance with the laws of the State of Washington were, among others, Gwendolyn

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Hatch (Niece), Rose Marie Lewis (Niece), and Melvin Sheldon, Sr. (Nephew).

Gwendolyn Young Hatch petitioned for rehearing contending that the judge's order and decree referred to, *supra*, contravened paragraph SECOND of decedent's Last Will and Testament dated Sept. 5, 1967.

Judge Snashall issued an Order Denying Petition for Rehearing on Mar. 23, 1977, stating therein, concerning paragraph SECOND, that it was illegal to have a trust upon a trust and the property being already in trust with the United States with the Superintendent acting as trustee on behalf of the United States for the deceased testatrix, the property could not transfer in a non-Federal trust to the said Robert Damion Sheldon had he outlived the decedent herein. However, since he is deceased, pursuant to the provisions of 43 CFR 4.261 (anti-lapse statute) the property would go to his heirs, Gwendolyn (Young) Hatch, Melvin Sheldon, Sr., and Rose Marie Lewis. Accordingly, the one-third ($\frac{1}{3}$) interest would go in one-ninth ($\frac{1}{9}$) interest to each of those persons.

The judge further stated, the end result is that Gwendolyn (Young) Hatch would receive the original two-thirds ($\frac{2}{3}$) plus one-ninth ($\frac{1}{9}$) which would give her a total of seven-ninths ($\frac{7}{9}$); Melvin Sheldon, Sr. would receive one-ninth ($\frac{1}{9}$) and Rose Marie Lewis would receive one-ninth ($\frac{1}{9}$). The judge stated it was obvious the testatrix

did not intend any of her estate to go by intestacy; and it was equally clear she did not wish any of her property to go directly to Patty Ann Young, at least not until such person reached the age of 21 years, it apparently being her intention that such of the property left "in trust" was to be used for the support and education of the child. Under the judge's holding that portion of the estate originally intended to be "in trust" for said child goes to the child's mother which would meet the intention of the testatrix as near as can be done in view of the inability to have a trust upon a trust.

Gwendolyn (Young) Hatch filed the original of her appeal with the Western Washington Indian Agency instead of the Administrative Law Judge within the 60 days allowed in the Departmental regulations. 43 CFR 4.291.

We find the failure to comply with the strict letter of sec. 4.291 not to be fatal to the appellant's cause although mistakenly filed with the Western Washington Indian Agency, since it was timely filed within 60 days after the date of mailing of the notice of the decision being appealed. *Estate of James Andrew White*, 6 IBIA 79, 84 I.D. 241 (1977).

The grounds for appeal are basically the same as those for rehearing.

[1] Regardless of the scope of an Administrative Law Judge's authority to grant or withhold approval of the will of an Indian

under statute, there is not vested in the judge, power to revoke or re-write a will which reflects a rational testamentary scheme disposing of trust or restricted property. *Tooahnippah (Goombi) v. Hickel*, 397 U.S. 598 (1970).

Although the Order and Decree of Jan. 13, 1977, was well intentioned, we cannot agree that the judge's disposition of the one-third property interest under paragraph SECOND conforms to the wishes of the testatrix.

The pertinent parts of paragraph SECOND of decedent's will read as follows:

2) One-third thereof I hereby give, devise and bequeath unto my brother, ROBERT DAMION SHELDON, *in trust*, nevertheless, for the following uses and purposes:

(a) I direct that any cash received shall be deposited into a savings account in a savings bank with his name *as trustee*, and if any real property shall form a part of the trust when said property is sold, the proceeds shall likewise be deposited into said savings account. My brother shall have no power of reinvestment.

(b) I direct that the *trustee* shall use so much of the trust fund as may be required for the care, support and education of PATTY ANN YOUNG, my grand niece, who I call "baby doll." When PATTY ANN YOUNG arrives at the age of 21 years, any assets remaining in said *trust* shall be paid over and delivered to her; provided further, if she shall not then be living, the same shall be paid over and delivered to her mother, GWENDOLYN YOUNG.

(c) If my brother, ROBERT DAMION SHELDON shall die before the distribution of the trust, then I nominate and appoint GWENDOLYN YOUNG as the

successor *trustee* * * *. (Italics supplied.)

[2] There is a strong presumption that one who takes the time to write a will does not intend to die intestate. *Erickson v. Reinbold*, 6 Wash. App. 407, 493 P.2d 794 (1972).

[3] In construing a will, the court is faced with the situation as it existed when the will was drawn and must consider all surrounding circumstances, the objects sought to be obtained and endeavor to determine what was in the testator's mind when he made the bequest, and the court must not make a new will for him or warp his language in order to obtain a result which the court might feel to be right. *Anderson v. Anderson*, 80 Wash. 2d 496, 495 P.2d 1037 (1972).

It is well established that, on construing a will, the courts will seek for and give effect to the intent, scheme, or plan of the testator if it be lawful. *In re Estate of Shaw*, 59 Wash. 2d 238, 417 P.2d 942 (1966).

The intent must be gathered when possible from the words of the will, construed in their natural and obvious sense. *In re Estate of Johnson*, 46 Wash. 2d 308, 280 P. 2d 1034 (1955).

We think it abundantly clear that the testatrix here devised one-third of her property, including trust, restricted and unrestricted, wheresoever situated, to Patty Ann Young. In addition thereto, we think the testatrix did not intend for Patty Ann to take possession until she reached the age of 21 years. If, how-

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ever, Patty Ann required funds for her care, support or education, the named trustee was to provide same to her from available cash, proceeds received from or royalties derived from restricted or trust property, or the proceeds from the sale of unrestricted property.

Obviously, the testatrix never intended for Melvin Sheldon, Sr., or Rose Marie Lewis, to share in her estate and to conclude otherwise would be contrary to the intentions of the testatrix.

Judge Snashall concluded in effect that the restricted Indian lands for which the Secretary of the Interior retains responsibility as trustee, may not be placed in the hands of a private trustee for management for the benefit of the Indian owner. We do not think this to be the case here. Neither Robert Damion Sheldon nor Gwendolyn Young had the power to manage or reinvest.

We believe this case to hinge on the questions of, did the testatrix have the power to devise; did Robert Damion Sheldon or Gwendolyn Young have the power to accept the estate in trust for the use of Patty Ann Young until she attained the age of 21 years; and the right of the Secretary of the Interior to approve the terms of such devise which limits his own discretionary powers over the administration of the restricted interests involved.

The gift here is to Patty Ann Young, not to the trustee personally but as her representative until she attains the age of 21 years, with no power to manage, reinvest or other-

wise. The subject clause does not therefore constitute a private trust.

We find paragraph SECOND, subpart (a) and that part of subpart (b) referring to trustee's use of trust funds for the care, support and education of Patty Ann Young, to be valid and conclude that its terms may lawfully be carried out, although not perhaps without considerable administrative difficulty. Mere inconveniences of administration should not be allowed to defeat the purposes of an otherwise valid testamentary trust. *Estate of Isaac Maynard Broncheau*, 61 I.D. 139 (1953). It is highly probable that Patty Ann Young had already attained the age of 21 years on the date of testatrix' demise, in which case we would not be faced with this inconvenience.

A possible legal impediment may still preclude Patty Ann from taking, since the restricted or trust property in question comes under the jurisdiction of the Tulalip Tribe who voted to accept the application of the Act of June 18, 1934 (48 Stat. 984, 25 U.S.C. § 461 *et. seq.* (1970)), known as the Indian Reorganization Act, on Apr. 6, 1935.

[4] The Act recognizes two classes of persons who may take testatrix' lands by devise, that is, any member of the Tribe having jurisdiction over such lands and legal heirs of the testator.

[5] "Any heir of such member" as used in sec. 464 means those who would, in the absence of a will, have been entitled to share in the estate.

Consequently, if upon remand Judge Snashall finds that Patty Ann is a member of the Tulalip Tribe, she would be entitled to take under paragraph SECOND of decedent's will. On the other hand, if the judge finds that she was not a member of the Tulalip Tribe then she would not be entitled to take.

In the event that Patty Ann Young is found not to be a member of the Tulalip Tribe, we find nothing illegal in our construing and we construe certain of the language of paragraph SECOND, subpart (b) to mean that, if for any reason a legal impediment is found to exist precluding Patty Ann from taking, then the same would pass to her mother, Gwendolyn Young.

To reiterate, we find that the testatrix intended the devise under paragraph SECOND to go to Patty Ann Young provided no legal impediment precluded her from taking. Further, the testatrix intended that should an impediment exist to preclude Patty Ann Young from taking, then the devise would go to her mother, Gwendolyn Young Hatch. We find that a private trust does not exist here. We conclude that a legal impediment may exist to prevent Patty Ann from taking; namely nonmembership in the Tulalip Tribe. If Judge Snashall should find that Patty Ann Young was not a member of the Tulalip Tribe then the devise would go to Patty Ann's mother, Gwendolyn Young Hatch.

NOW, THEREFORE, by virtue of the authority delegated to the

Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this matter is REVERSED IN PART and REMANDED to Judge Snashall for revision in accordance with the Board's directive as set forth above. The order as then issued by the Judge shall be final unless an appeal is taken to this Board within 60 days of issuance of such order.

MITCHELL J. SABAGH,
Administrative Judge.

WE CONCUR:

ALEXANDER H. WILSON,
Chief Administrative Judge.

WM. PHILIP HORTON,
Administrative Judge.

**ARMCO STEEL CORPORATION
(ON RECONSIDERATION)**

8 IBMA 245

Decided February 13, 1978

Petition for Reconsideration by the Mining Enforcement and Safety Administration of the Board's decision of Aug. 17, 1977, which affirmed in result a decision by Administrative Law Judge George A. Koutras granting an Application for Review filed by Armco Steel Corp. under sec. 105 (a) of the Federal Coal Mine Health and Safety Act of 1969.

Board decision of Aug. 17, 1977, 8 IBMA 88, 84 I.D. 454, affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Closure Orders: Generally

February 13, 1978

In an application for review of an imminent danger withdrawal order where the alleged imminently dangerous conditions relate to roof conditions, there is no guarantee from the face of a modification order issued by a different inspector 36 hours after the issuance of the original order that the conditions described in the modification existed at the time of the issuance of the original order.

2. Federal Coal Mine Health and Safety Act of 1969: Closure Orders: Generally

A modification order issued 36 hours after issuance of an imminent danger order, while allegedly curing defects in the description in the original order of conditions or practices, did not satisfy the requirement of promptness of notification implicit in the mandate of sec. 107 of the Act.

APPEARANCES: Thomas A. Mascolino, Esq., Assistant Solicitor and Robert A. Cohen, Esq., Trial Attorney for Petitioner on Reconsideration; Mining Enforcement and Safety Administration and Lee F. Feinberg, Esq., Spilman, Thomas, Battle & Klostermeyer, of Counsel, for Respondent on Reconsideration Armco Steel Corp.

OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE SCHELLENBERG

INTERIOR BOARD OF MINE OPERATIONS APPEALS

On Aug. 17, 1977, this Board issued a decision in *Armco Steel Corporation*, 8 IBMA 88, 84 I.D. 454, 1977-1978 OSHD par. 22,089 (1977), affirming in result a decision by Administrative Law Judge Koutras (Judge) granting an Ap-

plication for Review of a withdrawal order charging an imminent danger issued by an inspector for the Mining Enforcement and Safety Administration (MESA) under the authority of sec. 104(a) of the Federal Coal Mine Health and Safety Act of 1969 (Act).¹ Before the judge, MESA alleged and arguably proved that although the face of the order document failed to describe adequately the conditions constituting the imminent danger as is required by sec. 104(e) of the Act, nevertheless, by verbal and other communication, the inspector apprised the operator in fact of the conditions and practices constituting the danger. The judge heard the case on that basis and held that the operator was not prejudiced by the inadequate description but that ultimately MESA did not carry its burden of proving the existence of the alleged conditions or practices; he therefore granted the application and vacated the withdrawal order.

MESA appealed to the Board, asserting error on the judge's part in his conclusion that MESA did not carry its substantive burden, and Armco cross-appealed asserting error in the judge's handling of its procedural argument regarding the lack of adequate description.

The Board's decision did not take issue with the judge's conclusion regarding the procedural validity of the order *viz.* adequate description under section 104(e) of the practices and conditions constituting the alleged imminent danger.

¹ 30 U.S.C. §§ 801-960 (1970).

Instead we broadened Armco's argument in this regard to find the total Congressional purpose in requiring a written description of the offending conditions or practices. Although Armco was correct in asserting that two of the section's purposes are notifying the operator so that it may take steps to correct the conditions and practices constituting the alleged imminent danger and notifying the operator so that it may prepare a legal case in the event of litigation, we emphasized in our opinion that the Congress contemplated interests other than those of the operator in requiring an adequate written description of the conditions and practices. Thus, we could ignore or even essentially agree with the judge's conclusion that Armco was not prejudiced by the inadequate description and still vacate the order. The interests contemplated, and this was the major point in our opinion vacating the order, are the interests of the state mining health and safety authority and of the representative of miners or the miners themselves. (Section 107 of the Act requires that a copy of the order be sent to the state authority and to the representative of miners and that a copy be posted conspicuously at the mine site.) The importance of notifying those parties of an imminent danger condition or any safety violation is obvious, as we indicated in our opinion, and it should be equally obvious that those parties may not be informed of the dangerous situation in the mine unless there is an ade-

quate description thereof in the order or other notification document.

On Sept. 13, 1977, MESA filed a Request for Reconsideration. MESA's argument was that any defect in the order caused by the inadequate description was cured by an amendment to the order issued by a different inspector a day and a half later. MESA contended that the Board's decision in *Ashland Mining and Development Company, Inc.*, 5 IBMA 259, 82 I.D. 578, 1975-1976 OSHD par. 20,161 (1975) provided legitimacy to that position.

We granted reconsideration on Oct. 6, 1977, limiting the scope of our reconsideration to whether a modification issued 36 hours later cured the stated defect in the original order of failure to describe, in detail, the conditions or practices alleged to constitute an imminent danger. Both MESA and Armco timely filed briefs in support of their respective positions on reconsideration.

There were two sub-issues implicit in the question outlined above, to which we asked the parties to direct themselves on reconsideration. The first is, assuming that the modification clearly described the imminently dangerous practices and conditions, how can a reviewing tribunal be sure that the conditions and practices described in the modification are the same conditions and practices existent at the time of the issuance of the original order when the modification was issued 36 hours later and by a different in-

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spector? The second sub-issue is, directing the focus of attention on the ultimate basis of the Board's decision which is on reconsideration, does not the passage of 36 hours from the issuance of the original order until its defect in clarity was corrected defeat the purpose of immediacy of notification to the miners, the representative of miners, and the state authorities implicit in the mandate of sec. 107 as explained by the Board in its decision?

Both parties attempted to address the first sub-issue, but neither addressed the second. MESA, in its argument, contends that "the 36 hour separation between the original order and its modification was reasonable under the circumstances" since Armco was not prejudiced in any event and that there "is no requirement that the same inspector who issued the original order * * * [shall] also * * * issue any subsequent modification or termination." (MESA Br. on Recon., 4-5.) More directly on point, Armco argues that the second inspector "could not legitimately evaluate the conditions present 36 hours before." (Armco Br. on Recon., 3.)

[1] MESA is, of course, correct that section 104(g) generally allows modifications of notices and orders, that *Ashland, supra*, generally supports that notion, and that there is no requirement that the same inspector must be the one who issues the modification for the modification or the original order to be effective. However, the modification's effect

and its validity on review are not always synonymous. In the first place, when, as in this case, a modification is issued 36 hours later by an inspector different from the inspector who issued the original order, we must conclude that there is no guarantee from the face of the modification that the later-described conditions are the same ones which led to the issuance of the original order.² This is particularly so where the conditions involved relate to the roof, owing to the dynamic nature of roof conditions.³ In the second place, MESA has read *Ashland, supra*, too broadly. Far from supporting MESA's position, *Ashland* is of no value to it and may even be read to undermine that position. MESA quotes this dicta in *Ashland* to support its argument:

Accordingly, we conclude that an Administrative Law Judge *may* look to a modification of an order to determine whether the condition or practice cited therein constitutes a violation of a mandatory health or safety standards. (Italics in original.)

Ashland, supra, at 265

MESA in its brief failed, however, to take note of this earlier pronouncement of the Board in the same paragraph as the above-quoted language: "the Board has

² MESA cites no other record evidence to the effect that these were the same conditions, and our independent search of the record has yielded none.

³ Armco argues that in any event the area described in the modification is different from that described in the original order, thus further limiting the effect of the modification as curing the defect in the original order (Armco Br. on Recon., 3-5). Given our disposition here, it is unnecessary to reach that issue.

held that the validity of a withdrawal order which contains an alleged violation is irrelevant in a 109 proceeding to a finding that the violation did obtain." *Ashland, supra*, at 265. (See *Eastern Associated Coal Corporation*, 1 IBMA 233, 79 I.D. 723, 1971-1973 OSHD par. 15,388 (1972)). The *Ashland* case was, of course, an appeal from a civil penalty proceeding; hence, the reference to "a 109 proceeding." The instant case is an appeal from an application for review proceeding, and here the validity of the subject order is most relevant. The procedural validity of the order in this case is, in fact, the central issue herein. Therefore, *Ashland's* pronouncement that a judge may look to a modification to determine the existence of a violation is simply inapposite to this case.

[2] Finally, as to the second sub-issue suggested by the Board's limitation of the scope of reconsideration, as outlined above, we are compelled to say that the requirement of immediacy implicit in the ultimate basis for the Board's decision on appeal precludes the curing of the defect in clarity of the original order by means of a modification at least on the facts of this case. In its opinion, the Board emphasized the requirement in sec. 107 (b) of the Act that a copy of the order be sent to the representative of miners at the mine and to the appropriate state mine health and safety agency or official and the requirement in sec. 107(a) of the Act

that a copy of the order be posted conspicuously on the mine bulletin board. The purpose of these provisions is clearly compromised when MESA fails to apprise the persons contemplated as receiving notice of the order of the nature of the imminently dangerous conditions and practices until at least 36 hours after they are first allegedly discovered.

The frailty of MESA's position is no better exemplified than by this statement in its Request for Reconsideration: "An inspector should not be fearful that imminent danger orders which have as their primary purpose to correction [*sic*] of hazardous conditions and the withdrawal of miners from the dangerous area, be vacated for failure to fully describe conditions which may still be unknown to him." (MESA Request for Recon., 6.)

The answer to this contention is that the Act, even in the definition of imminent danger itself (sec. 3(j)), clearly contemplates that the discovery of conditions and practices supportive of the existence of an imminent danger are prerequisite to the issuance of an imminent danger withdrawal order. The authority of an inspector to issue a withdrawal order where such conditions and practices are not demonstrably present is highly questionable at best, if not non-existent. Allowing the issuance of orders in any other circumstances would be violative of the letter and

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the clear intent of the Act and would lead to an "arbitrary use and abuse of the powers delegated [to an inspector] under section 104(a)" of which Armeo warned in its brief in support of its cross-appeal.

ORDER

WHEREFORE, upon reconsideration and pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1 (4)), IT IS HEREBY ORDERED that the Board's decision of August 17, 1977, in the above-captioned case IS AFFIRMED.

HOWARD J. SCHELLENBERG, JR.,
*Acting Chief
 Administrative Judge.*

I CONCUR:

DAVID DOANE,
Alternate Administrative Judge.

**APPEAL OF W. F. SIGLER &
 ASSOCIATES**

IBCA-1159-7-77

Decided February 16, 1978

Contract No. H50C14209487, Bureau of Indian Affairs.

Appeal Sustained in Part.

1. Contracts: Formation and Validity: Negotiated Contracts

When the Government issues a RFP to a sole source and the sole source submits three different proposals at different

times and the Government issues a second and somewhat different solicitation and finally the Government and the sole source sign another document which is somewhat different from all prior solicitations and proposals and is complete in itself, that document is the contract and supersedes all prior solicitations and proposals.

2. Contracts: Construction and Operation: Allowable Costs

Where the Government contracts with a small corporation to obtain the services of a recognized expert in fish biology and where the sum of an approximate yearly salary of \$44,000 plus approximately \$4,000 of fringe benefits and approximately \$8,000 of life insurance premiums are compensation to the expert for a total approximate yearly compensation or corporate cost of \$56,000 and where the specific contract is for approximately \$1 million said compensation and costs are reasonable allowable costs under the contract.

3. Contracts: Construction and Operation: Allowable Costs

"Fringe costs," leave, life insurance premiums, retirement plan costs, life raft for safety, are all allowable costs in the circumstances in this appeal.

4. Contracts: Construction and Operation: Allowable Costs

Fees and expenses in the preparation and conduct of an appeal are disallowed costs of prosecution of claims against the Government.

APPEARANCES: Mr. James A. McIntosh, Attorney at Law, Salt Lake City, Utah, for the appellant; Mr. Fritz L. Goreham, Department Counsel, Phoenix, Arizona, for the Government.

*OPINION BY
ADMINISTRATIVE JUDGE
STEELE
INTERIOR BOARD OF
CONTRACT APPEALS*

1. INTRODUCTION. THE GOVERNMENT CONTRACTS WITH AN EXPERT TO PERFORM AND SUPERVISE STUDIES SO HE CAN TESTIFY IN LITIGATION ABOUT PYRAMID LAKE FISH.

The genesis of this contract was several suits over the water level and fish in Pyramid Lake, Nevada. A need arose for an expert to perform or supervise studies of the lake fish and then to testify for the Pyramid Lake Indians (AF 13, Justice letter). Several lawyers were involved in representing the inter-

ests of the Indians including those from the private sector, the Department of Justice, and the Department of the Interior. All the lawyers agreed that W. F. Sigler was the person they wanted and the Department of the Interior eventually negotiated a cost-plus-fixed-fee contract with a small, newly formed Utah corporation, called W. F. Sigler and Associates, to perform and supervise certain studies of the lake and fish. Mr. Sigler was principal stockholder and president of this corporation.

The corporation and Mr. Sigler are performing the work required under the contract and this appeal is to decide various cost disallowances arising during performance of the contract.

2. TABLE OF CONTENTS OF THIS DECISION

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The Government's position that "excessive hours were worked by Mr. Sigler" is erroneous-----	4
"Fringe costs" for Mr. Sigler are allowed-----	5
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Fee for repair of Government-furnished property is allowed-----	11
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Changes in scope of work (additional claim No. 3) is dismissed without prejudice-----	13
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Professional fees—appeal costs are denied-----	16
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SUMMARY OF DECISION

(a) When the Government issues an RFP to a sole source and the sole source submits three different proposals at different times and the Government issues a second and somewhat different solicitation and finally the Government and the sole source sign another document which is somewhat different from all prior solicitations and proposals and is complete in itself, that document is the contract and supersedes all prior solicitations and proposals. The appeal as to "excessive hours," fringe costs, leave, life insurance premiums is allowed as indicated later herein.

(b) Where the Government contracts with a small corporation to obtain the services of a recognized expert in fish biology to testify in five suits in U.S. District Courts on behalf of the Departments of the Interior and Justice and an Indian Tribe and to perform and coordinate projects which cost in excess of \$1,300,000, the 1-year compensation of the expert of approximately \$56,000 made up of approximately \$44,000 salary, \$4,000 fringe benefits (FICA, etc.) and an \$8,000 Key Man life insurance premium is reasonable and is an allowable cost under the contract as indicated hereinafter. The appeal as to Mr. Sigler's life insurance premium, and retirement plan costs is allowed as indicated hereafter.

(c) Where the Government furnishes equipment at the suggestion

of the appellant but one particular equipment is defective and the other turns out to be ineffective because it will not work in the very slow currents of the lake and the appellant spends money to repair the first equipment and the local Government representative has contemporaneous knowledge of the problems and after possibly late formal notice under the Government Furnished Equipment (GFE) claim the Government pays the contractor's costs of equipment repair, the Board allows added fee for the added work of repairing the GFE. The cost of a life raft for crew safety on a deep cold lake subject to sudden storms is an allowable cost.

(d) Where the hearing official may have contributed to confusion about the need to appeal a final contracting officer's decision delivered to the Board the first day of the hearing, the contractor has 30 days from receipt of this opinion to appeal that decision.

(e) The claims for interest due to "under billing" and excessive borrowing are denied.

(f) Fees and costs of appeal prosecution are unallowable costs of prosecution of a claim against the Government.

(g) The appeal is allowed to the extent of \$73,477.94 costs and \$633 fee with certain issues remanded for further action by the contracting officer and certain prayers allowed and denied as indicated hereafter in the body of this decision.

[1] 4. *THE GOVERNMENT'S POSITION THAT "EXCESSIVE HOURS WERE WORKED BY MR. SIGLER" IS ERRONEOUS.*

(a) *The Parties' Positions*

The first matter to be decided by us is the proper interpretation of the contract as to the limitation, if any, on the number of hours that Mr. Sigler could work under this contract.

This dispute is stated in paragraph 10(g) of the Complaint, and pp. 24-26 and 31 of the contracting officer's June 20, 1977, decision (hereafter called the contracting officer's first decision), and pages 40-45 of the "Contractor's Response to Findings of Fact and Decision by the Contracting Officer" dated July 25, 1977 (hereafter called the contractor's response). It is also discussed at Tr. 13, 15, 332, 333, 335, and 364.

There were several proposals with "budgets" or estimates submitted prior to the execution of the contract. The Government contends that these became part of the contract and that Mr. Sigler could not work more hours than appeared in one "budget" (a one-page Exh. A to Exh. 17 to the contracting officer's first decision. Hereafter such exhibits as No. 17 will be referred to as AF ----, for Appeal File Document No. ----). "CR" means "Contractor's Response." "CRX" means exhibit X to Contractor's Response.

(b) *Findings of Fact.
Negotiation of a Contract*

1. At some time prior to Oct. 18, 1974, the Department of the Interior decided to obtain the services of William F. Sigler as an expert to state or support a position being advanced in several suits pending or anticipated in U.S. District Courts (Tr. 164, 245, 246, 247-252).

2. On Oct. 18, 1974, the Department of the Interior (hereafter called the Government) prepared an "Approval of Expert Consultant Employment Request" for William F. Sigler at the rate of \$250 per day under the authority of 5 U.S.C. § 3109, to "provide technical assistance and advice for the conduct of contracts to perform fishery studies on Pyramid Lake and Truckee River [to support certain listed suits in U.S. District Court]." The form stated that—

Mr. Sigler is a nationally renowned fishery biologist, limnologist, and his specialty has been dealing with fisheries in lakes located in the Great Basin and holds a PHD in fisheries and was head of the Department of Wild Life Science, Utah State University, from 1950 to 1974. He is the author of 84 publications and many technical popular fishery journal articles. He has been a consultant to the State Department, the Surgeon General on toxicology, the FAO in Argentina on fishery matters, the Idaho Water Resource Board, and was Chairman of the Utah Water Pollution Board. He is cited in Who's Who in America, Who's Who in Science, and World Who's Who in Science. He is the best possible expert to testify in connection with this case.

The form concluded that "[s]ervices will be needed throughout conduct of law suit, estimated to be

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about five years. First year estimate: 200 days" (AF 4).

3. On February 21, 1975, the Government issued a solicitation to appellant to perform and deliver four fishery studies, to provide evidence in five suits, and to provide the services of an expert witness and consultant and to give technical advice and guidance to the Government on all fishery and wildlife issues in the suits and assist in preparing or answering interrogatories (AF 7, 8). This document said the Contract would be "negotiated fixed price."

4. On Mar. 1, 1975, appellant made an "alternate proposal." It contained an estimate of 3,480 hours for Mr. Sigler, for the project starting in March 1975 and ending in June 1978, but with an initial contract only covering fiscal year 1975 (AF 9, pp. 5, 6). The cost estimate attached thereto listed 435 days at \$200/day for \$87,000 for Mr. Sigler and a total estimated contract cost of \$349,100 (for the Fall 1975-June 1978 period) (AF 9).

The cost estimate for Mr. Sigler by fiscal year was as follows:

	Days	Total dollars
Fiscal year:		
1975-----	45	\$9, 000
1976-----	125	25, 000
1977-----	125	25, 000
1978-----	140	28, 000
Total-----	435	\$87, 000

5. On Mar. 15, 1975, appellant offered an "Amended Alternative

Proposal" (AF 11). This added to the Alternative Proposal a fifth study. It was to be an ecological evaluation of Pyramid Lake Fishery resources. This estimated 5,280 hours for Mr. Sigler as a consultant. The cost estimate attached thereto indicated as follows:

	Days	Total dollars
Fiscal year:		
1975-----	60	\$12, 000
1976 and 1977-----	200	40, 000
1978-----	200	40, 000
Total-----	660	\$132, 000

(AF 11, Mar. 15, 1975, proposal, pp. 1-5). The estimated amount of the contract per fiscal year was as follows:

Fiscal year:		
1975-----		\$182, 600
1976-----		354, 000
1977-----		354, 000
1978-----		283, 100
Total-----		\$1, 173, 000

There was a Mar. 15, 1975, Certificate of Current Cost or Pricing Data.

6. While these negotiations were taking place the Government was obtaining the services of Mr. Sigler by purchase order until this contract could be finalized and executed (AF 13).

7. However, the Government was not satisfied with the terms and conditions of some or all of these proposals (AF 13, Apr. 21 document).

8. In May, the Government trust protection officer told the contracting officer that the then estimated cost was \$989,288 (AF 14) and justified a sole source contract.

9. On May 5, 1975, the Government issued another solicitation. This asked the offeror to conduct research on ecological evaluation of Pyramid Lake (with three sub-studies) and coordinate other listed studies, direct the technical report writing, and write summary reports for use in court. The contract type was to be "negotiated cost-reimbursement (cost-plus-fixed-fee)" (AF 15). The period of the contract was to be June 1975-June 30, 1978, but funds were only then available to June 30, 1975. The solicitation said, "In order to provide needed flexibility, the contractor may adjust individual budget items 10 percent. Reprogramming of funds in excess of 10 percent shall

be by mutual consent" (AF 15, p. 3).

10. On or before May 9, appellant submitted an "unsolicited proposal" with cost estimates for each year which, as to Mr. Sigler, were summarized on a one-page proposed estimated budget (AF 17) as follows:

Fiscal year:	
1975 -----	\$8,000
1976 -----	40,000
1977 -----	18,000
1978 -----	20,000
Total -----	\$86,000

11. On May 6 appellant had furnished some estimated overhead data to the contracting officer (AF 21).

12. On May 23 appellant made another proposal which is now AF 24. It indicates, for Mr. Sigler's effort, hours and dollars in typing, inked out with other figures inserted in ink as follows:

Fiscal year:	Hours		Dollars	
	Typed	Inked	Typed	Inked
1975 -----	320	200	\$8,000	\$5,000
1976 -----	1,600	None	40,000	None
1977 -----	720	None	18,000	None
1978 -----	800	None	20,000	None
Total -----	3,440	3,320	\$86,000	\$83,000

Fee	Typed	Inked	Typed	Inked
	8%	6%	17???	13,396
Total -----	\$241,147	\$236,676		

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13. On May 23 the contracting officer's office by telephone negotiated the fee (down from 8 to 6 percent) and modified the total estimated fee to \$53,463 (AF 22).

14. A contract H50C14209487 was mutually signed on May 23, 1975 (Exhibit A to the contracting officer's first decision).

15. On Sept. 2, 1975, the appellant, in a letter to the contracting officer, noted a problem of difference of interpretation about the budget (AF 26).

16. The contracting officer replied by a letter dated Sept. 15 saying, "I can see no problem, and concur with your interpretation of contract terms relevant to estimated costs. There is *no budget incorporated into your contract* * * * ; therefore, you need not adhere rigidly to your original cost proposal" (AF 27). (Italics supplied.)

17. The Government, in an audit report dated July 15, 1976, noted that its auditors interpreted the contract to be without any ceiling on the hours Mr. Sigler could spend on the contract. (However, the auditors felt that this was a suspicious fact which might allow Mr. Sigler to be paid \$68,697 for FY 1977 (AF 32-1, p. 2)).

18. On Sept. 23, 1976, the contracting officer advised appellant that substantial changes in the estimated hours of Mr. Sigler or others would require a change order (AF 48).

19. Modification 3, a change order, was issued by the contracting officer on Oct. 17, 1975; it said, "De-

lete 'Exh. A—Budget' from Table of Contents. Budget was not incorporated into contract." (Exhibit A to contracting officer's first decision is *the contract* with eight later modifications thereto. Confusingly, "the Budget" is Exh. A in AF 17).

20. Modification 3 complied with the recommendation to delete the budget mentioned in finding #16.

21. On Aug. 20, 1976, appellant commented on this part of the audit report (AF 49, Memo from Carlisle to Sigler dated Aug. 7, 1976, p. 2).

22. On Sept. 24, 1976, the contracting officer told appellant that "the estimated number of hours as negotiated by you, the contractor, will not be substantially increased without prior approval from this office" (AF 49-1).

(c) *Analysis of the law. Contracts are formed by mutual consent*

1. *General Principles*

Analysis, explanation of the law, and decision of this issue should be helpful in deciding many of the other issues in this appeal.

Contracts are formed by agreement. This is the fundamental principle of law that governs the formation of contracts: agreement. 17 C.J.S. *Contracts* § 30.

The parties reach agreement by offers and by acceptances. 17 C.J.S. *Contracts* § 34. They do so by requests for offers, by offers, and by acceptances. They do so by solicitations (requests for bids, proposals, or quotes), by offers, by the making of counter offers, and ultimately by

one party's acceptance of an offer (or counter offer) of another party.

Advertised procurement is, in legal terms, a very simple situation of offers from several offerors and a simple "I accept the offer of the ABC Company" acceptance by the Government. 17 C.J.S. *Contracts* § 41 b., 43. Thus the only legal elements in advertised procurement are: (1) offers and (2) an acceptance.

The second method of contract formation introduces the concept of counter offers. 17 C.J.S. *Contracts* §§ 43, 44. This is utilized in the negotiation method of reaching agreement.

2. *Application of General Principles to the Contract Executed May 23, 1975*

2.1 After the offers and counter solicitations set out in section 4(b) *ante*, the parties agreed on the contract, which is Exh. A to the contracting officer's first decision (except that said contract in the appeal file erroneously physically omits "the budget"; however, "the budget" is located in AF 17).

2.2 Thus "the agreement" is Exh. A. The offers and counter solicitations which occurred prior to

the execution of "the contract" are legally irrelevant.

2.3 The Government had no *contractual right* to complain if the appellant "exceeded" the budget on line items within the estimated cost. Unless clearly stated, the contract is not severable into the parts represented by line items. Therefore the Limitation of Cost clause applies only to the entire contract. The Government's May contract, Exh. A, rejected appellant's prior offers. 17 C.J.S. *Contracts* §§ 43, 44. The appellant was, and is, obligated to perform the work set out in the statement of work.

2.4 Thus, we find the Government's position that it can restrict the number of hours spent by Mr. Sigler working for appellant on this contract to be without contractual foundation.

The appeal is sustained as to the allowability of costs for all hours worked by Mr. Sigler.

[2, 3] 5. "FRINGE COSTS" FOR MR. SIGLER ARE ALLOWED

(a) *The Contentions of the Parties*

The appellant's claim for these "fringe costs" is set out in par. 10(c) of the complaint as follows:

	Health plus insurance	FICA	Utah unemploy- ment tax	Federal unemploy- ment tax	W.C.
Fiscal year:					
1976-----	\$987. 18	\$48. 72	\$824. 85	\$113. 40	\$21. 00 -----
1977-----	1, 242. 24	292. 32	895. 05	162. 00	21. 00 \$53. 04
1978-----	1, 622. 85	337. 56	965. 25	237. 60	29. 40 53. 04
Total-----	\$3, 852. 27				

February 16, 1978

The claim is for health, accident and dental insurance, FICA, Utah unemployment tax, Federal unemployment tax, and Utah workmen's compensation which appellant paid (or was liable for) because of its employment of Mr. Sigler on this contract.

The appellant's position is stated on pp. 30-38 of its Response (and essentially is) that these were proper allowable costs of appellant under the contract.

The Government's positions, as set out in the Answer, is stated on pages 17-22 of the contracting officer's first decision and essentially are that the costs are not allowable because: (1) the appellant's proposal did not include these costs; (2) such costs, if allowed, would constitute a change (and an increase) in appellant's plan for compensation of Mr. Sigler; (3) would result in a change (and an increase) in the estimated cost of the contract; (4) would be unreasonable compensation to the principal shareholder; and, (5) this was a sole source procurement.

(b) *Findings of Fact*

1. The Government issued two solicitations, AF 7 and AF 15, and either a third solicitation or a counter proposal in "the contract," Exh. A. The appellant made at least four offers, AF 9, AF 11, AF 17, and AF 24 and a further proposal (or an acceptance) by signing "the contract," Exhibit A.

2. The Government has not alleged mistake; it does not say "the contract" is not binding but instead

it seems to say that AF 17 is the offer which the Government accepted, that AF 17 is the contract.

3. The appellant is a small corporation (Exh. A, Tr. 40). Some of its employees were part time. Originally, the parties estimated that Mr. Sigler would only be needed part time on this contract (Tr. 50, 52, 169). During the course of the contract, however, it became clearer to appellant that Mr. Sigler would have to work full time on this contract (Tr. 52) and Government representatives asked Mr. Sigler (and thereby appellant) to work full work time on the contract (Tr. 170, 254). Nevertheless, the Government still takes the position that appellant has to "justify" increased hours spent by Mr. Sigler and others or the government will "hold" any modifications extending the contract period or increasing contract funds (AX 6, being Appellant's Exh. No. 6).

4. The Government, by its auditors, in its July 21, 1975, audit report, questioned costs over \$25/hour for Mr. Sigler's salary based on their conclusion that AF 17 or AF 24 was part of the contract. AF 32, p. 6. This "disallowance" continues in its Nov. 1977 audit for the period Apr. 1, 1976-Mar. 31, 1977 (AF 3, p. 8).

(c) *Decision: Neither AF 17 nor AF 24 is the Contract thus the Fringe Costs are Allowable under Exhibit A—the Contract*

1. We reiterate our holding that the contract between the Govern-

ment and appellant is the document which is Exh. A to the first contracting officer's decision.

2. Clause 329, "Allowable Cost, Fixed Fee and Payment" of the contract promises payment in accordance with 41 CFR 1-15.2 and the contract. There is no applicable contract provision so 41 CFR 1-15.2 alone is applicable.

3. The criteria set out in 41 CFR 1-15.201-2 are reasonableness, allocability, general accounting principles, and any special provisions of the contract or regulation.

4. The Government has not presented evidence on the first three criteria and we hold that its contractual argument is erroneous. Mr. Sigler was an officer and became a full-time employee of appellant. It is our conclusion that these costs were necessary, reasonable, and allocable because the costs are normal to a corporation engaged in the work required by the contract, many of these costs were imposed by law, and because there is an absence of evidence contesting these conclusions.

5. Thus we sustain the appeal as to allowability of the costs of fringe benefits claimed for Mr. Sigler.

6. *VARIOUS KINDS OF "LEAVE" FOR MR. SIGLER ARE ALLOWABLE COSTS*

(a) *The Contentions of the Parties*

The appellant claims \$12,875 for annual leave, sick leave and funeral leave of Mr. Sigler in par. 10(d) of the complaint.

The contracting officer's first and second decisions appear to us to be silent on this specific claim. Yet the parties, by their counsel, agreed at the hearing that this was "in issue" as to the senior biologist and associates (1 Tr. 12, 15).

(b) *Findings of Fact*

1. The appellant had a plan or written policy which provided for pay scales, hours of work, annual, sick, and funeral leave, and similar matters; Exh. I to contractor's response.

2. The appellant complied with this written policy and incurred costs thereunder (Tr. 40, 24, 99).

The employment plan was in operation and defined the employee relationship and costs for appellant (R Ex. D, D-1, p. 7).

(c) *Conclusions of Law and Decision*

These costs were actual incurred costs and are allowable costs under the contract. FPR 1-15.205-6 (a) and (g).

7. *LIFE INSURANCE PREMIUM COSTS FOR MR. SIGLER ARE REASONABLE AND ARE ALLOWABLE COSTS*

(a) *The Contentions of the Parties*

[2] This claim is for the life insurance premiums paid by appellant on the life of Mr. Sigler, the president, chairman, and principal shareholder of appellant. (Mr. Sig-

ler was also the principal supervisor of the work under the contract and the Government's and the Indians' only expert witness on fish.)

The claim, as set out in par. 10(a) of the complaint in dollars, is as follows:

Year:

1st -----	\$13, 272
2d -----	4, 376
3d -----	8, 624
Total -----	\$26, 260

Appellant contends that these amounts were properly paid to Mr. Sigler and are allowable costs to appellant under the contract.

The Government, on pages 17-22, says that these costs were unallowable because (a) they were not included in appellant's proposals AF 17 and AF 24, (b) they resulted in a change in appellant's compensation policy from that originally contemplated and proposed (Mr. Sigler originally planned to be a part-time consultant to the corporation; later he became a full-time employee), (c) this change resulted in an increase in cost under the contract, (d) the premiums, when added to Mr. Sigler's other compensation were unreasonably high, and (e) the payment was improper because this was a sole source contract.

(b) *Findings of Fact*

1. Prior to execution of this contract the appellant, Mr. Sigler and various Government personnel believed that Mr. Sigler could perform the then proposed or contem-

plated contract by less than full-time work (Tr. 50, 52).

2. The rates of compensation contemplated prior to execution of the contract varied from \$250 per day to \$200 per day (See par. 4b *ante*).

3. Prior to this contract Mr. Sigler had obtained the training and experience noted in paragraph 4(b) 2 *ante* the following:

Bachelor degree in Zoology
Master of Science in Ornithology
Ph.D. in Fisheries, Iowa State, 1947
Conservationist for the Soil Conservation Service, 1935-37
Consultant to Central Engineering Co. of Davenport, Iowa, 1940-41
Research Associate at Iowa State University, 1941-42, 1945-47
Assistant Professor Wildlife Management, 1947-50
Professor Wildlife Management and Head of the Department, 1950-74
Consultant to the State Department, the U.S. Surgeon General on Toxicology, the FAO in Argentina on Fishery matters, the Idaho Water Resources Board, and the Idaho Division of Management Services

He was chairman of the Utah Water Pollution Control Board.

He is a member of eight professional societies (exhibit to the contract).

4. At first, after execution of this contract, his agreement with appellant was to be compensated on an hourly basis as an employee not as a "consultant" at the rate of \$25 per hour *net* pay (Tr. 51) (*i.e.*, "in hand"), and spend 50 to 80 percent of his time working on this contract.

5. Throughout the contract Mr. Sigler has worked for appellant as

an employee of appellant not as a "consultant" or as an independent contractor (C. R. McIntosh ltr., dated Aug. 13, 1976, p. 2; Exs. D, D-1, pp. 4, 7, 8).

6. About the second year, it was agreed between appellant and Mr. Sigler that he would work 100 percent of his time on this contract (Tr. 52, 181).

7. This agreement was the result of the expressed desires of various representatives of the Government and the Indian Tribe (Tr. 179, 180, 222).

8. The shift from an hourly agreement to annual salary ar-

rangements, was also at least in part, the result of questioning by Government auditors.

9. Mr. Sigler worked for appellant and was paid by appellant for work on this contract as follows:

Government fiscal year:	Hours
75 -----	216
76 -----	1, 648
Interim quarter -----	416
77 -----	1, 896
78 (through Oct. 31, 1978) --	168
Total -----	4, 344

(AF 2).

10. The approximate compensation paid Mr. Sigler was as follows:

	Net pay	Fringes	Life insurance premium	Sum	Testimony re salary
Fiscal year:					
1975 -----	¹ \$5, 400	² \$3, 475	\$13, 272	\$22, 147	
1976 -----	41, 200	(³)	4, 376	⁴ 45, 576	44, 000 Tr. 167.
1977 -----	41, 440	⁵ 3, 819	8, 624	53, 883	48, 000 Tr. 167.
1978 -----					

¹ 216 Hours times \$25/hour.

² AF 32 p. 5.

³ Unknown.

⁴ Compare CRXD p. 11.

⁵ From AX 3 p. 6. The years do not seem to correlate correctly but we only desire approximate figures here.

11. FY 77 records almost a full-time year (48 weeks × 40 hours/week = 1,920 hours). The approximate gross compensation to Mr. Sigler in that year was \$54,000.

12. The Government auditor witness said that he and the audit branch expressed no opinion on the reasonableness of this compensation and did not question it on that basis but only questioned it on a contractual or legal theory basis that AF 24 was part of the contract

and did not provide for or allow costs over \$25/hour (Tr. 295-8).

13. However, the first audit did question the reasonableness, AF 32-1, p. 2, as does the second, AF 3, p. 7, and the Government does question it in the Answer, par. 7, and the contracting officer's first decision, pp. 17-22.

14. Mr. Sigler is essential to the appellants' ability to perform this contract (AF 1).

15. The appellants' board of directors was concerned to keep Mr. Sigler compensated so that he would spend full-time working on this contract (Tr. 26, 29, 42, 43, 47, 48, 63). One method of compensating Mr. Sigler was by use of "key man" insurance. Such insurance is fairly common in small corporations where one or a few individuals are "key men" in the present and future success of the corporation (cf. Contractor's Response Exh. D).

16. The payment of life insurance premiums on the life of Mr. Sigler, who was owner of the policy (AF 4) is compensation to Mr. Sigler (CRXD (1-A), pp. 1, 2, D-2, pp. 1-3). Such costs are allowable according to FPR 1-15.205-6(a) to the extent they are reasonable.

17. There are many small businesses in the area who pay their company presidents an annual salary of over \$50,000 not including retirement benefits (sometimes up to 25 percent) and key man life insurance (CRXD-2, p. 3) (Tr. 101).

(c) *Conclusions of Law and Decision*

1. The applicable standard is reasonableness in the industry or circumstances of the particular contract. FPR 1-15.205-6(a).

2. Appellant has cited authority and opinion evidence in support of its contention. The Government has failed to do likewise.

3. Mr. Sigler has to manage appellant's team of experts as well as several other teams of experts. The estimated cost of this effort is \$1

million, the total costs of the other items supervised is not clear from the record, but one part of one project exceeded \$300,000 (Tr. 263).

4. Thus it is our conclusion that the insurance premiums paid for Mr. Sigler by appellant are reasonable and are allowable costs under this contract. FPR 1-15.205-6(a) and 1-15.205-16(a) (v).

8. *LIFE INSURANCE PREMIUMS ON THE LIFE OF MRS. SIGLER ARE ALLOWABLE COSTS*

(a) *The Contentions of the Parties*

This claim appears in par. 10(b) of the complaint. Appellant paid for a \$10,000 life insurance policy on the life of Mrs. Sigler. The premiums total \$1,834.21 for approximately 3½ years. The appellant says this is part of reasonable compensation to an employee of the corporation and an allowable cost.

The Government says this is not an allowable cost because it resulted in a change (increase) in compensation to Mrs. Sigler, increases the cost of the contract and because this was a sole source contract (pp. 22-23 of the contracting officer's first decision).

(b) *Findings of Fact*

1. Mrs. Sigler is an officer of appellant and performs the duties of the corporate Secretary. She also performs secretarial and bookkeeping duties of a varied, skilled and responsible nature (CRXD-3).

2. Her annual "cash" salary is \$9,000 (CRXD-3).

Thus her approximate total yearly compensation is:

	Cash	Other compensation	Total
1976	\$9,000	\$700 (approximate premium).	\$9,700

4. The appellant carefully examined the alternative costs of placing Mrs. Sigler, who was 65, in the appellant's group life insurance plan or of obtaining a separate policy and found that it had a less total cost to obtain separate policies for the group without Mrs. Sigler and a separate policy for Mrs. Sigler.

(c) *Conclusions of Law and Decision*

1. The appellant has carried its burden of proof. We conclude that the cost was necessary, reasonable, allocable, and allowable. FPR 1-15.205-6(a) and 1-15.205-16(a) (v).

9. *RETIREMENT PLAN COSTS ARE ALLOWABLE*

(a) *The Contentions of the Parties*

This claim is stated in par. 10(e) of the complaint and amounts to approximately \$27,789.41.

It is treated by the Government as part of the fringe benefit claim (p. 19 of contracting officer's first decision).

It is also treated as additional claim #4. (See CR pp. 55-56 and pp. 44-45 of the contracting officer's second decision.) This allowed the claim, "subject to audit," in the amount of \$9,181.38 but "excluding

the Senior Biologist and associate members." See also 1 Tr. 19.

(b) *Findings of Fact*

1. Appellant has a retirement plan (Tr. 101).

2. It was approved by the IRS on Mar. 3, 1977 (Contractor's Response Exhibits X and Y). It provides that an amount equal to 5 percent of each qualified employee's salary be deposited in a retirement fund.

3. The Government was notified Apr. 5, 1977.

4. Modification 10 (increasing the estimated cost of the contract for various reasons including the retirement plan but excluding the senior biologist therefrom) was issued Sept. 29, 1977 (AF 102).

(c) *Conclusions of Law and Decision*

1. This dispute appears to have been settled except that counsel at trial disputed the part relating to the senior biologist and associates (1 Tr. 19).

2. We have held that neither AF 17 nor AF 24 is "part of the contract."

3. The retirement plan appears to be a reasonable, necessary cost. The claim as to the senior biologist is therefore allowed. FPR 1-15.205-6(f); 1-15.205-27.

10. *THE LIFE RAFT IS AN ALLOWABLE COST*

(a) *The Contentions of the Parties*

This is set out in par. 10(f) of the complaint. It is a claim for \$887

for a rubber life raft bought by appellant to serve as an emergency life raft for personnel in the Government-furnished research vessel used in Pyramid Lake.

The Government contends that this was extravagant and was bought without Government knowledge or approval, and therefore is an unallowable cost (pp. 27 *et seq.*, contracting officer's first decision).

(b) *Findings of Fact*

1. Much of the work to be done under this contract was field data acquisition on Pyramid Lake. The Government furnished a motor boat to be the major platform for this work (Schedule B to the contract). This was a large 30-foot motor boat. At first, appellant thought it also needed a one-man boat to tend nets near shore and bought a "Sport Yak," a plastic bathtub-like boat. The Government paid for this sport yak and took title to it.

2. The 30-foot vessel was thereafter modified by the addition of a platform and the sport yak became unnecessary.

3. Pyramid Lake is cold and deep and large and subject to sudden weather changes (Tr. 74).

4. The large motor boat carried four to eight people at times working on this contract (Tr. 74).

5. A life raft was a reasonable necessity for the motor boat and was a prudent safety requirement (Tr. 74).

6. The cost of the life raft was approximately \$887.

7. The life of the raft is about 3 years (Tr. 243).

(c) *Conclusions of Law and Decision*

1. The cost was reasonable.

2. The contract is silent as to any different treatment of material cost from labor costs. Thus a fair conclusion is that all costs, material, and labor need only meet the usual standards. Conceivably this cost could go into a capital account and be depreciated yearly or into a direct cost account for miscellaneous expendable items. The Government auditors provide no guidance as to the accounting treatment (AF 32, p. 10) except on the issue of reasonableness.

3. We conclude that this was a reasonable allowable cost and that it should have been treated as a direct cost when incurred.

4. The Government will get title when it pays for the life raft and it will thereupon become Government property.

5. The appeal as to this issue is sustained.

11. *ADDITIONAL FEE FOR THE REPAIR OF GOVERNMENT-FURNISHED PROPERTY IS ALLOWED*

(a) *The Contentions of the Parties*

This claim is set out in par. 10(i) of the complaint and part 6 (pp. 28-31) of the contracting officer's first decision and the contractor's additional claim #2, and the contracting officer's second decision, pp. 19-25.

The appellant asserts that the GFE was or became defective and

that appellant was compelled to spend about \$10,000 to repair the equipment.

The Government says that the appellant failed to give the notice required by the clause, that the Government selected and furnished the equipment on appellant's advice, that appellant failed to send its personnel for training in the operation of the equipment or to acquire and maintain recommended spare parts and that appellant's personnel caused some damage to the equipment.

The parties agree that the Government has paid the costs associated with repairs and that all that remains in dispute is the \$633 in additional fee claimed by appellant (Tr. 80, 81).

(b) *Findings of Fact*

1. Appellant recommended use of this equipment (Tr. 199).

2. The Government bought it and listed it as GFE on Schedule B (a list of GFE).

3. There were two pieces of equipment involved: (1) water analyzer, and (2) water current meter.

4. The appellant received this equipment in 1975 (Tr. 84). On Mar. 17, 1976, appellant formally notified the contracting officer of problems (Ex. N to Response).

5. By then appellant had incurred costs of \$4,000 in trying to repair the equipment.

6. However, the contracting officer's representative, who shared office space with appellant, had

some earlier knowledge of problems in Oct. or Nov. 1975 (Tr. 312).

7. The analyzer was fixed by June (Contractor's Response Exh. 0) but the meter was not sensitive enough to measure the very slow currents in the lake.

8. In July the Government questioned the claim for the reasons earlier stated in par. (a) *ante*.

9. Sometime later the Government paid the direct costs and now only questions the fee.

(c) *Conclusions of Law and Decision*

1. The Government correctly points out that clause 318, entitled "Government Property," governs.

2. In par. (a) of that clause the Government promises to deliver suitable equipment on time and failing that to equitably adjust the contract.

3. The contractor gave written notice, albeit late.

4. The Government has the burden of establishing any prejudice caused by the lateness. It has shown none. In fact by payment of the costs the Government has acknowledged that there was no prejudice.

5. The clause states that the contracting officer "shall equitably adjust the estimated cost, fixed fee or delivery or performance dates * * * or all of them [etc.]" by reason of the furnishing of late or unsuitable GFE. (Unsuitable GFE can be late until it is made suitable.)

6. The respondent has not established that the case falls within 318 (g) (1) (i), which provides for lim-

ited liability of the contractor for Government property. Thus the Government is obligated to carry out the promise of an equitable adjustment required by clause 318(a).

7. The additional cost was \$10,563.01.

8. The contractor made numerous trips, tore down and repaired the equipment, and had numerous telephone calls to get the equipment repaired or replaced.

9. We allow the claimed fee of \$633 as being reasonable in this added scope of work.

12. PROVISIONAL BILLING RATE AND FINANCING CHARGES

(a) *The Contentions of the Parties*

This is a claim—set out in par. 10(h) of the complaint—for \$18,410.31 (\$2,139.98 plus \$16,270.33) for amounts paid allegedly due to the Government's failure to timely adjust provisional billing rates.

A second portion of the claim is set out in additional claim number one and is for \$1,962 interest paid by appellant to borrow money to pay incurred costs for the period FY 77.

The appellant's claim is that the Government is obligated by the contract to negotiate reasonably accurate provisional rates so that the contractor is not compelled to borrow money to finance the difference between provisional and actual rates. The Government's position appears to be that it did not get a demand to increase rates until Aug.

12, 1977, and even then the Government did not have sufficient data reasonably to increase same. (However, one Government witness at the hearing indicated concern that the decision to pay at 55 percent was arbitrary (Tr. 334, 358.))

(b) *Findings of Fact*

1. Prior to contract execution appellant had been advised that vouchers would be paid within 2-3 weeks (A's Sept. 2, 1976, letter, in IBCA file; Tr. 241).

2. Clause 329(b) states payments may be made biweekly and payments will be made promptly (329(c)).

3. Clause 331(a) states indirect costs shall be obtained by applying negotiated overhead (OH) rates to direct cost bases. After each fiscal year the parties shall negotiate *final* OH rates for that year (331(b)). The allowability of costs shall be determined by Subpart 1-15.2 of FPR.

4. Par. (e) reads as follows:

(e) Pending establishment of final overhead rates for any period, the Contractor shall be reimbursed either at negotiated provisional rates as provided in the contract, or at billing rates acceptable to the Contracting Officer, subject to appropriate adjustment when the final rates for that period are established. *To prevent substantial over or under payment*, and to apply either retroactively or prospectively: (1) Provisional rates may, at the request of either party, be revised by mutual agreement and (2) billing rates may be adjusted at any time by the Contracting Officer. Any such revision of negotiated provisional rates provided in the contract shall

be set forth in a modification to this contract. (Italics supplied.)

5. The Government is presumed to be aware of all the terms of the expected contract when the fee was negotiated on May 23 at 6 percent or \$53,463 (AF 22). Presumably this fee was based on prompt payment of invoices and on reasonably fixed provisional billing rates and estimated OH costs (see AF 21) and interest and disallowances (AF 23).

6. The contractor prior to execution of the contract justified the 6-percent fee to the contracting officer (who was trying to negotiate a 5-percent fee) by saying as follows:

The capital investments on a project of this size, for a period of 37 months and one week, are rather substantial. The interest on salaries and equipment both contract and overload may, on occasion, be quite high. The complexity of the work is such that it may be difficult to predict a number of expense items; some of these may be disallowed in the overhead.

(AF 23).

(c) *Decision, Conclusions of Law*

(1) Appellant has failed to establish the amount of money it reasonably expected to borrow when it negotiated this contract. Thus even if appellant incurred interest in one year of \$1,962, appellant has not established that this exceeds the interest payable on the amount it reasonably planned to borrow. Thus since appellant has the burden of proving all the entitlement and quantum elements of this claim, and has failed to do so, we must and do deny this claim.

13. *CLAIM FOR INFORMAL CHANGES IN THE SCOPE OF WORK. ADDITIONAL CLAIM #3 IS DISMISSED WITHOUT PREJUDICE*

(a) *The Contentions of the Parties*

The contractor, in its response to the contracting officer's decision, filed four additional claims. The third additional claim was for numerous "constructive changes" to the contract. This claim was denied as premature and unclear by our order dated Sept. 27, 1977, IBCA-1159-7-77, 84 I.D. 483, 487; 77-2 BCA par. 12,763 at p. 62,014. Nevertheless, the Government issued a final decision on this by the second contracting officer's decision. This second decision was delivered to the Board at the hearing and there was a colloquy about which of these additional claims was properly ready for hearing. The hearing official did not then realize that the second decision included the third additional claim and thus the ruling (Tr. 18) that additional claim number one would be incorporated into the instant appeal was not intended to incorporate additional claim No. 3 into this appeal. Since the hearing official may have caused confusion on this point, appellant shall have 30 days from the date of receipt of this decision to file any notice of appeal as to additional claim No. 3. We make no ruling on the merits of additional claim No. 3 and so much of the instant appeal as relates thereto is dismissed without prejudice.

14. *PAR. 11 OF THE COMPLAINT AND RESPONDENT'S MOTION TO DISMISS IT IS ALLOWED AND DENIED IN PART*

(a) *The Contentions of the Parties*

In par. 11(a) the appellant asks for an order to increase the estimated costs and fee in accordance with the conclusions set out in this opinion. In par. (b) it asks for injunctive relief to prevent "defendants" from interfering with "plaintiff's" performance of the technical aspects of the contract. In par. (c)

the appellant asks for an order from us to respondent, to act on numerous (identified) requests for action. In par. (d) the appellant asks for an order to respondent to act reasonably and promptly in the future administration of this contract.

The Government's position, by a motion to strike, is that we do not have the authority to make such orders.

(b) *Decision*

1. We have found the following to be allowable costs or fee under the Contract:

Paragraph of this decision	Name of claim	Increase in estimated cost	Increase in fee
4C	Hours.....	(1)	(2)
5	Fringes.....	\$3, 852. 27	(2)
6	Leave.....	12, 875. 00	(2)
7	Life insurance premium on Mr. Sigler.....	26, 260. 00	(2)
8	Life insurance premium on Mrs. Sigler.....	1, 834. 26	(2)
9	Retirement plan.....	\$ 27, 789. 41	(2)
10	Life raft.....	887. 00	(2)
11	Fee re GFE.....	(2)	\$633
12	Under billing and interest.....	(4)	(4)
13	Changes.....	(5)	(5)
16	Appeal interest.....	(6)	(2)
17	Professional fees.....	(2)	(2)
		73, 477. 94	633

¹ Limited by reasonableness and current estimated cost.

² None.

³ Government counsel appears to have agreed that all of this claim except approximately \$9,000 will be allowed (Tr. 15).

⁴ Denied.

⁵ Dismissed without prejudice.

⁶ To be calculated by the C.O.

2. We have no injunctive power nor the power to require specific performance. The contract in numerous places, including clause 201, requires the respondent to act

reasonably and promptly in administering the contract. On occasion the Government has taken what could be considered an unreasonable length of time to act. The Dis-

putes clause impliedly promises reasonably prompt action. See the cases cited in our Sept. 27, 1977, opinion.

As to the rights and duties of the parties, we quote as follows:

The contracting officer displayed a lack of true comprehension of the philosophy of cost-plus-a-fixed-fee contracts. From his conduct, as shown by the evidence, he apparently did not realize that when the Government enters into a cost-plus-a-fixed-fee contract with a contractor, the Government engages the knowledge, the skill, the judgment and the capabilities of the contractor to perform the contract. It is the contractor's right, as well as his duty, to use all of those qualifications to employ men and women who will comprise his "team" to perform the contract, to buy materials, and to use *his* discretion, not that of the contracting officer, in carrying out all of the factors involved in the performance of the contract. The contracting officer's function is not that of a boss over the contractor, telling him what he can and cannot buy, whom he shall employ and how much he is allowed to pay employees. True, the contract bestows upon the contracting officer the authority to disapprove for reimbursement the costs involved in the contractor's performance, but unless he is able to demonstrate that the contractor's acts, or the costs he incurs, violate the terms of the contract or the guides found in Part 2 of Section XV of the Armed Services Procurement Regulation, it is the contracting officer's duty to approve the contractor's acts and to approve the costs thereof for reimbursement. (Italics supplied.)

J. A. Ross & Company, ASBCA 2326 (Dec. 12, 1955), 6 CCF par. 61,801; *Nash and Cibinic* (1966) p. 625.

We will assume that the Government will consider the legal/contractual requirement of reasonable

cooperation and will address itself to the letters mentioned in par. 11 (c) of the complaint. Thus that portion of the complaint is dismissed without prejudice.

As to appellant's request in par. 11(a) that we increase the estimated cost and fixed fee in accordance with this decision we have partially fulfilled this request by holding certain costs are allowable and certain fee is recoverable. See also *Aerojet General Corp.*, NASA 675-6, 78-1 BCA par. ----.

It is not at all clear that we have any authority to supervise the administration of contract disputes presented to the contracting officer and thereafter decided by use. Cf. *Cosmo Construction Company*, IBCA-412 (Feb. 20, 1964), 71 I.D. 61, 1964 BCA par. 4059, and *John Martin Company, Inc.*, IBCA-316 (Sept. 21, 1962), 1962 BCA par. 3486; *Simpson Drilling Co.*, IBCA-423-1-74 (Mar. 13, 1964), 1964 BCA par. 4140, p. 20, 174, but if these matters are not promptly resolved the contractor can, of course, institute a new dispute and appeal.

Thus the respondent's motion to dismiss or strike par. 11 of the complaint is allowed and denied as indicated above.

15. APPEAL INTEREST IS ALLOWED

(a) *The issue—dates*

This contract, in clause 335, provides for payment of simple interest on the amount allowed by the Board

from (1) the date of the contracting officer's receipt of an appeal to (2) the date a modification pursuant to Board decision is tendered to Appellant at the rate established by P.L. 92-41.

This Board, on July 20, 1977, docketed appellant's October 21, 1976, letter to the Government. The contracting officer issued his first decision June 20, 1977.

We must decide whether the interest period starts June 20, 1977, the date of the denial, or July 20, 1977, the date of docketing or Oct. 21, 1976, the date of an appeal-like letter, or some other date.

(b) Findings of Fact

1. On Sept. 24, 1976, the contracting officer sent appellant a letter (in reply to appellant's Aug. 20 letter) saying that five disputed items would be disallowed and an OH rate would be 55.77 (enclosure to appellant's Oct. 21, 1976, letter to the Secretary).

2. On Oct. 8, appellant indicated disagreement and asked for details and indicated it would appeal from the Sept. 24 letter (another enclosure to appellant's Oct. 21, 1976, letter to the Secretary).

3. On Oct. 21, 1976, appellant sent a long letter to the Secretary of the Interior entitled "Filing of a Dispute under Contract No. * * *" with 17 enclosures.

4. On Dec. 17, 1976, the contracting officer advised the IBCA that his Sept. 24 letter was not a final decision but that he had started

work on a final decision upon receipt of the contractor's Oct. 8 letter and that he expected to issue the final decision by Mar. 17, 1977.

5. On June 20, 1977, the contracting officer issued his first final decision.

6. The IBCA docketed the Oct. 21, 1976, letter as the notice of appeal on July 20, 1977.

7. On July 26, 1977, the contractor filed an "amended notice of appeal" from the June 20 final decision.

(c) Decision

1. The Government cannot prevent the allowance of a constructive change claim by refusing to acknowledge same.

2. Likewise the Government cannot prevent the payment of the interest promised in the contract in clause 335 "Payment of interest on contractor's claims" by delay in issuing a final contracting officer's decision. *Of. General Research Corporation, ASBCA 21,005 (Sept. 7, 1977), 77-2 BCA par. 12,767.*

3. The clause says that interest runs from the date the contractor furnishes the appeal to the contracting officer.

4. The Board on July 20, 1977, docketed the October 21, 1976, letter as the applicable notice of appeal.

5. We hold that interest runs on the sum of the costs and fees allowed in paragraph 14(b) *ante* from October 27, 1976, the date the contracting officer probably received the October 21 letter, until the date the appellant hereafter receives a

modification issued pursuant to this opinion. The Government shall do the multiplication using the rates of interest as provided in the clause.

16. PROFESSIONAL FEES

[4] (a) *The Contentions of the Parties*

This claim is set out in paragraph 10(k) of the Complaint and is for attorney's fees, CPA's fees and for contract administration and consulting fees and for expert and ordinary witness fees and other fees and costs in connection with this appeal. Further appellant asks that the contracting officer be held personally liable for these sums under 28 U.S.C. § 1927.

The parties have agreed that the Board will only decide liability (Tr. 275, 276).

(b) *Findings of Fact*

1. Appellant incurred costs for the following services (Tr. 276).

(a) Attorneys' fees (Tr. 35, 36 and Ex. C to contractor's response).

(b) CPA fees (Tr. 35, 36) (Ex. C to contractor's response Tr. 90, *et seq.*).

(c) Other fees and costs (*e.g.*, Tr. 98).

2. These fees fall into several categories as follows:

(a) Contract administration costs which were unrelated to any claim or dispute, *e.g.*, CPA services to establish cost-plus-fixed-fee accounting system (Tr. 91-96; 97).

(b) Expert services in relation to certain claims which were disputed

but settled before the appeal was filed (Tr. 19, 20).

(c) Expert services related to a claim and incurred during the appeal phase, about that claim.

(d) Attorney's fees incurred in prosecution of this appeal.

(e) *Rulings of Law and Decision*

1. Fees and costs associated with the prosecution of the appeal to this Board are not allowable costs. *The Singer Company, Librascope Division v. United States*, 215 Ct. Cl. ----, Dec. 14, 1977 (Slip Opinion, pp. 45-47), 568 F. 2d 695 (Ct. Cl. 1977), unless they fall within the exception to this rule allowed by *Allied Materials and Equipment Corp.*, ASBCA 17,318 (Feb. 28, 1975), 75-1 BCA par. 11,150, as interpreted by the Court of Claims in *The Singer Company, Librascope Division v. United States*, *supra*; *cf. Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). The three criteria of the *Allied Materials* exception (as stated by the Court) are: (1) presented to the contracting officer during performance of the contract, (2) clear Government liability, (3) benefit to the contract purpose.

Allied Material was a case where the Government failed to furnish GFE that was essential for the contractor to manufacture parts of tank engines. The contractor filed a request for an equitable adjustment, there were hard negotiations (which the ASBCA held constituted duress) and a settlement, a repudiation of the settlement and an appeal. The ASBCA allowed

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legal fees incurred up through the attempted negotiations-request for equitable adjustment. The Termination Contracting Officer terminated the contract for the convenience of the Government at the conclusion of these unsuccessful negotiations. *Allied Material and Singer* contain one further criterion and that is that "the conflict between the parties as to the equitable adjustment never became so disputatious as to reach the level of a claim against the government." *The Singer Co.*, slip op. p. 47.

2. We conclude that all costs and fees associated with the preparation of the notice of appeal, the contractor's response to the Findings of Fact and Decision of the Contracting Officer, the Complaint, and the conduct of the hearing are unallowable costs as they are costs of prosecuting a claim against the Government FPR 1-15.205-31.

3. We conclude that fees, expenses and costs incurred prior to the October 21, 1976 (Notice of Appeal), if they meet the other tests of FPR § 1-15.2 (e.g., reasonableness 15-201-3) are allowable under 1-15.205-31 (a).

4. Appellant cites no cases in support of its assertion that 28 U.S.C. § 1927 makes the contracting officer liable for costs. 28 U.S.C. § 451 defines "Court of the United States." Such definition does not include this Board, thus, 28 U.S.C. § 1927 is not applicable to this appeal or the contracting officer. Accordingly, this prayer for relief is denied.

The appeal is denied, sustained, and dismissed all as indicated hereinabove.

GEORGE S. STEELE, JR.,
Administrative Judge.

WE CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

RUSSELL C. LYNCH,
Administrative Judge.

RUSHTON MINING COMPANY

8 IBMA 255

Decided February 16, 1978

Appeal by Rushton Mining Company from a decision of Administrative Law Judge Edmund Sweeney in Docket No. PITT 75-398-P, dated Sept. 22, 1975, assessing \$750 in civil penalties pursuant to section 109 of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Violations: Negligence

An operator's freedom from negligence is not a factor to be considered in determining whether a violation of a mandatory safety standard occurred.

2. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Self-Rescue Devices

Where a mine employee is observed underground without a self-rescue device, the operator properly may be held to be in violation of 30 CFR 75.1714-2(a).

3. Federal Coal Mine Health and Safety Act of 1969: Penalties: Reasonableness

In view of the operator's negligence in failing to provide "competent, substitute, supervisory personnel" and the seriousness of the resultant mandatory safety standard violation of 30 CFR 75.301, a civil penalty assessment of \$400 is not excessive.

APPEARANCES: John R. Carfley, Esq., and Ira P. Smades, Esq., for appellant, Rushton Mining Company; Thomas A. Mascolino, Esq., Assistant Solicitor, and Michael V. Durkin, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

*OPINION BY ACTING CHIEF
ADMINISTRATIVE JUDGE
SCHELLENBERG*

*INTERIOR BOARD OF MINE
OPERATIONS APPEALS*

*Procedural and Factual
Background*

On Aug. 14, 1974, an inspector for the Mining Enforcement and Safety Administration (MESA) issued two (2) notices of violation to the Rushton Mining Company (Rushton). These notices were issued under sec. 104(b) of the Federal Coal Mine Health and Safety Act of 1969 (the Act) (30 U.S.C. § 814(b) (1970)) and alleged violations of certain mandatory safety standards. On Aug. 27, 1974, two (2) additional notices of violation were issued against Rushton, again under sec. 104(b) of the Act, and

again alleging mandatory safety standards violations.

Thereafter, MESA petitioned for an assessment of a civil penalty. Following a hearing on this petition in Docket No. PITT 75-398-P, Administrative Law Judge Sweeney held in his decision of Sept. 22, 1975, that Rushton had violated the mandatory safety standards, as alleged, in three of the four notices of violation. Accordingly, Judge Sweeney assessed civil penalties amounting to \$750.

From this decision Rushton appeals the judge's holding that it had violated 30 CFR 75.1714-2(a), a mandatory safety regulation which requires that each miner wear or carry a self-rescue device on his person. A civil penalty of \$200 was subsequently assessed for this violation. Also, while conceding the fact that it had violated 30 CFR 75.301 in failing to maintain permissible ventilation levels, Rushton appeals, as being excessive, the assessment of a \$400 civil penalty.

Contentions of the Parties

30 CFR 75.1714-2(a)

Rushton argues that MESA has failed to establish its negligence due to the fact that there was no showing that it did not do all that was expected of a reasonably prudent coal mine operator in insuring that each miner possessed a self-rescue device before entering the mine. It contends therefore, that Judge Sweeney erred in holding that it had violated 30 CFR 75.1714-2(a). MESA argues for an affirmance of

this holding on the grounds that Rushton simply did not comply with the mandatory language of this regulation.

30 CFR 75.301

While Rushton does not dispute Judge Sweeney's holding that it had violated 30 CFR 75.301 by failing to maintain a permissible ventilation level in one of its mine sections, it *does* dispute the judge's conclusion that this violation was of a "serious" nature. Rushton argues that no evidence was introduced to show that at the time of the MESA inspection, there was any danger of fire or explosion in the area of the mine where the violation occurred. It therefore contends that the \$400 civil penalty assessment is excessive and should be reduced accordingly.

MESA contends that the gravity of the violation in terms of the potential results realized by the occurrence of the hazardous event and by the likelihood of such occurrence requires that the civil penalty assessment be affirmed. It further argues that Rushton has failed to provide any compelling reasons for an adjustment of the penalty.

Issues on Appeal

I. Whether it was properly held that Rushton violated 30 CFR 75.1714-2(a) on the basis of an employee's failure to wear or to carry a self-rescue device underground.

II. Whether a civil penalty assessment of \$400 is excessive, in view of Rushton's negligence in failing

to provide "competent, substitute, supervisory personnel" and the resultant violation of 30 CFR 75.301, a mandatory safety regulation.

Discussion

[1] We have long acknowledged the fact that an operator may be liable for a civil penalty assessment under sec. 109 of the Act (30 U.S.C. § 819 (1970)), even though there is no showing of negligence on his part. *The Valley Camp Coal Co.*, 1 IBMA 196, 79 I.D. 625, 1971-1973 OSHD par. 15,385 (1972). Stated in different terms, that decision stands for the proposition that an operator's freedom from negligence is not a factor to be considered in determining whether a violation of a mandatory safety standard occurred.

Thus, the issue presently before the Board is not whether Rushton acted negligently, but whether it in fact complied with the mandatory language of 30 CFR 75.1714-2(a).¹ This regulation requires that a self-rescue device be worn or carried on the person of each miner.

[2] Relying upon Rushton's admission that the fact that its employee was observed underground without a self-rescue device is "uncontroverted" (Appellant's Brief, p. 1), we find that Rushton did not

¹ 30 CFR 75.1714-2(a) provides in pertinent part:

"§ 75.1714-2 Approved self-rescue devices; location; requirements.

"(a) Except as provided in paragraphs (b) and (c) of this section, self-rescue devices meeting the requirements of § 75.1714 shall be worn or carried on the person of each miner." (Italics supplied.)

comply with the mandatory language of this regulation. In so finding, we reject Rushton's argument that MESA failed to show that it did not do all that was expected of a reasonably prudent coal mine operator. We conclude that whether or not Rushton acted in a reasonably prudent manner is of no consequence to the finding of the aforementioned violation. The Board therefore is of the opinion that the Judge's holding should be affirmed.

II.

[3] While Rushton does not dispute Judge Sweeney's holding that it had failed to comply with the mandatory ventilation requirement of 30 CFR 75.301,² it *does* dispute the judge's determination that this violation was of a "serious" nature. Rushton contends that no evidence was introduced to show that at the time of the MESA inspection, there was a danger of fire or explosion in the area of the mine where the violation occurred.

The record shows that while the regular supervisory personnel attended a meeting, Rushton temporarily placed one of its miners in the capacity of a foreman. It was during this time that the MESA inspector issued a violation under sec. 104 (b) of the Act (30 U.S.C. § 814(b) (1970)) for Rushton's failure to ventilate an area of the mine in ac-

cordance with 30 CFR 75.301, a mandatory safety regulation.

The Board agrees with Judge Sweeney's conclusion that this violative condition stemmed from Rushton's negligence in failing to provide "competent, substitute, supervisory personnel" who could insure that permissible ventilation levels would be maintained (Decision, p. 11). We further agree that this violation was of a *serious* nature, as it created a danger of smoke buildup, and of fire or explosion from a gas buildup in the mine.

Finally, in analyzing this violation in terms of the potential hazard to the safety of the miners and the probability of such hazard occurring (*Robert G. Lawson Coal Co.*, 1 IBMA 115, 79 I.D. 657, 1971-1973 OSHD par. 15,374 (1972)), together with Rushton's negligence in failing to provide competent, substitute, supervisory personnel, we hold that the \$400 civil penalty assessment is not excessive and should be affirmed.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), **IT IS HEREBY ORDERED** that the decision of the Administrative Law Judge in the above-captioned case **IS AFFIRMED** and that the Rushton Mining Company pay a civil penalty in the amount of \$750 on or before 30 days from the date of this decision.

² 30 CFR 75.301 provides in pertinent part: § 75.301 Air quality, quantity, and velocity.

The minimum quantity of air reaching the last open crosscut in any pair or set of developing entries and the last open crosscut in any pair or set of rooms shall be 9,000 cubic feet a minute.

HOWARD J. SCHELLENBERG, JR.,
*Acting Chief Administrative
Judge.*

OPINION BY ADMINISTRATIVE
JUDGE LYNCH

WE CONCUR:

INTERIOR BOARD OF
CONTRACT APPEALS

ANNE POINDEXTER LEWIS,
Administrative Judge.

DAVID DOANE,
Alternate Administrative Judge.

APPEALS OF JB&C COMPANY

IBCA-1020-2-74 and
IBCA-1033-4-74

Decided *February 22, 1978*

Contract Nos. 14-06-100-6785, 14-06-100-6727, Specification Nos. 100C-1101, 100C-1097, Columbia Basin Project, Washington, Bureau of Reclamation.

Reconsideration Denied.

1. Rules of Practice: Appeals: Reconsideration

A request for allowance of attorney fees is denied on a motion for reconsideration where the prior decision specifically considered and disallowed these costs in accordance with prevailing law.

2. Rules of Practice: Appeals: Reconsideration

A motion for reconsideration is denied where based on the same arguments made and fully considered in the principal decision.

APPEARANCES: Mr. Fred A. Pain, Jr., Attorney at Law, Pain & Julian PA, Phoenix, Arizona, for appellant; Messrs. William N. Dunlop, Riley C. Nichols, Department Counsel, Boise, Idaho, for the Government.

The Board in a decision dated Sept. 28, 1977,¹ sustained in part and denied in part the above-captioned appeals. Motions for reconsideration of that decision have been filed by the appellant and by the Government.

The appellant's motion for reconsideration presents two contentions. First, appellant contends that the Internal Revenue Service has levied interest and penalty costs totaling \$127,968.86, by reason of unpaid FICA taxes. By letter dated Dec. 30, 1977, appellant advises that the Internal Revenue Service has agreed to abandon its claims for interest and penalties on the withholding taxes owed by appellant on the condition that the taxes are paid. Appellant further advises that it has agreed to do so, thereby making moot this aspect of the motion for reconsideration.

Regarding appellant's other contention that attorney fees should be allowed, no argument is advanced nor cases cited to exempt this case from the general rule against recovery of attorney fees incurred in prosecuting claims against the Government. In its original decision, the Board cites in footnote 91, the re-

¹ IBCA-1020-2-74 and IBCA-1033-4-74 (Sept. 28, 1977), 84 I.D. 495, 77-2 BCA par. 12,782.

cent cases which continue to adhere to this well-established principle. Appellant relies upon our having quoted in the principal opinion from the case of *Robert McMullan & Sons, Inc.*, ASBCA No. 19129 (Aug. 10, 1976), 76-2 BCA par. 12,072 at 57,962-963, in which the Armed Services Board of Contract Appeals stated that an equitable adjustment is "* * * necessarily a subjective matter, in the sense that the particular contractor damaged is to be made whole * * *." This statement was made in connection with the Board's finding that the jury verdict approach was the only available means of determining an allowance for added rock excavation made necessary by the differing site condition. The use of the jury verdict method of arriving at the amount was, as stated, resorted to by the Board because of the lack of credible evidence on the actual costs of rock excavation. Consequently, the reference and the jury verdict determination was limited to the single area of the cost claim under discussion. Other elements of the cost claims, including attorney fees, were separately treated in the decision. The disallowance of attorney fees under prevailing law merits no greater consideration than the other specifically disallowed costs which are not now contested.

The Government moves for re-

consideration of that part of the decision which finds a first category differing-site-condition under IBCA-1020-2-74, on the grounds that the Board erred:

1. In concluding the contract indicated the ground water flows would subside and could be handled by the same construction methods as surface water.

2. In finding the subsurface migration from Block 80 was not obvious and that the Government had the duty to disclose the same.

3. In holding the Government had a duty to disclose the subsurface migration of water from Block 80.

4. In espousing the view that the West Canal acted as a "barrier" to subsurface flows from Block 80.

In support of these charges of error, the Government reiterates its arguments prior to decision and erroneously restates portions of the decision in an attempt to overcome the findings that were discussed in the decision. Regarding the first argument, the decision states at p. 156 "* * * that the residual ground water would have been dealt with as competently as the diverted surface water." The construction methods by which such residual water might have been dealt with were not discussed; nor was there any implication that the same methods used for diverting surface water would suffice.

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The other contentions of the Government challenge the basic finding that a differing site condition existed based on the unforeseeable underground flow of water migrating from Block 80. We see no reason to restate the evidence supporting the findings in the principal decision. In support of its fourth contention that the West Canal could not be found to be a barrier to migrating water from Block 80, the Government claims the Board chose "to overlook the only evidence in the entire record on this point which directly contradicts the canal barrier findings," *i.e.*, Appellant's Exh. JJJ. We direct attention to pages 153-156³ of the decision where this crucial exhibit is discussed; particularly, with reference to the fact that this internal memorandum showing that existence of such water migration from Block 80 was a fact known to the Government, and that it failed in its duty to disclose this fact to appellant. This undisclosed vital information concerning the subsurface conditions cannot now be used to impute a greater knowledge to appellant during the prebid site investigation than was possible from the information made available at that time. The reasonableness and propriety of the conclusions and assumptions of appellant concerning the subsurface conditions can be measured only against the disclosed information and that which would

be gained by a prudent bidder making an adequate site investigation. Clearly, the Board did not overlook the importance of Exh. JJJ. In fact, as the cited portions of the principal decision shows, the exhibit was of paramount importance to the Board's finding for the appellant on the issue presented. We note one other contention (*i.e.*, one of the reasons assigned by the Board for distinguishing *Keltch*³ is considered to be extraneous to a finding of a differing site condition). In the principal decision the Board did note that in the *Keltch* decision, the contractor had been given specific instructions by the contracting officer on how to proceed after giving notice of a claimed differing site condition but that such instructions had not been followed. This discussion in the decision (pages 156-7),⁴ follows the findings of a differing site condition. It does not relate to the existence of the condition but rather to the question of whether the costs that resulted therefrom were recoverable. Unlike *Keltch*, in this case the contracting officer refused to give the contractor any directions as to how to cope with the differing site condition. It was, therefore, unnecessary to decide whether, and, if so, to what extent the costs incurred would be recover-

³ See *John M. Keltch, Inc.*, IBCA-S30-3-70 (June 22, 1971), 78 I.D. 208, 76-2 BCA par. 12,063, *aff'd* (Trial Judge Opinion, Jan. 23, 1974), 19 CCF par. 82,785, adopted generally by the Court, 206 Ct. Cl. 841 (1975).

⁴ 77-2 BCA par. 12,782 at 62,153; 84 I.D. 495 at 579.

² 77-2 BCA par. 12,782 at 62,152-153; 84 I.D. 495 at 577-8.

able if they had resulted from a failure to follow the directions of the contracting officer.

Conclusion

The motion for reconsideration filed by the appellant and the motion for reconsideration filed by the Government are both denied.

RUSSELL C. LYNCH,
Administrative Judge.

WE CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

G. HERBERT PACKWOOD,
Administrative Judge.

**PIPELINE PETROLEUM
CORPORATION**

34 IBLA 73

Decided *February 22, 1978*

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, dated May 16, 1977, declaring oil and gas lease NM 24985 terminated by operation of law for failure to pay the annual rental on time.

Reversed and remanded.

1. Accounts: Payments—Oil and Gas Leases: Rentals—Oil and Gas Leases: Termination—Payments: Generally

A check tendered prior to the due date of an oil and gas lease annual rental payment, which is properly dishonored by the drawee bank, does not constitute timely payment. But where return of the

check results from a confirmed bank error, subsequent collection and payment of the check relates back to the time of the original tender, and payment is timely.

2. Accounts: Payments—Oil and Gas Leases: Rentals—Payments: Generally

Annual rental payments on oil and gas leases are sent to depositories designated by the Secretary of the Treasury if their location permits the deposit to be hand carried; otherwise, the deposits are mailed to the Denver Branch of the Kansas City Federal Reserve Bank. Washington, D.C., offices of the Bureau of Land Management may send deposits to the Cash Division of the Treasury Department. All checks drawn on foreign banks or foreign branches of United States banks must be sent for deposit to the Cash Division of the Treasury Department.

An oil and gas lease rental payment check returned to the Bureau of Land Management because a Federal Reserve Bank will not accept for collection checks drawn on foreign banks, but which could be collected through the Cash Division of the Treasury Department and would be honored by the drawee bank, is not "uncollectible."

APPEARANCES: Morton J. Glickman, for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

*INTERIOR BOARD OF
LAND APPEALS*

Pipeline Petroleum Corp. appeals from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated May 16,

February 22, 1978

1977, declaring oil and gas lease NM 24985 terminated by operation of law for failure to pay the advanced annual rental on time.¹ Under 43 CFR 3108.2-1(a) (1976), implementing 30 U.S.C. § 188(b) (1970), a lease on which there is no well capable of producing oil and gas in paying quantities terminates automatically if the lessee fails to pay the annual rental on or before the anniversary date of the lease. Here, the lease issued May 1, 1975, and payment was due May 1, 1977. BLM based its decision on the fact that the check which appellant remitted to BLM in payment of the rental failed to clear.

Involved is a check drawn by Morton J. Glickman on the National Bank of Nova Scotia, payable to the "Bureau of Land Management," in the amount of \$20 "U.S." A notation on the front of the check indicates that it is "payable in U.S. funds." BLM received Glickman's check on Apr. 19, 1977, and endorsed the check for credit to the Treasurer of the United States. The check was then mailed to the Denver Branch of the Kansas City Federal Reserve Bank (FRB-Denver) for deposit. FRB-Denver, however, instead of depositing the check, returned it to BLM marked "Return Item Apr 26 '77 * * * NOT IN

USA." The latter notation refers to the fact the check had been drawn on a foreign bank.

In a notice of appeal and statement of reasons filed June 2, 1977, appellant asserts that FRB-Denver erred in returning the check, and that its payment was adequate and timely made.² It states:

The check was returned as uncollectable [*sic*] solely because of an error at the Bureau of Land Management's bank. The check was collectable [*sic*] at all times since it was issued. Notation on the check indicated the Paying Bank was not located in the USA. This is insufficient reason for the check to be returned since payment was being made in US funds from Canadian chartered bank, the Bank of Nova Scotia. The Bureau of Land Management has previously cashed numerous \$US \$ checks payable from Canadian banks.

[1] This case requires us to consider 43 CFR 1822.1-2(a) (1976), which specified the valid forms of remittance to BLM:

[F]orms of remittances that will be accepted in payment of fees, rentals, purchase price, and other charges required by the regulations in this chapter include cash and currency of the United States and checks, money orders, and bank drafts made payable to the Bureau of Land Management. *Checks or drafts are accepted subject to collection and final payment without cost to the Government office.* (Italics added.)

We have applied the italicized language in a number of cases, in which a lessee's check in payment of the advance annual rental was

¹ The land involved consists of the NW ¼ NE ¼, sec. 26, T. 15 S., R. 2 W., New Mexico principal meridian, Sierra County, New Mexico, May 1, 1975. Miller relinquished all but the current leasehold as of April 5, 1975. Miller then assigned the lease to Gregor Klurfeid on Sept. 1, 1976, who in turn assigned it to appellant on Nov. 1, 1976.

² Glickman also submitted on June 2 a second check virtually identical to the first, which was similarly returned by FRB-Denver.

returned as uncollectible. *Pauline V. and John H. Trigg*, 31 IBLA 296 (1977), and cases cited therein. In those cases, we held that where a bank has properly dishonored a check which was tendered to BLM prior to the due date, timely payment has not been made. But where return of the check resulted from a confirmed bank error, subsequent collection and payment of the check related back to the time that the check was originally tendered to BLM, and payment was timely. Those cases involved situations where a check was returned for insufficient funds or the like.

We consider now for the first time whether subsequent collection and payment of a check, properly returned by a Federal Reserve bank because the check was drawn on a foreign bank, relates back to the check's original tender to BLM. We hold that BLM erred in attempting to deposit a check drawn on a foreign bank with FRB-Denver. The bank's proper return of the check should not, therefore, prejudice appellant's right to receive credit for having tendered the check, if the check is subsequently collected and paid through the appropriate procedures.

A brief look at some of the framework of Government financial operations explains this result.

[2] The Federal Reserve Act, 12 U.S.C. § 1 *et seq.* (1970), establishes a system of depositories for Government funds consisting of the Federal Reserve banks and certain member banks of the Federal Re-

serve system designated by the Secretary of the Treasury (designated Federal depositories). 12 U.S.C. §§ 265, 391, and 392 (1970); 31 CFR Part 202 (1976). These banks also serve as the fiscal agents of the Government. *Id.* Pursuant to these provisions, BLM has adopted procedures, which the State Office apparently relied on here, for sending fees for deposit to designated Federal depositories within hand-carry distance of BLM regional offices and otherwise by mail to FRB-Denver. BLM Manual 1372.34 (1976). Apparently, in the present case, there is no designated Federal depository within hand-carrying distance of the State Office, and, thus, BLM mailed appellant's check to FRB-Denver.

FRB-Denver, however, like other branches of the Federal Reserve bank, will not clear checks drawn on foreign banks. As a result of this practice, the Treasury Department has created an alternative route for Government agencies to clear checks drawn on foreign banks through the Treasury's Division of Cash Services (Cash Division).³ The Treasury Fiscal Requirements Manual provides:

Section 6020—DISPOSITION OF CHECKS DRAWN ON FOREIGN BANKS AND FOREIGN CURRENCIES BY AGENCIES WITHIN THE UNITED STATES

6020.10—Where Deposits of Checks Should Be Made. All checks drawn on

³ Washington, D.C., area BLM offices may send deposits to the Cash Division regardless of the deposit's form. BLM Manual 1372.34 (1976).

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foreign banks and foreign branches of U.S. banks, whether payable in U.S. dollars or in a foreign currency, should be endorsed by the agency in the usual manner and transmitted for deposit to the Division of Cash Services, Bureau of Government Financial Operations, Department of the Treasury, Washington, D.C. 20220, along with covering certificates of deposit.

6020.20—Checks Drawn on Foreign Banks Payable in United States Dollars. Certificates of deposit accompanying these checks will be completed by the agency in the usual manner, including the insertion of the U.S. dollar amount. All such checks to be deposited should be included in a single certificate of deposit. The amount of the certificate of deposit will be credited in the Treasury's account upon receipt by the Division of Cash Services, Bureau of Government Financial Operations, and the confirmed copies of the certificate of deposit will be distributed in accordance with established procedures. A considerable period of time, frequently a number of weeks, is required to collect the proceeds of many checks of this type. Therefore, notwithstanding the fact that the entire amount of the certificate of deposit has been credited in the Treasury's account upon receipt, agencies should be aware that they may receive a TFS Form 5504 "Debit Voucher" in connection with uncollectible checks or collection charges on these items, some considerable period of time after the deposit was confirmed (ITFRM 5-6020.50).

6020.30—Checks Drawn on Foreign Banks Payable in Foreign Currencies. Certificates of deposit accompanying these checks will be completed by the agency in the usual manner, except that the U.S. dollar amount will be left blank. A separate certificate of deposit should be prepared for each check drawn on a foreign bank. For reference purposes, agencies should inscribe on the front of the certificate of deposit, or on the back

if space is lacking on the front: (1) the name of the bank on which the check is drawn; (2) the medium of exchange; (3) the foreign currency amount; and (4) the date of the check. The net dollar proceeds will be entered by the Division of Cash Services, Bureau of Government Financial Operations, when credit is received by that office and the confirmed certificate of deposit copies will be distributed under the established procedures.

Although the BLM Manual does not mention that foreign checks should be sent to the Cash Division, its section on uncollectible checks states: "Remittances deposited in a designated federal depository, Federal Reserve Bank, or the Cash Division of the United States Treasury, which are not paid upon presentation to the drawee, are returned to the Bureau by the Treasury Department as 'uncollectible.'" (Italics added.) BLM Manual 1372.28 (1976). Even though the Manual does not specifically provide that a foreign check must be collected through the Cash Division, the general definition of collectibility implies that the Cash Division should be utilized where appropriate to achieve collection, as it is where a foreign bank is involved. In other words, a check drawn on a foreign bank is not, per se, "uncollectible" and thus not payment. Instead of rejecting this form of payment, the check should have been sent to the Cash Division rather than FRB-Denver to effect collection.

As the check was not submitted to the Cash Division, appellant's

lease should not have been terminated for nonpayment. Appellant's check should be processed as provided by the Treasury Fiscal Requirements Manual and appellant held to have made timely payment contingent on the collection and payment of the check.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the deci-

sion appealed from is reversed and remanded.

MARTIN RITVO,
Administrative Judge.

WE CONCUR:

FREDERICK FISHMAN,
Administrative Judge.

JOSEPH W. GOSS,
Administrative Judge.

March 3, 1978

**APPEAL OF CALIFORNIA EARTH
SCIENCES CORPORATION**

IBCA-1138-12-76

Decided *March 3, 1978*

Contract No. 14-08-001-13911,
ERTS-A Imagery Application, U.S.
Geological Survey.

Sustained.

**1. Contracts: Construction and Opera-
tion: Notices—Contracts: Formation
and Validity: Cost-type Contracts**

Under a cost-plus-fixed-fee contract, a cost overrun is allowed where the Government's refusal to fund the overrun was based on appellant's failure to give timely notice under the Limitation of Cost clause and a subsequent audit report finds that the appellant was not aware of a 22 percent increase in the actual overhead rate until a post-performance audit was completed in accordance with the appellant's approved accounting practices.

APPEARANCES: Mr. Paul M. Meri-
field, President, California Earth Sci-
ences Corporation, Santa Monica,
California, for the appellant; Mr. E.
Edward Wiles, Department Counsel,
Washington, D.C., for the Government.

*OPINION BY ADMINISTRATIVE
JUDGE LYNCH*

*INTERIOR BOARD OF
CONTRACT APPEALS*

Appellant filed this timely appeal from the contracting officer's denial of a request that an overrun of \$1,548.13 be added to the estimated costs of a completed cost-plus-fixed-fee contract. The request of Aug. 13, 1976, for allowance of the

overrun amount followed a post-performance audit on the contract. Performance of the contract was completed on Dec. 31, 1975. The total estimated cost for the contract was \$59,753 and appellant contends that the overrun could not have been anticipated prior to contract completion and that this precluded timely notice being given in accordance with the requirements of the contract's Limitation of Cost clause (LOCC). Appellant attributed the overrun to unanticipated increases in overhead and general and administrative expenses, primarily in the last 6 months of the contract performance period, and to its inability to precisely predict final contract costs until final billings from suppliers were received.

The contracting officer denied the overrun funding request on the grounds of insufficient funding of the contract and the failure of appellant to give advance notice of the overrun in accordance with the requirements of the Limitation of Cost clause.

By Order dated May 26, 1977, the Board dismissed the appeal and remanded the case to the contracting officer for determination as to whether the failure to give timely notice of the overrun was excusable in accordance with the guidelines established by the Court of Claims in *General Electric Company v. United States*, 194 Ct. Cl. 678 (1971). The Order provided that the contracting officer shall issue his final decision within 90 days after the date of the Order. By letter

dated Sept. 12, 1977, appellant advised the contracting officer that no final decision had been received during the time allowed.

A motion filed by the Government with the Board on October 3, 1977, requested that it be granted until Oct. 25, 1977, to serve the final decision on the appellant. By Order dated Oct. 5, 1977, the Board granted the additional time, noting that an audit was in progress, but that no basis for the delay had been provided.

By letter dated Nov. 4, 1977, the contracting officer issued the final decision denying the request for the overrun on the grounds that the audit had confirmed:

1. The contractor's accounting system was considered adequate during the performance period of the contract;
2. The contractor had foreseen the possibility of a cost overrun approximately four months prior to completion of the contract; and,
3. The cost overrun is primarily the result of the contractor's failure to book direct labor costs on a timely basis.

Appellant reinstated this appeal by letter dated November 28, 1977, contending that:

1. The auditor found the accounting system to be adequate;
2. The auditor would have been equally correct had he stated that the contractor could have foreseen an *underrun* four months before the contract completion; and,
3. The failure to timely book direct labor costs was not previously in issue; but, rather the question was whether the appellant could reasonably have foreseen the overrun attributed to a 22 percent increase in overhead rates in the last six months of the contract.

The Government's disregard for timely compliance with the Board's Orders would suffice to sanction an adverse ruling on the question of notice. However, the brief audit report dated Oct. 20, 1977, provides information helpful to resolution of the appeal. Although attributing the overrun to the appellant's failure to timely record \$825 of direct labor costs during the last four months of the contract, the audit report confirms that the contractor was billing overhead at the rate of 105 percent of direct labor and was unaware during the last 6 months of the contract that the overhead rate would increase 22 percent from the billing rates. This knowledge would not become apparent to appellant until a post-contract audit was completed over 5 months after contract completion.

The audit report also states that "the contractor is a small business concern and does not maintain a financial management staff to provide timely financial data." Therefore, the auditor's conclusion—underlying the contracting officer's decision denying the overrun—that the contractor's accounting system was considered adequate falls short of the necessary determination that the accounting system was adequate enough to enable the contractor to foresee the overrun. To the contrary, the auditor finds an adequate accounting system for a cost-type contract which did not make the contractor aware of a significant increase in overhead rates during the contract period.

April 14, 1978

The Government's argument that the overrun was caused by tardy posting of direct labor late in the contract performance period deals more with which dollars expended exceeded the contract amount rather than the true cause of the overrun and its foreseeability.

The unforeseen 22 percent increase in overhead during the last 6 months of the contract would have a far greater impact, when applied to all direct labor, than the tardy posting of direct costs.

Appellant contends that the auditor could have stated correctly that appellant foresaw an underrun rather than an overrun. In the final months of the contract, a saving of \$2,363.95 was realized on subcontracting (appellant's letter, Sept. 22, 1976). Considering the unsophisticated accounting system of the contractor described by the auditor, it is reasonable to conclude that without knowledge of an increase in the actual overhead rate the contractor had no reason to believe that an overrun was imminent.

We find that the cost overrun involved in this appeal occurred without the fault or inadequacy of the appellant and was attributed to an unforeseeable increase in overhead rates during the last 6 months of contract performance.

So finding, the appeal is allowed in the amount of \$1,548.13.

RUSSELL C. LYNCH,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

**APPEAL OF BRILES WING &
HELICOPTER, INC.**

IBCA—1158-7-77

Decided April 14, 1978

Contract No. 81-0018 (Geological Survey), Office of Aircraft Services.

Government Motion for Partial Summary Dismissal Denied.

**1. Contracts: Performance or Default:
Excusable Delays—Rules of Practice:
Appeals: Dismissal—Rules of Practice:
Appeals: Hearings—Rules of Practice:
Appeals: Motions**

The Government's opposition to appellant's request for a hearing and its motion for partial summary judgment in a default termination case are both denied where the contractor contends and the Government denies that the delays experienced by the contractor in attempting to perform the contract were excusable and the Board finds that determining whether delays are excusable in such circumstances involves resolving a fact question which should only be done after the parties have had an opportunity to present their evidence at a hearing where one has been requested.

APPEARANCES Messrs. Richard S. Cohen, Richard T. Williams, Lee L. Blackman, Attorneys at Law, Kadison, Pfaelzer, Woodard, Quinn & Rossi, Los Angeles, California, for the appellant; Ms. Joyce E. Bamberger, Department Counsel, Anchorage, Alaska, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The contractor has timely appealed the termination of its right to proceed with performance of the above-captioned contract for default because of the failure to furnish a list of qualified pilots and qualified mechanics within the time allowed by the contract specifications. The contractor is also contesting a counterclaim asserted by the Government in these proceedings for the excess costs involved in having the services covered by the defaulted contract performed by another contractor.

A Government motion to dismiss the instant appeal was denied by our decision dated Dec. 2, 1977 (84 I.D. 967, 78-1 BCA par. 12,878). Presently before us for decision is an "Opposition To Request For A Hearing And Motion For Partial Summary Dismissal" filed by the Government, together with a supporting memorandum. In response, the appellant has filed a memorandum opposing the Government's position.

The Department counsel has attempted to show (i) that there is no genuine issue of material fact in dispute between the parties and (ii) that where material facts are not disputed, summary dismissal should be awarded (Government Memorandum, pp. 2-11). Appellant's counsel points to what he characterizes as material issues of

fact that remain to be determined and flatly asserts that the Government's motion is not authorized and should be dismissed (Appellant's Memorandum, pp. 4-22).

The various boards of contract appeals do have the authority to grant summary judgment, but it is an authority rarely exercised, because its effect is to deprive the parties of a hearing on the facts. See McBride & Wachtel, Government Contracts, Sec. 6.20[18]. While there are statements in some of our decisions indicating that motions for summary judgment will not be entertained (*e.g.*, *Young Associates, Inc.*, IBCA-557-4-66 (Nov. 3, 1967), 67-2 BCA par. 6676), the Board has denied requests for hearing and in effect granted motions for summary judgment on a few occasions in unique circumstances. See *Armstrong & Armstrong, Inc.*, IBCA-1061-3-75 and IBCA-1072-775 (Apr. 7, 1976), 83 I.D. 148, 76-1 BCA par. 11,826, footnote 30; and *Bateson-Cheves Construction Company*, IBCA-670-9-67 (Aug. 12, 1968), 68-2 BCA par. 7167, *aff'd on reconsideration*, 68-2 BCA par 7289. *Cf. Kiewit-Judson Pacific Murphy*, IBCA-141 (Jan. 5, 1961), 61-1 BCA par. 2898. Boards have not shown the same reluctance to proceeding summarily in cases involving cross-motions for summary judgment, since such cases do not entail denying a request for a hearing. See, for example, *International Business Machines Corporation*, DOT CAB No. 75-37 (Jan. 6, 1977), 77-1 BCA par. 12,293.

April 14, 1978

The rationale of the Government's position is succinctly stated on p. 6 of the memorandum which accompanied its motion and from which the following is quoted: "Where no material issue of fact exists between the parties, the Board need only resolve the legal issues. Appellant does not deny that its default was excusable for several reasons, all of which are without merit."

None of the cases cited by the Government in support of the above formulation, however, involved terminations for default in which a contractor who alleged an excusable cause of delay was denied a requested hearing; nor has our own research disclosed any such case. The views of the Board respecting terminations for default are reflected in our decision in *K Square Corporation, a/k/a Ultrascan Company*, IBCA-959-3-72 (Nov. 29, 1973), 80 I.D. 769, 774, 73-2 BCA par. 10,363, at 48,944, in which we stated: "A default termination is a drastic sanction the exercise of which should be sustained only upon a demonstration of full compliance by the Government with the established procedural safeguards and substantive requirements applicable." (Footnote omitted.)

At various time in the past we have undertaken to determine whether a genuine issue of material fact is in dispute. See, for example, *Armstrong & Armstrong, supra*, 83 I.D. 158-163; 76-1 BCA par. 11,826 at 56,464-466. In the case before us

the appellant has made a number of serious charges related to the specifications for the instant contract. It has alleged that "[T]he Government knew or should reasonably have known at the time it awarded the Contract that the number of available qualified pilots was so small it was impossible for Briles to supply helicopter pilots meeting the specifications" (Notice of Appeal, par. 1). It has also alleged that "[T]he pilot specifications were prepared by the Government so as to favor certain bidders on the Contract and to make it impossible for the other bidders to meet those pilot specifications" (Notice of Appeal, par. 2).

On this record we are not prepared to say what the Government knew or should have known about the appellant's capacity to perform the contract at the time of award;¹ nor is there sufficient evidence in the record on which to base a finding as to whether in the preparation of the specifications the Government intended² to favor certain bidders over other bidders, as has been charged by the appellant. In the circumstances present in this appeal, no useful purpose would be

¹ See *Armstrong & Armstrong, Inc.*, text, *supra*, where the question of what knowledge the Government had or was chargeable with having is discussed. (83 I.D. 160, 76-1 BCA par. 11,826 at 56,465.)

² Cf. *American Cement Corporation, IBCA-496-5-65* and *IBCA-578-7-66* (Sept. 21, 1966), 73 I.D. 266, 270-71, 66-2 BCA par. 5849, at 27,152. ("[I]f * * * the ascertainment of the intent of the parties to the contract became the paramount issue, the determination of the question of their intent would entail the resolution of a question of fact." (Footnote omitted.))

served by making a detailed examination of these questions with a view to determining whether they involve disputed questions of material fact. In this case the contractor is unquestionably claiming that the termination of its contract for default was improper because the delays experienced in attempting to perform the contract were attributable to the actions of the Government. This entails determining whether the delays involved were excusable within the meaning of Clause 3, Default.³ Such a determination involves determining a question of fact.⁴ See *Veeco Instruments, Inc.*, NASA BCA Nos. 271-6, 871-18 (Jan. 10, 1972), 72-1 BCA par. 9256, at 42,919:

A complaint is not subject to dismissal unless it appears to a certainty that no relief can be granted under any set of facts which can be proved in support of its allegations. *Conley v. Gibson*, 355 U.S. 41, 45 (1957 * * *).

* * * [T]he legal proposition cited by the Government begs the real question, which is basically a factual one, whether

³ General Provisions, Service Contracts (OAS-17 (Rev. 12-75)).

⁴ The contracting officer appears to be of the same view, since in the notice terminating the right of the contractor to proceed with performance the following especially pertinent statements are made:

" * * * The determination that the contractor has failed to furnish the information required under subparagraphs 302.7 and 305.3 within the time allowed by the contract plus the decision that the failures are not excusable as defined under Clause Three, Default, of the General Provisions (are) questions of fact and shall be final and conclusive unless within thirty days of receipt of this notice, the contractor mails or otherwise furnishes to the contracting officer, under Clause Six, Disputes, of the General Provisions, a written appeal addressed to the Secretary of the Interior." (Italics supplied.) (Exhibit 25.)

the failure to deliver the supplies on time arose out of causes beyond the control of both the contractor and the subcontractor and without the fault or negligence of either of them. In this regard, see *Metcom, Inc.*, ASBCA 14916, 70-2 BCA par. 8534.

We agree, without consideration of the merits of Appellant's allegations, that Appellant is entitled to a hearing. On the basis of the pleadings before the Board, certainty that Appellant would not be entitled to relief under the terms of the contract under any set of provable facts cannot be said to exist. It is not necessary that the petition set forth the specific facts to support its general allegations of excusable cause. All that is necessary is a simple, concise and direct statement that gives the Government fair notice of the grounds upon which the appeal rests.

In this case too the parties disagree as to whether the delays experienced by the contractor in attempting to perform the contract were excusable. This requires the Board to determine a question which has been characterized as "basically a factual one." *Veeco Instruments, supra*.⁵ So serious a question should not be resolved without affording the parties an opportunity to present whatever evidence they have bearing upon the questions involved in this appeal at hearing, as has been requested by the appellant in this case.

⁵ Even if this were not true, we would still have jurisdiction in the matter. See *American Cement Corporation*, note 2, *supra*:

" * * * But the authorities make clear that most questions of interpretation involve mixed questions of law and fact. The Board would not be without jurisdiction in the circumstances of this case, however, even if a pure question of law were found to be involved, since this would only affect the finality of the administrative decision and the nature of the judicial review." (Footnotes omitted.)

April 26, 1978

Conclusion

The Government opposition to appellant's request for a hearing and its motion for a partial summary judgment are both denied. A hearing will be scheduled in due course at which time evidence will be received as to the propriety of the termination for default and on the Government's counterclaim for excess costs in the amount of \$52,035.

WILLIAM F. MCGRAW,
Chairman,
Administrative Judge.

I CONCUR:

G. HERBERT PACKWOOD,
Administrative Judge.

JOHN R. DEAN

34 IBLA 330

Decided April 26, 1978

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting homestead entry application and final proof. AA-8213.

Set aside and remanded.

1. Alaska: Homesteads—Applications and Entries: Priority—Homesteads (Ordinary): Applications — Homesteads (Ordinary): Lands Subject to

The rejection of a homestead application in Alaska merely because there are prior-filed homestead applications for the same land is improper and premature where no action has been taken on the conflicting applications. If a prior-filed application is allowed, the land comes

within an allowed entry of record and a junior application must be rejected thereafter. However, if the prior application is rejected or withdrawn, it no longer bars allowance of a junior application.

2. Alaska: Homesteads—Homesteads (Ordinary): Generally—Homesteads (Ordinary): Final Proof

A homestead claimant in Alaska may be given credit for residence, cultivation and improvements after the time his homestead application is filed but before allowance of entry where the land was subject to appropriation by him or included in an entry against which he had initiated a contest resulting in cancellation of the entry.

3. Alaska: Homesteads—Applications and Entries: Generally—Homesteads (Ordinary): Final Proof—Words and Phrases

"Subject to appropriation by him." The provision in 43 CFR 2511.4-2(a) permitting credit for residence and cultivation by a homestead entryman before the date of entry if during that period the land was "subject to appropriation by him" does not refer to land for which there were prior-filed homestead applications which are subsequently withdrawn or rejected. Therefore, until action is taken on prior-filed applications, final proof filed by a junior homestead applicant should not be rejected merely because the land is subject to the prior applications.

4. Alaska: Homesteads—Homesteads (Ordinary): Final Proof

The mere fact homestead final proof in Alaska is filed before allowance of the homesteader's application for entry does not preclude consideration of the final proof if entry is allowed.

APPEARANCES: John R. Dean,
Anchorage, Alaska, pro se.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON
INTERIOR BOARD OF
LAND APPEALS

The appeal in this case arises from the following facts reflected on the record of the Alaska State Office, Bureau of Land Management (BLM): appellant, John R. Dean, filed homestead entry application AA-8451 for 100 acres of land in Alaska on Aug. 14, 1973. On Nov. 1, 1973, he amended the application by adding another 40 acres. No action on his application was taken by the BLM. Subsequently, on Dec. 23, 1974, Dean filed commuted final proof of compliance with the requirements of the homestead laws. Dean's application conflicts with parts of two other applications for homestead entry filed previously to him: AA-8196, filed by Glenn W. Price on Oct. 24, 1972, and AA-8312, filed by Deborah L. Angel on Nov. 13, 1972.

The decision by the BLM Alaska State Office of December 8, 1976, rejected Dean's application for homestead entry and his final proof. The rationale for this action was that the prior-filed applications segregated the lands from appropriation, citing *Albert A. Howe*, 26 IBLA 386 (1976). The decision also noted that Dean had not taken action under 43 CFR 4.450-1 (pertaining to private contests) so as to obtain a preference right of entry against the settlement of Deborah L. Angel.

Dean objects to the BLM action, asserting he did everything he

could to attempt to ascertain if there were conflicting claims to the land before he filed his application. He states that while he was living on the land, Deborah L. Angel approached him stating she had a prior right but was going to waive her rights to him, that Glenn W. Price informed Dean's wife he was unable to occupy the land, and that these visits were the first time he was aware of any prior existing rights. He decided to remain on the land because it did not appear anyone else would perform the requirements for a homestead entry. He points to the efforts he has made on the property. He contends, in effect, that if those having prior rights do not fulfill the requirements, he should be entitled to the land.

There is no indication in this record that the BLM State Office in Alaska adjudicated the prior-filed applications before they rejected Dean's application. Instead, it appears that they took action on his application only because he filed his final proof. The rejection of Dean's application and the final proof was premature.

[1] Let us first consider the rejection of the homestead application. The case cited in the BLM decision, *Albert A. Howe*, *supra*, and a subsequent decision *Richard T. Pope*, 27 IBLA 33 (1976), decided whether a homestead application in Alaska may constitute a "valid existing right" which is excepted from the effect of a withdrawal of land. They ruled that a homestead appli-

cation which is allowable constitutes such a right and a withdrawal does not bar allowance of the application. The *Pope* and *Howe* cases, in turn, relied upon *Raymond L. Gunderson*, 71 I.D. 477 (1964), and similar cases, which dealt with the issue of whether the requirements for making a second homestead entry must be met by an applicant who had previously filed a homestead application but who relinquished the application before entry was allowed. In departing from previous departmental rulings because of a change in regulations, *Gunderson* held that an allowable homestead application is considered the equivalent of an entry and thus the rules pertaining to filing second homestead entries must be satisfied. In that case, the appellant had two concurrent homestead applications totaling more than the allowable acreage. The decision held that the filing of two concurrent applications by the same person bars allowance of either since the acreage exceeds that allowed by law. However, if one application is relinquished, the other (not having excess acreage) could now be allowed if there were no intervening rights. Specifically, the decision states, at 485:

* * * the appellant's application could receive no priority during the period from Mar. 10, 1961 to Apr. 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, how-

ever, the appellant's application is not disqualified by virtue of the earlier application and is entitled to consideration with priority dating from Apr. 7, 1961, when the first application was relinquished.

Thus, the *Gunderson* case recognizes that a subsequent application filed while homestead applications are pending may be allowed if the prior applications must be rejected. To the same effect is *Samuel A. Wanner*, 67 I.D. 407 (1960), where the syllabus states:

When a valid application for a homestead entry is filed and an amended application is later filed for the same and additional land, which amended application is invalid because it contains excess acreage, the applicant loses his priority over an intervening applicant as to land included in his original application and in the intervening application.

In *Wanner*, a homestead applicant had amended his first-filed application after an intervening application was filed and the amendment caused the first application to contain excess acreage. The homestead entry allowed to the first applicant was to be canceled only as to lands in conflict with the intervening application if the intervening application were allowed for the conflicting lots. These cases demonstrate that the action by the Bureau in the present case was premature in rejecting Mr. Dean's application.¹

¹ See also *Ernest J. Ackermann*, 70 I.D. 378 (1963), where the syllabus states:

"Where a homestead settler on unsurveyed public land in Alaska initiates his homestead claim by settling upon the land while it was subject to the homestead entry of another and subsequently files notice of such settlement in the land office after relinquish-

(Continued)

As I pointed out in my separate opinion in *Howe*, at 26 IBLA 391, the reason for the rule that a homestead application may be considered the equivalent of an entry so far as the applicant is concerned rests upon the application of the doctrine of relation back. Thus, when a patent is issued, and also when an entry is allowed, the rights of the applicant are deemed to go back to the date of the original application. *White v. Roos*, 55 I.D. 605 (1936); *Rippy v. Snowden*, 47 I.D. 321 (1920). The rule is applied to protect the applicant from intervening claimants. It is only applicable, of course, if the application is allowed. Obviously if a prior-filed application is rejected or withdrawn there are no rights to be protected and a subsequent application may be allowed. If, however, the prior-filed application is allowed, the date of the entry for the purpose of protecting his rights against intervenors would relate back to the date of his application.

There is no regulation providing for the rejection of a homestead application merely because there is a senior homestead application for the same land. Regulation 43 CFR 2091.1 requires rejection of an application if land is in an "allowed entry or selection of record." Therefore, if a prior application is allowed the land becomes within an

entry and conflicting applications must be rejected. A homestead application cannot be considered an "allowed entry or selection of record" until there is adjudicative action by BLM approving and "allowing" the entry pursuant to the application.

From the foregoing discussion it is evident that a homestead application in Alaska may not properly be rejected merely because it conflicts with a prior-filed application, unless and until an entry is allowed. Accordingly, adjudication of Dean's application was premature and must be set aside.

[2] We turn now to the rejection of the final proof. It was rejected because the homestead application was rejected. That reason is now moot by our ruling on that issue. A question remains as to whether rejection of the final proof would be proper, in any event, where it is filed before the application for the homestead entry has been allowed. The answer to this is found by considering the purpose of final proof and how rights are acquired under the homestead laws applicable to Alaska.

Obviously, the filing of final proof is the pre-requisite for obtaining a patent to land entered under the homestead laws. A proper final proof would make a prima facie showing of compliance with the homestead laws at the time it is filed. The final proof is the final step of the homestead applicant to secure his rights. The first step for a homesteader is to initiate his

(Continued)

ment of the prior entry, his rights attach instantly on the filing of the relinquishment of the existing homestead and are superior to the rights of a homestead settler who files his notice of settlement and settles on the land subsequent to the relinquishment."

April 26, 1978

homestead claim. The regulations set forth how claims in Alaska may be initiated and how credit may be given for military service as a substitute for certain requirements:

* * * Claims in Alaska under homestead laws may be initiated by settlement on either surveyed or unsurveyed lands of the kind mentioned in the foregoing section. Claims may also be initiated on surveyed lands of that kind by the presentation of an application to enter. [48 CFR 2511.2 (a) (1).]

* * * Any person having a valid homestead settlement claim, or any person who has made homestead application for public lands which is allowed after the date of the filing thereof, or any homestead entryman whose application has been allowed, who after such settlement, application or entry enters the military service, is entitled, in the administration of the homestead laws, to have his military service construed to be equivalent to residence and cultivation upon the tract settled upon or entered, for the period of such service.

* * * No patent will issue, however, until he has resided upon, improved and cultivated his homestead for a period of at least 1 year. * * * [43 CFR 2096.2-5(a).]

The problem concerning appellant's final proof (apart from whether it makes a prima facie showing of compliance with the homestead laws) is that it was filed before his application for entry was allowed and in the absence of a notice of settlement being filed. To comprehend the problem, let us suppose that we were not faced with the question of the prior-filed applications. The facts otherwise would be the same, namely, the filing of a homestead application, no action taken thereon by BLM, and

then over a year later the filing of commuted homestead final proof. If, instead of the homestead application, a notice of settlement had been filed and the lands were then open for settlement, there would be no problem. With the reduction in requirements because the entryman was a veteran, if the final proof was acceptable on its face, there would be an equitable right to a patent, defeasible only through contest proceedings establishing that the requirements of the law had not in fact been met. Thus, the issue becomes whether the filing of an application for entry, rather than a notice of settlement, requires rejection of final proof filed before action is taken on the application.

With specific regard to settlement claims 43 CFR 2567.2 provides:

(b) *Notice of settlement.* (1) A person making settlement on or after Apr. 29, 1950 on unsurveyed land, in order to protect his rights, must file a notice of the settlement for recordation in the proper office for the district in which the land is situated, and post a copy thereof on the land, within 90 days after the settlement. Where settlement is made on surveyed lands, the settler, in order to protect his rights, must file a notice of the settlement for recordation, or application to make homestead entry, in the proper office for the district in which the land is located within 90 days after settlement.

* * * * *

(3) Unless a notice of the claim is filed within the time prescribed in subparagraph (1) and (2) of this paragraph, no credit shall be given for residence and cultivation *had prior to the filing of notice or application to make*

entry, whichever is earliest. [Italics added.]

Regulation 43 CFR 2567.2 quoted above echoes the requirements of the Act of Apr. 29, 1950, as it amended the law extending homestead laws in Alaska by requiring that a notice be filed by the settler within 90 days of settlement. 43 U.S.C. § 270 (1970). That Act also provided the effect to be given to the failure of a homestead settler to file the notice, as follows:

* * * the claimant, in making homestead proof or submitting a showing of residence, cultivation and improvements as a basis for a free survey, shall not be given credit for such residence and cultivation as may have taken place prior to the filing of (a) a notice of the claim in the proper district land office, (b) a petition for survey, or (c) an application for homestead entry, whichever is the earlier.

43 U.S.C. § 270-6 (1970).

The above statutory and regulatory provisions concerning the effect of failing to file a notice of settlement make the only restriction, as far as we are aware, on the effect of failure to file a notice of settlement. Dean did not file a notice of settlement, but he did file a homestead application. Under the above provisions he can be given credit for residence and cultivation from the time application to make entry is made. Thus, by implication there is a recognition that the final proof requirements for cultivation and residence can be satisfied after the application to make entry is filed but before formal allowance of the

entry. There is clear recognition of this fact elsewhere in the regulations. 43 CFR 2511.4-2(a) provides that an entryman "may have credit for residence as well as cultivation before the date of entry if the land was, during the period in question, subject to appropriation by him or included in an entry against which he had initiated a contest resulting afterwards in its cancellation." 43 CFR 2511.3-4(a) provides that "final or commutation proof may be made at any time when it can be shown that there is a habitable house upon the land and that the required residence and cultivation have been had."

[3] The only question which arises from these regulations is the meaning of "subject to appropriation by him" in 43 CFR 2511.4-2(a). Some guidance can be gleaned by considering past rulings under the homestead laws. For years it was the rule within this Department to allow credit for a settler's residence on land while it was covered by a conflicting entry which was subsequently canceled. *McDonald v. Jaramilla*, 10 L.D. 276 (1890). In 1910 this was questioned and a general rule was stated that "credit for residence should not be allowed during the time that the land is not subject to entry by the person maintaining such residence * * *." *Instruction*, 39 L.D. 230, 231 (1910). However, it was indicated that cases arising subsequently would be adjudicated upon each one's material facts. If a contestant settled upon

land within an entry before it was canceled he would still be given credit for his residence during that time if the previous entry was subsequently canceled and the contestant was permitted to make homestead entry. *Instructions*, 43 L.D. 187 (1914). Regulation 43 CFR 2511.4-2(a) continues these basic rules. However, in determining conflicting rights where land within a homestead entry is canceled or relinquished, the Department has long and consistently recognized that the rights of a conflicting settler upon the entry attach immediately upon the termination of the entry and prevail over a subsequent settler or applicant for entry. *Ernest J. Ackermann, supra*; *Bauer v. Neurnberg*, 46 L.D. 372 (1918). Generally the settler who is first in time prevails over any subsequent settler or applicant. An exception recognizes the statutory preference right of a contestant who procures the cancellation of an entry through a contest of the entry. *Id.* Aside from that, land within an allowed entry of record would not generally be considered as subject to appropriation by another.

Although for the purpose of the *Howe, Pope, and Gunderson* cases, *supra*, an application to make homestead entry in Alaska may be deemed the equivalent of an entry for certain purposes, as discussed previously, it does not preclude the inception of rights which can be recognized if the application is

subsequently rejected or withdrawn. Thus, although a settler or subsequent homestead applicant takes a risk that a prior-filed homestead application will be allowed, until that eventuality happens it cannot be said that the land is not subject to appropriation by a homestead settler. Whatever rights he may have are subject to being divested because of the prior right, but if that priority does not ripen into a vested right he may be able to appropriate the land and defeat subsequent claimants. The regulation applied existing law and did not change the law. Therefore, the term "subject to appropriation" does not refer to land for which there was a prior-filed homestead application which is subsequently withdrawn or rejected. It does not require rejection of a final proof asserting compliance with the homestead laws merely because prior-filed homestead applications remain of record. Adjudication of Dean's final proof was premature until action could be taken on his homestead application, and the decision is set aside as to the rejection of the final proof as well as the rejection of his application.²

[4] The fact that the final proof was filed before allowance of an entry also does not preclude consideration of the proof for that reason if entry is allowed. *See Avy Page*

² This action should not be interpreted as any ruling on the validity of the final proof. We are only concluding that it is premature to decide that issue in the circumstances of this case.

Bennett, 49 L.D. 153 (1922) (recognizing settlement prior to allowance of an entry and permitting proof to be made whenever the requirements of the homestead law were satisfied).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and

the case remanded for further action consistent with this decision.

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

EDWARD W. STUEBING;
Administrative Judge.

FREDERICK FISHMAN,
Administrative Judge.

○

April 21, 1978

JONES-O'BRIEN, INC.*

1 SEC 13 Decided April 21, 1978

SUSPENSION DENIED.

1. OIL AND GAS LEASES: SUSPENSIONS—OIL AND GAS LEASES: TERMINATION

A nonproducing oil and gas lease expires and may not be retroactively suspended when there is no suspension application pending at the time of expiration. The filing of an application for permit to drill and Geological Survey's delay in acting on the application do not create a *de facto* suspension of the lease.

Robert E. Mead, 62 I.D. 111 (1955), overruled.

Duncan Miller, 6 IBLA 283 (1972), overruled to the extent inconsistent.

OPINION BY

OFFICE OF THE SECRETARY

DECISION

STATEMENT OF FACTS

On Aug. 1, 1967, the Department of the Interior issued two 10-year noncompetitive oil and gas leases, ES 2538 and ES 2539 in Perry County, Miss., to Arthur E. Meinhart. Meinhart assigned an undivided fifty percent interest in each lease to Irwin Rubenstein. On Sept. 1, 1967, the Bureau of Land Management approved further assignments from Meinhart and Rubenstein of their respective interests in the leases to Beard Oil Co. Almost 10 years later, on May 3, 1977,

Beard designated Jones-O'Brien, Inc. as operator for portions of ES 2538 and ES 2539.

Neither the lessee nor its predecessors in interest made any formal effort to develop either of these leases until they were near expiration. According to a chronology prepared by T. F. Jordon,¹ Vice President of Jones-O'Brien, the first concrete efforts to begin drilling on the leased lands occurred on May 3, 1977, when Jordon attempted to make arrangements to have a drilling rig be available by July 25, 1977, six days before the expiration of the lease.² On June 21, 1977, forty days before the leases were to expire, Jones-O'Brien submitted a complete Application for a Permit to Drill (APD) to the Geological Survey's District Engineer for the area in which the leased lands are located.³

Due to a heavy workload, including the correction of a pollution problem at another site, the District Engineer was unable to complete the work required as a prerequisite to the approval or denial of the

¹ Memorandum from T. F. Jordon, Jr. to Paul F. O'Brien, Jr. dated Aug. 5, 1977. We note that although the memorandum is dated Aug. 5, 1977, it describes events occurring until Sept. 30, 1977.

² The chronology further indicates that the rig would not, in fact, have been available until the end of September.

³ The operator submitted an APD on June 16, 1977. However, since the application was not complete, the district engineer requested additional data the next day. The necessary data were received on June 21, 1977. (See Nov. 2, 1977 memorandum from the District Engineer to the Eastern Area Oil and Gas Supervisor for Operations.)

* Not in Chronological Order.

APD before the expiration of the leases on July 31, 1977. Further, for the same reasons, the District Engineer did not notify Jones-O'Brien in writing that its application would not be acted upon as provided by NTL-6, 41 FR 18116 (1976). The record indicates that the applicant believed, apparently as a result of conversations its representatives had with the District Engineer,⁴ that it was automatically entitled to a lease extension if the application was not acted upon before the expiration of the lease.⁵

The Geological Survey took no written action on the APD until August 19, 1977, when the District Engineer informed Jones-O'Brien that his office had been unable to complete an environmental assessment and that it should file a request for suspension of operations and production.⁶ On Aug. 29, 1977, nearly a month after the leases had expired, the Geological Survey received a written request for suspension for these leases. On Feb. 9, 1978,

⁴ See Feb. 6, 1976 Affidavit of Thomas F. Jordan, Jr. We assume throughout the decision that the District Engineer made this representation to the applicant. *But see also*, n. 11, at p. 8 below. We also note that at the time this advice was allegedly given, the U.S. Geological Survey, Conservation Division Manual stated, "There is no authority for reinstating a lease by making a suspension retroactive and all applications for a suspension received after a lease expiration date will be handled accordingly." CDM 646.3.3G.

⁵ Memorandum from Eastern Oil and Gas Supervisor, through Conservation Manager, to Acting Chief, Conservation Division (Oct. 4, 1977).

⁶ This letter states that the expiration date of the leases was Aug. 31, 1977. The District Engineer subsequently recognized and corrected the error in the Nov. 2, 1977 memo referred to above.

Jones-O'Brien filed a letter in support of its suspension application.

A noncompetitive oil and gas lease is issued for a primary term of 10 years, and continues for as long after its primary term as oil and gas is produced in paying quantities. 30 U.S.C. 226(e) (1970). A single two-year extension can be earned if the lessee was diligently conducting actual drilling operations on the date the primary term of the lease was to expire. 30 U.S.C. § 226(e) (1970); *Enfield v. Kleppe*, No. 76-1737, 566 F.2d 1139 (10th Cir., Dec. 16, 1977). The two-year extension was added by Congress in 1960 to provide an "impetus toward exploration for oil and gas and reward those who do so diligently." H.R. Rep. No. 1401, 86th Cong., 2d Sess. at 5.

Normally, a lease automatically expires in the absence of either production or diligent drilling on the date the primary term of the lease expires. A lease which might otherwise terminate can be preserved by a suspension. 30 U.S.C. § 226(f) (1970). There was neither production nor drilling on the expiration date of the leases involved in this case.⁷ The leases were not suspended on that date. In the absence of other circumstances, such as a retroactive suspension, both leases expired by operation of law.

For a variety of reasons, however, Jones-O'Brien contends that

⁷ On July 1, 1977, the Geological Survey approved communitization agreement E-47 covering both leases. Drilling on one lease under this agreement could be considered to benefit both leases.

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the Secretary should now suspend the lease, and approve the application to drill. The question presented is whether the Secretary may now suspend these leases effective at some time prior to their expiration on the basis of a suspension application filed subsequent to their expiration date.

DISCUSSION

The Mineral Leasing Act of 1920 authorizes the Secretary of the Interior to suspend oil and gas leases for several reasons, including in the interests of conservation, 30 U.S.C. § 209 (1970); 43 CFR 3103.3-8. The Department may suspend a lease in the interest of conservation where action cannot be taken on an application because of the time needed to comply with NEPA. See Solicitor's Opinion, 78 I.D. 256, 260 (1971); *Gulf Oil Co. v. Morton*, 493 F.2d 141 (9th Cir. 1973); *Union Oil Co. v. Morton*, 512 F.2d 743 (9th Cir. 1975). The Secretary is under no obligation to suspend; he may do so in his informed discretion after making the necessary finding that a suspension is in the interest of conservation. *E.g. U.S. Oil and Development Corp.*, A-26269 (Oct. 30, 1951). See *Stickelman v. United States*, 563 F.2d 413, 416 (9th Cir. 1977).

If a lease is in a nonproducing status (as are the leases involved here), only the Secretary of the Interior may approve a suspension and

that suspension may be done only in the interests of conservation. 43 CFR 3103.3-8(a). According to the Department's regulations, "A suspension shall take effect as of the time specified in the direction or assent of the Secretary." 43 CFR 3103.2-8(c). The regulations also state that a suspension application is to be filed in triplicate with the Oil and Gas Supervisor. 43 CFR 3103-8(a). Neither the statute nor the regulations explicitly state when an application must be filed (before or after the lease expires) or whether a suspension may be granted retroactively.

In *U.S. Oil and Development Corporation, supra*, an oil and gas lessee whose lease was in a nonproducing status filed a suspension application 19 months after the lease expired. The Department raised but did not decide the question whether a suspension application could be granted retroactively, *i.e.*, to revive the expired lease. Instead, it said that *assuming* the authority existed it should only be exercised where the lessee exercised "due diligence" to seek that relief and held that the filing of an "informal application" 19 months after the lease term ended was not diligent. The decision also noted:

The practice of reviving, through the "assent" procedure under Section 39, oil and gas leases long since expired would adversely affect the stability of the administration of the oil and gas provisions in the Mineral Leasing Act.

U.S. Oil and Development Corp., *supra*, at 2.

A similar result was reached in *Eagle Consolidated Oil Co.*, A-26259 (Jan. 3, 1952), where the Department denied a suspension request of an applicant who waited 29 months after lease expiration to apply for a suspension. The language in *U.S. Oil and Development Corp.*, that retroactive suspensions would adversely affect the stability of the administration of the Mineral Leasing Act was cited favorably.

Three years later, in *Robert E. Mead*, 62 I.D. 111 (1955), the Department again addressed the question of retroactive suspensions. Mead had received a partial assignment of a 5-year oil and gas lease due to expire Apr. 30, 1953. The lease was in producible status, but the well was shut-in for lack of transportation when the primary term expired on Apr. 30, 1953. On May 20, 1953, Mead (and the operator of the lease, Griffith Moore) filed a request for a lease suspension. The supervisor denied the suspension request as untimely filed; Mead and Moore appealed. Two other facts are pertinent:

(1) Moore entered active military Service on Apr. 17, 1953, and was on active duty until May 5, 1953.

(2) Appellants had spent over \$18,000 to drill two wells and had discovered marketable gas.

The decision noted that the Department had previously examined but not resolved the question of retroactive suspensions and discussed whether this application met

the "diligence" standards established in those cases. Its review of the factual situation indicated that:

*** a lessee is not obligated to request a suspension of operations even though he may be entitled to it. *** In other words, if the appellants had not requested a suspension until Apr. 30, 1953, the Department could not complain that they had not exercised due diligence in requesting the suspension. ***

62 I.D. at 114. The decision went on to hold that the filing of the suspension application 20 days after the lease expired was timely, and that if legally acceptable, the suspension application should be granted in view of:

(1) the absence of a lack of due diligence in applying for a suspension;

(2) the substantial expenditures *** which resulted in a well capable of production; and

(3) [the finding] that a suspension *** would *** be in the interest of conservation. ***

The decision approved a retroactive suspension on the grounds that it is not expressly barred by sec. 39, and that it is "necessary" to give sec. 39 its full intent. 62 I.D. at 115. The decision does not distinguish the problems discussed in *U.S. Oil and Development Corp. supra* or *Eagle Consolidated Oil Co., supra*, or the distinction between applications filed before and after the lease term expired. It also concludes, without citation, that sec. 39 allows revival of the lease terms.

United Manufacturing Co., 65 I.D. 106 (1958), seems to have reached a result in conflict with *Mead*. In *United Manufacturing*,

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a lease had automatically terminated because the lessee had failed to pay timely the fourth year's rental. The company raised the argument, among others, that the Department could retroactively suspend the lease and wipe out its failure to pay the rental. Although *Mead* was decided only three years previously, it was not cited or discussed in *United Manufacturing*; instead, the decision asserted that "the Department has never expressly ruled on the question whether the first sentence of sec. 39 confers authority on the Secretary to waive, suspend or reduce rentals which have accrued *before* any request is made for waiver, suspension or reduction of the rentals." (Italics added). 65 I.D. at 117.

The decision went on to reject the notion that this authority existed, citing *William Aherns*, 59 I.D. 323 (1946) as a contemporaneous construction of sec. 39 that expressed doubt about retroactive suspensions. *United Manufacturing* also concluded that the legislative history of the 1946 amendments to sec. 39 suggests "that the Secretary was not intended to be given authority to waive rentals retroactively." 65 I.D. at 117. The Department concluded that it had no authority to suspend a lease retroactively to waive failure to pay rent on time. 65 I.D. at 119.⁸ See also *Franco*

Western Oil Company, 65 I.D. 316, 320 (1958), *aff'd sub. nom., Safarik v. Udall*, 304 F.2d 944 (D.C. Cir.), *cert. den.*, 371 U.S. 901 (1962) assignments must be filed prior to last month to earn extension but decision to approve can be made after lease term expires); *Solicitor's Opinion*, 64 I.D. 309 (1957) (issuance of leases, assignments and request for suspensions may be backdated to date of application).

In *Duncan Miller*, 6 IBLA 283 (1972), the lessee had filed a suspension application *before* the lease expired (in the 7th month of the 10th year) with the Bureau of Land Management (BLM) instead of the Geological Survey as the Department's regulations require. The BLM denied the application and the lessee appealed. On appeal the IBLA affirmed the decision and said:

[e]ven if BLM were authorized to grant a suspension, the fact remains that the subject lease expired at the end of the tenth year, and there is no statutory authority, in the circumstances of this case, to reinstate and extend a lease which expired by the running of its term.

Miller established a rule at variance with both *MEAD* and *United Manufacturing*. It asserts that if the Department does not act on a suspension application *before* the lease term expires, it loses all authority to act. Significantly, the case reaches this conclusion without any discussion of prior departmental precedent or reference to the history of sec. 39. Its conclusions are

⁸ Although Congress subsequently changed the Department's authority to reinstate oil and gas leases terminated for failure to pay rent, for example, Act of May 12, 1970, 84 Stat. 206, 30 U.S.C. § 188(c) (1970) it has not changed the suspension authority.

baldly stated without any supporting rationale.

Finally, and most recently, in an unpublished (and unnumbered) opinion, the Acting Deputy Solicitor concluded that a retroactive suspension could only be granted where the application was filed *before* the lease expired. Memorandum from Acting Deputy Solicitor to Assistant Secretary Energy and Minerals, Subject: Suspensions of Operations and Production for Onshore Oil and Gas leases C-15001 and C-15019 (May 10, 1977). Those two lessees had filed APD's approximately one month before the primary term was expired. After being informed that the Geological Survey could not act on those applications in time, the lessees promptly (before the lease expired) applied for suspensions. The Department did not act on the applications prior to lease expiration. The Acting Deputy Solicitor informed the Assistant Secretary that it would be proper to suspend the leases and make the suspensions effective from the date of the applications because they were filed before the lease expired. This conclusion is consistent with the directions to the Geological Survey in the Conservation Division Manual previously quoted on p.2 n.4.

The Acting Deputy Solicitor's memorandum notes that the *Mead* decision which approved a retroactive suspension based on a suspension application filed after the lease expired, "makes no real attempt to explain the legal authority for what amounts to a reinstatement of the

lease." Memorandum at 3. Analogizing to the rules for extension of 5-year leases, the Acting Deputy Solicitor concluded that the "filing of an application [prior to lease expiration] throws the lease into a state where expiration is at least delayed to allow for processing of the application." Memorandum at 4.

[1] For a combination of reasons, I have concluded that the Acting Deputy Solicitor's Opinion correctly states the authority available to me under sec. 39: nonproducing leases may be suspended retroactively in the interest of conservation if a suspension application is properly filed before the lease expires.⁹

First, in several situations the Department has considered whether documents filed after a lease or permit expires have any effect. In each instance, the Department decided they do not on the grounds that nothing was "*in esse*" at the time the approvals were sought. *See Utah Power and Light Co.*, 14 IBLA 372 (1974); (prospecting permit cannot be assigned after the permit expired); *Solicitor's Opinion*, 64 I.D. 309 (1957) (application for assignment filed prior to lease expiration can be basis for extension while application filed after expiration cannot.) An application filed before

⁹ Having reached this conclusion, it is unnecessary to decide whether, after full consideration of the facts, this would be a proper case for the exercise of the discretionary power to suspend if that power were available. Granting a suspension in this and like cases might encourage lessees to postpone diligent development of oil and gas leases until the last month of a 10-year lease and thus diminish the ability of federal lands to contribute to this Nation's energy supply.

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the lease expires, can be viewed as preserving the right of the Department to act on the application. If a suspension application is not filed prior to the lease expiration, the lease ends totally and there is nothing in existence for the Department to suspend. *Cf., J. P. Hinds*, 83 I.D. 275 (1976). (the Department cannot breathe life into a mining claim located on withdrawn lands by retroactively revoking the withdrawal.)

Second, the same rule that governs suspensions to prevent leases from automatic termination because the lessee failed to pay the annual rental on time must govern suspensions to prevent automatic expiration of a lease the end of the primary term. The authority to suspend in both cases comes from sec. 39, 30 U.S.C. § 209 (1970), and both involve leases ending by operation of law. In the former instance the rule in the Department has been clear and consistent since 1946; *i.e.*, the Department lacks authority to suspend a lease which terminated by operation of law for failure to pay advance rent when no suspension application was filed before the lease terminated. *United Manufacturing Co., supra; William Aherns, supra.*

This result is sound from both a legal and policy viewpoint. The lack of authority to suspend in the rental situation has been made clearer by Congressional action subsequent to *United Manufacturing*. Although the Mineral Leasing Act still requires automatic termination of a lease for failure to pay

rental on time, in 1970 Congress devised a system that calls for strict compliance with the terms of the statute, but allows reinstatement in specified situations. If the rental payment is not made on time, a lease can be reinstated only if the failure to pay was either justifiable or not due to a lack of diligence. *Louis Samuel*, 8 IBLA 268 (1972), *appeal dismissed*, Civil No. 74-1112-EC (C.D. Cal., Aug. 26, 1974). If the Department had the authority to revive leases prior to 1970, the 1970 amendments would have been unnecessary. It would now completely frustrate Congress' intent to invent another system to reinstate terminated leases. Since sec. 39 has not and cannot be construed to reach that result in the rental situation, it cannot be construed to reach that result here.

Third, NTL-6, as discussed more fully later in this decision, has changed the rule on what constitutes a diligent application for a suspension. Specifically, it puts lessees on notice that if an APD is not timely approved, they have the burden of protecting their lease rights. 42 FR at 18116. While at the time of *Mead* it may have been proper to assert that a lessee had no obligation to request a suspension until the last days of the lease term, that presumption is no longer justified.

Fourth, I do not agree with the assumption in *Mead* that the ability to suspend under the facts there (and here) are "necessary to ad-

minister the Mineral Leasing Act." The contrary is true. The right to file a suspension application long (or shortly) after a lease has expired creates the possibility for fraud and other abuses. A subsequent lessee could properly consider a late-filed suspension application to be a significant cloud on a subsequently issued lease for that land and would probably defer expenditures until the question was resolved. As the Department said in *U.S. Oil and Development Corp., supra*, reviving leases retroactively would adversely affect the stability of the administration of the Mineral Leasing Act. For all of these reasons, *Robert E. Mead*, 62 I.D. 111 (1955) is overruled.¹⁰

The applicants also make two other arguments in support of their request for suspension. They are:

(1) That a verbal request for a suspension prior to the date of lease expiration in combination with a written request within a reasonable time thereafter satisfies the regulatory requirements; and

(2) that delay in action on the drilling permit application caused a *de facto* suspension of operations.

Neither argument is persuasive. First, the Department's suspension regulations specifically require a suspension application to be filed in writing in triplicate with the oil and gas supervisor. There is no authority to waive that requirement. In the past, the Department has

held that a written suspension application filed in the wrong office was improperly filed. *Duncan Miller, supra*. All persons dealing with the government are presumed to have knowledge of its regulations. 44 U.S.C. § 1507 (1970). Here, the regulations clearly and unequivocally require a suspension request to be in writing. 43 CFR 3103.3-8 (a). An oral request does not meet the requirements of the regulations.¹¹

Second, the Department has never recognized a *de facto* suspension of a lease. A *de facto* suspension is not consistent with the Department's regulations which, for nonproducing leases, require the Secretary to order a suspension. Moreover, there is no basis to find a *de facto* suspension here. Jones-O'Brien had working knowledge of NTL-6 and refers to it in at least one letter to the Department. NTL-6 informs all applicants for drilling permits that plans should be submitted at least 30 days in advance of any starting time. It also says, 41 FR at 18117,

¹¹ This decision assumes, but does not decide that an oral suspension request was made prior to lease expiration. An affidavit of Thomas Jordan dated Feb. 6, 1978, states that he requested an "extension" of the lease on July 13, 1977, and on July 30, 1977. Neither of these requests are contained in a chronology prepared by Jordan dated Aug. 5, 1977. For July 13, the Jordan chronology says: "Call to Godfrey. Told him of delay of rig (9/20 or 90 days) from last week and offered to write letter telling of delay. * * * We will spud with spudder before July 31, 1977 if we get permit and move in big rig later." This chronology indicates that as little as two weeks before the lease expired, the operator was having difficulty getting the needed equipment. The "suspension" request is not even mentioned.

¹⁰ With respect to this point it is proper to act after lease expiration on applications filed before the lease expired. *Duncan Miller*, 6 IBLA 233 (1972) is overruled to the extent it is inconsistent with this decision.

May 12, 1978

The early filing of a complete application is no guarantee that approval thereof will be granted within the 30-day period, as environmental considerations or the volume of applications in the affected Federal agencies may result in more than 30-day delay.

Elsewhere, NTL-6 says "operators are encouraged to file applications well in advance of the time when it is desired to commence operations." 41 FR 18119. Thus, NTL-6 gives no reason to lead an operator to assume that a *de facto* suspension would occur if the application was not approved; in fact, it gives the operator every reason to conclude the opposite. NTL-6 even warns operators in the event of delay to "take such appeal or other recourse as is allowed by law and/or regulation." 41 FR at 18117. In this case, the proper step for Jones-O'Brien would have been to file a timely suspension application.¹²

(Sgd) JAMES A. JOSEPH,
Acting Secretary.

APPEAL OF TANACROSS, INC.

2. ANCAB 379

Decided May 12, 1978

Appeal from the Decision of the Alaska State Director, Bureau of Land Management #F-14943-B dated September 14, 1976, rejecting

¹² NTL-6 does require the Geological Survey to notify the lessee if the application would not be approved on time, a step that was not taken here until after the lease expired. This does not excuse Jones-O'Brien's failure to file a suspension application. In the absence of affirmative action on the APD, the lessee must assume that the application will not be approved, and not the reverse.

in part a land selection application of Tanacross, Inc., for the lands in T. 18 N., R. 13 E., Copper River Meridian (hereinafter referred to as C.R.M.), pursuant to § 12 of the Alaska Native Claims Settlement Act (hereinafter referred to as ANCSA), 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974, as amended, 89 Stat. 1145 (1976)).

Decision of the Bureau of Land Management dated Sept. 14, 1976, affirmed in part and remanded in part May 11, 1978.

1. Alaska Native Claims Settlement Act: Survey: Procedures

The Bureau of Land Management was not in error in using survey procedures which varied from those specifically stated in the 1947 BLM Manual of Surveying Instructions when such procedures were utilized in order to avoid perpetuating an earlier surveying error into a new original township survey.

2. Alaska Native Claims Settlement Act: Land Selections: Village Selections—Alaska Native Claims Settlement Act: Administrative Procedure: Estoppel

The State Director, Bureau of Land Management, is not estopped from denying appellant's (Village Corporation) application for certain lands because BLM erroneously included those lands on its land records and on the map of lands sent to appellant as eligible for withdrawal under § 11(a)(1) of ANCSA.

3. Alaska Native Claims Settlement Act: Withdrawals: Cornering: Surveying Offsets

A township, which is by legal description and in the prescribed plan of rectangular

survey, located within a § 11(a) (1) (C) of ANCSA withdrawal, becomes excluded from such withdrawal when it fails to physically share a common corner with a township withdrawn under § 11(a) (1) (B) of ANCSA because BLM made an offset at that corner in order to cure a survey error.

APPEARANCES: John W. Burke, Esq., Joyce E. Bamberger, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management; Reggie Denny, Vice President, Tanacross, Inc.; Larry A. Wiggins, Esq., on behalf of Tanacross, Inc.; Jeffrey B. Lowenfels, Esq., Assistant Attorney General, Thomas E. Meacham, Esq., Assistant Attorney General, on behalf of the State of Alaska.

OPINION BY

ALASKA NATIVE CLAIMS APPEAL BOARD

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in ANCSA, *as amended*, 43 U.S.C. §§ 1601-1624 (Supp IV, 1974), and implementing regulations in 43 CFR Part 2650 and Part 4, Subpart J, hereby makes the following findings, conclusions, and decision affirming in part and remanding in part that Decision of the State Director, Bureau of Land Management (hereinafter referred to as the State Director) #F-14943-B.

On Dec. 9, 1974, the appellant, Tanacross, Inc., filed an application (F-14943-B) with the Bureau of Land Management for the lands in T. 18 N., R. 13 E., C.R.M., pursuant to § 12(a) of ANCSA. A village

may select only those lands which have been withdrawn for such purpose in accordance with § 11(a) (1) of ANCSA. This statutory provision states in pertinent part:

The following public lands are withdrawn subject to valid existing rights, from all forms of appropriation under the public land laws, * * *

(A) The lands in each township that encloses all or part of any Native village identified pursuant to subsec. (b) ;

(B) The lands in each township that is contiguous to or corners on the township that encloses all or part of such Native village; and

(C) The lands in each township that is contiguous to or corners on a township containing lands withdrawn by paragraph (B) of this subsec.

* * * * *

On Sept. 14, 1976, the Bureau of Land Management issued a decision rejecting appellant's application for selection of the lands here in question (T. 18 N., R. 13 E., C.R.M.). The essence of this decision can be summarized as follows:

Township 18 North, Range 13 East, Copper River Meridian would have been withdrawn under section 11(a) (1) (C) if the northwest corner of the subject township had been a common corner with the three adjacent townships. This did not occur because the northwest corner was originally established in a different location than the mathematical location shown on the protraction diagrams which were prepared at a later date. The protraction diagrams do not control the position of survey corners or lines between them once established upon the ground. The adjacent townships to the north were surveyed based upon the protraction diagrams and were closed upon the existing surveyed areas in the field. These townships were not extended from, but rather

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tied into the prior surveys, which created an offset between certain township corners. This offset would not have occurred had the original northwest township corner been situated in the same position as that described by the mathematically constructed protraction diagrams.

The Board has before it the situation where a township fails to physically corner on another township pursuant to § 11(a)(1)(C) because BLM corrected a surveying error at that corner and as a result an offset was created. The question arises as to whether this planned offset adequately establishes the basis for State Director's denial of the appellant's selection of the township here in question (T. 18 N., R. 13 E., C.R.M.), because it does not "corner on" a township withdrawn pursuant to § 11(a)(1)(B).

The facts upon which this controversy is based are contained in the pleadings and incorporated materials filed in this case. In 1905 Alfred B. Lewis commenced a BLM survey on the Fourth Standard Parallel North and proceeded north along the Third Guide Meridian East for a distance of 12 miles (two townships' boundaries). At the northernmost point of this survey line Lewis set in a granitestone corner marking the common corner of the four townships here in question (T. 18 N., R. 13 E.; T. 18 N., R. 12 E.; T. 19 N., R. 12 E.; and T. 19 N., R. 13 E.). Subsequent BLM surveys in this immediate area were based on this 1905 survey and utilized Lewis' monument. The south line of T. 17 N., R. 12 E., the south and

north township boundaries of T. 18 N., R. 11 E., and T. 18 N., R. 12 E., were both based on the Lewis survey line of 1905 which terminated at the northwest corner of T. 18 N., R. 13 E. Likewise, the west boundary of T. 18 N., R. 12 E., was controlled by this 1905 survey. In T. 17 N., R. 12 E., the easternmost two rows of sections were surveyed by BLM based upon the 1905 survey, as were Sections 18, 19 and 20 in T. 18 N., R. 13 E.

In 1962 a surveyor by the name of Ray Harpin was commissioned by BLM to survey the three townships which should have shared the monument marking the northwest corner of T. 18 N., R. 12 E., *i.e.*, T. 19 N., R. 12 E.; T. 19 N., R. 13 E.; and T. 18 N., R. 13 E. Instead of utilizing the terminus of Lewis' 1905 survey (northwest corner of T. 18 N., R. 13 E.) and extending that line northward to the Fifth Standard Parallel North, Harpin established points on the Fifth Standard Parallel North and ran the township boundary lines southward. Harpin found that by the use of his surveying technique, the Lewis corner establishing the northeast corner of T. 18 N., R. 12 E., was northeast of the position it should have been located. (Harpin utilized newly developed electronic measuring devices in this survey to measure lines and angles, *i.e.*, the airborne control system (ABC).) He reported this variation to his Cadastral Engineer, Don Harding, who chose to create an offset rather than perpetuate the error made by Lewis in 1905. It is

this offset between the southeast corner of T. 19 N., R. 12 E., C.R.M., and the northwest corner of T. 18 N., R. 13 E., C.R.M., which, according to the State Director, prevents the township in question (T. 18 N., R. 13 E.) from cornering on a township within the purview of § 11 (a) (1) (C) of ANCSA.

Before addressing the precise issues involved in this appeal in some detail, it is important to pause briefly and discuss the reasons why the township here in question (T. 18 N., R. 13 E., C.R.M.) was not withdrawn by virtue of being " * * * contiguous to * * * a township containing lands withdrawn by paragraph (B) of this subsec. * * * " (§ 11 (a) (1) (C) of ANCSA.) Theoretically, T. 18 N., R. 13 E., would have been so withdrawn because its western boundary is contiguous to the eastern side of T. 18 N., R. 12 E., which, in turn, would have been withdrawn pursuant to § 11 (a) (1) (B) of ANCSA because it normally would have cornered on T. 19 N., R. 11 E. (the core township withdrawn pursuant to § 11 (a) (1) (A) of ANCSA). (See diagram A, p. 101.) This theoretical withdrawal structure could not, however, be followed in this case because of two factors. First, on the basis of Lewis' survey of 1905, the north and west boundaries of T. 18 N., R. 12 E., were surveyed and established prior to the Harpin survey of 1962. As will be discussed in some detail at a later point in this opinion, these boundaries could not be altered by Har-

pin when he made his survey in 1962. When Harpin surveyed T. 19 N., R. 12 E., starting at its southeast corner (which, as previously discussed, was offset from the northwest corner of T. 18 N., R. 13 E.), he ran the southern boundary of that township out its prescribed distance and, as a result, a corresponding offset was created between T. 19 N., R. 11 E. (the core township) and T. 18 N., R. 12 E. It is by virtue of these two corresponding offsets between townships that the theoretical structure of township withdrawals cannot be followed under the facts of this case. Instead, the withdrawal pattern (as it pertains to the township here in question) is as follows: (1) T. 19 N., R. 11 E. (core township) is withdrawn pursuant to § 11 (a) (1) (A) of ANCSA; (2) T. 18 N., R. 11 E., and T. 19 N., R. 12 E., are withdrawn pursuant to § 11 (a) (1) (B) of ANCSA because they are contiguous to the core township; (3) T. 18 N., R. 12 E., does not corner on the core township because of the above-mentioned offset and therefore is not withdrawn pursuant to § 11 (a) (1) (B); (4) T. 18 N., R. 12 E., however, is contiguous to both T. 19 N., R. 12 E. and T. 18 N., R. 11 E. (already withdrawn under § 11 (a) (1) (B)) and is, therefore, withdrawn under § 11 (a) (1) (C) of ANCSA. (See diagram B, p. 101.) As can readily be seen under this withdrawal pattern, T. 18 N., R. 13 E. is contiguous to a township withdrawn under § 11 (a) (1) (C) but not contiguous to a township withdrawn pursuant to

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§ 11(a) (1) (B) as required, and as a necessary result, it was never withdrawn under the statutory framework of ANCSA.

DIAGRAM A

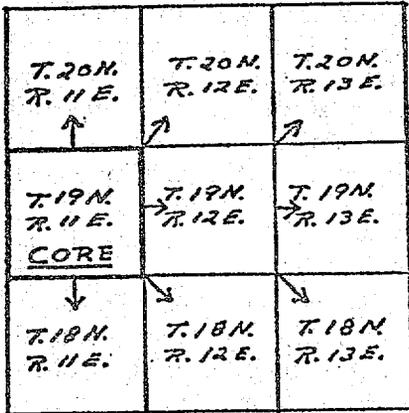
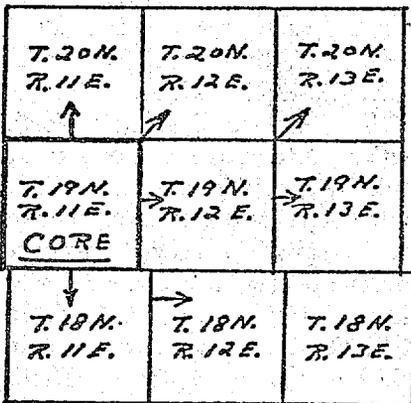


DIAGRAM B



In reviewing the pleadings and related materials incorporated into the record in this appeal, the Board finds that the following issues have been raised:

1. When surveying an original township, did the Bureau of Land

Management critically err in not following the standard surveying procedures (as set forth in the 1947 BLM Manual of Surveying Instructions) but instead employed procedures calculated to eliminate an error made in a prior township survey?

2. Does the fact that BLM erroneously included the township in question (T. 18 N., R. 13 E., C.R.M.) on its land records and on the map of townships sent to appellant as eligible for withdrawal under § 11(a) (1) of ANCSA estop the State Director from subsequently correcting the error and denying appellant's application for certain lands within said township?

3. When a township is by legal description and in the prescribed plan of rectangular survey, located within a § 11(a) (1) (C) of ANCSA withdrawal, does it become excluded from such withdrawal because it fails to corner on a township withdrawn by § 11(a) (1) (C) of ANCSA due to the fact that BLM planned an offset at the corner in order to cure a survey error?

At numerous points throughout appellant's pleadings, the argument is made that because BLM did not follow the surveying methods or techniques prescribed by the 1947 BLM Manual of Surveying Instructions (hereinafter referred to as "Manual") in carrying out the 1962 Harpin survey, that survey, and particularly the southeast corner of T. 19 N., R. 12 E., C.R.M., cannot control and thereby cause

the corner offset which is in question in this appeal. This contention cannot stand for a variety of reasons.

Appellant contends that by virtue of the fact that Lewis set a monument at the terminus of his 1905 survey and designated it as the common corner of four townships (T. 18 N., R. 12 E.; T. 18 N., R. 13 E.; T. 19 N., R. 12 E.; and T. 19 N., R. 13 E., C.R.M.), that corner had to control the subsequent survey of those four townships. This is so, it is argued, even though Lewis' monument was erroneously set.

It is well established that until some rights to specific lands have been acquired under government survey, corrected surveys can be made and substituted for prior ones. *Trustees of the Internal Improvement Funds v. Toffel*, 145 So. 2d 727 (Fla. App. 1962); *Kelsey v. Lake Childs Co.*, 112 So. 887, 93 Fla. 743 (1927). Similarly, surveys by United States surveyors, though sanctioned by the principal duty surveyor of the district, may be corrected when erroneous, *Lane v. Darlington*, 249 U.S. 331, 333, 63 L.Ed. 629, 630, 39 S.Ct. 299 (D.C. 1919); *Murphy v. Sumner*, 16 p. 3, 74 Cal. 316 (1887) and before patent the government may make as many surveys of public lands as the Land Department (BLM) desires, with the last-accepted survey controlling. *United States v. Reimann*, 504 F. 2d 135 (10th Cir. 1974); *Schwartz v. Dibble*, 197 p. 125, 25 Cal. App. 451 (1921).

From this line of authority it appears obvious that the monument set at the termination point of Lewis' 1905 survey could not control over future surveys made to correct errors where valid rights had not been established. Under the facts of this case, no lands in T. 19 N., R. 12 E., C.R.M., were patented or otherwise affected, and therefore the contention that the corner set by Lewis in 1905 controlled the survey of that township cannot stand.

Further, appellant asserts that BLM erred in carrying out the Harpin survey in 1962 because the Manual techniques were not adhered to and as a result, BLM is bound by the corner monument established by Lewis in 1905. More specifically, it is argued that BLM critically erred when it allowed Harpin to survey the eastern boundaries of T. 20 N., R. 12 E., and T. 19 N., R. 12 E., C.R.M., from the Fifth Standard Parallel North southward to correct a survey error made by Lewis in 1905. Appellant contends that the Manual bound BLM to start its survey of the above referenced township boundaries at the northwest corner of T. 18 N., R. 13 E., C.R.M., as erroneously established and monumented by Lewis and run northward to the Fifth Standard Parallel North. Had Harpin commenced his 1962 survey at the northeast corner of T. 18 N., R. 12 E., C.R.M. and gone northward for two more townships, all corrections would have been made against the Fifth Standard Parallel

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North and, therefore, the offset between township corners here in question would not have resulted. The basis for the appellant's position is the language of Section 151 of the Manual which provides:

Wherever practical the township exteriors will be successively through a quadrangle in range of townships, beginning with the townships on the South. The meridional boundaries of the townships will have precedence in the order of survey and will run from South to North on true meridians.

First, there is the question of whether the surveying instructions contained in the Manual have the force and effect of law upon BLM. Nowhere in the record of this appeal is it alleged by the parties that the Manual has such effect. The Manual states that it is issued for the guidance of the employees of BLM (see pp. III and 2 of Manual).

Secondly, it appears that the Manual provides for BLM to utilize surveying techniques other than those specifically contained in the Manual under certain circumstances. The Special Instructions state, in pertinent part:

In the execution of the surveys * * * the surveyor assigned is authorized and directed to make the surveys hereinafter set out, and necessary retracements and restoration of points of control, and will be *guided* by the Manual of Surveying Instructions, the provisions of these instructions and the provisions of any Supplemental Instructions which may be issued pursuant to the report of complications or *by reason of additional authorization.* (Italics added.)

(Special Instructions, Group 116, Alaska, State of Alaska Selection

Mentasta Area, United States Department of the Interior, Bureau of Land Management, Fairbanks District Office, June 28, 1962.)

This language clearly reveals the flexibility of the BLM system of survey and specifically allows for deviations to be made from the Manual instructions. The fact of this case reveals that Harpin advised Donald E. Harding, the Cadastral Engineer, of the variation between his location of the southeast corner of T. 19 N., R. 12 E., C.R.M., and that ostensibly established by Lewis, and the Cadastral Engineer chose to create an offset corner rather than perpetuate the error. Thus, the establishment of a new corner by Harpin, and the resulting offset at the point in question, would seem to be in accord with language of the survey's Special Instructions.

Third, and most significantly, is the fact that the Manual contains provisions other than Section 151 which would allow BLM the flexibility to cure a surveying error in such a manner that the error is not perpetuated into a new survey. This conclusion that surveying errors should not be perpetuated is supported by two specific sections of the Manual. Section 8 states:

Methods are provided, as will be explained in detail in chapter III, by which the discrepancies or inaccuracies of the older surveys *are not extended into the new surveys.* (Italics added.)

Section 137, continues the reasoning of the above-quoted language:

* * * The purpose [of correcting old surveys] is to avoid the incorporation

of the discovered discrepancies of the older lines *in the running of new original surveys* where the current specifications are to be adhered to. (Italics added.)

This section also supports the concept that discrepancies should be cured to conform the lines nearest the error to the rectilinear system:

[A] further objective is to return to "normal" procedure in those many places of the older surveys where there were departures or exceptions made in the rectangular plan.

In light of the above provisions, it is obvious that the Manual gave BLM ample latitude to create an offset at the point in question. Further, the taking of such action by BLM seems justifiable as a rational means to avoid perpetuating the error throughout the quadrant and to restore the survey lines to the rectilinear system.

[1] The Board therefore finds the Bureau of Land Management was not in error in using survey procedures which varied from those specifically stated in the 1947 BLM Manual of Surveying Instructions when such procedures were utilized in order to avoid perpetuating an earlier surveying error into a new original township survey.

The second contention raised by appellant is that the State Director is estopped from denying appellant's application for certain lands within T. 18 N., R. 13 E., C.R.M., because BLM erroneously included that township on its land records and on the map of townships sent to appellant as eligible for withdrawal under § 11(a)(1) of ANCSA.

[2] The Board finds sufficient au-

thority for the propositions that the government is not bound by the erroneous acts of its agents when the act would result in an arrangement not sanctioned by law, and the government is not estopped to attack illegality. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 408 (1917); *Reed v. Morton*, 480 F.2d 634, 643 (9th Cir. 1973), *cert. den.*, 414 U.S. 1064 (1973). Under § 11(a)(1)(C), only townships cornering or contiguous to lands withdrawn under § 11(a)(1)(B) could be withdrawn. This statutory mandate could not be preempted by an erroneous BLM map sent to the appellant to assist it in making selections. Therefore the Board holds that the State Director is not estopped from denying appellant's application for certain lands because BLM erroneously included those lands on its land records and in the map of lands sent to appellant as eligible for withdrawal under § 11(a)(1) of ANCSA.

As was discussed in the introductory comments, the Board has before it the situation where a township fails to physically corner on another township pursuant to § 11(a)(1)(C) because BLM has corrected a surveying error at that corner and as a result an offset was created. The question presented therefore is, does this planned offset adequately establish the basis for State Director's denial of the appellant's selection of the township here in question (T. 18 N., R. 13 E., C.R.M.), because it does not "corner on" a township withdrawn pursu-

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ant to § 11(a)(1)(B)? The Board's conclusion that such denial of township selection was justified is based on the following reasons.

First, while appellant paid some lip service to the argument that in the prescribed plan for surveying the public lands, the two townships which bring this appeal before the Board (T. 19 N., R. 12 E., and T. 18 N., R. 13 E., C.R.M.), physically corner in the ordinary and literal sense, this contention is untenable under the circumstances of this case. In Webster's New Collegiate Dictionary (1976), the intransitive verb "corner" is defined as "to meet or converge at a corner or angle." The verb "converge," means "to come together and united in a common interest or focus." *Id.* Therefore, close proximity is distinguishable from cornering and, further, only cornering townships have been expressly included for withdrawal under ANCSA (§ 11(a)(1)(C)).

Second, and most important, BLM has administratively interpreted "cornering" to mean those townships physically cornering, and since its decision in the Order Granting Petition for Reconsideration and Decision on Reconsideration, In Re: *Appeal of Eklutna, Inc.*, 2 AN CAB 214, 84 I.D. 982 (1977) (AN CAB # VLS 75-2), the Board is bound to follow that administrative definition.

In the above-cited Order, the Board cited *Udall v. Tallman*, 380 U.S. 1 (1965), to the effect that:

When faced with a problem of statutory construction, this Court shows great

deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." [citations omitted] "Particularly is this respect due when the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." * * * *Id.* at 16.

Similarly, the Board reaffirmed in the above-referred to *Eklutna* decision that:

When the meaning of the language of a statute is not free from doubt, courts have regarded as controlling a reasonable, consistently applied administrative interpretation of the statute [*Bhlert v. United States*, 402 U.S. 99, 105 (1971)].

From these well established legal premises, the Board found that under the facts of the said *Eklutna* case,

It appears from this document that the Bureau of Land Management examiners found no ambiguity in the term "cornering" and assumed that the term meant actual touching rather than cornering by legal description. * * *

* * * * *

In view of * * * the fact that the Bureau of Land Management and the Federal-State Land Use Planning Commission have interpreted cornering to mean those townships which *physically touch*, this Board does not believe that the Bureau of Land Management's interpretation of the meaning of cornering is unreasonable. (Italics added.) (*Id.* at 8 and 84 I.D. 989.)

Not only did this Board conclude that BLM's definition of "cornering" (*i.e.*, physically touching) was reasonable and controlling, but it also found that the

* * * Bureau of Land Management consistently used this definition of cornering in identifying those lands withdrawn under § 11(a) (1) for all villages under ANCSA. * * *

In light of the fact that the Board found BLM's definition of cornering to be (1) reasonable and (2) consistently applied, it held that the two-part test of the *Ehlert* case, *supra*, had been met and the administrative interpretation of the statute was controlling. This left the Board no other alternative but to rule in the above-cited *Eklutna* case that

* * * townships, which by legal description have a common corner, but are not in actual physical contact due to the location of a "standard parallel" or "correction" line, such townships shall be considered as not cornering for purposes of § 11(a) of ANCSA. * * *

While the physical offset which separated the two corners in the *Eklutna* case, *supra*, was caused by a "standard parallel" or "correction" line and not an offset used to correct a survey error, as in the present case, the distinction is not appreciable. It has been determined by the Board, following the dictates of *Ehlert*, that two townships corner within the purview of § 11(a) (1) of ANCSA only if they physically corner and that mere cornering by legal description will not suffice. Therefore, under the

holding in *Eklutna* an actual offset between township corners prevents them from cornering as prescribed by ANCSA, whether it be due to "standard parallels" ("correction" lines) or survey readjustments necessitated by survey errors.

[3] In summary, the Board hereby finds, for the above set forth reasons that a township, which is by legal description and in the prescribed plan of rectangular survey, located within a § 11(a) (1) (C) of ANCSA withdrawal, becomes excluded from such withdrawal when it fails to physically share a common corner with a township withdrawn under § 11(a) (1) (B) of ANCSA because BLM made an offset at that corner in order to cure a survey error.

Initially there was a fourth issue raised in this appeal. The question posed was whether or not the Village of Tanacross was, on Dec. 18, 1971, physically located in two townships thereby withdrawing the township here in question (T. 18 N., R. 13 E., C.R.M.) under the provisions of § 11(a) (1) (C). While this issue was raised, it was agreed by the parties and concurred in by the Board, that the double core township question should not be considered and resolved until the Board had decided the other issues on appeal. Having made said decision, as contained in this opinion, the Board hereby remands this case to BLM to determine if Tanacross Village was, on Dec. 18, 1971, physically located within more than one township.

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This represents a unanimous decision of the Board.

JUDITH M. BRADY,
*Chairman, Alaska Native Claims
Appeal Board.*

ABIGAIL F. DUNNING,
Board Member.

LAWRENCE MATSON,
Board Member.

**APPEAL OF EVERGREEN
ENGINEERING, INC.**

IBCA-994-5-73

Decided *May 17, 1978*

Contract No. 53500-CT2-258, Imperial Sand Dunes Road Project, Bureau of Land Management.

Appeal sustained in part.

1. Contracts: Disputes and Remedies: Appeals

One element of an appeal was denied as the sanction for the appellant's failure to answer certain interrogatories relating to that element.

2. Contracts: Construction and Operation: Changed Conditions (Differing Site Conditions)

While the wind at the worksite was severe, the Board found that no changed condition had been shown.

3. Contracts: Construction and Operation: Drawings and Specifications

When the specifications state that either of two types of cement mixers may be used and the use of one results in unexpected and unusual movement of the subbase which weakens the specified cement

base, the Board finds that the specifications and design are defective.

4. Contracts: Construction and Operation: Drawings and Specifications

A drawing in the bid package, which showed the concrete road base extending right to the edge of the underlying corner of the buildup supporting subbase, was found to be defective and misleading when during construction it was found that the upper corners of the sandy subbase would not support the road grading equipment needed and used to grade the concrete shoulders of the road, with the result that the subbase shoulders gave way and the road grading equipment slipped off the embankment. The appellant was entitled to the reasonable added costs of building wider subbase shoulders to remedy the omission from the drawing.

5. Contracts: Construction and Operation: Estimated Quantities

Where the bid package drawings listed estimated quantities and the general and special conditions indicated payment would be made for actual quantities used but the pay item was "per station," the contractor was entitled to payment in actual quantities placed at the unit price per cubic yard established in a unilateral change order issued to recompense the contractor for amounts placed in excess of those shown in the bid package.

6. Contracts: Construction and Operation: Contract Clauses

Payment was not allowed under a general erosion control clause when there was no order by the COAR citing that clause to replace roadbed blown away by severe winds.

7. Contracts: Construction and Operation: Changes and Extras

When the Government erroneously places stakes to locate the worksite—a road—it is liable for extra costs caused thereby.

8. Evidence: Admissibility

Evidence of the design and specifications in a subsequent contract over the same sand dunes involved in the instant appeal was not admissible and was properly excluded under Federal Rule of Evidence 407, when offered to prove design defects or feasibility of precautionary measures.

APPEARANCES: Mr. Samuel A. Anderson, Attorney at Law, Littleton, Colorado, for the appellant; Mr. David E. Lofgren, Department Counsel, Portland, Oregon, for the Government

OPINION BY ADMINISTRATIVE JUDGE STEELE

INTERIOR BOARD OF CONTRACT APPEALS

Introduction

In this appeal we must decide entitlement (quantum being reserved by agreement of the parties, transcript p. 3) as to numerous claims arising out of a \$235,206.10 contract to build approximately 5 miles of road across the Imperial Sand Dunes in Imperial County, California.

The Imperial Sand Dunes are an area of sand and dunes in California between the Chocolate Mountains to the east and the Salton Sea to the northwest and between Blythe and El Centro in the extreme southeastern portion of California (Tr. 16-18, appellant's Exhibit One (AX-1)).

The Bureau of Land Management (BLM) of the Department of the Interior decided to build a new road starting at Highway 78 and

going 5 miles into the dunes (AF-1). A Government engineer prepared the documents containing the design of the project (Tr. 213, 357, and appeal file documents 1, sheets 1-19, and the specifications). The major feature of the project was the road (the minor features were parking lots). The road was to be built up above the local ground level by the use of local sand borrow (AF-1 Sheets 14, 2-12). On top of this fill the contractor was to place a layer of concrete 6 inches thick (at the center) and nominally 10, 20 or 24 feet wide (depending on the particular portion of the road) (AF-1, sheet 14). The concrete would then be covered by a "seal coat." The slope of the sides of the embankment for the road was specified as 3 to 1 (*ibid*). The drawing showed profiles of the to-be-built road and the existing ground surface and figures for the amount of *cubic yards* of embankment.

The construction of roads in fine wind-blown sand presents unusual and difficult construction problems (Government Exhibit E (GX-E)) and this was the first time that the Government designer had been called upon to do such a design (Tr. 229, 233). Nevertheless, he (or other Government representatives) completed the drawings and specification and a bid package was prepared and 65 copies sent out to possible bidders (AX-38). The bid package was arranged so that the pay items for the road would be as follows (in part):

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Item No.	Description	Est. Quan.	Unit	Bid Price	Amount
2	Access road linear unclassified excavation and grading	175	Station (N.B.)	-----	
12	Portland cement for cement treated base (CTB)	12,000	Bbl.	-----	
13	Water for cement treated base	700	MG (1,000 gal.) (N.B.)	-----	
14	Processing CTB 8% by weight	105,000	Sq. yd.	-----	
15	MC-70 liquid asphalt curing seal for CTB	35	Ton	-----	(AF-1, bid)

The bid package also said (in par. 44 of the specifications) that the contractor should get and bear the cost for all water needed for the project (except, of course, for pay item 13).

The contract was signed, the notice to proceed issued on Mar. 15, 1972, and the appellant commenced work. After various problems (which will be detailed as necessary later) the project was completed and accepted in late July 1972 (Tr. 267, 268). Appellant filed certain claims, some were allowed, others denied and this appeal was filed. We will now set forth the facts and our decision as to each claim (the total claim is said to amount to \$221,627.08 plus interest from July 25, 1972—Complaint p. 6).

PART I. THE ASPHALT OVERRUN OF \$88,812.50

This claim is stated in paragraph 6J of the complaint and Item 17 of the contracting officer's decision. Appellant in its Jan. 12, 1973, claim letter said that this overrun was caused by the Government inspector's insistence that the asphalt coat be thicker than required by the specification. On July 11, 1972, the parties executed Change Order #1, item 17, adding \$61,500 to the contract. The Government apparently considered this something of a compromise as it viewed the original thinness in the concrete as the contractor's responsibility to correct

yet it allowed a lump-sum increase in price of \$61,500.

However, during the course of the appeal the appellant failed to answer certain interrogatories about a suit by the asphalt subcontractor, and the Board, on Oct. 29, 1974, partially allowed a Government motion to dismiss, and the Board dismissed the Massey claim for hot bituminous concrete relating to bid item 17. 74-2 BCA par. 10,905. Appellant, then without counsel, never complied with the condition in the order (answering the interrogatories) and the order became final. Our hearing official followed that order and excluded evidence on this claim item. We affirm his action and deny the claim. 43 CFR 4.127.

PART II. WIND AS A DIFFERING SITE CONDITION

Appellant's first major claim theory is that unusual and extremely high and constant winds slowed and disrupted the work and caused added expense in numerous ways and constituted a differing site condition (appellant's Aug. 22, 1977, brief, pp. 2, 7-8).

The facts, largely undisputed, are as follows. The IFB said nothing about wind. During its prebid site investigation the appellant may have obtained some vague information that the bad winter winds died down about Apr. (Tr. 120, 121). The appellant, after the contract was over, obtained the following data on wind at Indio, Chula Vista and Beaumont.

May

	Yuma*	Chula Vista	Indio	Beaumont
1972	1, 078 ¹	2, 866	1, 998	573
1971	1, 332	2, 969	1, 637	391
1970	1, 459		1, 465	
1969	1, 219		1, 225	
1968	1, 523		1, 553	
1967	1, 266		1, 091	
1966			1, 070	
1965			1, 366	
'67-71 av.	1, 362			

*From charts physically with the C.O.'s decision in AF-24.

¹ One chart says 1,078, another page says 1,028.

The figures listed are the total miles of wind movement over the recording station (AF-18, p. 8 *et. seq.* (claim letter)).

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June

	Yuma	Chula Vista	Indio	Beaumont
1972	1, 166	2, 808	1, 590	446
1971	1, 095	2, 609	1, 496	387
1970	1, 390		1, 419	
1969	1, 648		1, 625	
1968	1, 424		1, 300	
1967	1, 265		1, 236	
1966			970	
1965			1, 384	
1967-71 average	1, 364			

July

1972	1, 439	3, 032	1, 426	568
1971	1, 760	2, 610	1, 144	372
1970	1, 758		869	
1969	1, 591		899	
1968	1, 558		879	
1967	2, 169		432	
1966			725	
1965				
1967-71 average	1, 767			

AF-27 gives the following data for Yuma, Arizona.

Day	May 1971		May 1972	
	Ave. Sp.*	Max. Sp.*	Ave.	Max.
1	8.3	15	4.9	13
3	12.4	25	5.3	12
5	9.2	18	10.1	16
7	7.6	17	6.8	13
9	6.3	12	10.4	17
11	4.5	9	5.5	13
13	5.3	11	10.6	21
15	8.8	17	9.8	25
17	12.5	31	7.3	15
19	4.8	11	11.8	19
21	12.1	25	9.5	17
23	5.9	14	4.3	13
25	8.8	18	7.1	15
27	16.5	27	6.6	17
29	5.9	15	11.2	24

* Average and maximum wind speed in M.P.H.

June 1971			June 1972	
Day	Ave.	Max.	Ave.	Max.
1-----	5.5	14	11.2	19
3-----	7.5	17	8.3	16
5-----	5.6	15	6.8	40
7-----	6.2	12	7.5	13
9-----	9.1	18	11.5	17
11-----	5.8	13	4.0	10
13-----	5.0	9	10.9	18
15-----	6.5	11	6.8	12
17-----	7.2	16	7.8	15
19-----	5.8	13	5.6	16
21-----	8.8	17	10.4	24
23-----	13.7	25	8.9	16
25-----	12.2	20	5.2	16
27-----	8.5	18	6.0	10
29-----	6.6	12	6.3	12

July 1971			July 1972	
Day	Ave.	Max.	Ave.	Max.
1-----	5.2	8	6.5	15
3-----	10.4	20	8.6	15
5-----	7.1	16	13.2	28
7-----	7.5	15	9.5	20
9-----	4.8	10	5.9	11
11-----	6.3	15	7.6	17
13-----	9.2	17	11.1	18
15-----	14.8	27	17.5	29
17-----	7.1	13	13.1	17
19-----	10.5	18	7.9	14
21-----	12.8	22	6.5	10
23-----	10.8	16	8.8	25
25-----	10.1	15	8.1	12
27-----	12.1	18	6.5	16
29-----	12.7	29	7.6	29

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During appellant's work at the site, its experience with the wind was as follows: The wind blew holes out of the embankment (Tr. 164, 168) several times (Tr. 193). The wind blew out the side of the embankment in areas as big as a room (Tr. 164, AX-15), it blew the sealer off the soil cement, and would roughen the soil cement (Tr. 165-203), the holes in the embankment were 2 to 4 to 5 feet deep (Tr. 168), the wind blew sand onto the roadway, it destroyed windrows, the windrows had to be remade (Tr. 203), the wind rounded the slopes towards the shoulders (Tr. 220), it deposited sand on the top of the roadway from 1 inch deep (Tr. 221, AX-28) to about three-fourths of a foot deep, and the wind, even by the Government's testimony, took an inch off the road bed (Tr. 255) at times; and the sand blew on top of the soil cement at times before the sealer was put down (Tr. 265), and the wind blew hard (Tr. 263, 269, 331), there was at least one wind hole a foot deep by 10 to 15 feet long observed by the Government (Tr. 305, Mr. Ward).

At Glamis, about 5 miles from the worksite, sand was removed from Highway 78 on March 3, 17, 27, 30, April 2, 13, 14, 17, 24, 26, 27, on May 6, 14, 18, 19, 20, 27, 28, 29, 30, and on June 2, 4, 5, 7, 8, 9, 14, 15, 21, 22, 23, and 30.

Conventional snowplows were used on the above days to remove up to 6 to 8 inches of sand from Highway 78. During June bulldozers were also used on June 12, 13, 14,

15, 16, 19, 20, 21, 22, 23, 26 (Tr. 110) to remove sand from Highway 78. However, the wind location is very localized. Often it is blowing 20 miles from the dunes at the Imperial Irrigation District in Imperial, and there is no correlation with the wind at Glamis and the dunes (Tr. 111). On March 16 the wind was under 8 MPH at the Imperial Irrigation District but there was sand blowing at Glamis. There was high overtime paid to remove sand in March and June 1972. The wind was very bad at Glamis over the Memorial Day weekend. The wind force and direction are very variable within a 25 to 30 miles radius of Glamis (Tr. 115). The wind at Glamis has been blowing with varying severity for at least 20 years (Tr. 114) and the dunes have moved since 1911 (Tr. 118). Dunes the size of a desk formed on Highway 78 at times (Tr. 119). Normally, Jan., Feb., and Mar. are the windiest months (Tr. 120). Apr., May, and June of 1972 at Glamis were worse than the same period in 1971 (Tr. 122), but the highway department also had to clear sand during those months in 1973, 1974, and 1975 (Tr. 122).

Scaling off Exxon's "Western United States" road map, we estimate that Yuma is 40 miles east of the work site, Indio is 80 miles northwest, Beaumont is 120 miles northwest, and Chula Vista is 115 miles west of the job site and is near the coast. (See the following references for week testimony on distances: Tr. 17, 106, 83, 92-96, 110.)

From the data stated above, we conclude that the weather at the job site in May, June, and July 1972 was at or near the extreme for that time and place but was not outside the range that had occurred there historically. Put another way, we are not persuaded by the evidence recorded above that the wind at the job site during May, June, and July 1972 was greater or more persistent than had ever occurred there during the 10 or 20 prior years.

With these factual determinations we now consider the legal questions. The ASBCA clearly held that wind (weather) conditions cannot be the basis for relief under the changed conditions clause. *Hardeman-Monier-Hutcherson (A Joint Venture)*, ASBCA No. 12392 (Aug. 28, 1968), 68-2 BCA par. 7220 at page 33,520.² Accordingly, we find that the appellant has failed to show that the wind and the blowing of sand encountered at the work site constituted "conditions * * * of an unusual nature" within the meaning of the Differing Site Conditions clause. This claim is therefore denied.

PART III. WAS THE BID PACKAGE DEFECTIVE?

The next major claim theory advanced by the appellant is the con-

tention that the specification was defective (appellant's posthearing brief, p. 2 (issue #1), pages 2-7). The appellant says that the specification was defective in six particulars. These are: (1) the selection of the traveling cement mixer; (2) the use of the soil cement method of building the hard surface of the road; (3) the 3 to 1 slope for the embankment for the road (sometimes called the "subbase"); (4) the selection of the width of the road (really the embankment or subbase); (5) the choice of the seal coat; and, (6) the staking for the project. Each of these above, and in combination with each other and with the severe wind, constituted, in appellant's view, a defective specification.

However, before we find facts and analyze each element of this specification, we quote several statements of the legal standard.

[T]here was an implied warranty that the design specifications furnished by the Government, as the "planned location" and the "acceptable sequence of work involved in diverting the stream flow, protecting the sub-grade excavation area and dewatering the worksite," were adequate for their intended purpose. *United States v. Spearin*, 248 U.S. 132 (1918); *Hollingshead Corp. v. United States*, 124 Ct. Cl. 681 (1953); *HOL-GAR Manufacturing Corp. v. United States*, 175 Ct. Cl. 518 (1966).

Southern Paving Corporation, AGBCA No. 74-103 (Oct. 18, 1977), 77-2 BCA par. 12,813 at 62,363. In *Chaney and James Construction Co., Inc. v. The United States*, 190 Ct. Cl. 699, 705 (1970), the court said, "It is well estab-

² In *Hardeman-Monier-Hutcherson, A Joint Venture v. United States*, 198 Ct. Cl. 472 (1972), the Court endorsed the Board's ruling but went on to state at p. 486:

"[W]e do not wish to intimate that we believe that adverse sea conditions could never constitute changed conditions within the meaning of the standard Changed Conditions clause."

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lished that the Government warrants the adequacy of its plans and specifications to the extent that compliance with them will result in satisfactory performance." (Citations omitted.)

Of course, there is a difference between a performance specification where the contractor may at times be held to have assumed the risk of failure (e.g., *The Austin Company v. The United States*, 161 Ct. Cl. 76 (1963); and cases cited in *Dynalocron Corp. (Pacific Division) v. United States*, 207 Ct. Cl. 349, 363 (1975), and the situations where the Government provides detailed specifications. Compare, for example, *Sarkisian Bros.*, PSBCA No. 408 (Mar. 16, 1978), 78-1 BCA par. 13,076.

Our task is to determine the facts and decide which rule of law applies thereto.

ADDITIONAL FINDINGS OF FACT

The Traveling Cement Mixer

Par. 43 of the specification incorporated, and then modified, Standard Specifications for Construction of Roads and Bridges on Federal Highways Projects FP-69. Par 308.04 of FP-69 described a "Central Plant Method" of mixing cement and a "Travel Plant Method" in par. 308.03. The applicable portions of FP-69 and the addition thereto follow:

The subgrade shall support all equipment required in the construction of the

base. Soft or yielding areas shall be corrected prior to mixing.

The aggregate to be treated shall be placed in a uniform windrow or spread to a uniform thickness to the width required. The specified quantity of portland cement shall be applied uniformly in a trench on top of the windrow or spread uniformly over the aggregate. Spread cement that has been lost shall be replaced, without additional compensation, before mixing is started.

Mixing shall be accomplished by means of a mixer that will thoroughly blend the aggregate with the cement and water. The mixer shall be equipped with a water metering device that will introduce the required quantity of water during the mixing cycle. If more than one pass of the mixer is required, at least one pass shall be made before water is added.

The only mixing machine allowed shall be of the pugmill or auger type. The machine shall be designed to pick up the material to be mixed from a windrow or blanket and shall be equipped with a bottom shell or pan so that during at least 50 percent of the mixing cycle all the material is picked up and mixed while separated from the mixing table.

The appellant used a traveling mixer (Tr. 38-39). The appellant wet, placed and compacted the subbase. Thereafter it windrowed the sand for the soil cement, placed the cement, and mixed the soil cement and water by use of the traveling mixer (Tr. 21-24). The tires of the traveling mixer sank into the subbase and also caused ruts and upward mounding of the subbase into the soil cement mixture (AX-5; Tr. 24, 25, 26). This was only partially corrected by the addition of a special scraper to a water wagon (AX-6; Tr. 24, 25) and by towing the mixer rather than allowing it to op-

erate in a self-propelled mode (Tr. 44). It was impossible to fully correct or eliminate the upward mounding of the subbase into the soil cement caused by the wheels of the traveling mixer and the motor patrol and the natural softness and lack of cohesion of the sandy subbase.

On July 11, 1972, the parties signed modification I. By this agreement appellant agreed to recondition, clean, and patch the existing soil cement surfaces. Payment was agreed to be included in payment item 14. (After this work appellant—by part of the balance of the modification—agreed to cover the soil cement with a 1½-inch layer asphalt surface. This is covered in Part I of this decision.)

Conclusions, Traveling Mixer Claim

The bid package was defective in its combination of the use of local borrow, the specification of the subgrade sand (par. 308.02, Tr. 144) and its specification of the use of the traveling mixer.

The appellant performed in an adequately workman-like manner yet the use of the materials (sand and cement) and equipment (traveling mixer) produced a result which, while ultimately adequately satisfactory, caused unexpected difficulty and cost. Thus, since the Government is responsible when use of the specified equipment causes unexpected cost, *Southern Paving Corporation, supra*, we hold that

the appellant has established entitlement to the unexpectedly added costs caused by the rutting and mushrooming from the wheels of the traveling mixer. (The parties have agreed that we are not to decide quantum in this proceeding.) To this extent the design and specifications were defective.

In their negotiations as to "quantum" (see *Scona, Inc.*, IBCA No. 1094-1-76, 84 I.D. 1019, 78-1 BCA par. 12,934 at 62,985) (1977), the parties presumably will consider what costs are within Modification I and thus are barred, and what added cost, if any, caused by the defective specifications above described, are outside of the modification.

PART IV. THE USE OF THE SOIL CEMENT METHOD

The second allegedly defective element of the specification was the use of the soil cement method of construction.

This method required the wetting of the borrow, the placement of the borrow, the rewetting of the borrow and compaction, the grading of the borrow, the construction of three windrows on the placed borrow, the placement of cement in the windrows, the mixing by the traveling mixer (Tr. 24-26; AX-3-8), and the spreading and grading of the wet mixed concrete (Tr. 239-247, 242, 253; AX-5-7). The process resulted in an adequate road (Tr. 228) which, however, did crack in re-

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flection cracks (Tr. 228-9). This was after 4 years of use (Tr. 229). It did, however, result in the thin sections mentioned in the preceding part of this opinion and in rough surfaces of the subbase and base. The Government's designer testified he would not use soil cement again as it set up so fast (Tr. 302). He said the surface tolerance could not be met (Tr. 303), but we conclude that this (the thinness) was related to the use of the traveling mixer. Further, we perceive no recoverable damage from this defect, as to surface roughness, due to our ruling in Part I *ante*.

However, Mr. LaBelle appears to be of the opinion that the soil cement method was not adequate (Tr. 126, AF No. 2, Dec. 27, 1972, pp. 12-15), but the main thrust of his opinion as we understand it relates to edge restraint (Tr. 128) or width. (This topic is treated later in Part VII of this opinion). In conclusion, the appellant has not in our view sufficiently connected any excessive costs or excessive difficulties in the use of the soil cement method to convince us that the soil cement method, per se, constituted a defective specification. Even when a claimant only presents a liability claim, it must show some damages were caused by the defect. We perceive none in this record, other than surface roughness, to persuade us that the use of soil cement was a design defect. We are not persuaded that the wind caused the specified soil cement method to be defective.

PART V. THE THREE TO ONE GRADE OF THE SUBBASE

Sheet 14 of the contract drawings required a 3 to 1 grade to the sides of the subbase (embankment—fill) (AF-1). However, the evidence of the actual grade of the embankment is not all that clear or convincing. Mr. Beard opined that 3 to 1 was too steep (Tr. 406), but his knowledge of the project was not very extensive and was after the fact (Tr. 398). Mr. Kruger by hindsight thought 3 to 1 was adequate (Tr. 304). Mr. LaBelle only touched upon this as part of the edge restraint problem (Tr. 129). We conclude that the 3 to 1 was not per se defective. See Part XI of this opinion.

PART VI. THE WIDTH OF THE SUBBASE (THE "RUNWAY" OR SHOULDER)

The contract drawings showed the trapezoidal shape of the embankment for the road (Sheet 14, AF-1). They also showed that the cement base went right to the very edge of the top of the sand embankment (Tr. 69).

The appellant started to build the embankment not right at the junction at route 78 but a little way in (Tr. 389-90). It built from this point (Tr. 249) to station 175 (a distance of about 17,500 feet) by building the embankment 2 to 4 feet wider on each side than the widths shown in the contract drawings (Tr. 249-250). This was, in the Government's view, the contractor's "option" to build it to the design width

and no wider if he could, or build it wider if he wanted to but he should then include this "extra cost" in his bid for payment per station (Tr. 300). During the construction of the short first portion of the road, the appellant learned that the subbase was not strong enough at the outer edge to hold the weight of earth moving equipment (Tr. 37, 66, 69). The edge crumbled and the equipment slid off the top of the embankment (*ibid.*). The appellant decided to and did widen the embankment thereafter for the balance of the project so that it could complete the spreading and grading of the soil cement without crushing the edge of the roadway (Tr. 248). In the process the appellant built the top of the subbase about 2 to 4 feet wider at each side than was shown on Sheet 14 AF-1 (Tr. 225). This required appellant to (and it did) wet, excavate, place, compact, and rewet substantially more sand than would have been required if the sand had been able to bear the weight of the equipment at the top outer edge of the embankment, as it was shown on Sheet 14 of the drawings.

The Government project designer was also its project inspector. He observed that the appellant built the shoulders as indicated above and did not object thereto. He believed appellant had this "option" as a means of constructing the road (Tr. 248, 249, 261, 264).

Very early in the project (Tr. 14, 30) appellant's superintendent decided that the project was requiring

substantially more fill than he had expected so he hired a person whose sole job was to maintain a load count of the sand placed on the road (Tr. 30, 31). This count showed that more c.y. were placed than appeared in bid (Mod. 2). The Government's estimated units for the road indicated in the IFB was: 175 stations (AF-1 bid). This unit (station) was uninformative. But the Government's internal calculation was 237,755 c.y. (AF-7, Tr. 269, 270). Apparently, this was based upon the original "cross-sections" calculated from the profiles (and listing of cubic yardages) on the bid package drawings (AF-1 drawings, *e.g.*, sheet 12).

The Government designer and inspector knew of the initiation and maintenance of the load count by appellant from his personal observation and the observations of his assistants (Tr. 53, 56, 295).

The bid package contained the following two provisions. The first is in "the specification," the second in the additional general provisions:

42. QUANTITY ESTIMATES.

The cubic-yard quantities given in the Bid Schedule or on the drawings are based on field measurements. This is an estimate which is provided as a guide for the Contractor in determining the project time, equipment, and manpower requirements. Any difference between actual and estimated cubic yards required to do the work shall not be an acceptable reason for the Contractor to make claim for additional payment. See Clause 17 of Additional General Provisions.

17. VARIATION IN QUANTITIES—

The quantities stated in the bid schedule are estimated, for bid preparation and

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comparison, and are not guaranteed to be actual. If over or under runs occur during performance of the work, payment will be made for actual work quantities, as determined by actual survey, at unit prices bid. The Contractor will have no claim against the Government solely because of variations from the estimated bid schedule quantities.

In June 1972, the contentions of the parties were aired. The Government sent a letter dated June 16 (not in the appeal file) "charging noncompliance with contract specifications" (AF-4). The appellant presented a letter dated June 27, 1972 (not in our file), at a meeting with the contracting officer (and other Government personnel) on June 22, 1972. The topics covered at the meeting included: (1) thickness of cement, the cause thereof and the timing of knowledge thereof; (2) surface roughness of cement, and, apparently, the cause thereof; (3) site conditions; (4) impossibility of performance; (5) corrective action such as: (a) aggregate subbase, (b) use of different equipment; (6) width of roadbed; and (7) use and utility of the seal coat (AF-4).

There was a second meeting on June 28, 1972 (AF-5). At least two "settlement" proposals were advanced and discussed at the meeting. One was rejected by the Government. The appellant made a proposal that included increasing the contract price by \$100,000 and left the meeting with the belief that this proposal had been accepted by the Government (Tr. 425).

The C.O. noted in a memo to the file on July 17, 1972, that agree-

ment had been reached that (1) appellant would patch the soil cement at his own cost, (2) appellant would cover the cement with asphalt (apparently for a lump sum that would be paid by the Government), and (3) overruns in cubic yardage of excavation would be handled separately (AF-6). On July 11, 1972, the C.O. and appellant signed Mod. 1 which, (1) changed the "MC-70" seal coat to "Penta-Prime" and increased the price therefor, and (2) added schedule item 17 "Hot Bituminous Concrete Pavement Grading D" at an increase in price of \$61,500. The specifications added by this modification provided that, (a) cleaning and patching of cement would be done—in effect—at the contractor's cost (Section 307.05) and (2) added a 1½-inch minimum one lift hot bituminous pavement to be placed on top of the existing soil cement. This was to be measured but payment was on the lump sum basis indicated (AF-2). Mod. 1 also extended the time for completion by 20 days.

On July 17, 1972, the C.O. issued a unilateral change order (Mod. 2) which read as follows:

You are hereby instructed in accordance with Clause Number 3 & 4 of the General Provisions of the contract to comply with the following modifications. All other specifications, terms, and conditions of this contract remain in full force and effect. This document properly signed becomes a part of the contract.

The contract's completion time is [x] not changed [] increased [] decreased by _____ calendar days.

Schedule item number	Description of changes, new items, inc.	Cost	
		Decrease	Increase

This modification is issued unilaterally by the Contracting Officer to schedule payment for an increase of quantities within an item of the contract. The quantities are based on information available from engineering calculations. Final quantities will be adjusted prior to final payment, if determined appropriate.

18-----	Added Item: Unclassified excavation and grading completed in conjunction with Item 2 of the original Bid Schedule and in excess of the estimates furnished within the plans. This item is considered for payment on the basis of cubic yards. Station 1+00 to Station 175 additional Cu. Yd. 43,000 @ \$4225-----		\$18,167.50
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On Aug. 31, 1972, the C.O. wrote appellant and said the Government had calculated the in-place yardage as 296,432 c.y.; that the estimated yardage in the bid package was 237,755—the difference was 58,677 c.y. Further, since Mod. 2 had paid for 43,000 c.y., the difference of 15,677 c.y. is “reasonably within the original plans estimate provided for contractos [*sic*] information” and thus would not be paid. The letter also said that the 296,432 c.y. did not include the “additional width in the base which was not required by the specifications” (AF-7).

On Oct. 10, 1972, appellant submitted pay estimate #5 in the amount of \$138,677.69 (AF-10). This included \$27,312.50 for an overrun in asphalt—caused according to the subcontractor’s letter of Sept. 18, 1972, by Government di-

rection to lay a layer of asphalt thicker than 1½ inches (AF-9). It also included a claim for 101,070 additional c.y. per Mod. 2 (for \$42,702.08), and 42,200 c.y. “sand replacement caused by wind damage,” at \$46,842 and finally \$28,300 as the actual cost of furnishing additional water. The Government analyzed the pay estimate #5 and responded by a letter dated Nov. 8, 1972 (AF-12).

There was a claim meeting on December 12, 1972 (AF-17). The contractor submitted a written claim for \$215,627.08 on Jan. 12, 1973 (AF-18), and supplemented it with legal argument on Jan. 22, 1973 (AF-20), and increased the claim to \$221,635.60 on Jan. 30, 1973 (AF-21), furnished additional argument on Jan. 31, 1973 (AF-22), and the claim was partially allowed and partially denied.

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by a contracting officer's decision on Apr. 2, 1973 (AF-24).

The appeal file does not (on Apr. 19, 1978) contain document No. 26 (earthwork data sheets including printout and copies of load count sheets) nor No. 28 "Two rolls of cross-sections of road by stations," nor No. 29 "Collection of Load count sheets and tabulations of yardage involved and tally sheets," nor No. 31 "Computer printout of yardage computation based on cross-section of cuts and fills by stations of the project road." It does contain 14 sheets marked "Appeal file document No. 31 (portion)," and as to cubic yardages (AX-37).

The method used by the Government in calculating the "as built" yardage of the subbase or embankment appears to have been to reestimate or recalculate *based on the data in the solicitation package* (Tr. 269-270, 284-285). The Government did *NOT* do "as built" cross-sections (Tr. 286). Thus, the Government's conclusion that the as built quantities were 296,432 c.y. gives us little confidence in the accuracy of that figure. The agreement to only try liability may have contributed to the lack of solid evidence on this point. Because of this agreement, we are only called upon to determine entitlement. We conclude that Mod. 2 promised to pay for excavation in excess of that shown on the plans (or otherwise in the bid package). This promise is consistent with that made in the second sentence of additional general

provision 17. "At unit prices bid" now means at unit prices stated in Mod. 2. This conclusion of ours rejects the Government contention that the 15,677 c.y. is "reasonably within the plans estimate" (see AF-7). This ruling is on entitlement under Mod. 2.

PART VII. SHEET 14 IS DEFECTIVE

We now turn to the larger contention that Sheet 14 was defective because it failed to show the 2 or 4 foot shoulder found necessary to build the road.

We conclude that Sheet 14 was defective and misleading and should have been "covered" by a change order to build the shoulder necessary to carry the equipment that paved and trimmed the concrete shoulders. We reach this conclusion based upon the weight of the evidence. We construe Mr. LaBelle's testimony to say this (Tr. 127, 128, 129, 131, 147, 150, 151, 155). Likewise, the testimony of Mr. Beard (Tr. 405). We do not know the qualifications, training or experience of the author of Government's Exhibit E but the testimony of other witnesses supports the stated conclusion in Exhibit E that "[r]oadway construction on wind-blown sand presents unusual and difficult construction problems." The IFB in Specification Clause 42 (and additional general provision 17) said that the estimate in the drawings "is provided as a guide

for the contractor in determining the project time, equipment, and manpower requirements * * *." There was no written warning in the contract that the sand subbase would fail to support the weight of the equipment specified by the Government. There is testimony that the 3 to 1 slope, and the balance of the design, would have been adequate in normal dirt (Tr. 405). It apparently was not obvious to the Government engineer when he prepared the design that edge restraint would (or might) be needed. There is no testimony that this should have been deduced by the appellant at the time of the site visit. Thus, we are left only with Government counsel's argument that wind should have been obvious from the existence of the dunes. This argument does not, in our view, extend to any conclusion that the small business set aside bidders should have assumed that edge restraint would be needed because of any observations made at any prebid site visit. We conclude that the design, drawings, and specifications were defective in that they did not show shoulders (or other restraints) on the subbase.

PART VIII. CLAIM FOR REPLACEMENT OF WIND-BLOWN SAND

This claim is partially stated in pay estimate number 5 (AF-10).

We find that the wind did blow away sizable amounts of the subbase (TR. 41). Appellant cites the following clause as authorizing

payment for the work of replacing sand blown away by the wind. BLM "Road Construction Special Provisions for use with FP-69," Section 110, "Water Pollution and Soil Erosion control," section 110.03:

b. Where erosion/pollution control work is needed that is not otherwise required in the contract and is not due to the contractor's failure or negligence, and where such work falls within the specifications for a work item that has a contract price, the units of work ordered shall be paid for at the proper contract price. Should there be no comparable work item in the contract, the contractor shall be ordered to perform the work on either a force account basis if there is such a provision in the contract, or by agreed prices under a contract change order.

The testimony about this provision of the contract was not very helpful (Tr. 365).

Appellant might argue that it is entitled to payment at \$4225 per cubic yard based on the conclusion that replacement of blown away embankment was "necessary" under section 110.01 and that Mod. 2 established the price and further that section 110.3 or 110.3b establishes entitlement/liability.

We have carefully considered these arguments and conclude that section 110 does not establish entitlement. Appellant assumed the risk of wind erosion. The specification (except as indicated above), and pay items, are silent as to erosion control. We conclude that section 110 could only be put into operation in the circumstances of this project by an express order by the

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COAR clearly indicating reliance on section 110. Appellant replaced the blown away sand apparently in belief that it could recover under a differing site conditions claim. We have denied that claim and find no basis for relief under the erosion control provisions.

Nevertheless, we conclude that appellant is entitled to the difference in cubic yardage between that reasonably indicated in the bid package and that used to build the embankments *under the terms of modification number two*. The parties, in the first instance, will have the doubly difficult problem of trying to determine the amount of sand blown away.

PART IX. SPECIFIC CLAIM ITEMS IN THE FINAL DECISION

We now must turn to the specific items in the final decision which were appealed but which are apparently unsupported by evidence introduced at the hearing or mention in posthearing argument since we do *not* have a rule that claims (or defenses) not briefed are waived.

(A) *Contingency for extra and miscellaneous—\$1,000.*

Item 1 in C.O. decision p. 2; par. 6A Complaint and Answer. We deny this claim as not established by any evidence.

(B) *Asphalt (Tack coat SS-1) \$150.*

Item 6, p. 2, C.O. decision; par. 6B Complaint and Answer. One

tack coat was applied on "the approach road to Highway 78" (C.O.'s decision). It was, contractually, supposed to have been applied on Highway 78. There was an agreement not to spray Highway 78 at all but by appellant's error it was placed on the approach road. It was not placed under the contract and we do not have quantum meruit authority, therefore, this claim is denied.

(C) *Aggregate. \$1,758.06.* Item 7 of C.O.'s decision, par. 6C of Complaint and Answer. There is no evidence to support this claim so we deny it.

(D) *Asphalt Emulsified. \$2,790.45.* Item 8 of C.O.'s Decision, par. 6D of Complaint and Answer. We can find no evidence to support this claim and thus we deny it.

(E) *Corrugated Metal Pipe \$2,240.* Item 9, C.O.'s decision, par. 6E of Complaint and Answer. We find no evidence to support the claim and deny it.

(F) *Cement \$1,548.42 or \$642.85.* Item 12 of C.O.'s decision, pp. 3 and 4, par. 6F of Complaint and Answer. Irrespective of whether this added cost was caused by the use of the traveling mixer or it was caused by the wind, the contractor is entitled to be paid at the unit price for the work performed. *See Perini Corp. et al. v. United States*, 180 Ct. Cl. 768 (1967).

(G) *Water for Cement \$3,500.* Item 13 in C.O.'s decision, par. 6G in Complaint and Answer. Where

the claim is indicated to be in the amount of \$87,380.

The specifications clearly indicated that, except for water for the soil cement, the cost of needed water would be borne by the appellant. The assumption of risk was clear. Compare *Perini Corporation et al. v. United States, supra* (where it was clear to the court that the Government assumed this risk). Thus, we deny this claim (except to the extent that water was needed for the 2 or 4 feet extra width of embankment needed to carry equipment to build the shoulders of the road). *Cf. John E. Moyer, AGBCA No. 417 (June 25, 1975), 75-1 BCA par. 11,338.* (Hot weather is not a changed condition.)

(H) *Replacement sand due to wind damage.* \$46,842, par. 6H Complaint and Answer. We have ruled on this claim earlier herein.

(I) (1) *Additional yardage for runway and difference in ground elevation.* Paragraph 6I Complaint and Answer. We have ruled on part of this claim already (runway or shoulder). In the process we have rejected the Government's argument that Spec. 203.09 required appellant to build "benching" within the price for the station. Spec. par. 203.09 applies to slopes steeper than 2 to 1. These slopes were less steep, *i.e.*, 3 to 1, thus, 203.09 does not by its terms apply.

(I) (2) The appellant has two related claims. First, it says that the profiles shown on the bid drawings were altered by the wind so

that the toe of the embankment was not in fact where it was shown to be on the profiles. Claim letter (AF 18) chart showing four effects of the wind. However, there is insufficient evidence to support this claim. The evidence in the record (Tr. 161, 199, 219) is too vague and general for us to find the claim allegations supported. Thus, this claim element is denied.

(I) (3) The other claim is that the absence of elevation control markers ("hubs") caused confusion and extra cost. (There is a separate claim related to the *location stakes* placed by the Government. This is covered later in this decision.) The normal and customary method was to set "hubs" which gave elevation (Tr. 162, 198, 199, AF 18, p. 16), and grade stakes at the toe where the embankment joined the original ground (Tr. 199, 217). On this job the Government did not place "hubs" and placed the toe stake 10 feet out from its normal position (Tr. 217, 234, 235) and did not place "shoulder" stakes (Tr. 217). Later, the Government put in "blue tops" (grade stakes for the top of the finished grade) (Tr. 235). These practices (the absence of "hubs" and the offsetting of the stakes and the absence of "shoulder" stakes) caused some confusion and added work (Tr. 247). While AX-39 appears to be erroneously sketched at a 1:1 slope, the testimony (Tr. 396, 399, 403) is adequate for us to conclude that a 1-inch error in elevation at the toe would cause at least a

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3-inch error in horizontal position at the top of the subbase. And such error could also cause a 1-inch error in elevation of the top of the subbase.

Appellant also complained that the 10-foot "offsetting" of the toe stakes caused confusion. However, the claimant even in disputes limited to entitlement (see *Seona, Inc., ante*, for the definition of this term) must show at least nominal damages. The only evidence of damage that we find in the record is one area where the road was too high by 1 foot (Tr. 315). To this extent only we find entitlement on this claim element.

(J) *Asphalt overrun*. \$88,812.50. Par. 6J of Complaint and Answer. This claim is denied as the sanction for failure to provide discovery as indicated earlier. (It is item 17 in the C.O.'s decision.)

(K) *Clearing the construction site*. \$6,000. Par. 6K in Complaint and Answer. The Government has, in effect, asked that this be dismissed as premature as it had never been filed with the C.O. Appellant alleged that this was part of its differing site condition claim but we can find no evidence to establish in the record the merits of the claim; thus, we hereby deny it.

(L) *Seal Coat*. Appellant argues that the bid package was defective as to the seal coat (appellant's Posthearing Brief, pp. 3, 5). We could make findings of fact that the seal coat often blew away and exposed

the cement to wind and sand erosion and roughening, but this is unnecessary as the Government admits that the seal coat was unsatisfactory (Government's Reply Brief, p. 3). We conclude that the original seal coat was a defective design item.

(M) *Government Misconduct*. Appellant in his Posthearing Brief asserts that a major item of "misconduct" was the Government's alleged refusal to honor a \$100,000 settlement agreement supposedly made by the contracting officer (appellant's Posthearing Brief, p. 10).

We conclude that appellant has not made out its case as to the scope of the alleged agreement. There were several items in dispute and several claim theories being advanced (AF-4, AF-5). But the evidence does not tell us what was settled for \$100,000. We also observe that claims are customarily settled by a supplemental written agreement, and an often understood implicit understanding is that the verbal agreement is not final and complete until both parties sign the settlement document. This often includes release language. Thus, we do not fully credit the testimony that appellant expected a check for \$100,000 without the formality of a written settlement document. However, the major basis for our denial is the failure by appellant to establish (a) the terms of the alleged settlement agreement and (b) clear acceptance thereof by the contracting officer.

PART X. CLAIM FOR ADDED COSTS CAUSED BY WRONGLY PLACED SLOPE STAKES

(Appellant's Posthearing Brief, pp. 1, 5-7; Government's Reply Brief, pp. 4-5.).

First there is a procedural matter. The Government in its posthearing brief asserts (apparently accurately) that the staking claim was never presented to the contracting officer and, thus, "Appellant should be foreclosed from recovering for them at this time." We do not know whether the Government is suggesting that the claim is premature and the dismissal should be without prejudice so the contracting officer can consider the claim, or is too late and should be dismissed with prejudice. In any event, we will decide the claim on the merits. The Government did not object to appellant's staking evidence at the hearing (and introduced rebuttal testimony). Thus, we conclude the Government waived its "technical defense" to the claim. 43 CFR 4.108; 4.121; Federal Rule of Evidence 103(a)(i); *Belmont Industries, Inc. v. Bethlehem Steel Corp.*, 512 F. 2d 434, 438 (3d Cir. 1975). One purpose of requiring an objection is to alert the other party (and the Board) to defects or defenses that may perhaps then be corrected by the non-objecting party (or the Board). This "objection" by the Government filed in its brief weeks after the hearing is (in the circumstances of this case) too late. Further in this

appeal the Government presented rebuttal evidence and the contracting officer was apparently present throughout the hearing (he testified about other claim matters). *Of. James G. Henderson*, ASBCA No. 15353 (June 29, 1972), 72-2 BCA par. 9567 at 44,574. (Claim first asserted at hearing considered on merits as contracting officer testified in rebuttal.)

Now for the facts: (1) The first big fill was staked erroneously. This was the junction with Highway 78 (Tr. 160-161, 310, 311); (2) Then the first parking lot which was at Station 12 was erroneously staked two or four times (Tr. 161, 251, 311, 312, 324); (3) The west side from Station 24 to 25 was staked wrong (Tr. 162, 312, 313); (4) The curve between Station 48 and 55 was off in alignment (Tr. 162, 313); (5) Station 120 to 125 was at the wrong grade and alignment (Tr. 162, 314); (6) There were errors at Station 75 to 85 (Tr. 313); (7) There were errors at Station 145 to 149 (Tr. 315); (8) There were errors at Station 136 to 140 (Tr. 315); (9) There were errors at Station 175 (Tr. 316). The Government admits that two errors may have caused delay (Tr. 313) or added work (Tr. 315). The appellant's testimony about added costs caused by the staking errors is very general. However, the amount of added cost is a quantum issue which we do not have to decide at this time because of the parties' reservation of quantum issues.

As to notice, the contractor notified the Government onsite person-

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nel of the errors in staking as soon as the contractor's personnel became aware of them (Tr. 332, 333) and the Government personnel responded thereto as soon as possible (Tr. 333).

Thus, we find the Government liable for the eight staking errors listed earlier. The parties should negotiate quantum. If they cannot agree on this (or any other) quantum issue, the contracting officer should issue another final decision.

PART XI. EXCLUDED EVIDENCE

At the hearing appellant attempted to offer evidence as to the design and specifications for an extension of the road. This extension was built under a subsequent contract. Our hearing officer excluded this evidence. This excluded evidence, according to appellant's offer of proof, related to (a) the shoulder, (b) the 3 to 1 slope, and (c) the rock base. We have found liability as to the shoulder, so the evidence is irrelevant on that point but, the question now is whether the evidence should have been admitted as it relates to claims which we have denied.

The parties in their briefs have cited Federal Rule of Evidence 407 and *Boeing Airplane Co. v. Brown*, 291 F. 2d 310 (9th Cir. 1961) and *Powers v. J. B. Michael Co.*, 329 F. 2d 674 (6th Cir., cert. den., 377 U.S. 980 (1964)).

Rule 407, Subsequent Remedial Measures, which merely codifies

earlier expressions of court holdings, reads as follows:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The burden is on the proponent of the evidence to make an adequate offer of proof and show that a substantial right was affected FRE 103 (a) (2).

The first basis for the offer was to establish that in the second contract the Government did change the specifications to "accommodate and rectify many of the problems incurred" in the instant contract and appeal (Tr. 180, 182). This base falls within the prohibition of the first sentence of the rule. However counsel for appellant attempted to again state bases for admission of the evidence at Tr. 408-409 but our hearing officer persuaded him to postpone stating those bases until the filing of the posthearing brief.

In *Powers v. J. B. Michael Co.*, *supra*, the evidence was admitted for the limited purpose to prove control of an area. The circuit court affirmed even though this was a jury trial. This ruling is not applicable to the instant appeal.

We conclude that the ruling of our hearing officer conforms with rule 407. We need to decide whether

the evidence would have been admissible if offered to impeach the Government designer's opinions, as it was not offered for this purpose.

PART XII. INTEREST

Appellant in its Dec. 1975 Complaint asks for interest from July 25, 1972 (Apparently being the date of substantial completion of the work). Neither party argues this issue or cites any evidence of interest cost or authority for payment thereof. This contract was before

the effective date of the "Payment of Interest on Contractor's Claims" clause, see *Commonwealth Electric Co.*, IBCA No. 1048-11-74, 84 I.D. 407 (1977), 77-2 BCA par. 12,649, *reconsideration*, par. 12,781 and *Rocky Mountain Construction Co.*, IBCA No. 1091-12-75, 84 I.D. 898 (1977), 77-2 BCA par. 12,832 at 62,470. Thus, we can find no evidence or authority to entitle appellant to interest and this element of the claim is denied.

PART XIII. SUMMARY OF DECISION

Thus, to summarize we recapitulate as follows:

Claim	Part No.	Decision
Asphalt overrun	I	Denied.
Wind as a differing site condition	II	Denied.
Defective specification:		
(a) Traveling mixer	III	Allowed.
(b) Soil cement	IV	Denied.
(c) 3 to 1 grade	V	Denied.
(d) Shoulders	VI	Allowed.
(e) Seal coat		Allowed.
Variation of excavation (and related water) from IFB under modification two (Sheet 14 is defective).	VII	Allowed.
Replacement of windblown sand	VIII	Denied under erosion, allowed under Mod. 2.
Contingency	IXA	Denied.
Tack coat	IXB	Denied.
Aggregate	IXC	Denied.
Asphalt emulsified	IXD	Denied.
CMP	IXE	Denied.
Cement	IXF	Allowed.
Water	IXG	Denied except as needed for shoulders.
Replacement of sand due to wind	IXH	See VIII.
C.y. etc. difference in ground elevation	IXI	Denied and Allowed.
Asphalt overrun	IXJ	Denied.
Clearing construction site	IXK	Denied.
Seal coat	IXL	Allowed.
Misconduct (oral settlement agreement)	IXM	Denied.
Mislocated or missing stakes	X	Allowed.
Excluded evidence	XI	Denied.
Interest	XII	Denied.

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GEORGE S. STEELE, JR.,
Administrative Judge.

WE CONCUR:

WM. F. MCGRAW,
Chief Administrative Judge.

G. HERBERT PACKWOOD,
Administrative Judge.

WESTERN NUCLEAR, INC.

35 IBLA 146

Decided May 22, 1978

Appeal from decision of the Wyoming State Office, Bureau of Land Management, holding appellant liable for trespass damages. WY-03-4025.

Affirmed as modified.

1. Mineral Lands: Mineral Reservation—Patents of Public Lands: Reservations—Statutory Construction: Generally—Stock-Raising Homesteads

As to gravel, interpretations of the mineral reservation in patents issued by the United States under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), must be consistent with the established rule that land grants are to be construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.

2. Mineral Lands: Mineral Reservation—Patents of Public Lands: Reservations—Statutory Construction: Generally—Stock-Raising Homesteads

In determining whether gravel is included in a mineral reservation in a pat-

ent issued under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), the interpretation of the reservation must take into account the intended use for which the land was conveyed and those uses which the Government intended to reserve.

3. Mineral Lands: Mineral Reservation—Patents of Public Lands: Reservations—Stock-Raising Homesteads

A patent of land under the Stock-Raising Homestead Act, 43 U.S.C. § 291 *et seq.* (1970), was not generally intended to give the grantee the right to use the land for mineral development and mineral development was to proceed only under the mineral laws.

4. Mineral Lands: Mineral Reservation—Patents of Public Lands: Reservations—Statutory Construction: Generally—Stock-Raising Homesteads—Words and Phrases

"*Ejusdem generis.*" The *ejusdem generis* rule of construction may not be invoked to exclude gravel from the scope of a reservation of "all the coal and other minerals" in patents issued under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), because this rule of construction can only be effectively applied where there is a series of specific terms which define a class so that one may construe a general term by reference to that class.

5. Mineral Lands: Mineral Reservation—Patents of Public Lands: Reservations—Public Lands: Administration—Stock-Raising Homesteads—Trespass: Generally

Sec. 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), contemplates the Department of the Interior retaining continuing jurisdiction and administration of mineral deposits reserved by that Act.

6. Mineral Lands: Mineral Reservation—Patents of Public Lands: Reservations—Public Lands: Administration—Stock-Raising Homesteads—Surface Resources Act: Applicability—Trespass: Generally—Words and Phrases

"Public lands." Under 43 CFR 9239.0-7 which defines a trespass, the term "public lands" includes mineral deposits reserved under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970).

7. Mineral Lands: Mineral Reservation—Patents of Public Lands: Reservations—Stock-Raising Homesteads—Surface Resources Act: Generally

The declaration in the Surface Resources Act, 30 U.S.C. § 611 (1970), that no deposit of common varieties of gravel shall be deemed a valuable mineral deposit within the meaning of the mining laws, was not intended to operate as a conveyance, to holders of patents, of any minerals reserved under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970).

8. Mineral Lands: Mineral Reservation—Patents of Public Lands: Reservations—Stock-Raising Homesteads

Gravel in a valuable deposit is a mineral reserved to the United States in patents issued under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970).

9. Appraisals—Hearings—Mineral Lands: Generally—Surface Resources Act: Hearings—Trespass: Measure of Damages

When the Bureau of Land Management has appraised the damages for a mineral trespass under 43 CFR Part 9230, a hearing will not be ordered and an appraisal will not be disturbed in the absence of an offer of specific substantial evidence that the determination is incorrect.

APPEARANCES: Harley W. Shaver, Esq., Canges & Shaver, Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GOSS

INTERIOR BOARD OF LAND APPEALS

Western Nuclear, Inc., has appealed from the decision of the Wyoming State Office, Bureau of Land Management, in which the Bureau determined that appellant had committed an unintentional trespass on federally owned minerals and held appellant liable for \$13,000 in damages for gravel removed from the deposit. Appellant alleges it has also removed sand, but that material is not subject of the trespass action. Appellant challenges both the fact of the reservation of the gravel and the amount of damages which were imposed.

The State Office cited appellant for trespass involving violation of the Materials Act of July 31, 1947 (61 Stat. 681), *as amended*, by the Surface Resources Act of July 23, 1955 (69 Stat. 368), 30 U.S.C. § 601 *et seq.* (1970). The latter Act declared, *inter alia*, that "[n]o deposit of common varieties of * * * gravel * * * shall be deemed a valuable mineral deposit within the meaning of the mining laws * * *." 30 U.S.C. § 611 (1970).

The land on which the trespass had occurred was patented in 1926. The patent reserved to the United States "all the coal and other minerals in the lands so entered and

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patented together with the right to prospect for, mine, and remove the same pursuant to the provisions and limitations of the Act of Dec. 29, 1916 (39 Stat. 862-865)," the Stock-Raising Homestead Act, 43 U.S.C. §§ 291-301 (1970).¹ The first issue is whether this reservation includes gravel.

¹ These provisions and limitations are set forth at 43 U.S.C. § 299 (1970):

"All entries made and patents issued under the provisions of sections 291 to 301 of this title shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal. Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by said sections, for the purposes of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a

The State Office appraisal report describes the property as follows:

The deposit located on the property is an alluvial gravel with 6.4 acres of the 14 acre parcel mined for gravel. * * * There are 6-12 inches of overburden on the site * * *. It is estimated that the deposit thickness will average 10 feet or more in thickness. In the nature of speculation, the deposit could cover up to 40 acres, however this report is restricted to the 6.4 acre area mined. * * *

Highest and Best Use

After investigating the area in and around Jeffrey City based on the site data analysis above it is adjudged that the highest and best use of the property is for a mineral material (gravel) site.

The land was used for grazing before location of the pit and after rehabilitation will most likely be used as grazing land. However, during the time of operation of the pit its highest and most productive use is for a gravel site-mineral material site.

_____ court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with the rules and regulations prescribed by the Secretary of the Interior and to be filed with and approved by the officer designated by the Secretary of the Interior of the local land office of the district wherein the land is situate, subject to appeal to the Secretary of the Interior or such officer as he may designate: *Provided*, That all patents issued for the coal or other mineral deposits herein reserved shall contain appropriate notations declaring them to be subject to the provisions of sections 291 to 301 of this title with reference to the disposition, occupancy, and use of the land as permitted to an entryman under said sections." (Italics added.)

As to compensation for damage to grazing values, see *infra*.

For the subsequent legislative history of 43 U.S.C. §§ 291-98 (1970), see 43 U.S.C. § 315 *et seq.* (1970) and sec. 702 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2789. *Daniel A. Anderson*, 31 IBLA 162 (1977). The Federal Land Policy and Management Act provides that 43 U.S.C. §§ 291-98 (1976) are repealed.

The above conclusion in the appraisal report is based on a technical report of T. W. Holland. Also a part of the appraisal report is a mineral report in which geologist William D. Holsheimer states:

The gravel is overlain by a soil cover of fairly well developed loamy sand, some 12-18 inches in thickness. There is a relatively good vegetative cover, consisting mainly of sagebrush, and an understory of various native grasses.

Appellant argues that the mineral reservation issue is governed by the law in effect at the time the grant was made and points to the case of *Zimmerman v. Brunson*, 39 L.D. 310 (1910), in which the presence of sand and gravel was held not to make the land mineral in character. Although appellant recognizes that this decision was overruled by *Layman v. Ellis*, 52 L.D. 714 (1929), it contends that sand and gravel were not considered minerals at the time the statute was passed.

In a brief unpublished opinion, the Department has indicated that sand and gravel are minerals reserved to the United States in patents issued under the Stock-Raising Homestead Act, even though such minerals are no longer subject to location under the mining laws. *Solicitor's Opinion*, M-36417 (February 15, 1957). This Board has also ruled that sand and gravel are reserved in patents issued under another statute, 43 U.S.C. § 315(g) (1970), which reserves "all minerals to the United States. *United States v. Isbell Construction Co.*, 4

IBLA 205, 78 I.D. 385 (1971).² The arguments raised by appellant, however, have not been fully considered previously, and the reservation in the Stock-Raising Homestead Act has not previously been construed by the Board of Land Appeals.

[1] At the outset, it must be recognized that the appeal concerns construction of a mineral reservation in a patent issued by the United States, and interpretation must be consistent with "the established rule that land grants are to be construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *United States v. Union Pacific R. Co.*, 353 U.S. 112, 116 (1957). Under this rule, sand and gravel should be considered as included in a reservation of all minerals to the United States unless it is clear that they were conveyed by the patent under the statute. In *United States v. Union Oil Co. of California*, 549 F.2d 1271, 1273 n. 5 (9th Cir.), cert. denied, U.S., 98 S. Ct. 712 (1977), the Court cited *Union Pacific* and held that geothermal resources of previously unrecognized value were reserved under Stock-Raising Homestead patents. The *Union Oil* ruling at 1274 and 1277 is particularly applicable to the appeal herein:

² The Stock-Raising Homestead Act differed originally from the statute construed in *Isbell Construction Co.*, *supra*, which statute provided from the date of its enactment for compensation for damage to the land as well as to improvements. 43 U.S.C. § 315(d) (1970).

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* * * The Act's background, language, and legislative history offer convincing evidence that Congress's general purpose was to transfer to private ownership tracts of semi-arid public land capable of being developed by homesteaders into self-sufficient agricultural units engaged in stock raising and forage farming, but to retain subsurface resources, particularly mineral fuels, in public ownership for conservation and subsequent orderly disposition in the public interest. The agricultural purpose indicates the nature of the grant Congress intended to provide homesteaders via the Act; the purpose of retaining government control over mineral fuel resources indicates the nature of reservations to the United States Congress intended to include in such grants.

* * * * *
 * * * The report of the House Committee reproduces a letter from the Department of Interior endorsing the bill. The Department notes that "*all mineral[s] within the lands are reserved to the United States.*" H.R. Rep. No. 35, 64th Cong., 1st Sess. 5 (1916).

* * * * *
 The floor debate is revealing. The bill drew opposition because of the large acreage to be given each patentee. See, e.g., 52 Cong. Rec. 1808-09 (1915) (remarks of Rep. Stafford). In response, supporters emphasized the limited purpose and character of the grant. They pointed out that because the public lands involved were semi-arid, an area of 640 acres was required to support the homesteader and his family by raising livestock. E.g., *id.* at 1807, 1811-12 (remarks of Reps. Fergusson, Martin and Lenroot). They also pointed out that the grant was limited to the surface estate, * * * and they emphasized in the strongest terms that all minerals were retained by the United States. [Italics added.]

The primary issue herein is whether gravel constitutes a "min-

eral" resource under the Stock-Raising Homestead Act. The Act and its legislative history support a broad interpretation of the scope of the mineral reservation. Although no reference to gravel appears in the statute or legislative history, we believe that holding gravel to be a reserved mineral is consistent with Congress' dual purpose in conveying land for stock-raising purposes and retaining the right to develop all minerals.

[2] The Stock-Raising Homestead Act was enacted to encourage further settlement on public land and increase the supply of livestock. It was recognized that vast unpopulated areas of the West were semi-arid in character so that even 320 acres, the maximum entry under existing agricultural land laws, would not be sufficient to support a family. Although such land might not be suitable for farming, it was suitable for raising livestock, and the desire to see such land settled led to the consideration of legislation which evolved into the Stock-Raising Homestead Act. The Act provided for entry of 640 acres of land designated by the Department as stock-raising land, which was defined as

* * * lands the surface of which is * * * chiefly valuable for grazing and raising forage crops, do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, and are of such character that six hundred and forty acres are reasonably required for the support of a family * * *

43 U.S.C. § 292 (1970). The acreage that could be entered was double the maximum entry under existing agricultural entry laws, and Congress perceived the need to ensure that mineral resources would not be conveyed under what was a form of agricultural disposal.

Before 1909, lands which were mineral in character were subject to disposal only under the mineral laws. *United States v. Sweet*, 245 U.S. 563, 567-72 (1918). Because such land was not subject to disposal under the agricultural land laws, a homestead entry on mineral land could be canceled after a mineral claimant had established the mineral character of the land in a contest proceeding. *See, e.g., Layman v. Ellis, supra*, in which a homestead entry was canceled to the extent that it included a sand and gravel deposit. However, various statutes were enacted in 1909,³ 1910,⁴ and 1914⁵ which permitted agricultural entries on lands valuable for specified minerals but which reserved such minerals to the United States. The mineral reservation provisions of the 1910 and 1914 Acts provided the models for the mineral reservation provision of the Stock-Raising Homestead Act, except that the Stock-Raising Homestead Act required a reservation of

"all the coal and other minerals" rather than specifically mentioned minerals.

The Stock-Raising Homestead Act is predicated on the concept that land may be subject to multiple uses and that designation for one form of use should not preclude disposal for other possible uses. Thus, interpretation of a conveyance under the Act must take into account the intended use for which the land was conveyed and those uses which the Government intended to reserve. *United States v. Union Oil Co., supra; see Skeen v. Lynch*, 48 F.2d 1044 (10th Cir. 1931).⁶

[3] The very name of the Act, and the requirement of designation of the land as stock-raising land ("land the surface of which is * * * chiefly valuable for grazing and raising forage crops * * *") prior to entry, underscore the limited purpose of the grant. *United States v. Union Oil Co. of California, supra* at 1277. The text of the mineral reservation provision makes clear that a patent of land for stock raising purposes was not to give the grantee the right to use the land for mineral development and that mineral development was only to pro-

³ An Act for the protection of the surface rights of entrymen, 30 U.S.C. § 81 (1970), which provided for reservation of coal.

⁴ An Act to provide for agricultural entries on coal lands, 30 U.S.C. §§ 83-85 (1970).

⁵ An Act to provide for agricultural entry of lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic materials, 30 U.S.C. §§ 121-123 (1970).

⁶ In *Skeen, supra* at 1046, the Court stated: " * * * The legislative history of the Stock-raising Homestead Act when it was reported for passage including the discussion that followed relevant to this subject leave us no room to doubt that it was the purpose of Congress in the use of the phrase 'all coal and other minerals' to segregate the two estates, the surface for stock-raising and agricultural purposes from the mineral estate, and to grant the former to entrymen and to reserve all of the latter to the United States."

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ceed under mineral laws then in effect or those that may later come into effect. This intent is further emphasized in the legislative history of the statute.

The comments of this Department were included in the report of the House Committee on the Public Lands which recommended enactment of the legislation:

* * * Another reason for the reservation of the minerals is that this law will induce the entry of lands in those mountainous regions where deposits of mineral are known to exist or are likely to be found. To issue unconditional patents for these comparatively large entries under the homestead laws might withdraw immense areas from prospecting and mineral development, and without such a reservation the disposition of these lands in the mineral country under agricultural laws would be of doubtful advisability.

The farmer-stockman is not seeking and does not desire the minerals, his experience and efforts being in the line of stock raising and farming, which operations can be carried on without being materially interfered with by the reservation of minerals and the prospecting for and removal of same from the land. [Italics added.]

H.R. Rep. No. 35, 64th Cong., 1st Sess. 5 (1916).

The House report itself makes the following comment on the provisions:

It appeared to your committee that many hundreds of thousands of acres of the lands of the character designated under this bill contain coal and other minerals, the surface of which is valuable for stock-raising purposes. The purpose of section 11 is to limit the operation of this bill strictly to the surface of the lands described and to reserve to the United States the ownership and right to

dispose of all minerals underlying the surface thereof. The section also provides a method for the joint use of the surface of the land by the entryman of the surface thereof and the person who shall acquire from the United States the right to prospect, enter, extract, and remove all minerals that may underlie such lands, this method to be under the direction of the Secretary of the Interior under such rules and regulations as he may prescribe. [Italics added.]

Id. at 18.

The record of the floor debates also demonstrates the limited purpose of the patent and the broad effect of the mineral reservation. When queried as to whether the reservation included oil, Representative Ferris, chairman of the Committee on the Public Lands and sponsor and manager of the legislation, responded as follows:

Mr. FERRIS. It would. *We believe it would cover every kind of mineral. All kinds of minerals are reserved; and, more than that, it does not apply to timberlands or to lands susceptible of irrigation or any land that can get water from any known source. It merely gives the settler who is possessed of any pluck an opportunity to go out and take 640 acres and make a home there.* * * *

Mr. MOORE of Pennsylvania. If any oil should be discovered on these lands later on, the Government's right to that oil would be preserved under this mineral clause, would it?

Mr. FERRIS. Yes; and further, this act authorizes the reentry upon these lands to extract oil and coal and anything else in the way of minerals that may be on it.

Mr. MOORE of Pennsylvania. The gentleman does not think it is necessary to specify oil?

Mr. FERRIS. No. That is a mineral. But I have no objection to its being men-

tioned specifically if it is at all thought necessary. I feel doubly sure, however, it is not.

Mr. MOORE of Pennsylvania. It has been called to my attention that the word "mineral" would not include oil.

Mr. FERRIS. I do not think it is necessary; but if the gentleman thinks there is any conceivable doubt about it we will put it in, because *not a single gentleman from the West who has been urging this legislation wants anybody to be allowed to homestead mineral land.* This does not apply to a single acre of land in my own State, and therefore I have no selfish interest in it. But these gentlemen who are interested in it do not want to homestead mineral land or ordinary homestead land or oil land. [Italics added.]

53 Cong. Rec. 1171 (1916).

Indeed, the broad scope of the reservation and the limited nature of the grant drew objections from Representative Mondell who compared the provisions of the proposed legislation with the provisions of earlier legislation⁷ which provided for agricultural entry of mineral lands: "They [patents under the earlier statutes] convey fee titles. They give the owner much more than the surface; they give him all except the body of the reserved mineral." 53 Cong. Rec. 1234 (1916). In later debates, he objected:

In the first place, I think the fact should be emphasized that the bill establishes a new method and theory with regard to minerals in the land legislation in our country. It reverts back to the ancient doctrine of the ownership of the mineral by the king or the crown and reserves specifically everything that is mineral in all the land entered. It was, it was claimed, necessary to accept a provi-

sion of that kind in order to secure the larger acreage. The Interior Department insisted upon it, and many supported that view. My own opinion is that that policy is not wise and that in the long run it will be found to be infinitely more harmful than beneficial or useful or helpful to anyone, either the individual or the public generally. When one takes into consideration the wide range of substances classed as mineral, the actual ownership under a complete mineral reservation becomes a doubtful question.

54 Cong. Rec. 687 (1916).

Neither the Act nor its legislative history indicate any reason to treat gravel differently from its treatment in other Departmental decisions which, under other statutes, hold gravel to be a mineral. *E.g.*, *Layman v. Ellis, supra*, and *United States v. Isbell Construction Co., supra*. Patents under the Stock-Raising Homestead Act were issued for homesteads, not for gravel enterprises. The patent was not intended to convey the right to use the land for mineral development, that right being reserved to the United States for appropriation under the mineral laws.

The Ninth Circuit in *United States v. Union Oil Co. of California, supra*, at 1273-74, n. 5, has ruled:

This is basically a question of legislative intent * * *. To the extent that the argument rests on the meaning of the word [minerals] itself, however, the government is entitled to have the ambiguity resolved in its favor * * *.

Appellees argue that the term "minerals" is to be given the meaning it had in the mining industry at the time the Act was adopted * * *. This is a minority rule, *United States v. Isbell Constr. Co.*, 78 Interior Dec. 385, 390-91 (1971), even

⁷ See notes 3-5, *supra*.

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as applied to permit conveyances. 1 American Law of Mining § 3.26, at 551-53. (1976).

Appellant does not fully set forth the effect of *Layman* in overruling *Zimmerman*. *Layman* was not merely a decision which held that sand and gravel would prospectively be deemed minerals; the decision resolved a conflict between parties that had already entered the land and canceled an existing homestead entry to the extent that it included sand and gravel deposits. Furthermore, *Layman* specifically points out that *Zimmerman* was not an accurate statement of the law in 1910 and points to a number of contemporary authorities which conflict with *Zimmerman*. Even if we were bound to construe the reservation in accordance with the law in effect when the patent was issued or when the statute was enacted, there is no reason to believe that Congress intended the reservation to be subject to the erroneous rule in *Zimmerman* rather than those other authorities.⁸

Appellant through its counsel contends that the surface of the land consists of sand and gravel and that we should not deem these substances as reserved because their development would destroy the surface and thus nullify the patent. Appellant's argument obscures the Congressional intent to reserve mineral re-

sources for disposal under the mineral laws. If a mineral is not reserved when its development would injure the surface, then even coal in shallow deposits would pass to the homesteader, despite the unambiguous intent of the Act.

We recognize that there is a significant body of law to the effect that mineral reservations do not include the right to destroy the entire surface in developing the mineral. Such rulings arise from the concern that the grantor would have retained dominion over that which he purportedly conveyed and that the grantee would be deprived of the very substance of his bargain without compensation.⁹ Holding gravel to be a reserved mineral does not deny the holder of a stock-raising homestead patent the substance of his bargain without compensation, because the Act provides for com-

⁸ The New Mexico Supreme Court has held that a rock deposit is not a mineral reserved under the Stock-Raising Homestead Act. *State ex rel. State Highway Comm'n v. Trujillo*, 82 N.M. 694, 487 P.2d 122, 125 (S. Ct. N.M. 1971). The case involved a dispute between the holder of land under a Stock-Raising Homestead patent and a state agency authorized by the BLM to remove reserved mineral material from the land. Although the state court did not exercise jurisdiction over the interest of the United States in the rock deposit, it purported to apply Federal law. However, the court expressly rejected the analysis taken in *Skeen v. Lynch*, *supra*, and held that Congress did not intend to reserve rock.

The Ninth Circuit, in *Union Oil Co., supra*, at n. 11, relied upon *Skeen* and recognized that the *State Highway Commission* decision was not in harmony with the legislative history of the Stock-Raising Homestead Act. The Supreme Court of New Mexico has subsequently held sand and gravel to be reserved under a reservation of all minerals in *G. W. Burris v. State ex rel. State Highway Commission*, 88 N.M. 146, 538 P.2d 418 (S. Ct. N.M. 1975), but distinguishes *Trujillo, supra*.

⁹ In 1913, the U.S. Geological Survey regarded the presence of gravel as a sufficient basis for classifying land as mineral. U.S. Geological Survey, Department of the Interior, Bulletin 537, *The Classification of the Public Lands*, 138-42 (1913).

compensation for damages to crops and improvements. In 1949 Congress provided also for compensation for damage to grazing values.¹⁰ In neither the statutes' specific reservation of coal nor in its legislative history, is there any indication that surface deposits of coal or other minerals should be deemed excluded from the mineral reservation.

[4] Appellant points out that the reservation does not reserve "all minerals"¹¹ but "all the coal and other minerals." Appellant argues that under the principle of *ejusdem generis*, sand and gravel are not "other minerals" because they are not similar to coal. However, this rule of construction is applicable where there is a series of specific terms which define a class so that one may construe a general term by reference to that class. See 2A Sutherland, *Statutes and Statutory Construction*, § 47.18 (4th ed. C. D. Sands 1973). If a dissimilarity with coal were a sufficient basis for excluding a given mineral from the scope of the reservation, then the expression "other minerals" would be only surplusage because every other mineral can be distinguished from coal. Clearly, the use of *ejusdem generis* is not appropriate because the term "coal" provides an insufficient specific enumeration on which to base a construction of the general term "other minerals." *Id.* § 47.20. Such rules of construction

are only aids in determining the legislative intent and ought not to be invoked as obstacles to prevent the intent from taking effect. *Id.* § 47.22. See, e.g., *Skeen v. Lynch*, *supra*.¹²

[5] Appellant contends that the patenting of the land in this case removed it from the status of public land under 30 U.S.C. §§ 601-03 (1970), and that this Department has no jurisdiction over the gravel deposit in issue. This argument ignores the fact that section 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), clearly contemplates the Department's continuing jurisdiction and administration of deposits reserved by that Act. Such deposits fall within the ambit of the Department's enforcement authority. 43 U.S.C. § 1201 (1970).

[6] "The extraction, severance, injury, or removal of timber or mineral materials from public lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass * * *." 43 CFR 9239.0-7. See also 43 CFR 3602.1. Although 43 CFR 9239.0-7 refers to "public lands," that term can

¹⁰ In *Bumpus v. United States*, 325 F.2d 264 (10th Cir. 1963), the court applied the *ejusdem generis* rule in holding that sand and gravel were not included in a reservation of "oil, gas and other minerals." The reservation was in favor of a private party who had conveyed the land to the United States for reservoir purposes, and the case did not involve construction of a Federal land grant. Furthermore, the rule was applied only when the court determined that the result would be consistent with the intent of the parties to the transaction.

¹⁰ Sec. 5 of the Act of June 21, 1949, 30 U.S.C. § 54 (1970).

¹¹ The statute construed in *United States v. Isbell Construction Co.*, *supra*, required a reservation of "all minerals." 43 U.S.C. § 315 (g) (1970).

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only be defined in context. It is not a term of art having a specific legal effect. *Ben J. Boschetto*, 21 IBLA 193 (1975). In certain contexts, "public land" includes any interest in land administered by the Bureau of Land Management. *See, e.g.*, 43 U.S.C.A. §1702(e) (West Supp. 1977). The term must be broadly defined when it is used to describe the Department's administrative responsibility to protect mineral resources reserved by the Stock-Raising Homestead Act.

[7] Under 30 U.S.C. § 611 (1970), the status of gravel was only affected in connection with the mining laws. The mineral remains reserved under the Stock-Raising Homestead Act; the Surface Resources Act was not intended to operate as a conveyance of any reserved minerals to holders of stock-raising homestead patents. *Solicitor's Opinion*, M-36417, *supra*. The effect of the statute was to withdraw gravel deposits including those reserved under the Stock-Raising Homestead Act from appropriation under the mining laws. Development of gravel deposits on "public lands" should therefore be consistent with the terms of the Materials Act as amended by the Surface Resources Act. 30 U.S.C. § 601 (1970).

[8] It thus is clear that gravel in a valuable deposit is a mineral reserved to the United States in patents issued under the Stock-Raising Homestead Act.

[9] The State Office determined that appellant owed \$13,000 in dam-

ages for the removal of about 43,000 cubic yards of material valued at a royalty rate of 30 cents per cubic yard.¹³ Appellant argues that this determination is arbitrary, capricious, and unreasonable because appellant leases a similar site from the State of Wyoming and pays only six cents per cubic yard. However, it appears from the record that the 6-cent rate was established by a State agency in 1969 and has not been updated since then, and the record does not make clear that the State established its rate on the basis of then fair market value.

The State Office determination was based upon an appraisal report which considered four sites. The report indicated the royalty rates for materials from those sites, and the sites were compared with the deposit herein concerned on the basis of location, character of the material, access, depth of the material, and thickness of overburden. No comparable evidence was offered by appellant. A hearing will not be ordered in the absence of a specific factual assertion that would show

¹³ The appraisal report states the royalty reflects the value in the ground. Departmental regulation 43 CFR 9239.0-8 provides that the measure of damages is determined by the laws of the state in which the trespass is committed. We are aware of no provision of Wyoming law which limits damages to only the royalty value of the material removed, and where state law provides for compensation for damages, the measure of damages may be somewhat higher than the royalty value of the material removed. *See Knife River Coal Mining Co.*, 70 I.D. 16, 18 (1963). Our affirmation of the decision below should not be construed as fixing a limited rule for assessment of damages.

an appraisal is incorrect. *XYZ Television, Inc.*, 33 IBLA 80, 81 (1977). Where the Bureau of Land Management has appraised the damages for a trespass, the appraisal will not be disturbed in the absence of substantial evidence that the determination is in error. *Hub Lumber Company*, A-29527 (Sept. 17, 1963).¹⁴ Appellant's position was extensively briefed, and neither appellant nor the Solicitor's Office responded to the invitation to submit written argument as to the effect of the recently decided *United States v. Union Oil Company of California, supra*. Accordingly, appellant's request for a hearing and oral argument is denied.

Assuming the State Office figure of 30 cents per cubic yard is a reasonably accurate appraisal, and that the amount of material taken in trespass is 42,675 cubic yards,¹⁵ as reported by Western Nuclear in its letter of Jan. 7, 1976, and apparently accepted by BLM, the payment due is not \$13,000 as rounded-off by the appraiser; but rather the sum due is \$12,802.50.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

¹⁴ A similar rule applies to appraisals used to determine charges for use and occupancy of rights-of-way. See e.g., *Mountain States Telephone and Telegraph Co.*, 26 IBLA 393, 83 I.D. 332 (1976).

¹⁵ On Oct. 22, 1975, Gary Fletcher of Western Nuclear stated to BLM geologist William D. Holzheimer that 64,333 yards have been used and some 32,000 yards stockpiled.

JOSEPH W. GOSS,
Administrative Judge.

WE CONCUR:

MARTIN RITVO,
Administrative Judge.

DOUGLAS E. HENRIQUES,
Administrative Judge.

TOWN OF SILVERTON

35 IBLA 183

Decided May 23, 1978

Appeal from decision of the Colorado State Office, Bureau of Land Management declaring divestiture of title to lands granted under the Act of Feb. 25, 1925 (43 Stat. 980). CO-946(A).

Reversed and remanded.

1. Act of February 25, 1925—Patents of Public Lands: Generally—Public Lands: Disposals of: Generally

"An Act Granting public lands to the town of Silverton, Colorado, for public park purposes" (43 Stat. 980, Feb. 25, 1925).

The above Act and the patent issued in accordance therewith require that the lands granted be used for public park purposes only, and the town's attempt to lease a portion of the lands for the construction of camper sites does not violate the Act and patent since the use of a limited part of the patented land for camper sites is consistent with recreational and public park purposes.

APPEARANCES: William F. Corwin,
Esq., Town Attorney, for appellant.

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OPINION BY ADMINISTRATIVE JUDGE FISHMAN

INTERIOR BOARD OF LAND APPEALS

The town of Silverton, Colorado, appeals from the July 26, 1977, decision of the Colorado State Office, Bureau of Land Management (BLM), revesting in the United States title to certain lands patented to Silverton for alleged violation of the reversionary clause of the patent.

The Act of Feb. 25, 1925 (43 Stat. 980), under which the grant was made, reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby granted and conveyed to the town of Silverton, Colorado, for public park purposes, the following-described lands or so much thereof as said town may desire to wit:

A tract of land situate[d] in township forty north, range seven west, New Mexico principal meridian, in the county of San Juan and State of Colorado, conforming as nearly as practicable to legal subdivisions, and not exceeding three hundred and twenty acres in extent, which land embraces what is commonly known as lower Molas Lake, in said county.

That such conveyance shall be made of the said land to said town by the Secretary of the Interior, upon the payment by said town for the said land, or such portion thereof as it may select, at the rate of \$1.25 per acre, and patent issued to said town for the said land selected, to have and to hold for *public park purposes*, subject to the existing laws and regulations concerning public parks; and the grant hereby made shall not include

any lands which at the date of issuance of patent shall be covered by valid existing bona fide right or claim initiated under the laws of the United States: *Provided*, That there shall be reserved to the United States all oil, coal, and other mineral deposits that may be found in the land so granted and all necessary use of the land for extracting the same: *Provided further*, That said town shall not have the right to sell or convey the land herein granted, or any part thereof, or to devote the same to any other purpose than as hereinbefore described; and that if the said land shall not be used as a public park, the same, or such parts thereof not so used, shall revert to the United States. [Italics added.]

The patent associated with the grant, No. 1027982 (May 31, 1929), also recited that the lands were to be held for public park purposes and contained the identical reversionary clause stated in the Act, *supra*.

On Mar. 2, 1977, Silverton (appellant) and Hillyer Enterprises (Hillyer), a general partnership, entered a so-called "Maintenance Agreement" (as amended) covering the subject lands. The agreement, as amended by the parties, provides as follows:

THIS AGREEMENT dated this 2nd day of March, 1977, by and between the Town of Silverton, Colorado, by and through its elected Officers and Officials, hereinafter called the "Party of the First Part" and Hillyer Enterprises, a general partnership, hereinafter called "Party of the Second Part."

WITNESSETH:

The Party of the First Part hereby agrees to lease to the Party of the Second Part on a Maintenance Agreement for public park purposes a tract of land

known as Molas Lake Park situated in Sections 6 and 7 of Township 40N, R. 7W., of the N.M.P.M., Colorado, more particularly bounded and described as follows:

Beginning at corner No. 1; thence South eighty-four degrees, fifty-nine minutes West fourteen and twenty-five hundredths chains to corner No. 2; from which U.S. Location Monument Molas, bears North twenty-two degrees sixteen minutes East fifty-one and four hundredth chains distant; thence, South thirty-eight degrees twenty-five minutes West forty-one and ninety-one hundredths chains to Corner No. 3; thence, South thirteen degrees two minutes East twelve and sixty hundredths chains to corner No. 4; thence, South sixty degrees forty-six minutes east twenty-nine and twenty-eight hundredths chains to Corner No. 5; thence North eleven degrees four minutes East sixty-one and eighty-four hundredths chains to Corner No. 1, the place of beginning, containing one hundred thirty-seven acres and two hundred twenty-seven thousandths of an acre, according to the Official Plat of the Survey of the said Land, on file in the General Land Office.^[1]

1. The Party of the First Part leases the above described real property for public park purposes to the Party of the Second Part for a term of five years beginning January 1, 1977, and ending on December 31, 1982. For leasing the above described property, the Party of the Second Part shall pay to the Party of the First Part, on or before June 1 of each year the sum of \$500.00 (Five Hundred Dollars) per year for the lease of the above described real property.

2. The Party of the Second Part shall have the right to install a minimum of thirty-one camp sites on the said property over a period of five years with the right of adding additional camp units as the Party of the Second Part determines feasible and needed as long as the Party of the Second Part meets the re-

quirements of the laws or statutes required by the State of Colorado, County of San Juan, and/or the Town of Silverton.

3. The use of said property by said Party of the Second Part shall be for public park purposes in compliance with 43 U.S.C. Section 980 titled "An Act Granting Public Land to the Town of Silverton, Colorado for Public Park Purposes" and the Party of the Second Part's use shall be limited to the area set forth in paragraph 11, unless modified in writing.

4. The Party of the Second Part shall have the right to install a portable office and portable store on said property set forth in paragraph 11 for the use of the campsite facilities and also for the use of the general public; such buildings shall be portable building(s) or public home(s) which are adaptable for such use. The approximate size of the building will be 14 feet by 70 feet.

5. The Party of the Second Part shall provide free parking facilities for the public and a free day use area on the said property.

6. The Party of the Second Part shall have all such camping sites bordered by logs, rocks or comparable material and shall furnish fire pits and picnic tables for the use area and shall also have a trash disposal site and sewage disposal site which shall be the responsibility of the Party of the Second Part to maintain.

7. In the event that the Party of the Second Part would wish to install a central water system on the said property, he shall have the right to be able to use any water rights that the Town of Silverton may own or acquire on the said property.

8. The Party of the First Part shall, on or before July 1, 1977, exercise all reasonable effort to extend a road around Molas Lake which shall be open to the use of the public and also to the use of the Party of the Second Part herein.

9. For consideration granted herein and for the additional consideration of Ten Dollars (\$10.00), receipt of which is hereby acknowledged, the Party of the First Part grants to the Party of the Sec-

¹ This description encompasses the entire grant and is identical to that contained in the patent.

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ond Part an option to renew this Agreement for an additional period of ten years beginning January 1, 1983, and continuing until December 31, 1993. Within thirty days of the expiration of this original Agreement, the Party of the Second Part shall notify the Party of the First Part in writing whether or not he intends to exercise the option for an additional period of ten years. If the Party of the Second Part so elects to exercise this option, the Parties shall negotiate a new Agreement on a flat fee basis.

If such negotiation cannot be reached, then the agreed upon rental rate of the property shall be a percentage of the gross receipts not to be less than 2% nor more than 10% of such gross receipts as shown by the Federal Income Tax Return for Hillyer Enterprises for each year of operation.

10. Changes or additions to the plans for development of the camp sites [as plan of operation] submitted to the Party of the First Part on December 13, 1976, shall be made subject to review [and approval or disapproval] by the Party of the First Part, and subject to recommendations of the then Chairman of the Parks Committee.

11. The area in which the Party of the Second Part shall be allowed to install camper sites and set up a concessionary store for the sale of goods and services is set forth in Exhibit "A" [appellant's Exh. D] attached hereto and made a part hereof.

12. The party of the First Part shall grant unto the Party of the Second Part authority to deal with the United States Government or the Bureau of Land Management as it concerns the area under the Party of the Second Part's control as set forth in Exhibit "A" [appellant's Exh. D] attached hereto. All the dealings concerning the area not under the direct control of the Party of the Second Part shall be retained by the Party of the First Part.

13. The Party of the Second Part shall allow the Party of the First Part the au-

thority to expand the area set forth in Exhibit "A" [appellant's Exh. D]. Such permission shall not [be] withheld unreasonably. However at no time shall the entire area be used by the Party of the Second Part for camper sites. The Party of the Second Part shall not charge for the use of fishery rights at Molass [sic] Lake.

The BLM decision, finding appellant to be in violation of the reversionary provision of the grant states in its dispositive rationale:

Instead of leasing a limited area of the Park for development of a commercial campground, the entire park was leased to Hillyer Enterprises. Although initial plans call for development only perhaps [of] one-third of Park's area, it is evident both from the language contained in the lease and from our discussions with Silverton and Hillyer that development of as much as 90% or more of the Park for commercial campground purposes is ultimately contemplated, subject only to the approval of the Town of Silverton. Thus, even if it were possible for us to reconcile use of a portion of land patented for "public park purposes" for the operation of commercial facilities under the theory that such use amounted to no more than a "concession", we are estopped from doing so here by the potential magnitude of the projected development and the degree to which control over the area has been transferred into private hands.

Appellant asserts in its statement of reasons that only that part of the park necessary for the operation of the camper park would be under the control of Hillyer. Appellant refers to a map (appellant's Exh. D) of the Molass Lake Recreation Area dated Nov. 10, 1976. The map contains the label "Hillyer Enterprises Developer" and depicts 31 proposed campsites arranged along

a loop access road at one end of the lake. Also shown on the map are a "day use area" along a fraction of the lake shore and a "caravan camping area." Pointing to paragraph 10 of the Maintenance Agreement, appellant urges that the town "has in no way relinquished control over the park."

Appellant also lists improvements made by the town since the time of the grant. Among these are the construction of a 1-mile water ditch, a road around the lake, a small dam to control seepage, and a waterline from a spring to the access road.

Appellant asserts further that during 1976, the town spent \$3,800 in upkeep, maintenance, toilet rental, and trash removal. Appellant's position is that the Maintenance Agreement was entered into to eliminate a burdensome expense while preserving the public park character of the area.

Appellant submits that fishery at the lake would be under the control of the state game and fish regulations and that BLM would be at liberty to monitor any fees charged by the town or a private party for camping.

The terms of the original grant contain two specific limitations. The first is that the town shall not have the right to sell or convey the land granted or any part thereof. The second is that the land granted shall not be used other than for public purposes. The question, then, is whether either or both of these limitations would be violated if the

Maintenance Agreement between Silverton and Hillyer were put into operation.

Paragraph 2 of the agreement states that Hillyer may install a minimum of 31 camper sites, and has the right to install an indefinite additional number of such sites "as feasibly and needed." Paragraph 3 of the original maintenance agreement, as amended by the addendum, however, purports to restrict the use by Hillyer to the area appellant's Exh. D (paragraph 11). We have examined and have previously described Exh. D, which is Hillyer's map of the Molas Lake Recreation Area and which depicts 31 campsites as small rectangles along a loop access road at one end of the lake. Paragraph 13, embodied in the addendum, is somewhat puzzling in that it appears to delegate to Hillyer the power to allow the town to "expand the area set forth" in the map, subject to the limitation that at no time shall the "entire area" be used for camper sites. Hillyer is obligated to provide free parking and a free day use area.

[1] Although the agreement lacks specificity and clarity in certain aspects we do not think its general intent is to divert the use of the park, or a portion thereof from the particular purpose stated in the grant. We think, on the contrary, that the development contemplated would facilitate and increase the volume of recreational use by the public. Camping, whether by tent or camper, is a leisure and recreational activity in which people en-

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gage during their vacation time. The country's national parks are equipped with hygienic facilities, utilities, concessions, etc., to provide an attractive setting for this type of recreational use, and we have found no authorities holding that it is contrary to public park purposes. Camping was held a proper use of an unimproved park in *Tobin v. Hennessy*, 130 Misc. 226, 223 NYS 676, *aff'd* 223 App. Div. 10, 227 NYS 363 (1927), and numerous other uses² have been held to be in accord with public park purposes, where municipalities have leased park lands for such uses. Moreover, the lease is not vitiated by the fact that the lessee stands for a private gain where that gain is merely incidental to the primary purpose of serving the public.³ See *Murphy v. Erie County*, 268 N.E. 2d 771 (1971) and Annot. 47 ALR 3d 19.

² A city was authorized to lease part of a park for a restaurant in *Gushee v. New York*, 42 App. Div. 37, 58 NYS 967 (1899); a portion of land dedicated as an open public place and park was held available for leasing as a compact golf course in *Cohen v. Samuel*, 80 A.2d 732 (1951); a library was properly a recreational use in *Moore v. Valley Garden Center*, 185 P.2d 998 (1947), the court noting in conclusion that there had been a multiplicity of decisions holding that public libraries, art museums, natural history museums, children's playgrounds, conservatories, veterans' memorial halls and buildings, restaurants, zoological and botanical gardens, pioneers' memorial halls, historical societies, baseball parks, swimming pools, golf courses, and countless others constituted a recreational use of land for park purpose.

³ We note that the laws governing the operation of the National Parks give explicit recognition to private contractors and concessioners. See, e.g., 16 U.S.C. § 1(b) (1970), authorizing the furnishing of utility services to concessioners within the National Park

We note also that the town retains the power to approve or disapprove the development and therefore find no violation of the restriction against selling or conveying the lands. Appellant has pointed out that the lands have been a burdensome expense to the town. Cf. *Atlas Life Ins. Co. v. Board of Education of City of Tulsa*, 200 P. 171 (1921).

In summary, our review permits the conclusion that the lease is for the development, improvement, or enhancement of Molas Lake Park

System by the Department; 16 U.S.C. § 3 (1970), authorizing the granting of "privileges, leases, and permits for the use of land for the accommodation of visitors * * * for periods not exceeding thirty years"; 16 U.S.C. § 17(b) (1970), authorizing the Secretary "to contract for services or other accommodations * * *"; 16 U.S.C. § 20 (1970), providing for "concessions, accommodations, facilities, and services in areas administered by the National Park Service"; 16 U.S.C. § 22 (1970), providing for leases up to 20 years in Yellowstone National Park "for the accommodation of visitors"; 16 U.S.C. § 32 (1970), authorizing the Department to lease in Yellowstone up to 10 tracts of 20 acres each to an individual or company "as the comfort and convenience of visitors may require for the construction and maintenance of substantial hotel buildings and buildings for the protection of stage, stock, and equipment"; 16 U.S.C. § 45 (a) and (d) (1970), granting authority to the Secretary to issue for Sequoia National Park leases for parcels not exceeding 10 acres at any one place for not to exceed 20 years; and 16 U.S.C. § 55 (1970), authorizing the Department to grant for lands in Yosemite National Park, leases for not to exceed 20 years for tracts up to 20 acres for each place not to exceed ten in number for each person or corporation "as the comfort and convenience of visitors may require * * *".

The courts have given judicial recognition to concessionaire contracts affecting the National Parks. *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm.*, 393 U.S. 186 (1968); *United States v. Gray Line Water Tours of Charleston*, 311 F.2d 779 (4th Cir. 1962); *Eiseman v. Andrus*, 433 F. Supp. 1103 (D. Ariz. 1977).

for the benefit and enjoyment of the public.

The agreement states that there may be as much as 137 acres in the lease to be used for campsite out of a possible total of 320 acres raising the question whether the amount of acreage committed to private development is excessive in terms of the public character sought to be maintained for the lands.

Our findings are restricted solely to the current situation. We express no opinion whether other uses would be in violation of the terms of the patent. We recognize that the agreement authorizes the construction of campsites on 137 acres, but also contemplates that even more land may be devoted to such use. The assignment of more acreage to such use may violate the terms of the patent. The BLM was concerned that all the lands in the park might be devoted to campsites. We share this concern.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

FREDERICK FISHMAN,
Administrative Judge.

WE CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

MARTIN RITVO,
Administrative Judge.

**APPEAL OF CSH CONTRACTORS,
INC.**

IBCA-1107-4-76

Decided *May 25, 1978*

Contract No. CX-3000-5-9010, National Park Service:

Denied.

1. Contracts: Construction and Operation: Drawings and Specifications

Where evidence established that cause of failure of cantilever lintel and collapse of masonry wall was improper original shoring, as well as noncompliance with appropriate directions in reshoring process, on part of construction contractor's employees, and where evidence further showed that drawings and specifications were followed in construction of similar lintels on same project with successful result, the Board finds such drawings and specifications to be neither defective nor inadequate.

2. Contracts: Disputes and Remedies: Equitable Adjustments

Where evidence established that faulty construction of original shoring and non-compliance with appropriate directives in reshoring process on the part of construction contractor's own employees caused failure of cantilever lintel and collapse of masonry wall, the Board denies claim of entitlement to an equitable adjustment by the contractor for additional costs incurred in reconstruction of masonry wall as well as claim for 30-day time extension, since the contractor failed to prove allegations of defective or inadequate Government drawings and specifications.

APPEARANCES: Mr. Frank J. Emig, Attorney at Law, Dunn, Keane and Malzone, Beltsville, Maryland, for the appellant; Mr. F. Stewart Elliott, Department Counsel, Washington, D.C., for the Government.

May 25, 1978

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Background

This appeal arises out of the performance of a contract awarded to appellant by the National Park Service of the Department of the Interior for the construction of a skating pavillion and associated facilities at the Anacostia Community Park Development in Washington, D.C.

The construction contract was awarded Dec. 24, 1974, with the work to be completed by the close of business Dec. 31, 1975. The work was to proceed, pursuant to mutual agreement and formal notice, as of Jan. 6, 1975. The original contract amount was \$1,475,000. However, four Change Orders were issued. Change Order No. 4, included a time extension of 130 days because of union strikes occurring from May 1, 1975 through Oct. 25, 1975, resulting in a change of the completion date to May 8, 1976. A revised contract amount of \$1,521,124.45, resulted from the four Change Orders.

The contractor claimed an equitable adjustment in the total amount of \$22,480.82 for additional costs allegedly caused by inadequate design and insufficient Government specifications and directives with respect to the construction of a curved, concrete cantilever lintel in

the game storage and food concession building, located at the Southeast corner of the skating pavillion. The lintel failed, ultimately causing its collapse, as well as the collapse of the immediately adjacent wall.¹ In addition, the contractor alleged a delay of 30 days while effecting the rebuilding of the collapsed lintel and wall, and, therefore, claimed a 30-day time extension.

Pertinent findings of fact of the contracting officer are in substance as follows: that both the contract specifications and applicable industry standards required the contractor to provide proper and adequate shoring for the subject cantilever lintel; that the failure to do so caused the lintel to deflect which resulted in cracks in the facing tile of the walls radiating outwardly and upwardly at approximately 45 degrees from the corners of the lintel; that after formal rejection of the cracked walls on Aug. 15, 1975, the Government architects and engineers determined that because of the inherent delay involved in removing and replacing the entire lintel, the contractor should rebrace the lintel with end-grain bearing 4 x 4s at third-points on the lintel, as originally directed, and then remove the existing shoring in order to

¹ In the building trades, a *lintel* is defined as a horizontal architectural member supporting the weight above an opening. A *cantilever* is any rigid construction extending horizontally well beyond its vertical support used as a structural element of a bridge, building foundation, etc. *Random House Collegiate Dictionary*.

determine whether the visual impact of the sagging lintel on the building would be aesthetically and architecturally acceptable; that, if so, the lintel could then be repaired by pressure grouting the remainder of the wall; that these directives were not followed by the contractor in that the existing shoring was removed first instead of bracing with the 4 x 4s before removing existing shoring, resulting in the collapse; that the adequacy of the Government's directives was verified by the successful repair of another similarly situated lintel where such directives were followed. Accordingly, the contracting officer denied both the contractor's claim for additional costs and the request for a 30-day extension of time.

The appellant requests the Board to reverse the contracting officer's decision.

Issue Presented on Appeal

The question before the Board is whether the failure of the cantilever lintel and collapse of the wall were caused by the Government's inadequate design, incomplete specifications, or improper directives (as contended by appellant), or, on the other hand, by appellant's noncompliance with the specifications and directives, or failure to adhere to basic construction techniques and industrial standards (as contended by the Government).

Decision

As more particularly discussed below, we find that the contentions

of the Government are sustained by a clear preponderance of the evidence.

Evidence on Adequacy of Specifications and Design

Mr. Sarkis K. Nazarian was not only the president of CSH Contractors, Inc., but was its principal witness at the hearing conducted at Arlington, Virginia, Aug. 29-30, 1977, with Administrative Judge G. Herbert Packwood presiding. Apparently, Mr. Nazarian also authored the complaint for appellant,² the thrust of which was that section 04200, 3-3, B.I. of the contract specifications required shorings to support the reinforced masonry during construction,³ but the contract drawings and specifications were completely lacking in detail showing the contractor how to construct and install such shorings, and that therefore, the respon-

² The complaint, dated July 6, 1976, was written on a CSH Contractors, Inc., letterhead and signed only by Sarkis K. Nazarian, President. Counsel for appellant first appeared in the proceeding by letter, dated May 12, 1977.

³ The text of the specification is as follows: "SECTION 04200 UNIT MASONRY
3-3 REINFORCED UNIT MASONRY

B. Temporary Formwork: Provide formwork and shores as required for temporary support of reinforced masonry elements. Design, erect, support, brace and maintain formwork.

1. Construct formwork to conform to shape, line and dimensions shown. Make sufficiently tight to prevent leakage of mortar grout. Brace, tie and support as required to maintain position and shape during construction and curing of reinforced masonry.

2. Do not remove forms and shores until reinforced masonry member has hardened sufficiently to carry its own weight and all other reasonable temporary loads that may be placed on it during construction."

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sibility for the collapse must rest with the National Park Service.

Under cross-examination, however, Mr. Nazarian admitted that that specification assigned the duty and responsibility of designing the formwork and shoring to the contractor (Tr. 109-110). He also testified that he was not a structural engineer and was not certified by any state to be an engineer (Tr. 101); and further, that although the design and specifications were inadequate as alleged in the complaint, he would not refute a statement by a structural engineer that the design was adequate or a statement by an architect that the design was adequate architecturally (Tr. 117).

Mr. James Madison Cutts, a registered professional engineer in six states, as well as in the District of Columbia, specialized in consulting structural engineering for about 25 years before being employed by the architects of the subject project (Tr. 311-312). At p. 329 of the transcript record, Mr. Cutts, called by the Government as an expert witness, testified as follows:

Q. You have reviewed the design on this building, haven't you?

A. Yes, absolutely.

Q. And do you find any fault in it at all?

A. No. The lintel that collapsed was rebuilt as far as I know exactly according to the drawings, and as I said it is in perfect shape. All of the other lintels were built according to the plans. They are satisfactory. There are no cracks on any of the other lintels that I am aware of.

Q. How about the curved lintel and the cantilever have they ever failed in any of the other buildings?

A. No. We have never had a failure.

Evidence on Construction of Shoring

The only witness to testify at the hearing who was present when the original shoring for the subject lintel was erected was Mr. Jan Kenney, a laborer assigned by the appellant to help the carpenter. His testimony was to the effect that he and the carpenter constructed the shoring for the subject lintel under the direction of Mr. Jack Barrett, the project superintendent for appellant, and that the vertical bracing consisted of nailed-together 4 x 4s (Tr. 12-16). However, under cross-examination, when confronted with photographs 2 and 3, Exhibit R of the Appeal File, Mr. Kenney admitted that 2 x 4s mostly were used for the vertical bracing although they were told to use 4 x 4s (Tr. 31-34).

Mr. Barrett, was involved in an auto accident during the second week in Aug. 1975, and was replaced as project superintendent by Mr. Joe Paxton after the shoring was constructed but before the collapse occurred on Aug. 21, 1975. Mr. Barrett was unable to attend the hearing, so his posthearing deposition was taken at his residence in Ocean City, Maryland, on Sept. 20, 1977. His testimony generally was of little aid in this proceeding because most of the perti-

nent details, names, and dates seemed to have escaped his memory. However, he was quite positive about the shoring. At pp. 6 and 7 of the deposition transcript, he testified as follows:

Q. Do you recall what type of wood was used in this initial shoring?

A. Oh, we had to use plywood, we had to use mostly two-by-four's more than likely. Two-by-four's posts.

Q. Do you recall whether four-by-four's were used?

MR. ELLIOT. I object. You are leading him on everything. Put my objection in the record for the Judge to rule on.

THE WITNESS: I don't recall whether four-by-four's were used or not. I doubt it very seriously. Probably two-by-four's stamped together, you nail two of them together, because four-by-four's are too damn expensive. You nail a couple of two-by-four's together, more than likely. You are only carrying a short span that you were holding, and I probably have two-by-four's this way (indicating) and then go down to the ground with them, brace them at the bottom and put your plywood on top. This is basically what we did.

Under cross-examination, at p. 16, the testimony is as follows:

Q. And you testified that the shoring was with plywood and two-by-four's, is that right?

A. Yes, I am sure it was probably two-by-four's, yes. You know, they was scabbed together. I am pretty sure it was with two-by-four's.

Mr. L. D. Smith, project inspector for the National Park Service, had a degree in architecture from the University of Kansas and at the time of the hearing was studying for his examination for a professional license in architecture (Tr. 184). He testified: that in his opin-

ion, the original shoring was not adequate; that at a meeting on Aug. 18, 1975, in the presence of Tom Meagher and Wayland Fairchild, Joe Paxton, successor to Jack Barrett as project superintendent for the appellant, said in effect, "This is some of the worst shoring I have ever seen"; that before the masonry work for the subject lintel started, a question arose between the masonry subcontractor and appellant as to who was to provide the shoring, but that Jack Barrett yielded and agreed to provide the lumber and a carpenter; that it was apparent that the carpenter, under whom Mr. Kennedy worked, was a framing carpenter only, with very limited, if any, experience in shoring for concrete or masonry work (Tr. 213-216).

Mr. Thomas Meagher, who had a degree in Civil Engineering from Michigan State University, took over the job of project inspector from Mr. L. D. Smith on Aug. 7, 1975, which entailed a 3 weeks job overlap to permit Meagher to become familiar with the details of the project (Tr. 279). He testified at the hearing that one of the first unusual things that occurred after arriving on the job was the cracks in the concession building pointed out to him by Mr. Smith (Tr. 279). He also testified that "it was obvious that the shoring was not adequate to hold up the weight of the wall and the cement grout fill and the nails simply started pulling out of the wood, and the whole shoring deflected down 1 inch to three

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quarters of an inch, allowing the wall to crack" (Tr. 287).

James Madison Cutts, the structural engineer, explained, in substance, that the cause of the cracks was the questionable method of shoring because the load was transmitted through a lateral shear through two nails. He said that for reinforced masonry construction, all supports have to be erected in a manner where you get full end-grain bearing of the supporting member (Tr. 318). He also pointed out that all the lintels on the job deflected due to the nature of the construction of the shoring which was improper and not a standard way of supporting loads (Tr. 320).

*Evidence on the Cause of the
Collapse*

The evidence adduced at the hearing with respect to the cause of the collapse weighs heavily in favor of the Government's contention that appellant's employees failed to follow directives, specifications, and industry standards in the process of reshoring the subject lintel in the concession building.

Mr. Jan Kenney, the laborer assigned to the carpenter, testified that he and the carpenter reshored wall No. 2 first (this wall also had a lintel and minor cracks, but did not collapse); that they used 4 x 4s; cut them an inch long and drove them in with a mallet; that after putting one of the 4 x 4s in they took the one next to it out, if it had

to come out, and after that, the next one, if it had to come out; that some of them were in very tight; that they did not take all of the original shoring out, and did not take any shoring out before putting new 4 x 4s in; that they put in just one new 4 x 4 in wall No. 2, and that it took 2½ hours to reshore that wall (Tr. 21-23). Mr. Kenney was then asked about the reshoring of wall No. 1 (the wall that collapsed), and the following testimony ensued:

Q. Well, what did you do first? Did you put a new one in, or did you take an old one out?

A. We put a new one in. We put a new one in and this one, we just took it out because it was so loose.

Q. Okay. And after that, what did you do?

A. All right, I think that was it, after we put this one in. I mean, a truck came up and Neal went over to the truck. I think the driver wanted to know where the office was. And he went over to the truck and he talked to the driver. And at that time, the building just caved in.

Q. Where were you when this building—when the wall collapsed?

A. Standing under it. Well, I was standing, you know, just under the building and I had to move very fast to get away from it. [Italics supplied.]

(Tr. 24).

The witness also explained that they had started to reshore wall No. 1 the same way they had reshored wall No. 2 and that Mr. Paxton heard the noise of the collapse and came to the scene right afterward (Tr. 25, 26).

Mr. Nazarian testified that after the meeting at the site with the contracting officer's representatives,

the engineer, the architect, inspectors, Mr. Paxton, and others, where everyone was trying to find a solution to the problem caused by the cracked walls, about 1½ to 2 days later, Mr. Fairchild, the contracting officer's representative, told him to, "Yes, please go ahead and remove it and reshore it"; that he (Nazarian) then directed Mr. Paxton to do it who told Nazarian that the directives and instructions were given to the carpenter exactly the way he received them—to go and install one shore of 4 x 4 size, and remove the other one; that although Joe Paxton was still working for appellant he was not going to testify; that he knew what the carpenter did because of the conversation right after the collapse (Tr. 124-126). The record then reflects the following testimony:

Q. You weren't there?

A. No, I did not see him perform the work. Immediately, as soon as it fell out, the building fell down, he came around the building as I was standing there, when he explained to me what he had done.

Q. Who came around the building?

A. Mr. Neal Sadtler.

Q. What did he say, if anything?

A. He told me that he installed one shore, four-by-four, and immediately when he started removing the other one—and he told me it was compressed. There was a lot of weight on it. *He had to force it to move it out.* He moved it—the shore, the existing shore—and a minute, a few minutes, a few seconds later the building fell down.

Q. Do you know if he made any tests about the curing to see if it was cured before he removed the shoring?

A. No. [Italics supplied.]

(Tr. 126-127).

Thomas Meagher, civil engineer and project inspector, testified to the effect that after the walls of the concession building had been formally rejected because of the cracks, Aug. 15, 1975, it was decided to have a complete meeting with the architect and engineer, as well as with other interested parties, on August 18, regarding the rejection and solution to the problem of the wall; that such a meeting was held at the site on Aug. 18 with the structural engineer, the architect, the contractor's representative, Mr. L. D. Smith, Mr. Sarkis Nazarian, Mr. Joe Paxton, and himself all present; that the main point of the meeting was that although the wall was cracked and had been formally rejected, because of the problems of obtaining materials, rebuilding the wall and meeting the Bicentennial deadline, the Government would let the contractor have the option of attempting to repair the wall providing the architects thought the final product would be acceptable; that there were no specific instructions given regarding the reshoring other than 4 x 4 shores at third points would be acceptable; that he, Meagher, was at the project site on August 21, when the collapse occurred: that Joe Paxton, the superintendent, said he knew exactly what had happened from the carpenter's statements to him, and that the carpenter had simply started pulling out some of the shoring without bracing it previously and adequately; that later, at another corner of the building, by carefully install-

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ing 4 x 4 shores at third points tightly under the wall, then removing the old shoring, no extra deflection was allowed to occur and the repair was eventually accomplished successfully (Tr. 281-285).

James Madison Cutts, the structural engineer, as well as the other Government witnesses, Raymond A. Hare, the architect, and L. D. Smith, the previous inspector, generally confirmed the testimony of Mr. Meagher.

We note a significant contradiction between the testimony of Mr. Kenney and the statement attributed to the carpenter by the testimony of Mr. Nazarian with respect to the condition of the old shoring piece removed just before the collapse. We also deem it significant that Joe Paxton, the construction superintendent who was still employed by the appellant at the time of the hearing, did not testify, and that no explanation was offered for his failure to do so.

On the basis of the foregoing evidence, together with our study and consideration of the entire record in this case, we make the following findings of fact:

1. That the plans, contract specifications, and directives provided by the Government were adequate and appropriate for the purposes intended and did not contribute to the failure of the lintels and collapse of the wall.

2. That the proximate cause of the failure of the lintels was the improper and inadequate shoring pro-

vided therefore by the contractor due to a breakdown of communication between the construction superintendent and the carpenter, failure of sufficient supervision, and the inexperience of the carpenter involved with respect to shoring required for reinforced masonry lintels.

3. That the two main factors contributing to the collapse of the wall were (a) the continued deflection of the lintel because of the inadequate original shoring, and (b) during the reshoring process, the improper removal of the old shoring before the new shoring was adequately in place.

In a recent case with similar issues, the Armed Services Board of Contract Appeals held that a construction contractor was not entitled to additional compensation for rebuilding a riprap wall that collapsed prior to final acceptance because the contractor failed to prove that the collapse was due to a defective design by the Government rather than some fault attributable to the contractor's manner of performance.⁴

[1, 2] Likewise, we hold here that the appellant has not sustained its burden of proving that the failure of the cantilever lintel and subsequent collapse of the wall occurred as the result of any fault of the Government and has thus failed to establish entitlement to an equitable

⁴ *JOBEAR, INC.*, ASBCA No. 22050 (Dec. 6, 1977), 78-1 BCA par. 12,952.

adjustment. The appeal is, therefore, denied.

DAVID DOANE,
Administrative Judge.

I CONCUR:

G. HERBERT PACKWOOD,
Administrative Judge.

DAVID A. PROVINSE

35 IBLA 221

Decided *May 26, 1978*

Appeal from a decision of the Montana State Office, Bureau of Land Management, dated Sept. 2, 1977, rejecting oil and gas lease offers covering unsurveyed lands located in navigable portions of the Yellowstone River. M 37867, M 37868.

Vacated and remanded.

1. Accretion—Oil and Gas Leases: Lands Subject to—Patents of Public Lands: Reservations—Public Lands: Leases and Permits—Public Lands: Riparian Rights

Unsurveyed fast lands, formed by accretion to public land or to lands patented with an oil and gas reservation, riparian to a navigable river and lying within the meander lines of that navigable river, as recorded on the official plat, may be leased provided that a proper offer is received and the other relevant conditions precedent to leasing are met.

2. Accretion—Avulsion—Oil and Gas Leases: Lands Subject to—Patents of Public Lands: Reservations—Public Lands: Jurisdiction Over—Public Lands: Riparian Rights

Federal law determines the legal characterization of accretions, avulsions, and relictions to land riparian to navigable bodies of water, where title to the land or reserved interests in the land remains in the United States.

3. Public Lands: Riparian Rights

Federal law follows the common law in distinguishing between accretion and avulsion. Accretion is the gradual and imperceptible addition of land to adjacent riparian land. Title to accreted lands inures to the uplands owner. Avulsion is the sudden perceptible shifting of the course of a river or stream. In the case of avulsion title to the avulsed land is not lost by its former owner nor does it accrue to the owner of what was formerly the opposite bank.

4. Oil and Gas Leases: Generally—Oil and Gas Leases: Lands Subject to—Public Lands: Leases and Permits

The boundary of an oil and gas lease covering lands riparian to a navigable river is the meander line indicated on the official plat of survey and not the waterline. Thus, lands accreted to the leased lands may be separately leased.

APPEARANCES: David A. Provinse, pro se.

OPINION BY ADMINISTRATIVE JUDGE RITVO

INTERIOR BOARD OF LAND APPEALS

David A. Provinse appeals from a decision of the Montana State Office, Bureau of Land Management (BLM), dated Sept. 2, 1977, rejecting two oil and gas lease offers covering unsurveyed land riparian to the Yellowstone River. The offers describe by metes and bounds: (1) a 104.35-acre tract contiguous to

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lots 3, 4, and 5, sec. 29, and lot 1, sec. 30, T. 24 N., R. 60 E., principal meridian, Richland County, Montana, and (2) a 32.902-acre tract contiguous to lot 7, sec. 10, T. 22 N., R. 59 E., principal meridian, Richland County, Montana. Oil and gas leases M 17979 and M 34395 embrace the surveyed land to which the unsurveyed tracts are attached. Lots 3, 4, 5, sec. 29, and lot 1, sec. 30, have been patented with a reservation to the United States of oil and gas. Lot 7, sec. 10, is public land.

In its decision rejecting appellant's offers, BLM cites the following reasons:

First, according to the latest approved official survey, the accretion described in the offers does not exist; and therefore, a lease to any accretion would change the survey boundaries without official approval of the survey.

Second, according to the official survey plat, the land described in the offers is a portion of the bed of the Yellowstone River which is navigable and title to the riverbed passed to the State of Montana at the time the State entered the Union.

[Third], the water line is the boundary of upland bordering navigable waters and the limit of the United States' ownership of the upland. A lease to a lot bordering navigable waters would include all the land up to the water line. By the same rule, a lessee may lose acreage bordering [sic] navigable waters because of erosion.¹

¹ BLM goes on to say that unsurveyed lands should be leased only in "unusual or rare cases" but does not explain why. The decision whether to lease public lands is within the discretion of the Secretary of the Interior. *Udall v. Tallman*, 380 U.S. 1 (1965); *Harris R. Fender*, 33 IBLA 216 (1977); *Fred P. Blume*, 28 IBLA 58 (1976). Circumstances, if such exist, which would render leasing unsurveyed lands in question

Notice of Appeal was received Oct. 6, 1977, and a statement of reasons received Nov. 8, 1977.

Appellant accompanied his statement of reasons with evidence supporting his description of the unsurveyed tracts. Included are four aerial photographs of the land in question, two dated Aug. 9, 1967, and two dated July 17, 1974, which appellant apparently obtained from the Cadastral Survey Section of BLM, and BLM surface-mineral management quads NE-32 (Jan. 1975) and NE-24 (Apr. 1975); also covering the area in question. A comparison of appellant's exhibits with the latest official surveys of the area indicates that the present course of the Yellowstone River deviates markedly from the meander lines recorded in 1884 and 1902, the dates of the official surveys. In general, the river has narrowed significantly and additional sinuosity has occurred. As a result, much of what now appears to be fast land lies within the official meander lines of the river. Appellant presents six conclusions of law to justify his contention that BLM erroneously rejected his lease offers:

1. Title to accretion to federal land riparian to * * * the navigable waters of a state is governed by Federal Law.
2. That the ownership of a meandered lot upon a navigable stream carries with it the ownership of the land up to the

contrary to the public interest would provide valid grounds for rejecting the offer. Since, however, BLM did not elaborate its objections, we will express no opinion with respect to the present case.

water line which includes title to any accreted lands.

3. That a federal oil and gas lease upon a lot bordering a navigable or non-navigable stream covers only the interest in the land up to the meander line.

4. That lands between the meander line and medial line and the water line as they relate to federally owned lots and mineral rights are unsurveyed lands and as such are subject to filing for oil and gas leases under the regulations.

5. That the Congress has tied the leasing of federal tracts in oil and gas exploration to an acreage base and as such the lease will cover only the exact tract described in said lease with rentals assessed on a per acre basis.

6. That when title to unsurveyed accreted lands can be determined, these lands are available for leasing when described by metes and bounds as set forth in the regulation.

Thus, concludes appellant, under Federal law, title to the oil and gas resources in the unsurveyed tracts belongs to the United States, and the tracts—unencumbered by any previous leases—are available for leasing.

We agree. BLM did not apply proper legal standards in judging whether unsurveyed Federal lands or lands with reserved oil and gas within the meander lines of a navigable river should be made available for leasing. Furthermore, BLM incorrectly analyzed the rights of the Federal Government and the lessee of the riparian Federal land in the unsurveyed accreted lands. Accordingly, we vacate and remand BLM's decision.

[1] BLM improperly concluded that Federal oil and gas resources available for leasing could not

legally exist within the meander lines of the Yellowstone River. Expert evaluation of appellant's aerial photographs may well show the physical existence of the land appellant has described in his offer. If BLM harbors any doubts as to the accuracy of appellant's description, the photographs should be examined and their significance evaluated.²

If unsurveyed lands do exist, the leasing of such lands, within the meander lines of the river, is not precluded simply because the lands are unsurveyed. Rather, 43 CFR 3101.1-3 and 3101.1-4 (1976) merely impose special requirements on lease offers for unsurveyed lands—most notably that the lands be described by metes and bounds connected to an official corner of the public land surveys and that the offer describe any settlers on the land. These sections clearly control BLM's analysis that leasing unsurveyed lands would improperly "change the survey boundaries." The cited sections would be superfluous were this the case. Indeed, 43 CFR 3101.1-4(e) provides that the description of lands in leases issued prior to the approval of protected surveys will be conformed to the surveys when they have been extended over the leased area. As no finding was made that appellants failed to meet the legal requirements for an offer to lease unsurveyed

² Appellant might alternatively have submitted a valid private survey to establish the existence of these lands. *Forest Oil Corporation*, 15 IBLA 33 (1974), does not hold otherwise.

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lands nor is there any allegation that leasing of such unsurveyed lands would be contrary to the public interest, it was error to reject the offer on the grounds that the land lay within the meander lines of the river and were thus unsurveyed.

[2] The question now arises whether the unsurveyed land or the oil and gas deposits within the meander lines of the Yellowstone River contiguous to public domain or to land patented with a reservation of the oil and gas are federally owned and whether they are covered by an existing lease. The issue is the same as to both situations because where the United States has patented lands subject to an oil and gas reservation, lands accreting to the patented lands are also subject to the reservation. See *David W. Harper*, 74 I.D. 141 (1967); *Sam K. Viersen, Jr.*, 72 I.D. 251, 255-256 (1965).

To resolve the question of ownership we must first decide whether State or Federal law supplies the applicable rule of decision. Until recently, the answer clearly would be that questions concerning the extent of rights incident to Federal lands and resources riparian to navigable bodies of water were governed by Federal law. In *State Land Board v. Corvallis Sand and Gravel Company* (Brennan, J., and Marshall, J., dissenting), 429 U.S. 363 (1977), however, the Supreme Court sharply limited the applicability of Federal law. Specifically,

that case overruled *Bonelli Cattle Company v. Arizona*, 414 U.S. 313 (1973), and distinguished *Hughes v. Washington*, 389 U.S. 290 (1967), on which this Board has previously relied. *Forest Oil Corporation*, 15 IBLA 33, 37 (1974).

Our reading of *Corvallis* and the cases cited therein, however, convinces us that the applicable rule of decision in the present case remains Federal law. That is to say that Federal law determines the legal characterization of accretions, avulsions, and relictions, to land riparian to navigable bodies of water, title to which remains in the United States or in which the United States has retained the mineral rights.

The rationale of *Corvallis* is that under the "equal-footing doctrine" enunciated in *Pollard's Lessee v. Hagan*, 15 U.S. (3 How. 212) 391 (1844), title to the beds of navigable bodies of water indefeasibly vested in the States at the time of their admission to the Union. Thus, a State may not be divested of title to the bed in favor of an uplands owner by operation of Federal law, but may only divest itself of title through the operation of its own law. The *Corvallis* court states at 376:

* * * [D]etermination of the initial boundary between a riverbed, which the State acquired under the equal-footing doctrine, and riparian fast lands [is to be determined] * * * as a matter of federal law rather than state law. But that determination is solely for the purpose of fixing the boundaries of the riverbed acquired by the State at the time of its admission to the Union; thereafter the

role of the equal-footing doctrine is ended, and the land is subject to the laws of the State. * * *

The court, however, notes a possible exception to the rule in the case where title to the riparian land remains in the United States. Commenting on *Bonelli* the court explains at 371-72:

* * * The only other basis [than the equal-footing doctrine] for a colorable claim of federal right in *Bonelli* was that the Bonelli land had originally been patented to its predecessor by the United States, just as had most other land in the Western States. But that land had long been in private ownership and, hence, under the great weight of precedent from this Court, subject to the general body of state property law. *Wilcox v. Jackson* [13 U.S. (13 Pet. 498) 266 (1839)] at 517. Since the application of federal common law is required neither by the equal-footing doctrine nor by any other claim of federal right, we now believe that title to the Bonelli land should have been governed by Arizona law, and that the disputed ownership of the lands in the bed of the Willamette River in this case should be decided solely as a matter of Oregon law. [Footnote omitted.] [Italics added.]

The implication is that had the property remained in Federal ownership Federal law would have governed.

Examination of the court's reference to *Wilcox v. Jackson* supports this inference. At the cited page the *Wilcox* court states:

We hold the true principle to be this, that, whenever the question in any court, state or federal, is, whether a title to land, which had once been the property

of the United States, has passed, that question must be resolved by the laws of the United States; but that, whenever, according to those laws, the title shall have passed, then that property, like all other property in the State, is subject to state legislation, so far as that legislation is consistent with the admission, that the title passed and vested according to the laws of the United States.

The question here is whether the riparian rights of the United States in its retained land or interests have passed in some way to the State.

The *Wilcox* principle may be extended to require Federal resolution where the question is to define the boundary between land title to which is in the United States and State land. To hold otherwise, as the court notes in the language immediately preceding that quoted, would usurp the Federal Government's constitutional authority to regulate the public domain by divesting the United States of title to its own land and reserved resources against its own laws, and would thus make State law paramount to Federal law. See, U.S. CONST. art. IV § 3, cl. 2 and art. VI, cl. 2.³

³ The Board reached the same conclusion on *Forest Oil Corporation, supra*. See also, an extended discussion in *State of Utah, 70 I.D. 27, 45-48 (1963)*. This point is crucial. If it were unclear whether Federal or Montana law controlled title to the contiguous lands, this uncertainty alone should justify rejecting appellant's lease offer. Montana, in *McCafferty v. Young, 397 P.2d 96 (1964)*, had apparently departed from the common law definitions of accretion and avulsion. Where title to land is uncertain proper grounds exist for rejecting a lease offer. *Forest Oil Corporation, supra*; *J. W. McTiernan, 11 IBLA 284 (1973)*; *Georgette B. Lee, 10 IBLA 28 (1973)*.

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[3] In order to characterize under Federal law the ownership of unsurveyed lands contiguous to the riparian Federal land, it is necessary to examine the mechanism by which the lands were added to the riparian lands. Federal law follows the common law in recognizing the distinction between accretion and avulsion. Accretion is the gradual and imperceptible addition of land to adjacent riparian land. *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912); *Nebraska v. Iowa*, 143 U.S. 359 (1892); *Forest Oil Corporation, supra*; *Palo Verde Color of Title Claims*, 72 I.D. 409 (1965). Title to accreted land inures to the upland owner. *Id.* Avulsion is the sudden perceptible shifting of the course of a stream or river. In the case of avulsion, title to avulsed land is not lost by its former owner nor does it accrue to the owner of what was formerly the opposite bank. *Id.*⁴

Both BLM and appellant have concluded that the unsurveyed lands in question were built up as a result of accretion. We see no reason to disturb this determination. Thus, under Federal law, title to these lands vests in the United States as the owner of the uplands, as does the title to the oil and gas lands accreting to lands in which the United States has retained the oil and gas.

[4] BLM's final reason for rejecting appellant's lease offer was that the unsurveyed lands described by appellant's offer were already covered by the leases issued for the uplands. In other words, BLM asserts that the boundary of a Federal lease riparian to a navigable river is the waterline and not the meander line. Were this the case, BLM would be correct in rejecting the offer, since the extent an offer to lease lands embraces lands presently under lease, the offer is properly rejected regardless of whether the lease is void, voidable, or valid. *Forest Oil Corporation, supra*; *Frances M. Kanowsky*, 10 IBLA 358 (1973); *Bertil A. Granberg*, 7 IBLA 162 (1972). We, however, hold that the lease extends only to the meander line and not the waterline.

We have not previously had occasion to consider this precise question.⁵ In *Sam K. Viersen, Jr., supra*, however, the Solicitor considered the analogous question of leases bordering nonnavigable rivers. *See also, James L. Harden*, 15 IBLA 187 (1974), which adopts *Sam K. Viersen, Jr., supra*. These cases hold that the common law of accretion and relictions does not apply to determine the boundaries of oil and gas leases bordering nonnavigable waters. Instead, the boundary of the lease is the meander line indicated by the official plat.

⁴Two additional terms complete the lexicon. Reliction, which is treated like accretion, is the addition to riparian lands caused by the withdrawal of a body of water. Erosion is the diminution of lands by a process corresponding to accretion.

⁵The Acting Assistant Solicitor, however, apparently came to the conclusion we reached herein in his memorandum *Leasing procedure in cases involving accretions to riparian public lands* (July 9, 1954).

Two factors figured prominently in reaching this conclusion. First, an examination of the Mineral Leasing Act, 30 U.S.C. § 181 *et seq.* (1970), suggests that the intention of Congress that a lessee should receive only a specific acreage is so dominant that there is no room for the common law doctrine of riparian rights. For example, the acreage of an upland lot shown on a plat of survey is fixed and the rental due can be computed accurately and definitely. *Sam K. Viersen, Jr., supra* at 262. Second, in the case of a nonnavigable body of water, the United States not only owns the uplands but also the riverbed. For leasing purposes, therefore, the meander line is simply the dividing line between two tracts of land both owned by the United States and available for leasing. Since the presence of the nonnavigable body of water is of little practical significance to the lessee, there is no justification for arbitrarily varying the location of the tracts to conform to migration of the river. *Id.* at 262-263.

This second factor does not hold true for the case of leases bordering on navigable waters. As explained above, the title to the beds of navigable bodies of water vested in the States on their admission to the Union. The upland lessee does, therefore, suffer the possibility of having his leasehold diminished by erosion. Considerations of mutuality might suggest that the lessee

should be permitted to enjoy expansion of his leasehold by accretion.

We think, however, that Congress' intention to limit the lessee to a specific acreage overrides this line of reasoning.

Considerations of mutuality do not present a compelling argument. The common law holds that a lessee, who enjoyed peaceful possession under a landlord without title to the leased premises may not deny the landlord's title and is liable for rent. *Bishop of Nesqually v. Gibbon*, 158 U.S. 155 (1895); *Rector v. Gibbon*, 111 U.S. 276 (1884); *Stott v. Rutherford*, 92 U.S. 107 (1875); *Richardson v. Van Dolah*, 429 F.2d 912 (9th Cir. 1970). Thus, it is not offensive to the principles of equity that a lessee may choose to pay rentals on a leasehold, title to only a portion of which is in his lease, if he feels that the possession of such a leasehold would be advantageous to him. Furthermore, that one lessee may be deprived of the full number of acres he might have received, does not justify conferring a windfall on an entirely different lessee.

In sum, BLM's rejection of appellant's lease offer was based on inappropriate grounds. The record does not refute appellant's contention that the lands in question are unsurveyed Federal lands not subject to any existing lease. All else being regular, BLM should have accepted appellant's offer.

Therefore, pursuant to the authority delegated to the Board of

May 30, 1978

Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and remanded.

MARTIN RITVO,
Administrative Judge.

WE CONCUR:

JOAN B. THOMPSON,
Administrative Judge.

JOSEPH W. GOSS,
Administrative Judge.

ISLAND CREEK CO.

35 IBLA 247

Decided *May 30, 1978*

Appeal from decision of the Wyoming State Office, Bureau of Land Management, rejecting applications for extensions of coal prospecting permits W-23469 through W-23472, W-23474, and W-23475.

Affirmed.

1. Applications and Entries: Valid Existing Rights—Coal Leases and Permits: Applications—Coal Leases and Permits: Permits: Generally

Sec. 4 of the Federal Coal Leasing Amendments Act of 1975 removes the authority of the Secretary to grant extensions of coal prospecting permits, subject to valid existing rights, and applies to applications for permit extensions pending at the time the law was enacted

by Congress. Such pending applications are not valid existing rights under sec. 4 of the 1975 Amendments Act because the authority to grant coal prospecting permit extensions was discretionary with the Secretary.

2. Coal Leases and Permits: Applications—Coal Leases and Permits: Permits: Generally—Mineral Leasing Act: Generally—Secretary of the Interior

The Federal coal program was substantially revised in 1973 by the Secretary in proper exercise of his discretion. The Bureau of Land Management did not act in an arbitrary and capricious manner when, under the new coal policy, it suspended applications for coal prospecting permit extensions and the applications were eventually rejected because the Federal Coal Leasing Amendments Act of 1975 removed the authority to grant coal prospecting permit extensions. A program pursued for a period of time under a statutory grant of discretionary authority may be reviewed and revised at any time provided it is not done in an arbitrary manner and is done within the authority granted by Congress.

3. Authority to Bind Government—Federal Employees and Officers: Authority to Bind Government—Coal Leases and Permits: Generally

Reliance upon erroneous information provided by employees of the Bureau of Land Management cannot create any rights not authorized by law. The fact that a coal prospecting permittee alleges he was assured by BLM employees that he would receive permit extensions does not prevent the applicability of subsequent legislation which prohibits such extensions from causing his extension applications to be rejected.

APPEARANCES: William K. Bodell II, Esq., Lexington, Kentucky, for appellant; Lawrence G. McBride, Esq., Office of the Solicitor, Washington, D.C., for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

INTERIOR BOARD OF LAND APPEALS

Island Creek Coal Company appeals from the Oct. 5, 1977, decision of the Wyoming State Office, Bureau of Land Management (BLM), rejecting its applications for extensions of coal prospecting permits W-23469 through W-23472, W-23474, and W-23475. Each prospecting permit was issued with an effective date of December 1, 1970, for the statutory term of 2 years pursuant to section 2 of the Mineral Leasing Act of 1920, *as amended*, 30 U.S.C. § 201(b) (1970). The extension applications were filed in the State Office on Nov. 24, 1972. The State Office rejected the applications because section 4 of the Federal Coal Leasing Amendments Act of 1975, 90 Stat. 1083, 1085, 30 U.S.C.A. § 201(b) (West Supp. 1977), terminated the authority of the Secretary of the Interior to issue extensions of coal prospecting permits.

The former provision of the Mineral Leasing Act governing coal prospecting permit extensions, 30 U.S.C. § 201(b) (1970), sets the criteria the permittee must meet in order to be eligible for the exten-

sion. A Dec. 5, 1972, memorandum from the U.S. Geological Survey Regional Mining Supervisor, Billings, Montana, to the BLM Wyoming State Director indicates that appellant met the criteria at the expiration of the original term of its permits. Thereafter, the extension applications were referred to the BLM Director for review.

In Feb. 1973, the Secretary of the Interior announced that no new coal prospecting permits would be issued pending further notice and that no coal leases would be issued unless certain "short-term criteria" were met. The purpose of this moratorium was to develop "long-term" coal leasing policies and procedures. Throughout 1973, the BLM Director issued instruction memoranda which established the procedures for adjudicating coal lease applications in accordance with the Secretary's criteria. Subsequently, the BLM Assistant Director informed the BLM Wyoming State Director that appellant's extension applications might be approved if they met the short-term coal leasing criteria. Otherwise, the applications were to be suspended until further notice.

By letter dated Jan. 18, 1974, the State Office informed appellant that its extension applications must meet the short-term coal leasing criteria or they would be suspended. Appellant was given the opportunity to submit additional information to show that its applications met the short-term criteria. However, appellant did not do so. No further action

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was taken on its applications until the decision appealed from was issued. During that time, the Federal Coal Leasing Amendments Act of 1975 was enacted by Congress.

Appellant argues that the BLM decision is arbitrary, capricious and a denial of its vested rights in the prospecting permits. Appellant also argues, in effect, that BLM cannot apply a statute enacted after the extension applications were filed. In support of its arguments, appellant alleges that it expended time and money in coal exploration with the expectation that it would receive extensions in accordance with BLM's "established practice" of automatically granting such extensions. Appellant requests a "public hearing" to prove BLM has such an established practice. Finally, appellant alleges that "authorized representatives" of BLM assured it the Secretary would grant the extensions.

The Solicitor's Office filed an answer on behalf of BLM to appellant's statement of reasons. The Solicitor argues that BLM's decision was not arbitrary and capricious because Congress had removed its authority to grant extensions. The Solicitor asserts that regardless of past actions by BLM, the authority to grant coal prospecting permits extensions has always been discretionary. It argues that applications for discretionary action do not create valid existing rights and therefore the effect of the Federal Coal Leasing Amendments Act of

1975 applies to appellant's applications. The Solicitor details the actions of the Department regarding its coal leasing policy and the actions of BLM regarding appellant's extension applications. It argues that the necessary elements of estoppel are absent from the handling of appellant's applications. It makes additional arguments which need not be discussed in this decision.

We find that appellant has failed to show that it had a valid existing right to the permit extensions. We also find that in the absence of a vested right, BLM now has no authority to grant the extensions. For the reasons stated below, we affirm the decision of the BLM State Office rejecting appellant's permit extension applications.

[1] Sec. 4 of the Federal Coal Leasing Amendments Act of 1975, 90 Stat. 1085, completely revised that part of sec. 2 of the Mineral Leasing Act set forth in 30 U.S.C. § 201(b) (1970) "subject to valid existing rights." Among other things, the revision ended the prospecting permit system of Federal coal land development. As a result, the coal prospecting permit extension provision in the pre-1976 version of 30 U.S.C. § 201(b) (1970) is no longer in effect and no new provision has been enacted.

Appellant argues that the new statute cannot affect its extension applications because they were filed before the new statute was enacted. This Department must administer

the public lands in accordance with existing law. Unless appellant can show that its applications are "valid existing rights," it cannot receive extensions of its coal prospecting permits because the Department no longer has authority to grant such extensions. *American Nuclear Corp. v. Andrus*, 434 F. Supp. 1035 (D. Wyo. 1977); see *Hunter v. Morton*, 529 F.2d 645, 648-49 (10th Cir. 1976); *Hannifin v. Morton*, 444 F.2d 200, 202-203 (10th Cir. 1971); *Miller v. Udall*, 317 F.2d 573 (D.C. Cir. 1963).

In order to establish that it has a "valid existing right" to the permit extensions, appellant must show that the Department "had no discretion to grant or deny a privilege, but had the function only of determining whether an existing privilege granted by Congress had been properly invoked." *Schraier v. Hinkel*, 419 F.2d 663, 666 (D.C. Cir. 1969). Sec. 2 of the Mineral Leasing Act, under which appellant applied for the extensions, stated: "Any coal prospecting permit * * * *may* be extended by the Secretary for a period of two years, if he shall find * * *." 30 U.S.C. § 201(b) (1970). (Italic added.)

The courts have construed statutes using the word "may" in grants of authority as discretionary in the exercise of that authority. *Burglin v. Morton*, 527 F.2d 486, 488 (9th Cir. 1975), cert. denied, 425 U.S. 973 (1976); *Schraier v. Hinkel*, supra at 666; cf. *National Wildlife Federation v. Morton*, 393 F. Supp.

1286, 1295 (D.D.C. 1975) (use of "shall" construed as mandatory). The statute here, 30 U.S.C. § 201(b) (1970), sets standards for the granting of permit extensions, but clearly leaves approval of an extension application meeting the standards to the discretion of the Secretary. *Peabody Coal Company*, 34 IBLA 139 (1978); *Solicitor's Opinion*, 84 I.D. 415 (1977); see *Arthur E. Moreton*, A-27172 (Dec. 28, 1955). Therefore, a pending application for a coal prospecting permit extension is not a "valid existing right" within the meaning of section 4 of the Federal Coal Leasing Amendments Act of 1975, 90 Stat. 1085.

[2] Appellant further argues that it is entitled to the extensions based upon BLM's "established practice" of automatically granting coal prospecting permit extensions in the past. Appellant has confused practices of BLM with rights under law. The entire Federal coal program was substantially revised in 1973 when the Secretary, pending review of coal development policy and procedures, halted the issuance of coal prospecting permits and restricted the issuance of coal leases. *E.g., L. A. Walstrom, Jr.*, 25 IBLA 186 (1976); *Reliable Coal & Mining Co.*, 18 IBLA 342 (1975). These alterations were held to be within the discretion of the Secretary. *Hunter v. Morton*, supra.

The modifications of the coal program were announced in Feb. 1973, 3 months after appellant applied for the extensions. As described above,

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the Department prepared and issued its "short-term" leasing procedures at various times during 1973. We presume appellant was aware that the Department was reviewing its coal development policy and procedures. In Jan. 1974, BLM requested that appellant show how its extension applications met the short-term leasing criteria or else the applications would be suspended. Thus, appellant was kept informed of the changing departmental coal policy and was provided the opportunity to meet the new criteria. Appellant did not avail itself of this opportunity. Congress then enacted legislation which precluded appellant from receiving the extensions under any circumstances. Such a sequence of events does not constitute arbitrary and capricious action by BLM. *Hunter v. Morton, supra*; *Peabody Coal Co., supra*.

This Department is not bound forever by adopting a particular program under a statutory grant of discretionary authority. The Secretary may review and revise that program at any time provided that the review and revision is not conducted in an arbitrary manner and is within the authority granted by Congress. As the Supreme Court stated, agencies "are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." *American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397, 416 (1967);

accord F.C.C. v. Woko, Inc., 329 U.S. 223 (1946); *F.T.C. v. Crowther*, 430 F.2d 510 (D.C. Cir. 1970). Thus, appellant gains no right to the extensions even if BLM may have had a prior practice of granting extensions automatically to qualified permittees. Because appellant has no legal right to the extensions, we deny its request for a hearing on the factual question of BLM's "established practice."

[3] In its final argument, appellant alleges that "authorized representatives" of BLM assured it the extensions would be granted. Appellant offered no substantiation of this allegation nor explained how it relied upon such statements to its detriment. Reliance upon erroneous information provided by employees of BLM cannot create any rights not authorized by law. *Joe I. Sanchez*, 32 IBLA 228, 233 (1977). Congress enacted legislation which removed the Secretary's authority to grant coal prospecting permit extensions. Therefore, any possibility that appellant had of receiving extensions for his coal prospecting permits was ended by the Federal Coal Leasing Amendments Act of 1975, 90 Stat. 1083, regardless what the opinions of BLM employees were. *See Bankers Life and Casualty Co. v. Village of North Palm Beach, Fla.*, 469 F.2d 994, 998-99 (5th Cir. 1972), *cert. denied*, 411 U.S. 916 (1973).

To conclude, nothing that appellant has shown affords any basis for granting the extension applications

now. Therefore, other issues raised by the parties which do not affect this conclusion are not addressed.

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

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

FREDERICK FISHMAN,
Administrative Judge.

DOUGLAS E. HENRIQUES,
Administrative Judge.

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**APPEAL OF W. F. SIGLER &
ASSOCIATES***

IBCA-1159-7-77

Decided *April 14, 1978*

**Contract No. H50C14209487, Bureau
of Indian Affairs.**

Motion for Reconsideration Denied.

**1. Contracts: Formation and Validity:
Cost-type Contracts—Rules of Prac-
tice: Appeals: Reconsideration**

A Government motion for reconsideration is denied where the Board finds that a cost estimate (cost and pricing data) was not a firm offer to perform the work within the hours and at the prices or rates specified, but was rather simply the initial basis for negotiating a cost-plus-fixed-fee contract.

APPEARANCES: Mr. James A. McIntosh, Attorney at Law, Salt Lake City, Utah, for the appellant; Mr. Fritz L. Goreham, Department Counsel, Phoenix, Arizona, for the Government.

*OPINION BY ADMINISTRATIVE
JUDGE STEELE*

*INTERIOR BOARD OF CON-
TRACT APPEALS*

*Decision on Motion for Reconsid-
eration*

The Government, in its motion for reconsideration dated Mar. 17, 1978, has asked us to reconsider that part of our decision dated Feb. 16, 1978 (85 I.D. 41; 78-1 BCA par. 13,011), which holds that appellant can recover as allowable costs di-

rect and indirect costs for Mr. Sigler and associate members in excess of the hourly rates indicated for them in appeal file documents AF 17 and 24. The Government also asks us to explain why the communications designated appeal file documents AF 17 and 24 were not contractual offers which were accepted by the Government by mutual signature of the contract (Exhibit A to the contracting officer's first decision).

We have reviewed our decision and hereafter explain why we do not accept the Government's contention.

The history of the formation of this contract is as follows: At first the Government thought it would hire only Mr. Sigler as an expert (AF 4). It appears to have concluded, however, that it would require more work than Mr. Sigler alone could provide (AF 6, 7). Concurrently, Mr. Sigler and "the associate members" decided to form a corporation with a view to providing full-time or part-time consulting services in the various fields of expertise of the shareholders. They formed a corporation for this purpose. As contemplated and as it turned out, the contract involving the Pyramid Lake fisheries was the first contract of the new corporation. The Government decided on a sole source contract with the appellant corporation (AF 5, 13, 14, Exhibit A). Having decided on using the negotiation method of contract formation, the Government had available to it all the nor-

*Not in Chronological Order.

mal forms of contract allowed by the regulations for such contracts. (FPR 1-3.401; *Govt. Contracts Reporter*, par. 66,223). These included firm fixed price, fixed price with escalation, and fixed price incentive contracts on one end of the contract form scale and on the other, the cost contract, the cost-plus-fixed-fee, and the cost incentive type contracts. The range of normal contract types also included contracting on the basis of time and materials and labor hours.¹ The regulations permit the parties to combine parts and ideas from all these more common forms of contract and write a tailor-made custom contract for this particular project if they so desired (FPR 1-3.401; cf. *The Electro Nuclear Systems Corporation*, ASBCA No. 10,746 (December 2, 1966), 66-2 BCA par. 6,008; *LSi Service Corporation v. United States*, 191 Ct. Cl. 185 (1970)). The regulations also required the parties in particular circumstances (FPR 1-3.807-3) to obtain cost and pricing data so that the contractor would not have an unfair advantage during the negotiation process.²

¹ See discussion in *Federal Procurement Law*, Nash & Cibinic, The George Washington University, 1966, pp. 237-38, 240-241. See also pp. 49-51 of *Accounting Guide for Defense Contracts*, Fifth Edition (1966) by Paul M. Trueger, Commerce Clearing House, Inc.

² Nash and Cibinic, p. 246. "Congressional dissatisfaction with the pricing of negotiated contracts led to the amendment of the Armed Services Procurement Act to include requirements for cost and pricing data to be submitted in connection with the negotiation of certain contracts."

See also p. 247 from which the following is quoted:

The parties did not start off in 1974 with a clean slate. The Government procurement community had had extensive experience with various types of contracts for years.³ The cost overrun problem of CPMF contracts was well known.⁴ The problems with disputes about the allowability of costs had been litigated and written about.⁵

It was against this background that the Government issued the

"The primary thrust of the act is in the requirement for cost and pricing data to be furnished prior to negotiation of contract prices. By requiring contractors to furnish 'accurate, complete and current' cost and pricing data Congress intended to prevent them from 'receiving' unwarranted profits because the data used in establishing target costs or prices were 'inaccurate, incomplete, or out of date.' Senate Report No. 1884, Aug. 17, 1962, accompanying House Report 5532, 87th Cong., 2nd Sess. (1962). However, the act does not stop with these preventive provisions but goes on to provide the Government with the remedy of unilateral price reduction if prices were increased as a result of defective cost or pricing data. Thus, the act provides further assurances that the Government will not be charged unreasonable prices."

³ *Ibid.*, p. 232. Assistant Secretary of Defense testified in part to Congress in 1965.

"The difficulty, however, with cost-type contracts is that they offer the contractor no incentive to make any real effort to reduce the amount of costs incurred in the performance of the contract. In fact, in many situations a negative incentive may develop leading to stretch-outs and increased costs. This was one of the reasons for the repeated instances in the past in which final costs under CPMF contracts exceeded estimated costs by as much as 50 to 100 percent or more and contract deliveries fell a year or longer behind schedule."

⁴ FPR 1-3.805-2; *Government Contracts Reporter* par. 66,261.20.

⁵ See footnotes 3, 4; McBride, Wachtel and Touhey, *Government Contracts*, section 18.100 and Chapter 23, pp. 23-55 where it says in part as follows:

"A cost, particularly an indirect cost, does not become unreasonable simply because it is much greater than in previous years. Nor does an actually experienced cost become unreasonable when it proves to be higher than proposed in an offer, or exceeds provisional rates established at the start of the contract work."

April 14, 1978

first RFP on February 21, 1975 (AF 7). This said that the expected contract would be fixed price (but it (clauses 202, and perhaps 311) and appellant's proposal (AF 9, p. 5) and amended proposal (AX 11 March 15, 1975, p. 7, part II) had a cost contract type format). Thereafter the Government decided to enter into a cost-type contract (AF 14, 15) and issued the second RFP for a "negotiated cost-reimbursement (cost-plus-fixed-fee) contract" (AF 15). By May 22, the parties had agreed to about 99 percent of the language about scope of work and they next (topically) dealt with the cost and pricing data (and finally the fee). The appellant, with considerable give and take with the Government (AF 24, Tr. 313-321), sent in several sets of cost and pricing data (for example AF 17 and 24). At this time appellant thought that Mr. Sigler and the associate members would be independent contractors (called "consultants") to the appellant and appellant so indicated on the Government forms. Both parties used this concept and

the estimated hours, hourly costs, and overhead and fringe benefit concepts related thereto in establishing the "estimated cost" and the "fixed fee" of the expected CFFF contract.

After execution of the contract the appellant concluded that there were potentially serious tax penalty risks if it attempted to treat Mr. Sigler and the associate members as independent contractors and it decided to and did treat them as employees.⁶ Appellant began operations as a going corporation and entered into employment agreements, established a retirement plan, etc., and also started to perform the contract. Sometime thereafter the Government took the position that this contract was not a normal CFFF contract but was rather a custom-made hybrid contract more like a labor and materials contract. According to this view the corporation could not recover direct or indirect costs it incurred for Mr. Sigler's work in excess of those "rates" shown on the cost and pricing data.⁷ We must,

⁶ Mr. Sigler Tr. 98-101; Contractor's Response Exhibits D, D-1, D-1-A, D-2. The

⁷ For example (in part):

"3. DIRECT LABOR (Specify)	Estimated Hours	Rate/Hour	Est. Cost (\$)
(a) Senior Biologist.....	3,440	25.00	86,000
(b) Associate Members (listing attached).....	6,480	18.75	121,500
(c) Study Director.....	5,886	10.00	58,960
(d) Field Crew—7 men.....	41,440	5.00	207,200
(e) Occasional Labor.....	6,750	3.50	23,625
TOTAL DIRECT LABOR.....			497,285
"4. LABOR OVERHEAD (Specify Department or cost center)	O. H. Rate	X Base	Est. Cost (\$)
Employee benefits paid by firm (computed from Item 3 (c), (d) and (e) above.....	15%	289,785	43,470
TOTAL LABOR OVERHEAD.....			43,470

record is not so clear as to the associate members.

therefore, confront the argument that the cost and pricing data was a legal offer which was binding on appellant when it signed the contract.

In a few instances it appears that Government officials have entertained the belief that they have authority to control virtually every aspect of a contractor's performance.⁸ That is true only if the contract clearly so provides according to its terms and conditions. Problems arise when the parties—unknown to each other—have different perceptions of the meaning of documents or actions and where they have different views of the goals to be achieved by the contract. See, for example, the decision in *Vinnell Corporation*, ASBCA No. 18,879 (August 18, 1975), 75-2 BCA par. 11,463. The courts and boards have long wrestled with these problems and have developed rules to analyze and decide these situations. One of these rules is the one that an ambiguous document will be construed against the drafter (*Great Eastern Enterprises Corp.*, IBCA-1113-7-76 (July 15, 1977), 77-2 BCA par. 12,648). We employ this rule when we look at the circumstances of the negotiation and at clause 329 in the contract entitled "Allowable Cost, Fixed Fee and Payment."

The clause in part says as follows:

(a) For the performance of this contract, the Government shall pay to the Contractor:

⁸ See the discussion of this concept in the *J. A. Ross & Co.* case, ASBCA 2326 (Dec. 12, 1955), 6 CCF par. 61,801, cited in our original decision.

(1) The cost thereof * * * determined by the Contracting Officer to be allowable in accordance with:

(i) Subpart 1-15.2 of the Federal Procurement Regulations (41 CFR 1-15.2) * * *, and

(ii) The terms of this contract * * *.

We understand this to mean that appellant will be paid the costs allowed by the cost principles cited unless there is some other specific clause in the contract which controls the specific cost. The Government points to no specific clause and we cannot find one. The Government seems, however, to argue that a clause should be implied by operation of law. That law the Government seems to say is the general contract law of offer and acceptance. The Government says that AF 17 and 24 were offers. But that is not at all clear to us. AF 17 and 24 were cost estimates (which happened to be on Government cost and price data form—Form 60). They were the best judgments of appellant as to the number of hours required to do the work described in the statement of work and included appellant's current estimates of the hourly rates it would have to pay and the indirect costs it would have to incur.⁹

Our short answer to the Government's argument is that if it really

⁹ The form itself says "this proposal is submitted for use in connection with and in response to (describe RFP, etc.) and reflects our best estimates as of this date, in accordance with the instructions to offeror." Those instructions on the back of the form say that the form is to contain "a summary of incurred and estimated costs—suitable for a detailed review and analysis." See Form 60, *Government Contract Reporter*, par. 66,813-25. See also "estimated cost" in *Black's Law Dictionary*, revised Fourth Edition.

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wanted to enter into a time and materials contract it did not make that intention clear in either the second RFP, the verbal discussions as evidence in the record, or the contract it signed on May 23. (See the *Vinnell Corporation* decision, *ante*.)

We have reviewed that part of our original decision mentioned in the motion and affirm it as indicated above.

GEORGE STEELE, JR.,
Administrative Judge.

WE CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge

RUSSELL C. LYNCH,
Administrative Judge

FOOTE MINERAL COMPANY*

34 IBLA 285

Decided April 17, 1978

Appeal from decision of the Director, U.S. Geological Survey, GS-5 mining, setting aside decision of the Area Mining Supervisor and remanding case for recalculation of royalty.

Affirmed as modified.

1. Mineral Leasing Act: Generally—Mineral Leasing Act: Lands Subject to—Potassium Leases and Permits: Generally—Sodium Leases and Permits: Generally—Words and Phrases

"Other related products." *"Other associated deposits."* When sodium or potas-

sium brines are covered by leases conveying the exclusive right to mine and dispose of sodium compounds and other related products or potassium compounds and other associated deposits, the leases convey the exclusive rights to all minerals dissolved in the brine, including lithium.

2. Mineral Leasing Act: Generally—Mineral Leasing Act: Lands Subject to—Mining Claims: Lands Subject to—Mining Claims: Locatability of Mineral: Leasable Compounds—Mining Claims: Specific Mineral(s) Involved: Generally—Multiple Mineral Development Act: Generally—Potassium Leases and Permits: Generally—Sodium Leases and Permits: Generally—Words and Phrases

"Leasing Act minerals." The Multiple Mineral Development Act, 30 U.S.C. § 524 (1970), reserved all leasing act minerals to the United States, and no rights to deposits of leasing act minerals are open to location under the mining laws under 30 U.S.C. § 525 (1970). "Leasing Act minerals" is defined as "all minerals which, upon Aug. 13, 1954, are provided in the mineral leasing laws to be disposed of thereunder." 30 U.S.C. § 530 (1970). Because leases for sodium, potassium, and "other related products" are authorized pursuant to 30 U.S.C. §§ 262, 282 (1970), "other related products" along with sodium and potassium fall within the category of Leasing Act minerals which include lithium which is dissolved in a sodium or potassium brine.

3. Mineral Leasing Act: Royalties—Potassium Leases and Permits: Royalties—Sodium Leases and Permits: Royalties—Words and Phrases

"Gross value at the point of shipment to market." The royalty rate for products mined and disposed of under sodium and potassium leases must be imposed on the

*Not in Chronological Order.

"gross value of the sodium (or potassium) compounds and other related products at the point of shipment to market," which means the gross value of a refined product for sale in an established market, and in general, no deductions may be allowed for costs incurred in developing a product to a marketable condition except for the price of reagents which are chemically combined with the product sold from the lease.

4. Administrative Procedure: Hearings—Hearings—Rules of Practice: Hearings

A request for a hearing will be denied in the absence of an assertion of fact which, if proved true, would entitle appellant to the relief sought.

5. Administrative Authority: Estoppel—Estoppel—Federal Employees and Officers: Authority to Bind Government—Mineral Leasing Act: Royalties

The Government is not estopped from collecting royalty payments which are owed, even if it has accepted improper payments in the past.

6. Mineral Leasing Act: Royalties

The Statute of limitations for filing claims on behalf of the Government in a Federal court need not be invoked in an administrative adjudicative proceeding to determine royalties due to the United States under mineral leases.

APPEARANCES: Kenneth D. Hubbard, Esq., and Randy L. Parcel, Esq., Holland and Hart, Denver, Colorado, and John H. Ross, Esq., Vice President and General Counsel, Foote Mineral Co., Exton, Pennsylvania, for appellant; Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the U.S. Geological Survey.

OPINION BY ADMINISTRATIVE JUDGE RITVO

INTERIOR BOARD OF LAND APPEALS

Foote Mineral Company appeals from the Sept. 17, 1976, decision of the Acting Director, U.S. Geological Survey (Survey), requiring that royalty be paid for lithium products developed from brines near Silver Peak, Nevada, leased by appellant under sodium and potassium leases. The decision rejected appellant's contentions that no royalty was due because lithium is a mineral locatable under the mining laws, 30 U.S.C. § 21 *et seq.* (1970). The decision found that appellant had been paying royalty on the basis of production costs without regard to the gross value or proceeds received for the minerals produced from the leased deposits. The Director determined that appellant had produced lithium carbonate having a total gross value of \$20,754,037 from 1966 to 1973, and that the royalty paid should have been \$622,621.11, but only \$173,001.69 was paid, leaving a deficit of \$449,619.42 in the absence of allowable deductions. The Dec. 5, 1974, decision of the Area Mining Supervisor which was considered by the Director on appeal would have imposed the full deficit of \$449,619. The Director, however, set this decision aside and remanded the case for recomputation of the royalty, allowing a deduction for soda ash reagent, disallowing a deduction for lime reagent, and limit-

ing the amounts required to those which accrued after Nov. 1, 1967.

The record establishes that the leases held by appellant were issued in 1963, 1964, and 1968, respectively, after appellant or its predecessor in interest submitted proofs of discovery of valuable potassium and sodium brine deposits, made in explorations included under prior prospecting permits. These leases convey to the lessee either "the exclusive right and privilege to mine and dispose of all the sodium compounds and related products" or "the exclusive right and privilege to mine and dispose of all the potassium and associated deposits" in the leased lands. Although appellant claims that it produces neither sodium nor potassium products from the brines, it does produce lithium products from the brines.

On the basis of the above uncontroverted facts, the issue relating to the locatability or leasability of lithium in brine can be more precisely delineated. Thus, we may appropriately ask whether, under the mineral leasing laws, the leases in question confer the exclusive right to develop the lithium as an "other related product" of sodium or an "associated deposit" of potassium. If not, may rights to develop the lithium be appropriated under the general mining laws pursuant to the Multiple Mineral Development Act, 30 U.S.C. § 521 *et seq.* (1970), even though the sodium and potassium deposits are under lease?

Appellant argues that royalty may not be imposed on lithium in

a sodium or potassium brine, because lithium is not expressly listed in the mineral leasing laws, because lithium is physically and chemically different from sodium or potassium, and because lithium is not a by-product of any sodium or potassium production. While these contentions involve a number of factual assertions which appellant has offered to prove, the meaning of "other related products" and "associated deposits" is initially a matter of statutory construction and thus raises a legal rather than a factual issue.

The sodium provisions of the Mineral Leasing Act allow for issuance of leases only for land known to contain valuable deposits of sodium compounds or upon which a permittee had discovered a valuable deposit of such compounds. 30 U.S.C. §§ 261, 262 (1970). However, the Act provides for royalty not only on sodium compounds but on "sodium compounds and other related products," 30 U.S.C. § 262 (1970), and the leases appropriately grant the exclusive rights to the deposits of sodium and other related products. The Potassium Act provides for a royalty on "potassium compounds and other related products, except sodium," 30 U.S.C. § 282 (1970), and the potassium leases convey the exclusive rights to deposits of potassium and other associated deposits. The issue, then, turns on whether or not the lithium is a related or associated product of the sodium or potassium deposits.

[1] As originally enacted, the sodium sections provided for a mini-

imum 12½ percent royalty on "production." Mineral Leasing Act of Feb. 25, 1920, § 24, 41 Stat. 447. The Dec. 11, 1928, amendments lowered the minimum royalty to 2 percent on "sodium compounds and other related products." Act of Dec. 11, 1928, 45 Stat. 1019. These amendments were made so that the provisions would parallel the provisions in the 1927 Potassium Act, discussed *infra*. See H.R. Rep. No. 1003, 70th Cong., 1st. Sess. 2 (1928) (to accompany H.R. 10885). Although the original statutory language referred to "production" rather than "other related products," it is nevertheless clear as a practical matter that the Act intended sodium leases to convey rights to develop all minerals dissolved in sodium brines. Under the original Act, only brines or deposits that were once brines could be leased, because the Act provided that the sodium compounds for which permits and leases could be issued were "dissolved in and soluble in water, and accumulated by concentration."¹ Because brines often contain dissolved minerals in addition to sodium, the lessee as a practical necessity would need to secure the rights to mine and dispose of the other minerals in the brine if he wished to develop the sodium. If such rights were to exist, they could only exist under the lease because no mining claim could then have

been located on land in a lease or permit or on land known to be valuable for leasing act minerals until the enactment of the Multiple Mineral Development Act of Aug. 13, 1954, 30 U.S.C. § 521 *et seq.* (1970). See *Joseph E. McClory*, 50 L.D. 623 (1924). Thus, in order to give effect to the intent to lease brines, we must conclude that sodium leases included the right to develop otherwise locatable minerals dissolved in the brine.

The 1927 Potassium Act provided for a minimum 2 percent royalty on "potassium compounds and other related products, except sodium." The exception for sodium ensured that sodium would still be subject to the 12½ percent minimum royalty which was in effect until the 1928 amendments. The fact that sodium was expressly excluded provides an additional clue as to the scope of "other related products." Sodium, like lithium, is a different chemical element from potassium, but if Congress did not think that sodium could be an "other related product" of potassium in a physical and chemical sense, there would have been no need to expressly exclude it in order to maintain its differing royalty rate. The express exclusion of sodium manifests the legislative view that sodium would otherwise be deemed an "other related product" of potassium where the two elements existed in the same deposit.

The Department has long held that when lithium "is recoverable from brines of sodium or potassium,

¹The 1928 amendments eliminated this phrase because there appeared to be no good reason for limiting the state in which sodium compounds could be found. H.R. Rep. 1003, *supra*, 1-2.

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which are leasable under the Mineral Leasing Act, the lithia production is governed by and included in the general lease terms." Letter from Max Edwards, Assistant to the Secretary and Legislative Counsel, to Senator Howard W. Cannon (Mar. 29, 1962). For example, lithium has been obtained since 1938 from the hot sodium and potassium brines at Searles Lake, California, pursuant to sodium or potassium leases.

As an example of a recent consideration of a similar problem, we note that the Geothermal Steam Act, December 24, 1970 (84 Stat. 1569), 30 U.S.C. § 1007 (1970), defines "associated geothermal resources" as including "any mineral or minerals (other than oil, hydrocarbon gas, and helium)."

The dissent stresses that the lithium from the lease should be locatable because the sodium or potassium is worthless. However, we must point out that the leases were issued on the basis of claims by appellant's predecessor that it had discovered a valuable deposit of sodium or potassium. If that was so then, and the lithium was also covered in the lease as a related or associated product, we do not comprehend how it falls out of the lease even if the sodium and potassium later become "worthless." We must remember that a lease once issued remains valid for its term even if there is no development, unless the lease provides otherwise and the Department enforces such a provision.

While we must conclude that the term "other related products" embraces otherwise locatable minerals dissolved in a sodium or potassium brine in order to give practical effect to the sodium and potassium leasing provisions, this conclusion is also directed by elementary rules of statutory construction. Meaning and effect must be given to every word of a statute, and if "other related products" were not construed to include otherwise locatable minerals dissolved in a sodium or potassium brine, the term would be mere surplusage. See 2A Sutherland, *Statutes and Statutory Construction*, § 46.06 (4th ed. C. D. Sands 1973). Accordingly, when a lease grants the exclusive rights to sodium or potassium and other related or associated products, it conveys the rights to all minerals dissolved in a potassium or sodium brine deposit.

[2] Appellant contends that sec. 5 of the Multiple Mineral Development Act, 30 U.S.C. § 525 (1970), opened such minerals to location.²

² 30 U.S.C. § 525 (1970) provides as follows:

"Subject to the conditions and provisions of this chapter, mining claims and millsites may hereafter be located under the mining laws of the United States on lands of the United States which at the time of location are—

"(a) included in a permit or lease issued under the mineral leasing laws; or

"(b) covered by an application or offer for a permit or lease filed under the mineral leasing laws; or

"(c) known to be valuable for minerals subject to disposition under the mineral leasing laws;

to the same extent in all respects as if such lands were not so included or covered or known."

To hold that section 5 allows mining claimants to appropriate rights that have already been exclusively granted under sodium or potassium leases would raise obvious constitutional problems. Again, we must bear in mind that the leases were issued to appellant's predecessor on applications filed pursuant to earlier prospecting permits which required discovery of valuable deposits of sodium or potassium to sustain the issuance of a lease. To hold that the leases, which are presumed valid when issued and which grant the right to exploit lithium, leave the lithium subject to later independent location would indeed create a situation uncertain and dangerous to the lessee.

Furthermore, it is a simple tautology to state that sec. 5 did not open to location any deposit reserved under sec. 4 which reserved "all Leasing Act minerals." 30 U.S.C. § 524.³ Section 11 provides:

³ 30 U.S.C. § 524 (1970) provides as follows:

"Every mining claim or millsite—

"(1) heretofore located under the mining laws of the United States which shall be entitled to benefits under secs. 521 to 523 of this title; or

"(2) located under the mining laws of the United States after Aug. 13, 1954, shall be subject, prior to issuance of a patent therefor, to a reservation to the United States of all Leasing Act minerals and of the right (as limited in section 526 of this title) of the United States, its lessees, permittees, and licensees to enter upon the land covered by such mining claim or millsite and to prospect for, drill for, mine, treat, store, transport, and remove Leasing Act minerals and to use so much of the surface and subsurface of such mining claim or millsite as may be necessary for such purposes, and whenever reasonably necessary, for the purpose of prospecting for, drilling for, mining, treating, storing, transporting, and removing Leasing Act minerals on and from other lands; and any patent

"Leasing Act minerals' shall mean all minerals which, upon Aug. 13, 1954, are provided in the mineral leasing laws to be disposed of thereunder." 30 U.S.C. § 530 (1970). As we have held above, the potassium and sodium leasing provisions clearly provide for the disposition of other related products of the sodium and potassium compounds. It necessarily follows that such other related products were reserved by 30 U.S.C. § 524 (1970) and were thus not open to location under 30 U.S.C. § 525 (1970). Because "other related products" included lithium which is dissolved in a sodium or potassium brine, no rights to the lithium may be appropriated under the general mining laws when the lithium is dissolved in a leasable sodium or potassium brine deposit or in such a deposit which is already subject to a lease.

Appellant argues that the opposite result is directed by *United States v. Union Carbide Corp.*, A-7345 (June 16, 1974), *aff'd as modified*, 31 IBLA 72, 84 I.D. 309 (1977), in which a particular compound was held to be locatable even though it had a sodium ion in its molecular structure. Appellant also cites *Wolf Joint Venture*, 75 I.D. 137 (1968), in which a particular

issued for any such mining claim or millsite shall contain such reservation as to, but only as to, such lands covered thereby which at the time of the issuance of such patent were—

"(a) included in a permit or lease issued under the mineral leasing laws; or

"(b) covered by an application or offer for a permit or lease filed under the mineral leasing laws; or

"(c) known to be valuable for minerals subject to disposition under the mineral leasing laws."

compound was held to be leasable because it was held to be a sodium compound, not because the mineral in question was physically associated with another leasable mineral, oil shale. Appellant further points out that in these cases, hearings had been held and expert testimony taken on the physical and chemical nature of the substances, and urges that we undertake a similar procedure here. However, these cases involved the question of whether the mineral deposit itself was sodium, a fact not in issue here because appellant concedes that the brines contain sodium and potassium, and that the leases it holds were issued on the basis of the discovery of these brines. Those cases did not involve consideration of whether the mineral in question was an "other related product" in a deposit which was conceded to be sodium already subject to outstanding leases. Thus, those cases provide no authority for the resolution of the issue now before us.

The Solicitor contends that the Multiple Mineral Development Act did not open to location any minerals which were physically associated with deposits of leasable minerals, citing a *Solicitor's Opinion* titled *Mining Claims—Rights to Leasable Minerals*, 75 I.D. 397 (1968). Appellant challenges the application of this opinion to the instant case, but even if it were applicable, appellant argues that the lithium would still be locatable so long as the development of the lithium would not damage the so-

dium or potassium. Appellant has offered to prove that the sodium and potassium are not damaged by development of the lithium.

Assuming, *arguendo*, that appellant's development of the lithium does not "damage" the sodium or potassium, it appears that application of the rule in the *Solicitor's Opinion* would still bar the location of the lithium because the development of the lithium necessarily involves processing the sodium or potassium brine. However, the *Solicitor's Opinion* is more appropriately invoked in those situations where the mineral lease does not convey the rights to the physically associated material. In the instant case, we do not hold the lithium to be nonlocatable merely because it is physically associated with sodium or potassium; we hold it nonlocatable because the rights to the lithium belong to the holder of the rights to a sodium or potassium deposit.⁴ Because the lithium

⁴ While otherwise locatable minerals may be rendered nonlocatable because they are physically associated with leasable minerals, it does not always follow that an otherwise locatable mineral can be developed pursuant to a lease for the leasable mineral. Unless such authority is conferred by a phrase like "other related products," the result may be that neither of the commingled deposits can be developed in the absence of special legislation. This conclusion is based on the analysis of the history of the Uraniferous Lignite Act of, 1955, 30 U.S.C. § 541 *et seq.* (1970), appearing in *Solicitor's Opinion, supra*, 400-402. That Act authorized the development of commingled deposits of lignite (a form of coal which is leasable) and uranium. The fact that the Act followed the Multiple Mineral Development Act is significant; Congress specifically adopted this Department's view that neither

(Continued)

is produced pursuant to appellant's sodium and potassium leases, royalty must be paid for the lithium.

The dissent's allusion to the concept that Materials Act minerals, such as sand, gravel, and clay, pass with a valid mining claim, without payment of royalty, is not helpful. Such mineral materials are not leasable minerals and are not reserved in a mining patent under the Multiple Mineral Development Act. A successful mineral locator gains title not only to the mineral on which his location is based, but to all other minerals, locatable or not, within the limits of his claim, except those that are reserved under the Multiple Mineral Development Act. It is only in relation to leasable minerals that the problem of reconciling leasing and location arises.

Accordingly, we reject appellant's demand for refund of royalty already paid, and we turn our attention to what royalty is due.

The Director's decision specifically ruled on only two claimed de-

ductions: (1) the costs of lime reagent, and (2) the cost of soda ash reagent, leaving to the Area Mining Supervisor the determination whether other deductions may be allowed. The Director allowed a deduction for the cost of the soda ash reagent, but the deduction for lime reagent was disallowed. Appellant protests the disallowance of the cost of the lime reagent and other expenses including plant operations, transportation to point of shipment to market, and packaging costs.

The Solicitor has moved for dismissal of the appeal with respect to the royalty issue on the ground that appellant has not been adversely affected because the Director had remanded the case to the Area Mining Supervisor to recompute the royalty by taking allowable deductions into account. However, the Director made a specific ruling as to the deductibility of the costs of the lime reagent and the soda ash reagent, and by appealing the disallowance of a deduction for the cost of the lime reagent, appellant has raised an issue which is ripe for our review. Thus, we are called upon to determine whether the disallowance of this deduction is consistent with the pertinent statutory and lease provisions. This necessarily entails a discussion of the general principles which govern the allowance of deductions. Accordingly, this motion is denied.

[3] The terms of the leases and the statutory provisions require the stated royalty rate to be applied to

(Continued)

the mining laws, including the Multiple Mineral Development Act, nor the mineral leasing laws authorized the disposal of commingled deposits of locatable and leasable minerals. H.R. Rep. No. 1478, 84th Cong., 1st Sess. 2 (1955). This report stated: "Neither the mining laws of the United States, *as amended*, nor the mineral leasing laws provide for disposal of either mineral where one is host to the other." This analysis of the Multiple Mineral Development Act carries great authority as it is a ratification by the legislature of a contemporaneous interpretation of the effect of that Act by the agency charged with its implementation. Under this interpretation, if the sodium or potassium leases did not convey the rights to develop the lithium, no mineral from the brine could be developed in the absence of special legislation.

"the quantity or gross value of the output of sodium [or potassium] compounds and other related products [or associated compounds] at the point of shipment to market." 30 U.S.C. §§ 262, 282 (170). (Italics added.) The Department has long interpreted this provision in general to preclude allowance of deductions for plant operations costs and other costs incurred in developing a salable product, and no deduction has been allowed for transportation costs incurred by the lessee where the product had not reached the point of shipment to market. See, e.g., *United States Potash Co.*, A-17518 (Feb. 28, 1934). The "point of shipment to market" not only states the physical location at which the gross value must be determined; it also indicates the required condition of the product when its gross value is determined. Clearly, a product cannot be ready for shipment to market unless it has been processed to a marketable state. This concept won judicial approval when a court upheld the Secretary's determination that the royalty rate must be imposed on the gross value of a "refined product suitable for an established market." *United States v. Southwest Potash Corp.*, 352 F. 2d 113 (10th Cir. 1965), cert. den., 383 U.S. 911 (1966). That case involved a direct sale of raw potash ore produced under a Federal potassium lease, and the court upheld the Department's determination that the proper royalty base was the price that would have been received had

the ore been processed to a product salable in the normal market rather than the actual price paid for the raw ore. The Department exercised this authority under lease provisions which paralleled a regulation now codified at 30 CFR 231.61. Virtually the same provision appears in appellant's leases. Therefore, as a general rule, the statutory provision precludes the Department from allowing deductions for expenses incurred in developing a marketable product from the leased deposits.⁵

However, the Department has long recognized a difference between "primary" and "secondary" products for the purpose of determining the proper royalty base. Where the lessee markets a "secondary" product, the royalty is based on the gross value of the primary product used in making the secondary product, not on the gross value of the secondary product which is marketed. See, e.g., letter from Oscar L. Chapman, Assistant Secretary, U.S. Department of the Interior, to John T. Burrows, President, Union Potash & Chemical Co. (Nov. 9, 1940). While a "primary"

⁵ The rule precluding allowance of deductions for expenses incurred in developing a marketable product draws added support from the fact that under the provisions of the leases, royalty may be "paid in value" or "taken in kind" at the election of the Government. The leases provide: "When taken in kind royalty products shall be delivered in merchantable condition at the point of shipment without cost to the lessor * * *." Because the United States could take 3 percent of the finished products without any cost, there is no reason for allowing deductions when royalty is paid in value rather than taken in kind.

product is a refined product, it is not a chemical combination of a leasehold mineral with a purchased reagent; generally, those products which are chemical compounds of purchased reagents with minerals extracted under the lease are called "secondary" products.

In the instant case, the Director determined that appellant produces and sells lithium carbonate from a brine containing lithium chloride and other minerals. A purchased lime reagent is added to the brine to precipitate the minerals other than lithium. Soda ash is then added and becomes chemically combined with the lithium to produce lithium carbonate. These determinations are not controverted by appellant. Because the lithium carbonate is a chemical compound of purchased soda ash with lithium from the lease, the Director properly treated the lithium carbonate as a secondary product and allowed a deduction for the soda ash reagent. However, the Director properly denied the deduction of the cost of the lime reagent because it did not become chemically combined with a mineral from the lease which was later sold. The cost of the lime reagent is properly treated as any other processing expense for which no deduction may be allowed.

In support of its contention that these expenses may be deducted from the royalty base, appellant has cited a number of Federal and State court decisions which have allowed deductions of the type appellant presses here. However, the

royalty provisions in the leases in each of those cases differed in at least one essential characteristic from the Federal statutory lease provision imposing royalty on the "quantity or *gross* value of the output of sodium or potassium compounds and other related products *at the point of shipment to market.*" 30 U.S.C. §§ 262, 282 (1970). (Italics added.) Indeed, this particular value has been recognized as "somewhat unusual." *United States v. Southwest Potash Corp., supra* at 118 (Seth, J., concurring specially).

Appellant asserts that if it sold the brine directly without incurring plant operation costs and the like, the price received would be lower because the purchaser would have to bear these costs, and the royalty would be less. The conclusion appellant draws from this hypothetical situation is simply incorrect. Such a sale would be most unusual, although it may sometimes occur.⁶ *United States v. Southwest Potash Corp., supra*, makes clear that even if appellant sold the brine directly, the Department could properly hold the royalty base to be the price that would be received if the brine were processed to a refined product salable in the normal market, rather than

⁶ Such a sale of brine did occur in one of the cases cited by appellant, *Parnell, Inc. v. Giller*, 372 S.W. 2d 627 (Ark. 1963), distinguished from the instant case because the royalty rate was applied at the wellhead rather than at point of shipment to market. However, the court noted the unusual nature of such a sale.

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the actual price paid for the raw brine.

[4] Appellant has requested a hearing pursuant to 43 CFR 4.415, and asserts that there are controverted issues of fact involved in the questions of the locatability of the lithium deposits and the allowance of deductions from the royalty base. For the Board of Land Appeals to exercise its discretion under 43 CFR 4.415 and order a hearing, an appellant must allege facts which, if proved, would entitle it to the relief sought. *Rodney Rolfe*, 25 IBLA 331, 83 I.D. 269 (1976). The Department has not disputed any factual assertion by appellant which is relevant to the disposition of this appeal, and we find that appellant has raised no material issues of fact. With respect to the locatability of the lithium, our decision rested on a fact not controverted by appellant: that the lithium is dissolved in brines containing sodium and potassium. Our conclusion rests on the application of the relevant statutes to this fact, and appellant has asserted no fact that would lead to a contrary result. With respect to the royalty issue, no controverted issues of fact have been developed because the case is being remanded to the Area Mining Supervisor to determine whether any of appellant's claimed deductions may be allowed in a manner consistent with this decision and Departmental precedents. Disallowance of the deduction for the cost of the lime reagent does not involve any controverted issue

of fact for which a hearing would be warranted. Accordingly, appellant's request for a hearing is denied.

[5] Appellant asserts that Survey is estopped from collecting the royalties which accrued prior to the time when Survey determined that appellant was incorrectly computing its royalty. The royalty rates are stated in the leases, and both the leases and the statute require that the applicable royalty rate be applied to the gross value of the sodium or potassium and other related products at the point of shipment to market. Acceptance of royalty on any other basis is contrary to statute and beyond the authority of this Department under the mineral leasing laws. Thus, the Government is not estopped from demanding royalty payments owed by lessees, even if it has accepted improper royalty payments in the past. *Atlantic Richfield Co. v. Hickel*, 432 F.2d 587, 591 (10th Cir. 1970), *aff'g.*, *Sinclair Oil and Gas Co.*, 75 I.D. 155 (1968); *Gulf Oil Corp.*, 21 IBLA 1 (1975). Appellant asserts that in *Atlantic Richfield*, the court recognized that the doctrine of equitable estoppel may affect the Government, but appellant ignores the following holding of the Court: "* * * an administrative determination running contrary to law will not constitute an estoppel against the federal government." *Id.*, at 592. We fail to discern any issue of fact relating to the question of estoppel.

[6] The original decision which had been appealed to the Director

sought to impose full royalties which were due from 1966. The Director remanded the case to limit the royalties to those which became due from Nov. 1, 1967, on the theory that the statute of limitations precluded collection of royalties which became due more than 6 years prior to the letter of Oct. 31, 1973, notifying appellant that the royalty calculations had been in error. Appellant contends that no royalty can be collected for more than 6 years prior to Dec. 5, 1974, when the full amounts due had been determined. We, therefore, cannot escape from ruling on the propriety of applying the statute of limitations in the instant case.

28 U.S.C. § 2415(a) (1970) provides as follows:

Subject to the provisions of sec. 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: Provided, That in the event of later partial payment or written acknowledgement of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgement. [Italics added.]

Although the Director had applied the statute in a fashion, we are not convinced that its application is at all warranted in this case in its present posture. We, therefore, hold that appellant owes the royalties which accrued after 1966 and

we modify the Director's decision accordingly.

As the Solicitor has pointed out in his brief, the statute is concerned with the filing of claims for money damages by the United States in district courts. Generally, a statute of limitations operates directly on the remedy only but does not affect the merits of the controversy or the underlying right to recover. *United States v. Studiwant*, 529 F.2d 673 (3d Cir. 1976). Thus, when one remedy is barred by a statute of limitations, other remedies may still be available against which the statute of limitations cannot be interposed. See, generally, 51 Am. Jur. 2d *Limitations of Actions*, §§ 21-23 (1970); 53 C.J.S. *Limitations of Actions*, §§ 6, 7 (1948).

This decision involves the administrative determination of the underlying obligation of the appellant to pay royalty to the United States; such a determination does not automatically trigger a remedy. See, e.g., *United States v. Southwest Potash Corp.*, *supra* at 118. To apply the statute at this stage of the proceedings would lead to a determination of the underlying obligation which would compromise the effectiveness of alternative remedies to which the statute of limitations might not apply. For example, if we were to determine that appellant does not owe royalty due prior to Nov. 1, 1967, this might conceivably preclude any action pursuant to 30 U.S.C. § 188(a) (1970) resulting from appellant's failure to pay the proper royalty during that period. However, if there is no considera-

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tion of the statute of limitations in calculating the royalty due, there is some likelihood that 28 U.S.C. § 2415(c) (1970) might be construed as precluding appellant from raising the statute as a defense in a proceeding under 30 U.S.C. § 188 (a) (1970). Because the statute of limitations relates to remedies rather than underlying obligations, it need only be considered if the need to pursue remedies arises which necessarily occurs after the underlying obligation has been determined in an adjudicative proceeding. Because the purpose of this proceeding is only to determine the underlying obligation for royalty, the statute of limitations raises no issue within the scope of this administrative adjudicative proceeding, as contrasted with settlement negotiations or other actions taken to collect the amounts due.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from its affirmed as modified.

MARTIN RITVO,
Administrative Judge.

I CONCUR:

JOAN B. THOMPSON,
Administrative Judge.

ADMINISTRATIVE JUDGE
STUEBING DISSENTING:

Respectfully, I must agree with the appellant that lithium is a locatable mineral for which, under the

circumstances of this case, no royalty accrues to the United States.

With regard to the Federal public lands, the statutes have provided three categories of minerals and prescribed different methods for the disposition of each. The three categories, of course are, the *locatables*, the *leasables*, and the *salables*. The *leasables* are those specific minerals expressly designated by the Mineral Leasing Act of Feb. 25, 1920, *as amended*, 30 U.S.C. § 181 *et seq.* (1970). These include sodium, potash, coal, oil and gas, phosphates and others specifically named in the statutes. The *salables* are those minerals which can be purchased from the United States under the authority of the Materials Act of July 31, 1947, *as amended*, 30 U.S.C. § 601 *et seq.* (1970), and include common varieties of sand, stone, gravel, pumicite, cinders and clay.¹ The *locatable* minerals are those which may be freely appropriated by the discoverer pursuant to the General Mining Law of May 10, 1872, *as amended*, 30 U.S.C. § 22 *et seq.* (1970).

Those minerals which may be freely appropriated under the General Mining Law by qualified claimants without payment of royalty or purchase price include *all minerals which the Congress has not seen fit to designate either as leasable or salable*. This is so because the 1872 mining law provided that "*all valuable mineral deposits*" would come

¹ "Free use" of these materials may also be permitted under this statute in certain circumstances.

within its purview,² and the Mineral Leasing Act, the Materials Act, and the Act of July 23, 1955, 30 U.S.C. § 611 (1970), only carved out those specific exceptions which the Congress intended to eliminate from location.

Lithium is an element, the lightest known metal. As such it is certainly neither sodium or potassium, nor any other Leasing Act mineral, nor is it a common mineral material which is salable under the Materials Act. Thus, it is clearly a locatable mineral, and I doubt that anyone knowledgeable in the laws relating to the disposition of minerals on Federal lands would disagree, were lithium to be mined in isolation from any Leasing Act mineral.³

However, because the lithium in this case is extracted from a brine in which sodium and potassium also are present, the majority have concluded that the law relating to sodium and potassium applies, rather than the law relating to locatable minerals, which lithium happens to be. This might make a certain kind of sense if the appellant were exploiting potassium and sodium for their commercial value and producing lithium as an incidental by-product; or if appellant, in its pur-

suit of lithium, found it necessary to destroy the sodium or potassium, or its value. But appellant is doing neither. The record indicates that it is mining⁴ only lithium. The sodium and potassium are produced and separated from the brine only as a necessary and unavoidable incident to the extraction and separation of the lithium. The sodium and potassium are not utilized in any manner, but are discarded on the premises by the appellant. Appellant alleges that the sodium and potassium, although undamaged, have no commercial value. Appellant's only apparent interest in the sodium and potassium is that they are there and must be produced if the lithium is to be extracted.

Rarely is any mineral which is the target of a mining venture found in such an isolated and unadulterated condition that it can be mined without the necessity of extracting any other mineral. For example, a gold dredging operation extracts and discards great quantities of sand, gravel, and clay in the process of separating and recovering small amounts of gold, and an underground mining operation for a locatable mineral, such as galena, must extract, remove and discard whatever other valueless

² 30 U.S.C. § 22 (1970). Italics added.

³ Lithium is never found uncombined in nature. However, it is extensively produced in the United States from spodumene, an ore which contains no Leasing Act minerals, except, perhaps, negligible amounts of "replacement" by sodium. See *A Dictionary of Mining, Mineral and Related Terms*, 1968 ed., pp. 648, 1057; and *Mineral Facts and Problems*, 1970 ed., pp. 1073-1081. Both references are official publications of this Department, of which official notice may be taken pursuant to 43 CFR 4.24(b).

⁴ "Mining. a. The science, technique, and business of mineral discovery and exploitation. * * * b. Process of obtaining useful minerals from the earth's crust * * *." *A Dictionary of Mining, Mineral and Related Terms*, 1968 ed., p. 715. Since there is no "exploitation" by appellant of the sodium and potassium because they are not economically "useful minerals," appellant cannot accurately be said to be engaged in "mining" those minerals.

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mineral material happens to be host to—or co-existent with—the object of the venture. Yet I have never heard it asserted that the producer of such locatable minerals must purchase under the Materials Act the sand, rock, gravel or clay extracted and discarded, or that he must obtain a lease and pay royalty under the Mineral Leasing Act because worthless minerals listed in that Act have been encountered and must be extracted as an unavoidable incident of the operation. Yet the majority opinion carries the latter analogy one step further by holding that not only must the producer of a locatable mineral have a lease where the recovery of the locatable mineral involves the incidental extraction of a leasable mineral, the locatable mineral by some magic is transformed legally into a leasable mineral for which royalty must be paid on the same basis as if it were the leasable which was being sold, even though the leasable is worthless and unwanted.

The majority declares that “the issue turns on whether or not the lithium is a related or associated product of the sodium or potassium deposits.” My first quarrel with the majority’s rationale is the manner in which this issue is postulated. Why are these brines characterized as “the sodium or potassium deposits?” Insofar as value is concerned, it is the *lithium* which is the predominant mineral. Therefore, the question, more properly posed, should be whether the sodium or potassium are related or

associated products of the *lithium deposits*. Thus stated, the answer to the question loses its legal significance, as there is no law or regulation which requires the producer of a *locatable* mineral to pay royalty on related or associated minerals. Even where, as in this case, the producer of a locatable mineral has leases which entitle him to extract and sell certain leasable minerals on a royalty basis, if those leasable minerals extracted have no value and are not sold, there is no basis for the imposition of royalty.

Moreover, the existence of mineral leases for sodium and potassium does not preclude the production of locatable minerals from the same land. It once would have, but Congress cured this impediment in 1954 by enacting the Multiple Mineral Development Act, 30 U.S.C. § 521 *et seq.* (1970). That legislation made it possible to simultaneously produce locatable and leasable minerals from the same land, each being governed by its respective statute.

Even assuming, *arguendo*, that, as stated by the majority, the issue could be made to depend on whether the lithium is an “other related product” of sodium, or an “associated product” of potassium, the answer is hardly as clear as the majority perceives it to be. It is essentially a question of statutory construction. There is no doubt that the lithium, magnesium, sodium and potassium are all related as associated by *proximity*. That is, they co-exist in the same brine. But

is mere proximity the relationship which the authors of the legislation had in mind? Or, as to me seems more plausible, did they intend that the minerals be associated or related generically? *A Dictionary of Mining, Mineral, and Related Terms* defines "family" as follows: "When a number of genera agree in certain major structural characters, they are grouped together to form a family." As the minerals in question are separate elements, it would seem that although they might have properties which can be compared, it seems unlikely that they could be regarded as having a generic relationship. Even if this could be shown, the record does not reflect it, and such a relationship was not part of the rationale of any of the decisions which hold that appellant must pay royalty on its lithium production.

However, I am not primarily concerned here with the nature of the relationship of the minerals in question. What I am principally concerned with is the incongruity of holding that where a valuable locatable mineral is being mined in an operation which requires the incidental extraction of economically worthless leasable minerals, the legal status of the valuable mineral is controlled by and converted to that of the worthless minerals.

Finally, since the majority is unable to resolve this appeal by holding simply that the extraction of this lithium is governed by the 1872 Mining Law, as I would do, it should accede to appellant's request

for a hearing before an administrative law judge. Appellant should have the opportunity to submit evidence on the physical and chemical properties of the minerals concerned, the nature of the deposit, the methodology of the separation process, etc. If a royalty is to be imposed, appellant should have the opportunity to support its contention that its use of lime is a necessary production cost for which allowance should be made.

EDWARD W. STUEBING,
Administrative Judge.

CONTINENTAL TELEPHONE OF THE WEST

35 IBLA 279

Decided June 2, 1978

Appeal from decision of the New Mexico State Office, Bureau of Land Management, rejecting request for free rental for right-of-way NM 4348.

Affirmed.

1. Rights-of-Way: Generally

A request for rent-exempt status for a right-of-way granted for telephone poles and lines pursuant to the Act of Mar. 4, 1911, 43 U.S.C. § 961 (1970), is properly denied where the terms of the grant clearly state that the grant is made in consideration of periodic rental payments and contains no authorization for rent-exempt status.

2. Accounts: Fees and Commissions— Fees—Rights-of-Way: Generally— Words and Phrases

"*Rural Electrification Administration projects.*" A right-of-way holder is not

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excused from payment of rental under 43 CFR 2802.1-7(c) (1976), by virtue of holding an REA loan, where such holder is neither a cooperative or nonprofit organization.

APPEARANCES: Gregory J. Busko, Associate Corporate Counsel, for appellant.

OPINION BY ADMINISTRATIVE
JUDGE FISHMAN

INTERIOR BOARD OF LAND
APPEALS

Continental Telephone of the West has appealed from a decision dated Dec. 12, 1977, of the New Mexico State Office, Bureau of Land Management (BLM), rejecting appellant's request for free rental for right-of-way NM 4348.

The right-of-way for telephone poles and lines in Sandoval and Rio Arriba Counties, New Mexico, was granted pursuant to the Act of Mar. 4, 1911, *as amended*, 43 U.S.C. § 961 (1970), [repealed by P.L. 94-579, Title VII, § 706(a), October 21, 1976, 90 Stat. 2793] to Lindrith Telephone Co. on July 12, 1968. Lindrith merged with Western States Telephone Co. in Oct. 1968, and the latter subsequently became part of Continental Telephone Co. of the West.

A provision in the original grant states that the rental amount was \$25 for each 5-year period, payable on or before the first day of each 5-year period. A further provision states that the regulations applicable to the grant were 43 CFR 2234.1 and 2234.4-1 (1967). Subsec.

2234.1-2(a)(2) states in pertinent part:

All applications filed pursuant to this part in the name of individuals, corporations or associations must be accompanied by an application service fee of \$10 except where the right of way will authorize use and occupancy of the lands exclusively for the purposes stated in sec. 2234.1-6(c). The service fee will not be returnable. * * *

Subsec. 2234.1-6 (now 2802.1-7 (1976)) covers payment required, exceptions, default, and revision of charges. It provides, in pertinent part:

(a) Except as provided in paragraphs (b) and (c) of this section, the charge for use and occupancy of lands under the regulations of this part will be the fair market value of the permit, right-of-way, or easement, as determined by appraisal by the authorized officer. Periodic payments or a lump-sum payment, both payable in advance, will be required at the discretion of such officer: (1) When periodic payments are required, the applicant will be required to make the first payment before the permit, right-of-way, or easement will be issued; (2) upon the voluntary relinquishment of such an instrument before the expiration of its term, any payment made for any unexpired portion of the term will be returned to the payer upon a proper application for repayment to the extent that the amount paid covers a full permit, right-of-way, or easement year or years after the formal relinquishment: *Provided*, That the total rental received and retained by the Government for that permit, right-of-way, or easement, shall not be less than \$25. The amount to be so returned will be the difference between the total payments made and the value of the expired portion of the term calculated on the same basis as the original payments.

(b) Except as provided in paragraph (c) of this section, the charge for use and

occupancy of lands under the regulations of this part shall not be less than \$25 per five-year period for any permit, right-of-way, or easement issued.

(c) No charge will be made for the use and occupancy of lands under the regulations of this part:

(1) Where the use and occupancy are exclusively for irrigation projects, municipally operated projects, or nonprofit or Rural Electrification Administration projects, or where the use is by a Federal governmental agency.

(2) Where the permit, right-of-way, or easement is granted under the regulations in §§ 2821, 2822, 2842, 2871, 2872.

* * * * *

(e) At any time not less than five years after either the grant of the permit, right-of-way, or easement or the last revision of charges thereunder, the authorized officer, after reasonable notice and opportunity for hearing, may review such charges and impose such new charges as may be reasonable and proper commencing with the ensuing charge year.

In Sept. 1973 a rental review was made of appellant's right-of-way pursuant to sec. 2802.1-7(e) which resulted in increasing the rental from \$25 per 5-year period to \$150 per 5-year period, effective as of the rental period beginning on July 12, 1973. A decision advising appellant of the increase was issued on October 1, 1973. A further reappraisal was made in 1977 when the rental charges were determined to be \$425, effective as of July 12, 1978. By BLM decision of July 12, 1977, appellant was advised of the reappraisal and of its right to a hearing in connection therewith. Appellant replied to this decision by letter dated Sept. 27, 1977, in which it requested free rental under sec.

2802.1-7(e)(1), *supra*, asserting that the project on its right-of-way was originally financed with a Rural Electrification Administration (REA) loan which was still outstanding.

The decision appealed from denied appellant's request essentially on the ground that "use and occupancy" of the right-of-way was by a private corporation for profit and even though "it was initially financed in whole or in part by the REA" it "was not for a REA project *exclusively*." (Italics in original.)

On appeal to this Board, appellant's position is that its status as a private corporation for profit does not preclude its eligibility for free rental under the above-quoted regulation. Appellant states that the poles and lines on the right-of-way were built with REA funds and that therefore it should be entitled to free rental.

[1] Having reviewed the case file, we find that it is completely devoid of any indication that appellant or its predecessors in interest earlier had sought free rent. On Jan. 8, 1968, the land office in receipt of the right-of-way application, advised that a \$10 filing fee was due. By letter of July 3, 1968, the land office further advised the applicant that an appraisal had fixed the rental at \$25 per 5-year period. As noted above, on Oct. 1, 1973, a decision increasing the rental to \$150 per 5-year period was issued. There is no indication in the record that appellant ever objected

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to, or protested, any of these assessments for any reason. Appellant appears to have acquiesced in and remitted these fees until the summer of 1975 when it wrote letters demanding refunds of all rentals theretofore paid.¹ On appeal, appellant has submitted no evidence to support its allegation that it is entitled to rent exempt status because the initial project was financed by an REA loan.

[2] The essential question raised by the appeal is the interpretation of 43 CFR 2802.1-7(c), which reads as follows:

(c) No charge will be made for the use and occupancy of lands under the regulations of this part:

(1) Where the use and occupancy are exclusively for irrigation projects, municipally operated projects, or nonprofit or Rural Electrification Administration projects, or where the use is by a Federal governmental agency.

(2) Where the permit, right-of-way, or easement is granted under the regulations in §§ 2821, 2822, 2842, 2871, 2872.

43 CFR 2802.1-7(c)(2) applies only to roads and highways under 23 U.S.C. (Interstate and Defense Highway System) and roads over public lands under R.S. § 2477, 43 U.S.C. § 932 (1970).² The precise issue is whether the "use and occupancy are exclusively for * * * Rural Electrification Administration projects." 43 CFR 2802.1-7

(c)(1) relates exclusively to Governmental and nonprofit use.

The Rural Electrification Administration of the Department of Agriculture has never had any projects³ of its own—its function has been and continues as a source of loans for electrical plants, transmission lines, and rural telephone service. 7 U.S.C. §§ 901-924 (1976). See 7 CFR Parts 1700 and 1701.

Agriculture's pamphlet captioned "REA Loans & Loan Guarantees for Rural Electric & Telephone Service" recites at page 3 as follows:

Telephone Loans

REA telephone loans may be made to telephone companies, to public bodies, and to cooperative non-profit, limited-dividend or mutual associations. In authorizing the telephone loan program, Congress directed that it be conducted to "assure the availability of adequate telephone service to the widest practicable number of rural users of such services."

About two-thirds of the telephone systems financed by REA are commercial companies and about one-third subscriber-owned cooperatives.

It is appellant's contention that the "present poles and lines located on NM 4348 were built with REA funds * * * [and] this qualifies as a REA project within the meaning of 43 CFR 2802.1-7(c)(1)."

Appellant also points out that Lindrith Telephone Company re-

¹ These letters are not contained in the file. They are mentioned in a memorandum dated Oct. 3, 1975, from the Field Solicitor, Santa Fe, advising the State Director, BLM, to issue a decision denying refund of any rentals.

² Repealed by section 706(a) of FLPMA, 90 Stat. 2793.

³ The term "Federal Project Rural Electrification" was utilized in the early days (circa. 1937) of REA. See *The Story of Cooperative Rural Electrification*, Department of Agriculture, Miscellaneous Publication No. 811 at page 7. The telephone amendments to the REA Act of 1936 were added by the Act of Oct. 28, 1949, 63 Stat. 948, 7 U.S.C. § 921 *et seq.* (1976).

ceived a 2 percent REA loan, that Lindrith was granted the right-of-way in 1968, and that when appellant took over Lindrith in 1974, "it assumed all obligations arising out of the REA mortgage."

It is noteworthy that the Forest Service of the Department of Agriculture waives right-of-way fees as follows:

Fees will be based on land value (FSM 2715) where land value can reasonably be determined. The minimum annual fee is \$2 per acre or \$10 per mile or fraction thereof, whichever is greater for each line constructed on the right-of-way.

Rural Electrification Administration-sponsored cooperatives shall be granted free use provided the company is both organized as a cooperative and has an outstanding REA loan. The annual list of paid-up REA borrowers should be reviewed currently to determine appropriateness of free permits (provided by Annual Statistical Report—REA bulletin 1-1 for REA electric lines, and REA Bulletin 300-4 for REA telephone lines). Both reports can be obtained from the Government Printing Office (GPO) or possibly from local REA offices. [Italics supplied.]

Forest Service Manual § 2728.12 (d).

Thus the Forest Service envisages that two criteria must be met: The right-of-way user must (1) be a REA cooperative and (2) have an outstanding REA loan.

We note that sec. 504(g) of FLPMA, 90 Stat. 2279, 43 U.S.C.A. § 1764(g) (West Supp. 1977) provides in applicable portion as follows:

(g) The holder of a right-of-way shall pay annually in advance the fair market

value thereof as determined by the Secretary granting, issuing, or renewing such right-of-way: * * * Rights-of-way may be granted, issued, or renewed to a Federal, State, or local government or any agency or instrumentality thereof, to nonprofit associations or nonprofit corporations which are not themselves controlled or owned by profitmaking corporations or business enterprises, or to a holder where he provides without or at reduced charges a valuable benefit to the public or to the programs of the Secretary concerned, or to a holder in connection with the authorized use or occupancy of Federal land for which the United States is already receiving compensation for such lesser charge, including free use as the Secretary concerned finds equitable and in the public interest. * * *

Thus FLPMA, for any period following its enactment on Oct. 21, 1976, embodies the Congressional policy of fair-market rental for rights-of-way except where the user is a Governmental agency, a nonprofit association or corporation not controlled by a profitmaking entity, or where such user renders a valuable service to the public either gratis or at a reduced charge. Appellant meets none of these criteria.

We also note that the Reclamation Project Act of 1939, sec. 9(b), 43 U.S.C. § 485h(c) (1970), provides in part as follows:

(c) The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That any such contract either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3½ per centum per annum if the Secretary determines

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an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year. Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper: *Provided further, That in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936.* * * * [Italics supplied.]

We recognize the absence of any direct precedential ruling on whether a company is entitled to rent free rights-of-way by virtue of merely holding a REA loan as is contended by appellant. The reference in 43 CFR 2802.1-7(c) (1) to REA projects should be construed in consonance with other statutory and regulatory preferences afforded REA borrowers. These envisage

free rental for *only* "cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936." This is the standard in sec. 9 of the Reclamation Project Act of 1939, *supra*, and is virtually identical to the position of the Forest Service and FLPMA.

We conclude there is no basis either in the grant, the regulations, or the record to support appellant's theory of entitlement. The conclusion urged by appellant cannot be reconciled with the terms of the original grant, in which appellant and its predecessors in interest acquiesced for 7 years. *Cf. The Superior Oil Co., 12 IBLA 212 (1973).* We determine that appellant is neither entitled to a refund of past rentals nor to a rent-free right-of-way for the remainder of the grant. Appellant is, of course, free to avail itself of its right to a hearing on the periodic revision of charges pursuant to 43 CFR 2802.1-7(e).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

FREDERICK FISHMAN,
Administrative Judge.

WE CONCUR:

EDWARD W. STUEBING,
Administrative Judge.

JOAN B. THOMPSON,
Administrative Judge.

**APPEAL OF SIERRA
CONSTRUCTION CO.**

IBCA 1145-3-77

Decided *June 7, 1978*

Contract No. N00C14206932, Bureau of
Indian Affairs.

Appeal sustained in part.

**1. Contracts: Disputes and Remedies:
Burden of Proof**

When the Government says that a claim is barred by a supplemental agreement, it has the burden of proof as to the terms and conditions of that agreement.

**2. Contracts: Disputes and Remedies:
Damages: Liquidated Damages**

When the Government assesses liquidated damages for late performance of a contract and the contractor asserts that the delay was excusable because of unusually severe weather, the contractor must show not only that the weather was bad (and delayed the work), but that the weather was worse than normal for that time and place.

APPEARANCES: Mr. Richard H. Carr, Construction Manager, Utility Division, Sierra Construction Co., Albuquerque, New Mexico, for the appellant; Mr. Dale H. Itschner, Mr. William Back, Department Counsel, Window Rock, Arizona, for the Government.

*OPINION BY ADMINISTRATIVE
JUDGE STEELE*

*INTERIOR BOARD OF
CONTRACT APPEALS*

Introduction. This is an appeal from the assessment of \$5,445 of liquidated damages for the allegedly late completion of a contract to modify sewage treatment facilities

at five Indian schools in Arizona and New Mexico (Appeal file—hereafter “AF,” Contract). In the notice of appeal the appellant asserted four excusable causes for the delay. These were: (1) inadequate Government plans, (2) constructive change orders, (3) unusually severe weather and (4) invalidity of the assessment because of lack of any damage to the Government due to the delay. The Government’s defenses, beyond a general denial, were lack of 10 days notice under clause 5(d)¹ (Answer pp. 5, 9), and accord and satisfaction due to supplemental agreements as to certain change orders (Government’s March 13, 1978, letter brief; Tr. 168, 169, 195, 203).

Appellant has not made any affirmative claims for any increase in the contract price.

FINDINGS OF FACT

1. The Department of the Interior, Bureau of Indian Affairs, entered into a negotiated contract No. N00C14206932 with Sierra Construction Company on Jan. 26, 1976 (AF tab. I) for the fixed price of \$159,300. The contract required the appellant to construct and modify the sewage treatment facilities for boarding schools located at (1) Ojo Encino, New Mexico, (2) Pueblo Pintado, New Mexico, (3) Lake Valley, New Mexico, (4) Mariano Lake, New Mexico, and (5) Rock Point, Arizona. The contract included Standard Form 23-A. It

¹ Standard Form 23-A, October 1969 Edition, Clause 5, entitled “Termination for Default—Damages for delay—time extensions.”

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also included, in Clause GC-22, a provision for liquidated damages of \$125 per day beyond the completion date (AF Contract p. B-52). The completion date was 130 days after receipt of the notice to proceed (AF, Contract p. A6).

2. We can find no direct evidence of the date of the Notice to Proceed. Nevertheless, we conclude from Mod. 1 that it was issued 130 days prior to Aug. 14, 1976 (AF tab. J—Mod. 1).

3. Appellant commenced performance of the contract and ran into certain problems next briefly described. At Mariano Lake the designated lagoon would not fit on the property because of an error in the contract plans (GX-6; Tr. 16, 17). Also appellant encountered rock in the lagoon (GX-6). Further, a compaction test was improperly performed by the Government (GX-6). Also, it was impossible to obtain the specified fence posts (GX-6; Tr. 98, 117, 118, 119). At Pueblo Pintado there was a Government drawing error as to the size of the new dike (GX-6). Also, the garbage dump that had to be removed by the appellant was much larger than shown on the drawing or visible from inspection (GX-6; Tr. 18, 37, 76, 98). Furthermore, there was a delay caused by the Government taking some time to locate a proper borrow site (GX-6; Tr. 40-42, 46, 73, 74, 75, 76, 100). In addition, there was some delay caused by overflow, and by Government stoppage of pumping (GX-6; Tr. 19, 20, 85, 86, 88, 89); and by bad weather on Apr.

15-19, May 4, 6-10, 19, 20, 27; June 1, 3, 5, 6, 7, 30; and July 1, 2, 3, 8-10, 13 (AF tab G; Tr. 24, 25, 26, 29, 37, 44, 80, 81, 82, 132, 133, 157, 170, 174-5, 194, 258-263, 270).

[1] 4. On July 14, 1976 (Tr. 221), the appellant and the Government met and discussed some of the topics listed in the prior paragraph. Appellant asked for 70 to 77 days as an extension of time because of some of the above-mentioned matters. At the same or a different meeting the appellant and the Government also discussed a change order to remove the middle dike at the Baca school. Appellant asked for 30 days extension for this work.

At the conclusion of the July 14 meeting, the Government said it would agree to 15 working days for the dike and 19 working days for certain other excusable delays for a total of 34 working days or an extension of the completion date from August 14 to September 30, 1976. The appellant's representative indicated that he was not happy with these extensions, but if that was all the Government would grant, then that was all it would grant (Tr. 39, 46, 47, 48, 50, 51, 52, 56, 57, 61, 63-64, 66, 68, 94, 100, 101, 107, 108, 139, 140, 208, 213, 215, 217, 222-228, 249-257, 273, 274, especially 228). Thereafter, the Government sent a supplemental agreement to this effect to appellant, and it was signed and returned by the appellant's office secretary who signed as officer manager.

5. We conclude, after reviewing all the testimony and Mod. 1 and 2 and AX 4 and 7, that the individ-

ual who signed Mods. 1 and 2 had actual or apparent authority to bind appellant to the terms of Mod. 1. Put another way, appellant had the burden of proof and persuasion that Mrs. Brownell did *not* have authority to sign Mod. 1 and in our view has failed to carry those burdens. Thus, we conclude Mod. 1 is an accord and satisfaction as to the claims for extension of time for the topics mentioned in Mod. 1 and in paragraph 18 *post*.

6. The parties negotiated Mod. 2 which was independent of Mod. 1. In Mod 2 the parties agreed to a

price increase and an extension of the completion date from September 30 to October 1, 1976, because of certain added work to install certain expansion joints.

7. The appellant was delayed 5 days at Mariano Lake and Lake Valley while the Government decided on the acceptability of fence posts at Mariano Lake (AX-6; Tr. 98, 99).

[2] 8. We have plotted all the weather data in GX-4, AF tab D and AF tab G and conclude that appellant encountered "bad weather" as next indicated:²

<i>Date</i>	<i>Basis for Finding</i>
July 14	No inspection, .03 to Chaco Canyon and .10 at Otis
16	No inspection, .40 at Gallup, trace at Star Lake
17	No inspection, .15 at Otis
18	No inspection, .22 at Farmington, .10 at Lukachukai
19	No inspection, .18 Chaco C., .04 Farm., .43 Gallup, .04 Otis, .22 Lukachukai (L)
20	No inspection, Trace at Gallup, .23 at L.
22	No inspection, .11 at Chaco C., .02 Farm., .06 Gallup
23	T. Gallup, .02 Otis, .10 Keyenta
24	No inspection, .06 Star L., trace at Gallup
26	Insp. at Lake V. only, .08 Star L., 40 Keyenta, .21 L, trace Chaco C. and Gallup
27	Insp. at Lake V. only, .40 Farm., .17 Gallup, .13 L.
Aug. 2	1.5 L.
3	Insp. Lake V. only, .17 Star L., .57 Chaco C., .03 Farm., .80 Gallup, .02 Otis, .20 Teec N.P.
18	No inspection, .12 Star L., .10 Chaco C., .05 Otis
19	No inspection, .03 Star L., .24 Chaco C., .03 Farm., .77 Gallup
24	No inspection, .42 Star L.
26	No inspection, .07 Gallup
30	No inspection, T at Farm., .06 at Gallup Aug. 20

² We have not listed "bad weather" prior to July 14 because of our conclusion—stated in paragraph 5—that Mod. 1 was an accord and satisfaction for bad weather up to July 14.

- Sept. 7 No inspection, .15 Otis
- 14 No inspection, .08 Chaco C., T Star L.
- 15 No inspection, .03 Chaco C., .04 Farm., .13 Gallup, T. Star L., .26 L.
- 17 No inspection, .10 Star L., .03 Chaco C.
- 26 No inspection, .09 Farm., .26 Gallup, .07 Otis, .08 Star L.
- 27 No inspection, .12 Chaco C., .69 Farm., T Gallup, .02 Otis, .02 Star L., 1.60 L.
- Oct. 2 No inspection per GS-1&2, .06 Star L., .01 Chaco C.
- 21 No inspection, .01 Chaco C., .07 Gallup
- 22 No inspection, .06 Farm., .02 Gallup, .02 Otis
- 23 (Sat) No inspection, .06 Star L., T Farm., .24 Gallup, .15 Otis
- 26 No inspection, .08 Star L., .17 Chaco Co., .29 L.
- 28 No inspection, T Chaco C., .03 Gallup
- 29 No inspection, .04 Star L. (.04 means .04 inches of rain recorded, T. means trace).

9. We have denied the claim of excusable delay for the days next indicated for the reasons next stated:

<i>Day</i>	<i>Reason</i>
July 25	This was a Sunday. No work was allowed on Sundays according to GC-8.
Aug. 16	No record of rain except AF tab G
23	The only record of rain is Tab G and .01 at Gallup.
29	This was a Sunday.

10. Where, as here, the appellant asserts that an assessment of liquidated damages for late completion of a contract should be reduced because of "unusually severe weather," it has the burden to establish not only the severity of the weather but that such weather was "unusual" for the time and place where the work was performed. The appellant has established that the weather encountered was "severe" as indicated in paragraph 8 above. However, appellant has failed to introduce sufficient evidence³ as to weather in prior years, and thus has failed to establish that the weather actually encountered on this contract was

³ The only evidence of "usual" or "normal" weather is three columns of data on page 2 of each monthly report of precipitation entitled, "total," "departure from normal," and "greatest day." The evidence of "unusually severe weather" as listed follows:

Month	Day	Location	Total	Departure From Normal	Greatest Day
7	27	Farm.....	1.19	.41	.40
8	3	Chaco C.....	1.40	.01	.57
9	27	Farm.....	1.67	.82	.69

unusually severe for the time and place. Therefore, we are unable to find that the weather listed in paragraph 8 is excusable within the meaning of Clause 5 of SF 23-A, except for July 27 and Sept. 27. Thus, we allow a 2-day extension for unusually severe weather. Compare *Sunset Construction Inc.*, IBCA 454-9-64 (Oct. 29, 1965), 72 I.D. 440, 65-2 BCA par. 5188.

11. The sum of excusable days of delay indicated in paragraphs 7, 8 and 10 is 7 days (but see paragraph 20 for the complete calculations).

12. Mod. 3, a supplemental agreement signed by Mrs. Earp for appellant, extended the completion date through Oct. 4, 1976.

13. The work was accepted as substantially complete as next indicated:

Project	Date	Evidence
Ojo Encino.....	Nov. 2, 1976	AF tabs D, E.
Pueblo Pintado.....	Nov. 2, 1976	AF tabs D, E.
Lake Valley.....	Nov. 10, 1976	AF tabs D, E.
Mariano Lake.....	Nov. 10, 1976	AF tabs D, E.
Rock Point.....	Dec. 20, 1976	AF tabs D, E, and C (Tr. 164).

14. The Government has asserted an affirmative defense of lack of 10-day notice under clause 5 of SF 23-A in its answer filed in this appeal. It did not assert this affirmative defense when it denied the request for time extension. See AF tab G; compare tabs C and D. Whether or not the Government can raise this affirmative defense in the answer after not mentioning it earlier, *cf.*, *Santander Construction Co, Inc.*, ASBCA No. 15882 (Feb. 12, 1976), 76-1 BCA par. 11,798 at p. 56,323; the Government has failed to establish that it was prejudiced by the lack of such notice. *Hawaiian Airmotive Division of Pastushin Industries, Inc.*, ASBCA No. 7892 *et al.*, June 30, 1965) 65-2 BCA par. 4946; *Cf. Airco, Inc.*, IBCA No. 1074-8-75 (Apr. 6, 1976), 76-1 BCA

par. 11,822 p. 56,447 and footnote 10. Further, the parties discussed the fence post problem as early as July 1 (GX-2), and some other allegedly excusable delays on July 28, Aug. 24, Sept. 30, and Oct. 21 (GX-2). Thus, it appears to us that the Government was aware that appellant had experienced bad weather and was likely to ask for extensions of time therefor. We find that there has been no prejudice to the Government; accordingly, we have considered the claims and defenses on their merits with the results indicated herein.

We conclude that the \$125-per day was a reasonable rate (Tr. 166) on a \$159,300 contract where the sewage lagoons were within two city blocks of boarding schools (Tr. 138) and there was a reasonable

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possibility of health problems and injury to livestock and court action due to late completion of the contracts (Tr. 139, 221). Compare *Fulton Shipyard*, IBCA No. 735-10-68 (Dec. 29, 1970), 77 I.D. 249, 71-1 BCA par. 8616.

16. We also conclude that the rate of liquidated damages agreed to at the time the contract was entered into was reasonable in relation to the damages likely to be suffered by the Government if the contract was completed late (Tr. 221). To the extent that the work was completed late, the Government has the right to assess liquidated damages at the rate set out in the contract as interpreted and as prorated in AF tabs C, D (Tr. 220, 241-242) and as prorated hereinafter in par. 21 *post*.

17(a). The appellant in defense of the Government liquidated damages claim has also asserted that it was delayed by constructive change orders issued by the Government, for example: (a) stopping pumping out of lagoons in preparation for construction work (Tr. 19, 20, 85, 86, 88, 89, 119) and, (b) requiring fencing where none was required in the contract (AX-9, Tr. 240, 242). Thus, we must make findings on these contentions.

17(b). On several occasions at several locations (Tr. 89, Lake Valley and Ojo Encino) the Government stopped appellant from pumping out the sewage lagoons (Tr. 19, 20). This was in August and Sept. (Tr. 86), and thus was not part of the 19 days compro-

mised and allowed in Mod. 1. Appellant shut down and was delayed for 5 days at Lake Valley and Ojo Encino for these reasons (Tr. 88, 89). See also paragraph 19(g) *post*.

17(c). The Government told appellant it would have to fence the area where it was pumping sewage (Tr. 90; GX-2, Sept. 20). But the evidence is too general to make a finding as to the delay if any caused thereby.

17(d). The appellant dug a temporary holding pond which took some unspecified time, but the record is insufficient for us to find that this was not required by the contract (Tr. 119, 120).

17(e). The contract required appellant to place certain fill. This could be "from borrow at a site approved by the contracting officer and within ½ mile from the lagoon site." Spec. par. 2.05. The appellant was delayed 2 weeks (Tr. 74-75) at Pueblo Pintado and 5 days at Mariano Lake, while the Government finally selected proper sites (Tr. 74). We are not persuaded by GX-5 or 6 that this was included in Mod. 1. (It may have been intertwined with other delays and, if so, the Government as the claimant has the burden of proof in these circumstances where it seeks liquidated damages. *Commerce International Co., Inc. v. United States*, 167 Ct. Cl. 529 (1964)). Thus, we conclude that appellant is entitled to 14 days excusable delay at Pueblo Pintado and 5 days at Mariano Lake.

18. For clarity we will state what was included in the Mod. 1 compromise.

(a) At Mariano Lake

(1) Wrong size pit (lagoon site)
GX-6

(2) Rock in lagoon GX-6

(3) Erroneous compaction tests
GX-6

(4) Fence post was discussed but was *not* included in Mod. 1, 19 days,
GX-6, GX-5.

(b) Pueblo Pintado

(1) Design error about footage of dike GX-6, GX-5.

(2) Garbage dump—misrepresentation on plans as to size, GX-6, GX-5.

(3) Landfill location—we do not understand this to be the location of the borrow site problem, GX-6, and we conclude from GX-5 that no days were included in Mod. 1 for the landfill or the borrow site problems.

(4) Overflow on pond GX-6, GX-5.

19. We summarize our decision so far:

(a) Weather up to (but not including) July 14 was settled in Mod. 1.

(b) Weather after July 14 is excusable delay as indicated in paragraphs 8, 9, and 10 *ante*.

(c) The issues set out in paragraph 18 were compromised and settled in Mod. 1. (except for the fence posts and the land fill).

(d) Delay in locating borrow site; this is excusable delay, see paragraph 17(e) (Tr. 75, 76, 100).

(e) Expansion joints—whether or not this added work took more than the 1 day allowed by Mod. 2, the excess over 1 day is not excusable delay as Mod. 2 binds the parties.

(f) Added fencing at Mariano Lake, 5 days excusable delay (Tr. 98), at Lake Valley 3 days excusable delay (Tr. 98-99).

(g) Stopping of pumping, 3 days delay at Rock Point (AX-5; Tr. 110). See also paragraph 17(b) *ante* (Tr. 124-126), and 7 days at Mariano Lake (Tr. 275-277).

(h) Five days delay at Lake Valley and at Mariano Lake due to delay in decision about type of fence posts, see paragraph 7 *ante* (AX-6; Tr. 95-96).

(i) Change Order for outfall line at Rock Point extended time through October 4, 1976 (Mod. 3, Tr. 22).

(j) After appellant's presentation of evidence of Government caused delay, the Government has the burden of showing that there was no concurrent fault or delay, except where the evidence of excusable delay is primarily within the knowledge of appellant. Where the appellant asserts that it was excusably delayed by unusually severe weather, it has the burdens stated in paragraph 10 *ante*, and must also persuade us that such unusually severe weather in fact delayed work on the project.

20. The findings and conclusion heretofore made are reflected in the following schedule:

Cause	Par.	OJO E.	P.P.	Lake V.	Mar. L.	Rock Pt.
Mod. 3-----	19(i)-----	Oct. 4				
Fence post-----	7, 19(h)-----	0	0	5	5	0
Weather-----	8, 9, 10-----	2	2	2	2	2
Stop pump-----	17b, 19g-----	5	0	5	7	3
Loc. Borrow-----	17(e)-----	0	14	0	5	0
Add fence-----	19f, 17(a)-----	0	0	3	5	0
Total ex. days-----		7	16	13	24	5
Sub. comp-----		Nov. 2	Nov. 2	Nov. 10	Nov. 10	Dec. 20
Contract comp date-----		Oct. 11	Oct. 20	Oct. 17	Oct. 28	Oct. 9
Days late-----		22	13	24	13	72

21. The contract clause provided for liquidated damages at \$125 per day. It was silent as to proration if 4, or 3, or 2, or 1 of the five sites were completed on time. The Government prorated the \$125 so that for the days when Rock Point was the only late work, the rate was \$40 per day (AF tab D, Dec. 8, 1976, memo). We do not have the dollar price of the work at each job site in our copy of the solicitation and such information may not correlate with a reasonable approximation of the probable damages which might be incurred for late completion of each project. In these circumstances, we conclude that a reasonable proration of the latently ambiguous liquidated damages clause is \$125 per day divided by five work sites or \$25/per day for each of the five work sites. Thus, the liquidated damage assessment is 144 days times \$25 for a total assessment of \$3,600.

22. The contract contains clause 39 entitled "Payment of Interest on Contractor's Claims." The parties should consider whether this clause is applicable to this appeal. *Propersev, Inc.*, ASBCA No. 20768 (Feb. 28, 1978), 78-1 BCA par. 13,066 (clause applies to claim for "remission" of liquidated damages); *Lockley Manufacturing Co.*, ASBCA No. 21231 (Jan. 26, 1978), 78-1 BCA par. 12,987; 20 *Government Contractor*, par. 214 (interest runs from the date of the contracting officer's decision even though the Government admitted liability in its answer).

23. The appeal is sustained and denied as indicated hereinbefore.

GEORGE S. STEELE, JR.,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

**APPEAL OF KODIAK ISLAND
SETNETTERS ASSOC.**

3 ANCAB 1

Decided *June 12, 1978*

Appeal from the Decision of the Chief, Branch of Lands and Mineral Operations, Bureau of Land Management, Alaska, # AA-6646-A, dated Nov. 18, 1977, approving the land selection application of Natives of Akhiok, Inc., pursuant to §12 of the Alaska Native Claims Settlement Act (hereinafter referred to as ANCSA), 43 U.S.C. §§1601-1624, (Supp. IV, 1974), as amended, 89 Stat. 1145 (1976).

Decision of the Bureau of Land Management dated Nov. 18, 1977 affirmed.

1. Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights

Sec. 14(g) of ANCSA protects existing permits as valid existing rights and provides that patent is to be subject to the right of the permittee to the complete enjoyment of all rights, privileges, and benefits granted to him by the permit.

2. Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights

An expired special use permit is not an existing right and does not constitute a "valid existing right" under sec. 14(g) of ANCSA.

3. Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights

Use and occupancy of land under a permit from the U.S. Fish and Wildlife

Service does not constitute a "valid existing right" in the land separate from the permittee's rights under the permit.

4. Alaska Native Claims Settlement Act: Administrative Procedure: Interim Conveyance

An interim conveyance is the conveyance of title to unsurveyed lands, subject to the reservations set forth in sec. 14(c) and other sections of ANCSA, and in other provisions of law.

5. Alaska Native Claims Settlement Act: Land Selections: Section 14(c)

The reservation in the decision to convey, stating that conveyance to the Village Corporation is subject to the requirements of sec. 14(c) of ANCSA, protects rights in use and occupancy of the land, if any, claimed by appellants under sec. 14(c), until the date of the patent of the land to the Village Corporation, at which time the village must make a determination as to these appellants' rights under sec. 14(c).

6. Alaska Native Claims Settlement Act: Land Selections: Section 14(c)—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction

Until such time as the Village Corporation makes a determination of the appellants' rights claimed under sec. 14(c) of ANCSA, this Board lacks jurisdiction to hear appellants' appeal concerning such rights.

APPEARANCES: G. Kent Edwards, Esq., on behalf of appellants; Robert C. Babson, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management; Martin A. Farrell, Jr., Esq., on behalf of the Natives of Akhiok, Inc.

June 12, 1978

OPINION BY
ALASKA NATIVE CLAIMS
APPEAL BOARD

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in ANCSA, *as amended*, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), and implementing regulations in 43 CFR Part 2650 and Part 4, Subpart J, hereby makes the following findings, conclusions, and decision affirming the Decision of the Chief, Branch of Lands and Mineral Operations, Bureau of Land Management, Alaska, # AA-6646-A.

On Dec. 19, 1977, twenty-eight individuals filed a Notice of Appeal from the above-entitled Decision concerning the selection application of the Natives of Akhiok, Inc. and Koniag, Inc. On Jan. 19, 1978, appellants filed a Motion for Extension of Time for Filing Statement of Reasons and Interest Affected and further stated that all appellants refer to themselves collectively as the Kodiak Island Setnetters Assoc. Subsequently appellants have filed documents setting forth their statement of reasons and interest affected in this appeal.

On Jan. 24, 1977, the attorney for appellants moved this Board to include John and Jane Nuttall and Russell Metzger as appellants to this appeal, along with all other individuals named in the Notice of Appeal who assert that they are the Kodiak Island Setnetters. It was stated that these individuals had a special use permit similar to those

of the other individuals in this appeal and an adjudication of their claim would involve identical legal issues as those presented by appellants, Kodiak Island Setnetters. It was stated that the omission of these individuals as members of the Kodiak Island Setnetters Assoc. in the Notice of Appeal occurred through oversight. On Feb. 22, 1978, this Board gave the Natives of Akhiok, Inc., and the Office of the Regional Solicitor, on behalf of the Bureau of Land Management, 15 days to respond to this Motion. No response has been made to this Order of the Board for response.

This Board therefore orders that the above-named individuals be included as appellants to this appeal.

Each of the appellants in this case allege that they have been the holders of special use permits issued by the U.S. Department of the Interior, U.S. Fish and Wildlife Service, which entitled them to use certain described lands within the Kodiak National Wildlife Refuge as a base for gill net and setnet operations. From copies of these permits filed with the Board, it appears that at least some of the appellants had been issued special use permits for their fishing sites as early as 1962. The latest permits of appellants show a period of use from May 15, 1977 to Sept. 15, 1977.

Richard Hensel, Assistant Refuge Supervisor, Alaska Area, U.S. Fish and Wildlife Service, in an affidavit filed by appellants, outlined the history of the permit system and stated

that prior to the early 1960's the Department of the Interior did not require permits for the establishment of fishing sites and that persons were allowed to establish commercial hunting and fishing sites along the shoreline of Kodiak Island on public lands. Subsequent to this time, a permit system was established with the permits being issued for a five year period. In 1971, the permits were changed from a five year to a one year term. Although the permits were limited to one year in duration, he stated that the permits were automatically renewed.

The purpose of the permits, as stated in the copies of the permits submitted to the Board, is for the use of land for buildings in which to base a gill net or setnet operation. The latest permits of appellants show a period of use ending Sept. 15, 1977. In a Memorandum submitted by the Bureau of Land Management on May 25, 1978, it is stated that appellants applied to the U.S. Fish and Wildlife Service for re-issuance of the special use permits for the upcoming fishing season, that the U.S. Fish and Wildlife Service decided against issuing the permits, and the appellants have appealed this decision to the Secretary of the Interior.

The appeal before the Board was not brought from the decision of the U.S. Fish and Wildlife Service to not reissue the special use permits to appellants. This appeal arises from a decision to convey the lands underlying appellants' special use

permits to the Natives of Akhiok, Inc., and Koniag, Inc., pursuant to the Alaska Native Claims Settlement Act, and the failure to designate these permits as "valid existing rights."

The appellants state that each of them have constructed and used buildings, cabins and sheds on the land covered by the permits. They further allege that these special use permits, together with their use and occupancy of the land, constitute a "valid existing right" which should be recognized under sec. 14(g) of ANCSA. Appellants also allege that pursuant to sec. 14(c)(1) of ANCSA, the Village Corporation of Akhiok is required to convey the lands covered by such permits to the appellants. They contend that ruling on sec. 14(c)(1) is appropriate at this time in order to protect appellants' rights. They claim that in the event that the Department fails to rule on this issue, the appellants may be required to leave the land without any remedy until such time as the Village Corporation receives patent to the land and then conveys whatever land, if any, may be required to be conveyed to the appellants.

The Office of the Regional Solicitor, on behalf of the Bureau of Land Management, argues that the special use permits of appellants have expired, that appellants do not have any property interest in such land covered by the permits, and that appellants thus do not have a valid existing right pursuant to sec. 14(g) of ANCSA. Regarding ap-

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pellants' claim that they have a right to conveyance of the land underlying their permits pursuant to sec. 14(c)(1) of ANCSA, the Bureau of Land Management argues that this issue is not ripe for adjudication at this time since patent has not issued to the Village Corporation.

The first issue to be decided in this case is whether the special use permits of appellants, constitute a valid existing right within the meaning of that term under ANCSA. Sec. 14(g) of ANCSA deals specifically with valid existing rights. This section states:

All conveyances made pursuant to this Act shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this Act, a * * * permit * * * has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the * * * permit * * * and the right of the * * * permittee * * * to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. * * *

The appellants also argue that sec. 14(g) of ANCSA specifically lists permits as the type of right which is encompassed by the phrase "valid existing rights." They also cite Conference Report No. 92-581 in regard to valid existing rights which states:

All valid existing rights including inchoate rights of entrymen and mineral locators are protected.

The issues in this appeal do not involve inchoate rights of entrymen and mineral locators. The issue here in dispute involves special use per-

mits issued by the U.S. Fish and Wildlife Service and the question of whether these permits constitute "valid existing rights" pursuant to sec. 14(g).

The Bureau of Land Management alleges that the issuance of a special land-use permit is clearly discretionary on the part of the U.S. Fish and Wildlife Service and that it carries with it only a limited right of use which may be revoked when it is determined that the land covered by the permit should be devoted to another use. They claim that appellants' rights in the permit is a privilege rather than a right, and that appellants have no right to renewal which would withstand a Federal withdrawal. In support of this proposition they quote the following language which is contained in the special use permits in question:

5. Responsibility of Permittee * * * At the end of the period specified or upon earlier termination, he shall give up the premises in as good order and condition as when received. * * *

6. Revocation Policy. This permit may be revoked by the Regional Director of the Service without notice for noncompliance with the terms hereof or for violation of general and/or specific laws or regulations governing National Wildlife Refuges or for nonuse. *It is at all time subject to discretionary revocation by the Director of the Service.* * * *

8. Termination Policy. At the termination of this permit, the permittee shall immediately give up possession to the Service representative. * * *

10. Transfer of Privileges. This permit is not transferable, and no *privileges* herein mentioned may be sublet or made

available to any person or interest not mentioned in this permit. No interest hereunder may accrue through lien or be transferred to a third party without the approval of the Regional Director of the U.S. Fish and Wildlife Service and the permit shall not be used for speculative purposes. (*Italics added.*)

Appellants have not alleged that their permits have been renewed nor that any language in the permit or in any applicable statute or regulation gives them the right to the renewal of their permits. It has been alleged by the Bureau of Land Management, without contradiction, that subsequent to the filing of this appeal, the U.S. Fish and Wildlife Service denied appellants' application for renewal and that such decision has been appealed by the appellants to the Secretary of the Interior. The issuance of special use permits has been held to be purely a discretionary act of the Secretary. [*Allen M. and Margery D. Boyden*, 2 IBLA 129, 131 (1971); *Ness Investment Corp. v. U.S. Dept. of Agriculture*, 360 F. Supp. 127 (D. Ariz. 1973), *aff'd.*, 512 F.2d 706 (9th Cir. 1975).] The question of the issuance of permits to appellants being presently before the Secretary of the Interior, the issue of appellants' right to renew these permits is not an issue before this Board.

[1,2] Sec. 14(g) protects existing permits as valid existing rights and provides that patent is to be subject to the right of the permittee to the complete enjoyment of all rights, privileges, and benefits granted to him. Once a permit expires, however, it is not an existing right and

is not protected by sec. 14(g). Since the period of time set forth in the permits for appellants' use of the land has expired, this Board finds that appellants' permits do not constitute valid existing rights and are not protected by sec. 14(g) of ANCSA.

If appellants' permits had not expired or should the Secretary of the Interior reverse the decision of the U.S. Fish and Wildlife Service and reissue the permits to the appellants, it would appear to this Board that the appellants would then have a right protected under sec. 14(g). Such is not the situation in this appeal, however.

Appellants have also asserted that their use and occupancy of the land subject to the permits constitutes a valid existing right.

The permits issued to appellants specifically allowed the construction of buildings on the land covered by the permits for use connected with each appellant's fishing site. The language of the permits cited by the BLM provided, however, that the permittees must give up the premises at the end of the period specified or at such time as the permits were terminated, in as good order and condition as when received, and characterized the permittees' interests in the permits as privileges rather than rights.

[3] The use and occupancy of the land covered by the permits was within the scope of authority given appellants under the permits. Appellants have not cited any authority which gave them any right to conduct this activity absent the sub-

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ject permits. The Board finds that appellants' use and occupancy of the land under the permits does not constitute a "valid existing right" in the land separate from their rights under the special use permits.

Appellants further assert that pursuant to sec. 14(c)(1) of ANCSA, they have an interest in the land covered by their permits, and that this land must be conveyed to them by the Natives of Akhiok, Inc. They maintain that this Board should allow them to proceed with the formal establishment of the claims under this section.

The Bureau of Land Management contends that whatever rights appellants may have under sec. 14(c) of ANCSA are not ripe for adjudication at this time.

Sec. 14(c) of ANCSA provides as follows:

Each patent issued pursuant to subsec. (a) and (b) shall be subject to the requirements of this subsec. Upon receipt of a patent or patents:

(1) the Village Corporation shall first convey to any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied as a primary place of residence, or as a primary place of business, or as a subsistence campsite, or as headquarters for reindeer husbandry;

In order to implement secs. 14(c) and 13(a) of ANCSA which requires the Secretary to survey lands to be patented under the Act, the Secretary promulgated regulations in 43 CFR 2650.5-4 which provides in pertinent part:

* * * * *

(b) Surveys will be made within the village corporation selections to delineate

those tracts required by law to be conveyed by the village corporations pursuant to sec. 14(c) of the act.

(c) (1) The boundaries of the tracts described in paragraph (b) of this section shall be posted on the ground and shown on a map which has been approved in writing by the affected village corporation and submitted to the Bureau of Land Management. Conflicts arising among potential transferees identified in sec. 14(c) of the act, or between the village corporation and such transferees, will be resolved prior to submission of the map. Occupied lots to be surveyed will be those which were occupied as of Dec. 18, 1971.

(2) Lands shown by the records of the Bureau of Land Management as not having been conveyed to the village corporation will be excluded by adjustments on the map by the Bureau of Land Management. No surveys shall begin prior to final written approval of the map by the village corporation and the Bureau of Land Management. After such written approval, the map will constitute a plan of survey. Surveys will then be made in accordance with the plan of survey. No further changes will be made to accommodate additional sec. 14(c) transferees, and no additional survey work desired by the village corporation or municipality within the area covered by the plan of survey or immediately adjacent thereto will be performed by the Secretary.

Sec. 14(c) of ANCSA provides that "upon receipt of a patent or patents," the Village Corporation shall first convey certain lands. Regulation 43 CFR 2650.5-4 further provides that conflicts under sec. 14(c) are to be resolved prior to the submission of a plan or map to the Bureau of Land Management. The submission of such plan or map is required before survey will begin.

Appellants have not appealed from the issuance or proposed issu-

ance of patent to the Natives of Akhiok. They have brought an appeal from a decision to convey which will result in the issuance of a document called an "Interim Conveyance." Interim conveyance is defined in 43 CFR 2650.0-5(h). This section states:

"Interim conveyance" as used in these regulations means the conveyance granting to the recipient legal title to unsurveyed lands, and containing all the reservations for easements, rights-of-way, or other interests in land, provided by the act or imposed on the land by applicable law, subject only to confirmation of the boundary descriptions after approval of the survey of the conveyed land.

[4] It is clear that an interim conveyance is a conveyance of title to unsurveyed lands, subject to the reservations set forth in sec. 14(c) and other sections of ANCSA, and in other provisions of law. The interim conveyances which are preceded by decision to convey specifically state that such document and conveyance is subject to the requirements of sec. 14(c) of ANCSA. The decision to convey does not attempt to identify 14(c) interests since the language of sec. 14(c) and the language of 43 CFR 2650.5-4 places with the Village Corporation the primary burden of identifying sec. 14(c) rights; and resolving any disputes among the holders of sec. 14(c) rights and the Village Corporation.

The decision to convey here under appeal provides on p. 9 as follows:

The grant of land shall be subject to:

* * * * *

6. Requirements of sec. 14(c) of the Alaska Native Claims Settlement Act of Dec. 18, 1971 (85 Stat. 688, 703; 43 U.S.C. 1601, 1613(c) (Supp. V, 1975)), that the grantee hereunder convey those portions, if any, of the lands hereinabove granted, as are prescribed in said action; * * *

* * * * *

[5, 6] This Board finds that the above-quoted language protects rights of use and occupancy of the land, if any, claimed by appellants under sec. 14(c), until the date of patent of the land to the Village Corporation, at which time the village must make a determination as to these claimants and their claims. Until such time as this is accomplished there is no way for this Board to determine if there is any dispute between appellants and the Natives of Akhiok, Inc., and the Board lacks jurisdiction to hear such an appeal.

This Board finds that appellants' request for an adjudication of their claims pursuant to sec. 14(c) (1) of ANCSA is premature and that appellants must direct any application for a conveyance pursuant to sec. 14(c) (1) to the Natives of Akhiok, Inc.

This Board finds no merit in appellants' assertion that by failing to rule on their assertions that they are sec. 14(c) claimants and are entitled to conveyance of certain land pursuant to sec. 14(c), it may be possible for the Department of the Interior to order appellants off the land formerly covered by the special use permits before the forthcoming fishing season. Although this Board has ruled that appel-

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lants have no valid existing right to the land based on the special use permits issued to them in the past, this in no way affects whatever right appellants may have to use and occupy the land, and to receive patent to the land, pursuant to sec. 14(c) (1). The Board does not decide the question of whether appellants are entitled to a conveyance pursuant to sec. 14(c), or any question as to what they must receive if it is determined that they have rights under sec. 14(c).

Based on the above findings and conclusions, this Board hereby Orders that the Decision of the Bureau of Land Management # AA-6646-A is hereby affirmed.

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
*Chairman, Alaska Native
Claims Appeal Board.*

ABIGAIL F. DUNNING,
Board Member.

LAWRENCE MATSON,
Board Member.

FULL CIRCLE, INC.

35 IBLA 325

Decided *June 19, 1978*

Appeal from a decision of the Idaho State Office, Bureau of Land Management, imposing increased rental charges for renewal of use and occupancy of appellant's communication site right-of-way I-146.

Set aside and remanded.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way—Regulations: Applicability—Rights-of-Way: Generally

Applications for rights-of-way on public lands pending on Oct. 22, 1976, are to be considered as applications under Title V of the Federal Land Policy and Management Act of 1976, but existing regulations will govern the administration of public lands to the extent practical until new regulations are promulgated.

2. Appraisals—Communication Sites—Rights-of-Way: Generally—Words and Phrases

"Fair market value." As used in 43 CFR 2802.1-7, "fair market value" of a communication site right-of-way is the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the right to use the site would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user who desired but is not obligated to so use.

3. Appraisals—Communication Sites—Rights-of-Way: Generally

The comparable lease method of appraisal of microwave communication sites, which involves the comparison of comparable rental data from other leased sites with data from the subject site, is the preferred method of determining the fair market rental value of the right-of-way where there is sufficient comparable data available.

4. Appraisals—Communication Sites—Rights-of-Way: Generally

Appraisals of rights-of-way for communication sites will be upheld if no error is shown in the appraisal methods used by the Bureau of Land Management and the appellant fails to show by convincing evidence that the charges are excessive.

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lants have no valid existing right to the land based on the special use permits issued to them in the past, this in no way affects whatever right appellants may have to use and occupy the land, and to receive patent to the land, pursuant to sec. 14(c) (1). The Board does not decide the question of whether appellants are entitled to a conveyance pursuant to sec. 14(c), or any question as to what they must receive if it is determined that they have rights under sec. 14(c).

Based on the above findings and conclusions, this Board hereby Orders that the Decision of the Bureau of Land Management # AA-6646-A is hereby affirmed.

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
*Chairman, Alaska Native
Claims Appeal Board.*

ABIGAIL F. DUNNING,
Board Member.

LAWRENCE MATSON,
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FULL CIRCLE, INC.

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4. Appraisals—Communication Sites—Rights-of-Way: Generally

Appraisals of rights-of-way for communication sites will be upheld if no error is shown in the appraisal methods used by the Bureau of Land Management and the appellant fails to show by convincing evidence that the charges are excessive.

Where an appellant has raised sufficient doubt that the Bureau properly considered the highest and best use of a right-of-way in determining comparability of other sites as a basis for the use charges, the case may be remanded for the Bureau to reconsider whether a further appraisal or adjustments in the appraised values should be made.

5. Accounts: Payments—Appraisals—Communication Sites—Rights-of-Way: Generally

Where a grantee seeks renewal of a right-of-way for a communication site, the Bureau of Land Management should require an advance annual payment at the rate formerly charged until a new fair market value rate may be established by appraisal. In the absence of contrary directives, the guideline in 43 CFR 2802.1-7(e) should be applied to renewals of existing rights-of-way. Increased charges may not be imposed retroactively, but are only imposed by the authorized officer, after reasonable notice and opportunity for hearing, beginning with the next charge year after the officer's decision.

6. Accounts: Payments—Appraisals—Rights-of-Way: Generally

Interest may be imposed on use charges for right-of-way sites depending on considerations of fairness and equity. In the absence of contrary directives, interest may be imposed for occupancy of a site where use charges should have been imposed at the same rate as past permitted use. Also, interest may be imposed on increased charges due on an annual basis for the years prior to payment of such amount.

7. Appraisals — Communication Sites—Federal Land Policy and Management Act of 1976: Rights-of-Way

Under sec. 504(g) of the Federal Land Policy and Management Act of 1976, payments for use of right-of-way sites should be on an annual basis at the fair market

value unless the annual payment would be less than \$100. Therefore, although lands may be appraised for a longer future period of time, lump-sum payments for future years may not be demanded for amounts exceeding the statutory amount; instead charges for such amounts should be made on an annual basis.

APPEARANCES: LeRoy F. Clausen, Branch Operations Supervisor for Full Circle, Inc., for appellant.

*OPINION BY
ADMINISTRATIVE JUDGE
THOMPSON*

*INTERIOR BOARD OF
LAND APPEALS*

Full Circle, Inc. appeals from a decision of the Idaho State Office, Bureau of Land Management (BLM), dated May 11, 1976, which approved appellant's application for renewal of its communication site right-of-way on Flattop Butte near Jerome, Idaho,¹ subject to the conditions that it make a lump-sum payment of a revised rental rate of \$5,125 for an 8.7-year term renewal grant, covering the period from May 5, 1972, to Dec. 31, 1980, and file all current FCC licenses within 30 days from receipt of the decision.

The right-of-way in issue was initially granted to Pacific Supply Cooperative on May 5, 1967, pursuant to the Act of Mar. 4, 1911, 43 U.S.C. § 961 (1970), *repealed*, Federal Land Policy and Management Act of 1976, § 706, 90 Stat. 2743, 2793. The grant permitted con-

¹SW ¼ NW ¼ of sec. 13, T. 8 S., R. 17 E., Boise Mer., Jerome County, Idaho.

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struction of a 10-foot by 10-foot concrete block building, a 50-foot steel supporting tower, and a one-frequency transmitter operating on 466.000 Mc/s with an associated one-frequency receiver. The rental for the site was appraised at \$460 for a 5-year term, and was paid lump sum, in advance. The term of the grant was "5 years subject to renewal with compliance with terms, conditions and stipulations."

After May 5, 1972, the BLM notified Pacific Supply Cooperative that its right-of-way grant had expired, and advised it of the procedures by which it could renew the grant.² Full Circle, Inc., a wholly owned retail subsidiary of Pacific Supply Cooperative, submitted its written request for renewal on June 7, 1972. On September 17, 1975, Full Circle, Inc., was sent notification by the BLM that a review of the rental charge for use and occupancy of the site had been made to bring such charges in line with the current fair market value. That review revealed an adjustment from the \$460 amount for 5 years to \$5,125 for the 8.7-year period from May 5, 1972, to December 31, 1980, which amount was then due and payable. The BLM afforded appellant "the opportunity to comment on the appraised value," and if appellant had present appraisal data which would show the rental determination was erroneous, the BLM would set up a meeting for the presentation of such

data. On Oct. 14, 1975, appellant requested such a meeting, stating that:

It is hard for me to believe that our rental should go from \$92.00 per year to \$589.08 per year—a 640% increase—for our 10' by 10' structure located on the site.

An informal hearing was set, and appellant was notified to be prepared to present evidence showing the rental value was not proper.

It appears from the record that the "hearing" was held on Jan. 28, 1976. However, there is no transcript or summation of the proceedings, although memoranda in the record indicate that appellant presented no evidence at the meeting. Full Circle, Inc., filed written objections to the appraisal with the BLM on Mar. 25, 1976. On May 11, 1976, the decision being appealed from was issued, finding that appellant's written protest to the appraisal raised the same issues discussed at the informal hearing and that no additional appraisal data or evidence had been shown. Relying on 43 CFR 2802.1-7, providing that the charge for use and occupancy of such lands is the fair market value of the right-of-way as determined by appraisal by the authorized officer, the BLM required lump-sum payment of the \$5,125 before issuance of the renewal grant would be allowed. This rental amount was based upon an Appraisal Report approved August 13, 1975, that a lump-sum payment of \$4,035.48 was due for the period from May 5, 1972, through Dec. 31,

² This letter is dated May 9, 1972, and sent by certified mail, noted as received by Pacific Supply Cooperative on May 24, 1972.

1980, an 8.663-year period. The \$5,125 figure was reached by adding compound interest for 3.408 years.

Full Circle, Inc., filed a timely appeal alleging in its statement of reasons that the revised rental was too high and specifically arguing, *inter alia*, that:

1. Only privately owned property was used in the appraisal data.

2. Potential coverage from the site was used as a point in the appraisal and no consideration given to the actual use.

3. More weight was given to TV, radio broadcasting stations, and telephone companies leases than to those used for 2 way radio sites.

4. The Notice of Renewal was received three years and four months after the lease started. The bill included \$1,089.52 interest. We did not have the option of paying the new lease amount without this interest charge.

[1] The renewal application was filed and the State Office decision was issued prior to the enactment of the Federal Land Policy and Management Act of 1976 (hereinafter cited as FLPMA), 90 Stat. 2743. Sec. 510(a) of that statute provides in part as follows:

Effective on and after the date of approval of this Act, no right-of-way for the purposes listed in this title shall be granted, issued or renewed over, upon, under, or through such lands except under and subject to the provisions, limitations, and conditions of this title * * *. Any pending application for a right-of-way under any other law on the effective date of this section shall be considered as an application under this title. The Secretary concerned may require the applicant to submit any additional information he deems necessary to comply with the requirements of this title.

Appellant's renewal application is now subject to the provisions of

FLPMA. However, sec. 310 of the Act provides that existing regulations will govern the administration of public lands prior to the promulgation of new rules and regulations to the extent practical.³

[2] By statute and regulation, grantees must pay "fair market value" for rights-of-way on public lands. 43 CFR 2802.1-7(a); FLPMA § 504(g), 90 Stat. 2743, 2779.⁴ The term "fair market value"

³ Sec. 310 provides as follows:

"The Secretary, with respect to the public lands, shall promulgate rules and regulations to carry out the purposes of this Act and of other laws applicable to the public lands, and the Secretary of Agriculture, with respect to lands within the National Forest System, shall promulgate rules and regulations to carry out the purposes of this Act. The promulgation of such rules and regulations shall be governed by the provisions of chapter 5 of title 5 of the United States Code, without regard to sec. 553(a)(2). Prior to the promulgation of such rules and regulations, such lands shall be administered under existing rules and regulations concerning such lands to the extent practical."

⁴ Sec. 504(g) of FLPMA, 90 Stat. 2743, 2779, provides in part as follows:

"The holder of a right-of-way shall pay annually in advance the fair market value thereof as determined by the Secretary granting, issuing, or renewing such right-of-way: *Provided*, That when the annual rental is less than \$100, the Secretary concerned may require advance payment for more than one year at a time * * *."

43 CFR 2802.1-7(a) provides as follows:

"Except as provided in paragraphs (b) and (c) of this section, the charge for use and occupancy of lands under the regulations of this part will be the fair market value of the permit, right-of-way, or easement, as determined by appraisal by the authorized officer. Periodic payments or a lump-sum payment, both payable in advance, will be required at the discretion of such officer: (1) When periodic payments are required, the applicant will be required to make the first payment before the permit, right-of-way, or easement will be issued; (2) upon the voluntary relinquishment of such an instrument before the expiration of its term, any payment made for any unexpired portion of the term will be returned to the payer upon a proper application for repayment to the extent that the

(Continued)

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has been judicially defined and the courts have recognized a number of methods for appraising fair market value. Drawing upon numerous judicial decisions, the Interagency Land Acquisition Conference developed the *Uniform Appraisal Standards for Federal Land Acquisitions* (1973). This Department has adopted these standards as guidelines for appraisers in determining charges for use of public lands. See 602 *Departmental Manual* 1.3; *American Telephone and Telegraph Co.*, 25 IBLA 341, 348-49 (1976). The "fair market value" standard with respect to rights-of-way has been stated as follows:

* * * fair market value [under 43 CFR 2802.1-7(a)] is the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the right to use the site would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user who desires but is not obligated to so use.

American Telephone & Telegraph Co., *supra*, at 349-50; see *Uniform Appraisal Standards*, *supra* at 3.

[3] The State Office determined the fair market value of appellant's site by comparing that site with various other communication sites under lease, and their rental rates, which is a proper appraisal method when current, well-established

rental data for comparable sites is available. *American Telephone & Telegraph Co.*, *supra* at 350; see *Uniform Appraisal Standards*, *supra* at 9-11.

The Appraisal Report at p. 8 listed the following factors as determinative of market value for the purposes of comparing appellant's site with other sites:

TIME: Considers the age of the lease and the effect of passing time on rental prices.

TENURE: The length of the leases and the effect of the length of lease on rental prices.

COVERAGE: Considers the relative area and populations which could be served or covered from the sites.

LOCATION: The relative distances from major population centers.

ACCESS: Considers the type and quality of access available to the sites.

SIZE: Considers the relative sizes of the sites.

POWER: Considers the availability of power at or near the sites.

[4] Appellant primarily contends that the methods used by BLM in making the appraisal were inappropriate. It objects to BLM's use of data from privately owned sites and indicates that two Forest Service sites are rented for \$100 a year. The BLM appraisal noted that BLM was the largest owner of communication sites in the general area, with the Forest Service being next, but it gives no information concerning the charges on any of these Government sites, including those on the same butte where appellant's site is located. There is no reversible error in BLM's using only privately owned leased sites where only they are comparable.

(Continued)

amount paid covers a full permit, right-of-way, or easement year or years after the formal relinquishment: *Provided*, That the total rental received and retained by the Government for that permit, right-of-way, or easement, shall not be less than \$25. The amount to be so returned will be the difference between the total payments made and the value of the expired portion of the term calculated on the same basis as the original payments."

Private transactions may provide an especially persuasive indication of the prevailing market for comparable interests in comparable land. However, if Government sites are comparable, they should also be used. Where there are similar and nearby Government sites, the appraisal report should at least explain why they have not been considered.

Appellant contends that BLM improperly gave a higher value to its site because it has a source of power whereas other sites do not. It contends that it paid to have power brought to its site and pays regular charges. The appraisal report indicates only that the Idaho Power Company furnishes metered power to the existing users on the butte. If appellant were the first user of the butte and had paid to have power brought to the butte, as well as extended to its site, an adjustment would be warranted. The primary user should not be charged for enhanced values attributable to improvements made by it. Whether an adjustment would be warranted would depend upon the distance and cost involved in obtaining the power source. Certainly an ordinary hook-up to an existing powerline would not seem to justify an adjustment, although an expensive extension of power facilities to a site would. There is insufficient information in this case to show whether any adjustment would be warranted here.

Appellant's major specific objection is to the inclusion of sites for TV and radio stations being

deemed comparable to its right-of-way. It asserts it is being charged the same amount as users who need the broader coverage and serve hundreds of thousands of people, whereas it serves only 1,600 accounts and does not need the broader coverage. Appellant does not dispute the fact the site has the potential for a broader coverage than it uses. Actual use may demonstrate the highest and best use of a site. However, where it is clear a potential exists for a higher and better use of the site than presently used, that potential may be considered in determining fair market value if a market exists for such a potential use. The *Uniform Appraisal Standards, supra*, at 7 provides:

Because the highest and best use is a most important consideration, it must be dealt with specifically in appraisal reports. Many things must be considered in determining the highest and best use of the property including: supply and demand; competitive properties; use conformity; size of the land and possible economic type and size of structures or improvements which may be placed thereon; zoning; building restrictions; neighborhood or vicinity trends.

In rating the site as a "broad coverage site," the BLM appraisal mentioned various classes of communication use and considered the site of value for use by most of the general class. What is lacking in the report, however, is a factor which is difficult to evaluate, but is a part of the highest and best use test. That is the market potential for the use deemed to be higher and better than the existing use.

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Thus, while it may be feasible for this site to be used for TV and radio communication facilities, there was no consideration of the likelihood that there exists a market demand for that use for this and comparable sites.

The general standard for reviewing rights-of-way appraisals is to uphold the appraisal if no error is shown in the appraisal methods used by BLM or the appellant fails to show by convincing evidence that the charges are excessive. *Four States Television, Inc.*, 32 IBLA 205 (1977); *Mountain States Telephone & Telegraph Co.*, 26 IBLA 393, 83 I.D. 332 (1976); *Western Slope Gas Company*, 21 IBLA 119 (1973); *Western Arizona CATV*, 15 IBLA 259 (1974); cf., *American Telephone & Telegraph Co.*, *supra*. Appellant has not shown convincing evidence that the charges are excessive. However, it has raised sufficient doubt and question concerning the methods employed in this appraisal, especially the application of the highest and best use principle, to warrant BLM's reconsidering whether a further appraisal should be made, or, at least whether an adjustment in the appraised value is warranted. Reconsideration of the charges to be imposed must be undertaken in any event in view of the forthcoming discussion of issues.

[5] Appellant objects to the retroactive application of the charges back to the date its original grant expired and to the imposition of interest on those charges. Appellant

did not file an application to renew the right-of-way before the grant expired. BLM did, however, implicitly permit appellant to remain in occupancy of the site. The general regulation, 43 CFR 2802.1-7(a), provides for the fair market value of the right-of-way to be determined by appraisal by the authorized officer and payments made in advance. *See also*, FLPMA, sec. 504 (g).⁵ BLM did not require advance payment for the continued use and occupancy of the site while it was reviewing the charges. It only indicated a review of the charges would be made. It did not clearly condition the continued use of the site upon a future rate to be applied retroactively. Therefore, we need not decide whether it would be proper to do so. At least, however, BLM should have required advance annual payment at the same rate as the expired grant until an appraisal could be made. The fact BLM erred in this respect does not obviate appellant's obligation to pay a use charge for the time it occupied the site. Under whatever hypothetical legal theory may be used to characterize appellant's continued occupancy of the tract, it is apparent from the thrust of the general regulation that payment is required at the fair market value. Until a new fair market value is established then the amount of the charges based upon a prior determination may be used.

The issue then is whether the fair market value established by a sub-

⁵ See n. 4, *supra*.

sequent appraisal should be retroactively imposed to May 5, 1972, beginning the period after the last day of the original term of the grant. The granting of a renewal application would relate back to that date for a continuous authorized use. If, rather than 5 years, the original grant had been for a longer term and 5 years of that term had passed, regulation 43 CFR 2802.1-7(e) would be applicable. It provides:

At any time not less than five years after either the grant of the permit, right-of-way, or easement or the last revision of charges thereunder, the authorized officer, after reasonable notice and opportunity for hearing, may review such charges and impose such new charges as may be reasonable and proper commencing with the ensuing charge year.

As pointed out in a memorandum to the Director, BLM, dated Mar. 16, 1977, by the then Acting Deputy Solicitor, there is some ambiguity in this regulation, especially concerning what is meant by the "ensuing charge year." He advised that for previously granted rights-of-way increased use charges may not be applied retroactively but must be imposed prospectively, "effective as of the commencement of the charge year next following the rate adjustment decision of the authorized officer." Therefore, new charges at an increased rate are to be imposed only after the authorized officer's decision following notice and opportunity for hearing. The memorandum did not address the renewal problem presented in our case.

There is no regulation expressly covering our problem where the

original term of the grant has expired and the user is seeking a renewal. There is a gap in the regulations between 43 CFR 2802.1-7(a) which requires advance payments for use and occupancy at the fair market value, and 43 CFR 2802.1-7(e) which requires new charges for the ensuing charge year after reasonable notice and opportunity for a hearing. However, the essential policy thrust of the latter regulation for existing users of rights-of-way under a continuous long-term grant is also appropriate for existing users who have installed improvements and have a continuing use of a site. This is so regardless of whether the user may or may not have some contractual right of renewal or may have some other legal basis for continuing its use and occupancy. In the absence of any contrary regulatory or policy direction, BLM should follow the guideline established in 43 CFR 2802.1-7(e) and apply the same procedures and principles to renewals of existing rights-of-way.

In this case the original grant expired May 4, 1972. The decision by the authorized officer increasing the charges following notice and a hearing was dated May 11, 1976.⁶ Therefore, the increased charges would begin the next ensuing charge year,

⁶Because appellant has raised no issues concerning the hearing held in this case, we make no comment on its adequacy. A person who fails to make a timely objection to any procedural deficiency in an administrative proceeding is held to have waived the right to object subsequently. *Adams v. Witmer*, 271 F.2d 29 (9th Cir. 1958).

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which begins May 5, 1977. The charges for the use prior to that time would be at the annual rate for the original grant. If upon reconsideration of the appraisal upon our remand, the appraised amount is reduced from that set by the May 11, 1976, decision, the new amount may be imposed from May 5, 1977, since it is lower than the amount established by the May 1978 decision. However, if the amount is increased, the amount of the increase over that established by the May 1976 decision should be imposed only after the authorized officer's decision following notice and an opportunity for hearing and would be applicable to the next charge year thereafter.

[6] The imposition of interest poses a difficult issue. We are unaware of any specific regulation requiring interest to be imposed or forbidding it. BLM here imposed interest on the entire lump-sum amount. This included annual charges for future years. We believe interest imposed on charges for future years was improper. We have reviewed some of the law concerning imposition of interest charges in somewhat analogous situations and find there are varying authorities and conclusions reached. Basically what we have here is appellant's use of the land under an implied license without payment of charges until BLM notified it of the increase in rental. BLM was under a regulatory mandate to impose an advance rental charge, but did not do so for the years which lapsed between the

expiration of the grant and the new charges. Appellant contends it would have made payments to avoid interest charges if it had been informed of the charges. This situation is most like cases concerning the imposition of interest charges prior to a court judgment determining the liability of one party to another. Although there is a split of authority on whether interest may be imposed, the most basic rule is that courts will impose pre-judgment interest under considerations of fairness, and will deny it when it is considered inequitable to do so. *Board of County Commissioners v. United States*, 308 U.S. 343, 352-53 (1939); *Atlantic Richfield Company*, 21 IBLA 98, 82 I.D. 316 (1975).

In the absence of any specific contrary policy directive concerning this matter, we rule that interest may be imposed under similar conditions of fairness and equity. Here appellant used the land for a period of time before he was advised of the increase in charges. Although BLM erred in not requiring advance payments in the amount of the prior use charge until a new charge could be imposed, appellant could expect to pay a use charge for that time. No reasonable person would expect free use of the land in the circumstances. Since appellant had the use of its money during the time, it is fair for the United States to recover as interest its loss of the use of money payments which should have been imposed. For the period prior to May 5, 1977, the in-

terest would be on the amount of the annual rate prescribed under the original grant. It is also fair to impose interest on the increased charge due on an annual basis for the years prior to payment of such amount. Although appellant's appeal suspended the effect of the BLM decision during the time of the appeal, this does not affect the consequence of the imposition of the charges in considering equities and fairness. Appellant could have avoided the imposition of interest on the increased amount by paying the charges under protest while it appealed. Therefore, interest will be charged on the increased amount from the period beginning May 5, 1977. If on remand the charge is reduced, interest will be only on the reduced amount. If the charge is increased over that amount set by the May 11, 1976, decision, interest on the amount of the excess over that amount will be charged only if the charge is not paid prior to commencement of the ensuing charge year following imposition of the charge.

[7] The next issue concerns the lump-sum payment for future years. Under the regulations in existence when BLM notified appellant of the charges, the choice of requiring annual or lump-sum payments was left to the discretion of the authorized officer. 43 CFR 2802.1-7(a). Under section 310 of FLPMA, existing regulations may be applied to the extent practical. Sec. 504(g) of that Act provides for annual payments and would only allow lump-sum payments for

future years when the annual rental amounts to less than \$100. This provision is inconsistent with the regulation and governs. Accordingly, a lump-sum payment should not be demanded for future years where the annual amount exceeds \$100. In this case, the lump-sum payment will only cover the past years of use and an advance payment for the next year. Although sec. 504(g) provides for the annual rental to be based on fair market value, we do not believe this requires an appraisal each year. Use charges established by an appraisal may be prospective for a reasonable future time period, but the payments in excess of \$100 are to be charged on an annual basis.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded to the Bureau of Land Management for further action consistent with this decision.

JOAN B. THOMPSON,
Administrative Judge.

I CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

ADMINISTRATIVE JUDGE
GOSS CONCURRING:

I concur in the result and agree that the case should be remanded to the Bureau, but I believe that the threshold issue which must be determined is whether appellant holds under his initial grant or under an

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entirely new grant. I would hold that appellant's rights stem from an authorized extension of his original grant. The original grant provides "Expiration date of grant: 5 years subject to renewal with compliance with terms, conditions and stipulations."¹ Clearly the renewal clause was included in the grant for a purpose. On the basis of the grant, including the renewal provision, appellant constructed substantial improvements.

Appellant's rights depend upon whether the exercise of the option to renew should be treated as timely. The original 5-year period ended May 5, 1972. Appellant continued to hold over and by letter of May 9, 1972, the State Office wrote appellant listing requirements for renewal and stating the documents were to be filed within 30 days. Appellant's written request for renewal was received on June 7, 1972. On Sept. 17, 1975, appellant was advised that the charge was increased from \$460 for the first 5 years to \$5,125 for the period May 5, 1972, to Dec. 31, 1980, which amount was stated to be due and payable. In its letter of Oct. 31, 1975, the State Office informed appellant: "A hearing to discuss your right-of-way has been scheduled for Nov. 18, 1975 * * *. The hearing provided for by the regulations is informal and interlocutory in nature."

The regulation referred to is 43 CFR 2802.1-7(e):

At any time not less than five years after either the grant of the permit,

¹ Under 43 U.S.C. § 961 (1970) 50-year grants were authorized.

right-of-way, or easement or the last revision of charges thereunder, the authorized officer, after reasonable notice and opportunity for hearing, may review such charges and impose such new charges as may be reasonable and proper commencing with the ensuing charge year.

The hearing was held and appellant given the opportunity to make further submissions. On May 11, 1976, the State Office issued its decision entitled "Renewal Application Held for Approval." The charge of \$5,125 for the period May 5, 1972, to Dec. 31, 1980 was imposed.

Where there is a holding over, it is not clear that advance written notification is required for timely exercise of an option to renew. Even if it is so required, in this case BLM intended either to waive the requirement² or to deem the filing to be timely. 43 CFR 1821.2-2(g). Such action was within BLM authority and was most equitable. It is in accord with the provisions of 43 U.S.C.A. § 1764(b). (West Supp. 1977):

Each right-of-way or permit granted, issued, or renewed pursuant to this section shall be limited to a reasonable term in light of all circumstances concerning the project. *In determining the duration of a right-of-way the Secretary concerned shall, among other things, take into consideration the cost of the facility, its useful life, and any public purpose it serves.* The right-of-way shall specify whether it is or is not renewable and the terms and conditions applicable to the renewal. [Italics added.]

If an entirely new grant were involved then questions could arise as

² Cf. *Southern Ry. Co. v. Peple*, 228 F. 853 (4th Cir. 1915) and cases cited in 51C C.J.S. *Landlord and Tenant* § 62(3)b (1968).

to (1) whether a grantee's own occupancy under his first grant would be virtually conclusive on the issue of highest and best use under a new grant, and (2) whether a grantee should be considered a secondary user rather than a primary user, and charged under a new grant for use of an improved site and certain fixed improvements³ constructed under the first grant. See *American Telephone and Telegraph Company*, 25 IBLA 341, 350-52, 356-58 (1976). Herein, the majority recognizes that appellant may be treated as a primary user in connection with certain power line extensions, which would indicate that appellant should be treated as having a continuing right.

Assuming the Department deemed the option to renew to be properly exercised, appellant has rights which stem from his initial grant, and the issue becomes what charge should be imposed under the renewal when the option clause is silent. The rule in private leases, a somewhat analogous area, is quoted in *Yamin v. Levine*, 120 Colo. 35, 206 P. 2d 596 (1949) at 597:

* * * "A general covenant to extend or renew implies an additional term equal to the first, and upon the same terms, including that of rent." 1 Taylor's Landlord and Tenant (9th Ed.), p. 406, § 332. See, also, *Kollock v. Scribner*, 98 Wis. 104, 73 N.W. 776; *Penilla v. Gerstenkorn*, 86 Cal. App. 668, 261 P. 488; 32 Am. Jur., p. 806, § 958. * * *

Applying that same reasoning to the right-of-way grant herein, the

renewal rental would continue as originally fixed, until changed pursuant to the grant. The grant incorporates 43 CFR 2802.1-7(e), *supra*, which provides as a matter of right that new charges may be imposed only after hearing. *American Telephone and Telegraph Company, supra*, at 346. The charge upon appellant would thus remain at the original rate until the charge year following May 11, 1976. Except as modified on appeal, the new charges would be due from May 5, 1977.

It seems clear the highest and best use of the property is for general communication site purposes, and I do not believe that in making such a determination it is necessary to distinguish between broad and limited coverage sites. Highest and best use categories are usually rather general. Appraisals being difficult, appraisers should be free to use comparison data from both types of communication sites. I agree with the majority that once highest and best use is determined, the value of the site is greatly influenced by the demand for the type of coverage possible from a particular site.

In other respects, I am generally in accord with the majority opinion. While appellant's case would have been stronger had it submitted independent data,⁴ under the circumstances a remand is necessary.

JOSEPH W. GOSS,

Administrative Judge.

³ Subject to 43 CFR 2802.5, a grantee retains the right to remove his improvements.

⁴ *Mountain States Telephone & Telegraph Co., supra.*

APPEAL OF STATE OF ALASKA

3 ANCAB 11

Decided *June 20, 1978*

Appeal from the above-captioned Decision of the Alaska State Office, Bureau of Land Management, regarding land selections of Eklutna, Inc., under secs. 11 and 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), as amended, 89 Stat. 1145 (1976).

Affirmed.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Res Judicata

A prior decision of the Department will not be overturned by this Board where the claimant has failed to prosecute an appeal from such decision and in essence acquiesced to the decision for a prolonged period of time.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Administrative Procedure: Standing

In the absence of any interest in the lands in issue, the appellant has no standing to raise the necessity of a sec. 3(e) determination.

APPEARANCES: James N. Reeves, Esq., Assistant Attorney General, on behalf of the State of Alaska; Edward G. Burton, Esq., Burr, Pease & Kurtz, Inc., on behalf of Eklutna, Inc.; and Robert C. Babson, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management.

OPINION BY

*ALASKA NATIVE CLAIMS
APPEAL BOARD*

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), as amended, 89 Stat. 1145 (1976), and the implementing regulations in 43 CFR Part 2650, as amended, 41 FR 14737 (Apr. 7, 1976), and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Pursuant to the regulations in 43 CFR Part 2650, as amended, and Part 4, Subpart J, the State Director is the officer of the United States Department of the Interior who is authorized to make decisions on land selection applications involving Native Corporations under the Alaska Native Claims Settlement Act, subject to appeal to this Board.

FACTUAL BACKGROUND

On Sept. 16, 1977, the State of Alaska filed its Notice of Appeal and Statement of Reasons from the Bureau of Land Management Decision of Aug. 16, 1977, regarding Eklutna, Inc's selection application # AA-6661-C, and stated that:

* * * The sole basis for this appeal is that the Bureau erred in determining that the land was available for selection under ANCSA. Title to the land lies with the State of Alaska, not the United States. In the alternative, even if title were not found to lie in the State, the

land could in no event be conveyed to the Eklutna Corporation under ANCSA.

* * * * *

The lands in issue are situated in the W 1/2 of Sec. 36, T. 15 N., R. 2 W., Seward Meridian, and throughout the briefing all parties are in agreement that the eventful history of these lands is basically as stated in the Regional Solicitor's reply brief:

* * * * *

The land involved, the W 1/2 of Sec. 36, T.15N., R.2W., was first reserved as part of the Chugach National Forest by Presidential Proclamation 852, Feb. 23, 1909.

The Act of Mar. 4, 1915, 38 Stat. 1214, 48 U.S.C.A. 353, reserved secs. numbered 16 and 36 in each township of the then Territory of Alaska for the support of common schools in said Territory, to become effective upon the government survey of such lands.

On July 14, 1917, the township containing sec. 36 was surveyed.

On May 29, 1925, sec. 36 was excluded from the National Forest, and returned to the public domain by Presidential Proclamation 1741, 44 Stat. 2577.

On Mar. 12, 1943, the land was * * * withdrawn, this time for the War Department for military purposes, by Public Land Order 95.

On Nov. 20, 1950, P.L.O. 95 was revoked as to the W 1/2 of sec. 36 and the land * * * withdrawn for use by the Alaska Railroad by Public Land Order 689.

Sec. 6(k) of the Alaska Statehood Act, July 7, 1958, 72 Stat. 339, repealed the Territorial school lands reservation contained in the 1915 Act, *supra*, and provided that all lands reserved by that Act should be granted to the State of Alaska "* * * for the purposes for which they were reserved * * *" upon admission of the State into the Union. The State of Alaska was formally admitted into the Union by Presidential Proclamation on Jan. 3, 1959.

On Apr. 27, 1960, the State of Alaska filed an application with BLM for the land in question. The claim was filed pursuant to the Act of June 21, 1934, 48 Stat. 1185. As this Act merely directed the Secretary of the Interior to patent such school lands to the various states as they were entitled to under other applicable statutes, the State's application was based upon § 6(k) of the Statehood Act, and upon the Act of Mar. 4, 1915. In BLM Decision dated Nov. 28, 1960 * * *, the State's application was denied because the land in question was withdrawn by P.L.O. 689, *supra*. On Dec. 27, 1960, the State gave notice of its intent to appeal * * * this decision, and stated: "A statement of reasons will be timely filed." No such statement of reason was ever filed, and by BLM Decision dated Mar. 22, 1961 * * *, the State's appeal was summarily dismissed for failure to file said statement of reasons in a timely fashion. The State has failed to appeal the 1960 BLM Decision, *supra*, to date.

On Feb. 18, 1963, the State filed State Selection A-058730 with BLM for the land in question.

On Dec. 18, 1971, ANCSA was passed.

On Mar. 9, 1972, P.L.O. 5184 identified all lands withdrawn by § 11 of ANCSA.

On June 12, 1973, the Alaska Railroad filed a Notice of Intent to Relinquish certain lands withdrawn for its use by P.L.O. 689, *supra*. The W 1/2 of sec. 36 was included.

On July 17, 1974, Eklutna Corp. filed Application AA-6661-C with BLM for the W 1/2 of sec. 36.

* * * on Aug. 16, 1977, the BLM Decision at issue in this appeal approved Eklutna's selection.

* * * * *

ASSERTIONS OF THE APPELLANT, STATE OF ALASKA

In its initial briefing the appellant asserted that inasmuch as these

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lands were located within sec. 36 of a township, they were in fact "school lands" within the meaning of the Act of Mar. 4, 1915 (38 Stat. 1214), *as amended*, 43 U.S.C. §§ 851 and 852 (1970), that "* * * title thereto passed to the State in 1959" by operation of sec. 6(k) of the Alaska Statehood Act, and the lands were thus unavailable for withdrawal under sec. 11 of ANCSA for selection by the Eklutna Corporation.

Opposing parties asserted that the State of Alaska had applied for these very lands in 1960, had been denied the lands by BLM because of an existing railroad withdrawal, had appealed the BLM Decision, but lost their appeal for failure to prosecute, and therefore were barred from claiming the same lands now.

In response, the State argued that while the railroad withdrawal precluded the State from obtaining title to the lands on the date of Statehood, such withdrawal merely operated to suspend this particular school land reservation for the duration of the withdrawal, rather than permanently preclude the State from title. Therefore, although title to the lands was not granted at Statehood, that a "springing interest" was created by sec. 6(k) of the Statehood Act which would convert to title once the railroad withdrawal ceased, and that the United States could not convey these lands to a third party and frustrate the State's right to acquire title upon the revocation of the railroad withdrawal. The

State of Alaska contended that the 1960 BLM Decision had no affect whatsoever on its "springing interest" in these lands, but simply stood for the proposition that the lands were not available to the appellant at the time of statehood.

Additionally, the appellant also urged that the lands were not available for selection by the Eklutna Corporation inasmuch as the same were not "public lands," for, even if not owned by the State, they were withdrawn by the United States by Public Land Order No. 689, dated Nov. 20, 1950, for the benefit of the Alaska Railroad. Since no sec. 3(e) determination pursuant to ANCSA was made by the Secretary of the Interior prior to the Eklutna Corporation's selection application deadline of December 18, 1974, the lands were not "public lands" available for selection. Thus, in essence the appellant maintained that since the lands labored under a railroad withdrawal, it was mandatory that the Secretary make a 3(e) determination of these lands and since the same was not done the lands were excluded from an ANCSA withdrawal and unavailable for selection.

ASSERTIONS OF OPPOSING PARTIES

The two opposing parties in this matter who sought to defend the BLM Decision were the Regional Solicitor's Office on behalf of the Bureau of Land Management, and the Eklutna Corporation which had

selected the lands pursuant to ANCSA.

Both parties contended that on Apr. 13, 1960, the State of Alaska had made a sec. 6(k) application for patent to these particular lands on the grounds that they were within a school section and vested in the State upon admission to the Union. However, by Decision, dated Nov. 28, 1960, from which the State allowed its appeal rights to fail, the Chief of the Department of the Interior's Lands Adjudication Unit had rejected the State's sec. 6(k) application thus barring the appellant from now asserting the identical claim. Additionally, the parties also asserted that even if the State's "springing interest" was not totally destroyed by the 1960 Decision, it was destroyed by the lack of availability of the lands at statehood because of the railroad withdrawal and later by the 1971 sec. 11(a) withdrawal of ANCSA, and thus the lands were in fact available as "public lands" for selection by Eklutna.

Regarding the absence of a sec. 3(e) determination, as raised by the appellant, Eklutna asserted the defense that since the appellant had no interest in these lands it had no standing to raise the issue of a sec. 3(e) determination. Both parties agreed that the BLM Decision on appeal in essence made the sec. 3(e) determination of "smallest practicable tract * * *," but such was not even necessary since the lands in issue were no longer used by the railroad who filed its Notice of Intent to Relinquish the lands on Jan. 12, 1973. The Regional Solicitor fur-

ther asserted that "* * * the necessity of a Secretarial determination arises only to *except* the land from the definition of public lands contained in the first phrase of sec. 3(e), not to *include* it under that definition."

DISCUSSION

As previously recited, neither the history of these lands nor their location are in issue, and though the effect of the events are interpreted differently by the parties, the key pieces of legislation as well as the 1960 BLM Decision are as follows:

The Act of Mar. 4, 1915, 38 Stat. 1214, in pertinent part:

When the public lands of the Territory of Alaska are surveyed, under direction of the Government of the United States, sections numbered 16 and 36 in each township in said Territory shall be, * * * reserved from sale or settlement for the support of common schools in the Territory of Alaska; . . . *Provided*, That where settlement with a view to homestead entry has been made upon any part of the sections reserved hereby before the survey thereof in the field, or where the same may have been sold or otherwise appropriated by or under the authority of any Act of Congress, or are wanting or fractional in quantity, other lands may be designated and reserved in lieu thereof in the manner provided by [what is now codified as 43 U.S.C. §§ 851 and 852]. . . .

The proviso contained in the Amendment of the Act of Mar. 4, 1915, by the Act of Mar. 5, 1952, 66 Stat. 14:

Nothing in this sec. and sec. 354 of this Title [43] shall affect any lands included within the limits of existing reservations of or by the United States, or lands subject to or included in any valid application, claim, or right initiated or held under any laws of the United States unless

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and until such reservation, application, claim, or right is extinguished, relinquished, or canceled.

Sec. 6(k) of the Alaska Statehood Act, July 7, 1958:

Grants previously made to the Territory of Alaska are hereby confirmed and transferred to the State of Alaska upon its admission. Effective upon the admission of the State of Alaska into the Union, sec. 1 of the Act of Mar. 4, 1915 (38 Stat. 1214; 48 U.S.C., sec. 353), as amended, and the last sentence of section 35 of the Act of Feb. 25, 1920 (41 Stat. 450; 30 U.S.C., sec. 191), as amended, are repealed and all lands therein reserved under the provisions of section 1 as of the date of this Act shall, upon the admission of said State into the Union, be granted to said State for the purposes for which they were reserved; but such repeal shall not affect any outstanding lease, permit, license, or contract issued under said section 1, as amended, or any rights or powers with respect to such lease, permit, license, or contract, and shall not affect the disposition of the proceeds or income derived prior to such repeal from any lands reserved under said section 1, as amended, or derived thereafter from any disposition of the reserved lands or an interest therein made prior to such repeal.

The BLM Decision dated Nov. 28, 1960, in part:

Application for Patent Rejected in Part

On Apr. 27, 1960, the State of Alaska filed application, under the act of June 21, 1934 (48 Stat. 1185; 43 U.S.C. 371a), for patent to Sec. 16, and the W 1/2, Lots 4, 5, S 1/2 SE 1/4 SW 1/4 NE 1/4, E 1/2 SE 1/4 NE 1/4, S 1/2 SW 1/4 SE 1/4 NE 1/4 (Parts of Lot 3), W 1/2 SE 1/4, W 1/2 SW 1/4 NE 1/4, Sec. 36, T. 15 N., R. 2 W., S.M., school sections in place.

The records of the Land Office reveal that Sec. 16, was withdrawn from all forms of appropriation under the public land laws, including the mining laws and

reserved for use of the War Department as a demolition and practice bombing range under Executive Order 8755, dated May 17, 1941.

The W 1/2 of Sec. 36, was withdrawn from all forms of appropriations under the public land laws, including the mining and mineral leasing laws and reserved for the Alaska Railroad by Public Land Order 689, dated Nov. 20, 1950.

Solicitor's Opinion M-36528, dated Sept. 24, 1958, holds that such portions of school sections reserved for the Territory of Alaska by Sec. 1 of the act of Mar. 4, 1915 (38 Stat. 1214; 48 U.S.C. 353) as are being used and occupied by a Federal agency and contain Federal improvements when the State is admitted into the Union, are impliedly excepted from the grant made by section 6(k) of the Statehood Act of July 7, 1958 (72 Stat. 339).

As Sec. 16, T. 15 N., R. 2 W., S.M., is part of a military reservation, and the W 1/2 of Sec. 36, is reserved for the Alaska Railroad, the application for patent by the State of Alaska is rejected for these lands.

* * * * *

It is inescapable that any "springing interest" the State of Alaska claims to the lands in issue, has its origin in the Act of March 4, 1915, and inasmuch as that Act was repealed by sec. 6(k) of the Alaska Statehood Act, any lingering rights of the State must find its life in that particular section of the Statehood Act.

The Supreme Court of the United States in considering similar Acts from other States has held that language such as that contained in the 1915 Act is not language of present grant and that Congress retains absolute power over the lands until all requisites of the school lands legislation are performed.

Likewise, in addressing similar language as that found in sec. (k) of the Alaska Statehood Act, the same cases held that while such an Act contains language of present grant, it “* * * is a mere reference to what precedes and does not change, or purport to change, the terms of the donation.” *U.S. v. Morrison*, 240 U.S. 192, 200 (1916). See also *U.S. v. Wyoming*, 331 U.S. 440 (6) (1947).

Under this interpretation sec. 6 (k) of the Alaska Statehood Act was a present grant of those “school lands” which fell within the terms and met the requisites of the original 1915 donating legislation. However, a present grant of the particular lands in issue was not possible at statehood because of the then existing railroad withdrawal. In the opinion of this Board the lands availability under sec. 6(k), whether then or now, was finally decided in the 1960 Decision of BLM, and the time for the State to have taken exception has passed by more than 17 years. The portion of the 1960 Decision upon which this Board relies is as follows:

* * * * *

The W 1/2 of Sec. 36, was withdrawn from all forms of appropriation under the public land laws, including the mining and mineral leasing laws and reserved for the Alaska Railroad by Public Land Order, 689, dated Nov. 20, 1950.

Solicitor's Opinion M-36528, dated Sept. 24, 1958, holds that such portions of school sections reserved for the Territory of Alaska by Section 1 of the act of Mar. 4, 1915 (38 Stat. 1214; 48 U.S.C. 353) as are being used and occupied by a Federal agency and contain Federal

improvements when the State is admitted into the Union, are impliedly excepted from the grant made by Sec. 6(k) of the Statehood Act of July 7, 1958 (72 Stat. 339).

As Sec. 16, T. 15 N., R. 2 W., S.M., is part of a military reservation, and the W 1/2 of Sec. 36, is reserved for the Alaska Railroad, the application for patent by the State of Alaska is rejected for these lands.

* * * * *

[1] A prior decision of the Department will not be overturned by this Board where the claimant has failed to prosecute an appeal from such decision and in essence acquiesced to the decision for a prolonged period of time. In this regard both the courts and the Department have previously so ruled:

Gabbs Exploration Co. v. Udall, 315 F.2d 37, 41 [D.C. 1963]:

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.

Union Oil Co. of California et al, 71 ID 169, 181 [1964], the Department held:

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 appellant's claim for relief.

[2] The final issue raised by the appellant in its original brief involved the failure of the Secretary to make a sec. 3(e) determination of the lands in issue prior to

June 23, 1978

Eklutna's selection thereof. However, in the absence of any interest in the lands in issue the appellant has no standing to raise the necessity of a sec. 3(e) determination.

Sec. 3(e) of ANCSA provides:

"Public lands" means all Federal lands and interest therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under sec. 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to January 17, 1969;

As previously discussed the State of Alaska by virtue of the 1960 BLM Decision has no "springing interest" in these lands as "school lands" nor for that matter any interest benefited by sec. 3(e) of ANCSA. On Jan. 12, 1973, Notice of Intent to Relinquish use of these lands was filed by the Alaska Railroad and no other party has made any claims that Eklutna's selection in any way intrudes or interferes with their right or use of these lands. Therefore, it is the conclusion of this Board that the absence of a sec. 3(e) determination is not a bar to Eklutna's selection, nor does the State of Alaska have any standing to complain that no such determination was made.

ORDER

The Decision of BLM dated Aug. 16, 1977, which is the subject of this appeal is hereby affirmed and the appeal of the State of Alaska is Ordered dismissed.

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
*Chairman, Alaska Native
Claims Appeal Board.*

ABIGAIL F. DUNNING,
Board Member.

LAWRENCE MATSON,
Board Member.

MOBIL OIL CORP.

35 IBLA 375

Decided June 23, 1978

Appeal from decision of the Arizona State Office, Bureau of Land Management, canceling in full or in part oil and gas leases A 10078-A 10088, A 10090, A 10091, and A 10093-A 10095.

Affirmed.

1. Oil and Gas Leases: Applications: Generally—Rules of Practice: Appeals: Effect of

Where BLM issues a decision requiring that an oil and gas offeror submit additional advance rental within 30 days, and the offeror files a timely appeal to this Board, the running of the 30 days is suspended. Following affirmation by this Board of BLM's decision, the offeror is properly given the entire 30 days within which to submit the additional rental.

2. Oil and Gas Leases: Generally

An oil and gas lease is "issued" on the day it is signed by the authorized officer of the Department of the Interior, although it is not effective, per 43 CFR 3110.1-2, until the first day of the month following its date of issuance.

3. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Rentals

An oil and gas offer which is accompanied by advance rental of \$0.50 per

acre may not be rejected as not including sufficient advance rental, per 43 CFR 3103.3-2, 3111.1-1(d) and (e) (1), if the regulation raising the rental to \$1 is not in effect when the offer was filed.

APPEARANCES: R. B. Altman, Esq., Houston, Texas, for appellant.

*OPINION BY
ADMINISTRATIVE JUDGE
STUEBING*

*INTERIOR BOARD OF
LAND APPEALS*

Mobil Oil Corp. appeals from the Nov. 23, 1977, decision of the Arizona State Office of the Bureau of Land Management (BLM), which canceled oil and gas leases because they had been issued to it erroneously. We affirm.

On Jan. 4, 1977, Murel G. Goodell filed over-the-counter noncompetitive oil and gas lease offer for lands in Arizona, submitting advance rental in the amount of \$0.50 per acre along with this offer. On Feb. 11, 14, and 15, 1977, BLM notified Goodell that he would have to submit an additional \$0.50 per acre, as the annual rental for such oil and gas leases had been raised to \$1 per acre, effective Feb. 1, 1977. On Mar. 17, 1977, Goodell filed a timely notice of appeal of BLM's decision requiring this additional rental. This Board considered Goodell's appeal and affirmed BLM's decision requiring additional rental *sub nom. Thomas G. Fails*, 32 IBLA 302 (1977), decided Sept. 30, 1977. The administrative record was then returned to BLM.

While this matter was before us on June 10, 1977, Mobil top-filed

over-the-counter noncompetitive oil and gas lease offers covering all of the lands applied for by Goodell. Additionally, in these offers, Mobil applied for some lands not included in Goodell's offers.

On Oct. 17, 1977, Goodell received notice of our rejection of his appeal in *Fails, supra*. On Oct. 28, 1977, BLM, having received no payment of the additional \$0.50 per acre from Goodell, issued oil and gas leases to Mobil instead. On Nov. 14, 1977, however, Goodell tendered the deficient rental to BLM, and on Nov. 23, 1977, instituted a private contest against Mobil challenging the issuance of leases on these tracts to Mobil rather than to him. Also on Nov. 23, 1977, BLM issued a decision canceling Mobil's leases insofar as they conflicted with Goodell's offer, so that it might grant them to him instead, from which decision Mobil has appealed, thereby moot-ing the contest.

[1] There is no doubt that BLM acted incorrectly by issuing the leases to Mobil on Oct. 31, 1977, as, at this time, Goodell's senior offers were still extant. Under the terms of BLM's decisions of Feb. 11, 14, and 15, 1977, Goodell had 30 days within which to pay the additional rental due. Under 43 CFR 4.21(a), the effect of a decision by BLM is suspended when a timely notice of appeal is filed. Where, as here, a BLM decision requires a submission by a party within a prescribed period, the filing of the appeal suspends the running of the period, and, after this Board has issued its decision, the party is properly given

the entire period in which to comply. *Paul H. Sleeper*, 22 IBLA 318 (1975); see *David M. Miller*, 15 IBLA 270 (1974). Thus, the 30-day period for compliance prescribed by BLM was suspended when Goodell appealed, and, when our decision was issued, he was entitled to a full 30 days to comply.

The record indicates, and appellant has noted, that Goodell did not receive notice of our decision in *Falls, supra*, until Oct. 17, 1977. Goodell submitted the additional rental on Nov. 14, 1977, within 30 days of his receipt of our decision, thus preserving the priority of his offers. We conclude that BLM should properly award the leases to him, else being regular.¹

Our holding in this matter is essential to a just resolution of the controversy. Under 43 CFR 4.410, Goodell had a right to appeal from BLM's decision, as it was adverse to his pecuniary interests. Under 43 CFR 4.21(a), the effect of a decision is suspended pending review by this Board. Suspending the effect of a decision on appeal insures that the status quo will be preserved while the affected party's rights are reviewed. If BLM's decision were given continued effect during review on appeal, his interest might irrevocably pass to an intervening party with inferior rights. It is true that Goodell could have avoided the problem by tendering the additional rental under protest while the matter was on appeal. However, noth-

ing in the regulations required him to do so, and he should not be disqualified because he did not.

[2] Appellant argues that Goodell's offers were deficient and ought not to have been accepted by BLM, in that they were not accompanied by full payment of advance rental. Appellant maintains that, since Goodell's offers were filed in Jan. 1977, under 43 CFR 3110.1-2, the leases could not have been effective any earlier than Feb. 1, 1977, the date of the increase in annual rental, and that Goodell therefore should have submitted \$1 per acre as advance rental. As he submitted only \$0.50 per acre, appellant concludes, his offers were fatally defective, per 43 CFR 3103.3-1 and 3111.1-1(d) and (e)(1). We are not persuaded by this argument.

Under 43 CFR 3103.3-2, the increased annual rental of \$1 per acre applies to all leases *issued* on or after Feb. 1, 1977, not *effective* on or after this date. An oil and gas lease is "issued" as of the date it is signed by the agent of the Government. For example, in the instant case, Mobil's lease A 10078 was issued (erroneously) on Oct. 28, 1977, the date on which Mario L. Lopez signed it on behalf of this Department. This fact is clear from the language on the lease form: "This lease for the lands described in item 3 above *is hereby issued*, subject to the provisions of the offer and on the reverse side hereof. THE UNITED STATES OF AMERICA[,] By [s/] Mario L. Lopez, Chief, Branch of Lands and Minerals Operations[,] Oct. 28, 1977."

¹ Accordingly, it is unnecessary for us to comment on the procedural propriety of a private contest in such circumstances.

(Italics supplied.) This question was recently addressed in an opinion by Secretary Andrus, *James W. Canon*, 84 I.D. 176 (1977), which held that an oil and gas lease is not *issued* until it is signed by the authorized officer. *Id.* at 182. In so holding, the Secretary cited 43 CFR 3123.5(b) (1966), presently 43 CFR 3111.1-1(c), which provides that “[t]he United States will indicate * * * the issuance of the lease by the signature of the appropriate officer thereof in the space provided.”

Appellant has confused the date of issuance of an oil and gas lease with its effective date. Under 43 CFR 3110.1-2, leases are dated as of the first day of the month following the date of their issuance. This is done for the convenience of the Government in collecting annual rental and supervising the continued effectiveness of oil and gas leases. However, this effective date of the lease is not the same as the date of its issuance. Under the regulation, *supra*, the effective date of the lease may even be made retroactive to the first day of the month in which the lease issues.

[3] It was thus possible that BLM would “issue” these leases to Goodell prior to Feb. 1, 1977, the effective date of the increased annual rental, in which case, the annual rental would have been \$0.50 per acre. As there was still a chance, albeit a slim one, that BLM would issue leases pursuant to his offers prior to the date the higher rental came into effect, Goodell’s advance rental was not deficient,

and we cannot hold that he failed to submit adequate advance rental along with his offers. The amended regulation was not in effect when Goodell’s offers were filed. Therefore, he was not in violation and his offers were acceptable at that time.

In summary, BLM’s decisions of Feb. 11, 14, and 15, 1977, requiring that Goodell submit additional advance rental in the amount of \$0.50 per acre within 30 days on pain of rejection of these offers, were suspended pending review of these decisions by this Board. When this Board issued its decision in *Thomas G. Fails*, *supra*, BLM’s decisions were affirmed and their effect reinstated, and Goodell had 30 days within which to submit the rental or lose his priority to appellant, who had become a junior offeror by top-filing offers on these lands while the matter was on appeal. Appellant did submit the additional rental in a timely manner, and thereby preserved his priority. BLM mistakenly issued leases to appellant in derogation of Goodell’s rights, and correctly canceled them on Nov. 23, 1977.

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

EDWARD W. STUEBING,
Administrative Judge.

WE CONCUR:

JOAN B. THOMPSON,
Administrative Judge.

JOSEPH W. GOSS,
Administrative Judge.

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APPEAL OF PAUG-VIK, INC., LTD.**3 ANCA 49**

Decided July 5, 1978

Appeal from the above-captioned decisions of the Alaska State Office, Bureau of Land Management granting free use permits on lands selected by Paug-Vik, Inc., Ltd., under secs. 11 and 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), as amended, 89 Stat. 1145 (1976).

Decisions of the Bureau of Land Management remanded for further findings June 30, 1978.

1. Withdrawals and Reservations: Generally

Withdrawal of public lands for the use of a federal agency is within the discretion of the Secretary. An application for withdrawal conveys no vested right, unlike an entry under the public land laws which entitles the entrant to issuance of patent upon satisfaction of statutory requirements.

2. Segregation: Filing of Application

The filing of an application for withdrawal of public lands by a federal agency segregates the land from location, sale, selection, entry, lease, or other forms of disposal under the public land laws to the extent that such withdrawal, if effected, would prevent such forms of disposal.

3. Withdrawals and Reservations: Generally—Words and Phrases

"Withdrawn and reserved." The words "withdrawn" and "reserved" are frequently used interchangeably and in conjunction with each other, and cannot be distinguished with separate precise meanings.

4. Withdrawals and Reservations: Generally

Withdrawals and reservations under the authority of the Pickett Act, 43 U.S.C. § 141 *et seq.* (1970), are of a permanent, continuing nature in that they remain in effect until revoked by the President or by Act of Congress.

5. Withdrawals and Reservations: Generally—Segregation: Generally

There is a legal distinction between the administrative segregation of land under application for withdrawal, pending action on the application, and the completed withdrawal itself.

6. Segregation: Generally—Words and Phrases

"Segregation." Segregation is an administrative procedure preliminary to favorable or unfavorable action on a withdrawal application by the Secretary of the Interior in the exercise of his delegated authority under the Pickett Act, 43 U.S.C. § 141 *et seq.* (1970), and is not legally equivalent, in its effect on the status of the land, to a completed withdrawal or reservation.

7. Segregation: Filing of Application—Alaska Native Claims Settlement Act: Withdrawals: Generally

Segregation of lands covered by a withdrawal application filed by a military agency, accomplished by a notation of the land records, does not prevent statutory withdrawal of such lands for selection by a Native Corporation pursuant to section 11 of ANCSA.

8. Alaska Native Claims Settlement Act: Withdrawals: Federal Installations

The exception in sec. 3(e) of ANCSA for the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any federal installation, can apply to lands which are not formally

withdrawn for the agency using such lands and seeking to protect its use by invoking the exception.

APPEARANCES: John A. Smith, Esq., Smith and Taylor, 201 East 3rd Ave., Anchorage, Alaska 99501, on behalf of Paug-Vik, Inc., Ltd.; Martha Mills, Esq., Office of the Attorney General, 360 K Street, Suite 105, Anchorage, Alaska 99501, on behalf of the State of Alaska; Captain Gordon Wilder, Esq., Hq. 21 ABG/JA, Elmendorf AFB, Alaska 99506, on behalf of the United States Air Force; John M. Allen, Esq., Office of the Regional Solicitor, 510 L Street, Suite 408, Anchorage, Alaska 99501, on behalf of the Bureau of Land Management; Donald Boberick, Esq., Office of the Regional Counsel, 632 West 6th Ave., Anchorage, Alaska 99501, on behalf of the Federal Aviation Administration; Elizabeth Johnston, Esq., P.O. Box 220, Anchorage, Alaska 99510, on behalf of Bristol Bay Native Corporation; Harland W. Davis, Esq., 610 West 2nd Ave., Anchorage, Alaska 99501, on behalf of Bristol Bay Borough; George G. Moen, P. O. Box 7002, Anchorage, Alaska 99510, on behalf of the U.S. Army Corps of Engineers.

OPINION BY

ALASKA NATIVE CLAIMS APPEAL BOARD

The Alaska Native Claims Appeal Board, pursuant to the delegation of authority in ANCSA, *as amended*, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974) and implementing regulations in 43 CFR Part 2650 and Part 4, Subpart J, hereby makes

the following findings, conclusions, and decision.

PROCEDURAL BACKGROUND

This case involves an appeal filed by Paug-Vik, Inc., Ltd., seeking review of the issuance by the Anchorage District Office, Bureau of Land Management (BLM), of free use permits authorizing the removal of gravel by certain governmental agencies from lands selected by Paug-Vik pursuant to secs. 11 and 12 of the Alaska Native Claims Settlement Act. This appeal does not arise from a decision to convey land to Paug-Vik or from a decision on conflicting applications for the land; no such decisions have been issued by BLM. The only action here appealed is issuance of permits for gravel extraction on lands in which the appellant, Paug-Vik claims selection rights under ANCSA. Paug-Vik initially sought judicial review of BLM's action in the United States District Court for the District of Alaska (*Paug-Vik, Inc., Ltd. v. Tindall*, #A76-96 Civil). The court, by Order of July 16, 1976, directed Paug-Vik to exhaust its administrative remedies with the Department of the Interior and returned the files to BLM, which transmitted them to the Interior Board of Land Appeals (IBLA).

Following briefing on jurisdictional issues and on the merits of the appeal, the Interior Board of Land Appeals referred the case to

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this Board for decision of the following issues:

1. Does segregation of the lands involved herein, accomplished by the notation of the application to withdraw the lands filed by the Army Corps of Engineers in May, 1968, serve to prevent selection of such lands by the Appellant under 43 U.S.C. § 1601 *et seq.*, the Alaska Native Claims Settlement Act (ANCSA)?

2. Assuming that the lands were available for selection by Appellant under the Alaska Native Claims Settlement Act, can issuance of the permits be justified under the interim administration authority of the Department, granted by § 22(i) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1621(i), particularly in light of 30 U.S.C. § 601 (1970)?

The Board, by an Order dated July 27, 1977, accepted jurisdiction, designated necessary parties, and scheduled briefing.

At a conference held Aug. 2, 1977, to discuss and clarify the issues on appeal, the parties requested that in addition to the issues previously stated, a further issue (here designated 1A) should be resolved in the appeal as follows:

1A. Whether the disputed gravel pit is within the smallest practicable tract enclosing land actually used in connection with the administration of the federal installation, and therefore not within "public lands" as defined in § 3(e) of ANCSA and not available for Native selection?

The parties further requested that the third issue referenced in IBLA's referral Order dated July 7, 1977, involving the propriety of the Air Force application to withdraw lands, if, as alleged, prior Native use and occupancy

made the land available for withdrawal, should be decided by ANCAB rather than IBLA if not rendered moot by resolution of other issues.

It was tentatively agreed that the Board should first decide the following issues which might be dispositive of the appeal and that factual hearings and/or decision of Issue 3, involving interim administration authority, would be deferred:

1. Whether the segregation of the lands involved herein, accomplished by the notation of the application to withdraw the lands filed by the Army Corps of Engineers in May 1968, served to prevent selection of such lands by the Appellant under 43 U.S.C. § 1601 *et seq.*, the Alaska Native Claims Settlement Act?

1A. Questions of law arising from the issue of whether the disputed gravel pit is within the smallest practicable tract enclosing land actually used in connection with the administration of a federal installation.

On Aug. 3, 1977, Paug-Vik, Inc., Ltd., filed with the Board a Stipulation by Paug-Vik and the State of Alaska, reciting that the parties had negotiated an agreement for the State of Alaska to take up to 60,000 cubic yards of gravel from the gravel pit at King Salmon, Alaska, for the purpose of paving the Naknek/King Salmon road for the price of 60 cents per cubic yard of gravel to be deposited in escrow with the State Director of the Bureau of Land Management.

In response to a motion by appellant, opposed by the State of Alaska, the United States Air

Force, and the Corps of Engineers, the Board on Jan. 5, 1978, heard oral argument limited to the two issues defined by the Board in an Order of Aug. 8, 1977, involving the effect of the segregation of the lands, by notation of the Air Force application to withdraw, on selection of such lands by Paug-Vik (Issue 1), and questions of law related to whether the disputed gravel pit is within the smallest practicable tract of land used in administration of a federal installation (Issue 1A).

ISSUE I

Does segregation of the lands involved, by notation of the application to withdraw the lands filed by the Army Corps of Engineers in May, 1968, prevent selection of such lands by the Appellant under ANCSA?

It is undisputed that the lands here in question are located within the core township of Naknek, Alaska, a village incorporated under the Claims Act as Paug-Vik, Inc., Ltd. Therefore, such lands are withdrawn for selection by Paug-Vik under sec. 11(a)(1) of ANCSA if they are public lands as defined in sec. 3(e) of the Act and if they are not excepted from such withdrawal, pursuant to sec. 11(a)(1) as "lands withdrawn or reserved for national defense purposes other than Naval Petroleum Reserve Numbered 4."

The record indicates that the lands in question have been withdrawn and reserved for the use of the Federal Aviation Administration and its predecessor Agency, the Civil Aeronautics Administration,

since 1950; that the Air Force has been using the land under permit from the FAA; that in 1967 or 1968 the FAA notified the Air Force of its intent to excess and relinquish the lands; and that subsequently the United States Army Corps of Engineers, Alaska District, on behalf of the Air Force, on May 3, 1968, filed an application with the Bureau of Land Management to withdraw approximately 1,481 acres of these lands for Air Force use. Application # AA-2838 requested withdrawal of four parcels: in T. 17 S., R. 45 W., S.M., a 360 acre tract designated "main area" (Parcel 1) and a 30 acre tract designated "POL tank farm" (Parcel 2); and in T. 17 S., R. 44 W., S.M., an 11 acre tract designated "refuse disposal area" (Parcel 3) and a 1,080 acre tract described as "demolition and gravel borrow areas" (Parcel 4). The lands on which the disputed free use permits were issued are located in T. 17 S., R. 44 W., S.M., in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of sec. 33 and the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of sec. 34, within Parcel 4. Notice of the application for withdrawal was published in the Federal Register on June 15, 1968.

Meanwhile, in Nov. of 1966, Stewart L. Udall, then Secretary of the Interior, instituted the "informal land freeze," a Department policy suspending all pending dispositions of lands, pending resolution of Alaska Natives' land claims. This policy led to establishment of the "official land freeze" by PLO 4582, published in the Federal Register Jan. 17, 1969, which withdrew

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from all appropriation or disposition any unappropriated land in Alaska until Dec. 31, 1970. This date was subsequently extended by succeeding Secretaries of the Interior until ANCSA was enacted on Dec. 18, 1971. (35 FR 18874; 36 FR 12017.)

ANCSA was then enacted on Dec. 18, 1971.

Regulations governing the filing and processing of applications for withdrawals of land are as follows. 43 CFR 2091.2-5, Withdrawal or reservation of Federal lands, provides:

(a) *Application.* The noting of the receipt of the application under §§ 2351.1 to 2351.6 in the tract books or on the official plats maintained in the proper office shall temporarily segregate such lands from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws, including the mining and the mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal. To that extent, action on all prior applications the allowance of which is discretionary, and on all subsequent applications, respecting such lands will be suspended until final action on the application for withdrawal or reservation has been taken. Such temporary segregation shall not affect the administrative jurisdiction over the segregated lands.

43 CFR 2351.3 also provides for withdrawal applications to have a segregative effect, as set forth in 43 CFR 2091.2-5, quoted above.

43 CFR 2351.4 establishes procedure to be followed by the Bureau of Land Management in processing the applications:

(a) The authorized officer of the Bureau of Land Management will have published in the FEDERAL REGISTER a notice of the filing of the application and of the opportunity of the public to object to, or comment on, the proposed withdrawal or reservation. In cooperation with the applicant agency, he will also provide for publicity sufficient to inform the interested public of the proposed withdrawal or reservation.

(b) If, as a result of such notice and publicity, sufficient protest is filed against the proposal, or if, in his discretion, it is otherwise desirable in the public interest, the authorized officer of the Bureau of Land Management will, subject to the approval of the Secretary of the Interior if the applicant agency objects, hold a public hearing at a time and in a place convenient to the interested public and to the agencies involved. Costs of such hearings incurred by the Bureau of Land Management, except for the salaries of its personnel, will be borne by the applicant agency.

(c) The authorized officer of the Bureau of Land Management will undertake such investigations as are necessary to determine the existing and potential demand for the lands and their resources. He will also undertake negotiations with the applicant agency with the view of adjusting the application to reduce the area to the minimum essential to meet the applicant's needs, to provide for the maximum concurrent utilization of the lands for purposes other than the applicant's, to eliminate lands needed for purposes more essential than the applicant's, and to reach agreement on the concurrent management of the lands and their resources.

The State argues that the temporary segregation of land resulting under 43 CFR 2091.2-5 from notation in the tract book of the Air Force withdrawal application constitutes a reservation of the land for

national defense purposes within the meaning of the exception in sec. 11(a)(1) of ANCSA, so that the land was not properly withdrawn for Native selection and is not selectable by Paug-Vik. The State also argues that the Air Force, having taken all steps necessary to obtain the withdrawal applied for, now has a vested right, akin to equitable title, in the withdrawal.

The Regional Solicitor concurs that while the land was not formally withdrawn for the Air Force, it was "reserved" within the meaning of sec. 11 through the segregative affect of the application for withdrawal; he argues that formal withdrawal for the benefit of the Air Force was previously unnecessary because the land was already withdrawn for the Federal Aviation Administration which authorized the Air Force to use the land.

Paug-Vik contends that temporary segregation under the regulations does not protect land so segregated from Native selection under ANCSA because final withdrawal of the land remains discretionary with the Secretary. The regulation quoted merely gives the applicant, here the Air Force, the right to a decision on the withdrawal applied for before other applications are considered and suspends other applications "until final action on the application for withdrawal or reservation has been taken." This process creates no rights or equitable title in the applicant. The segregation could not and did not restrict the power of Congress, acting both as proprietor and legislator of

the public domain, to withdraw such lands by statute. Withdrawal or reservation means administrative or statutory action by which federal lands are restricted from the full operation of the public land laws on settlement, entry, and location; no such action was taken on the Air Force withdrawal application before the enactment of ANCSA. Congress, in sec. 11 of ANCSA, statutorily withdrew the disputed lands. Pursuant to this statutory withdrawal, the lands are now available for selection by Paug-Vik. Issuance of free use permits on such lands is therefore improper and such permits should be vacated.

[1] The Board first rejects the State's argument that, having taken all steps necessary to obtain the withdrawal, the Air Force has a vested right to approval of its application. Withdrawal of public lands for the use of a federal agency is within the discretion of the Secretary of the Interior. (*City of Kotzebue*, 26 IBLA 264, 267, 83 I.D. 313 (1976)). An application for withdrawal conveys no vested right, unlike an entry under the public land laws which, upon satisfaction of statutory requirements, entitles the entrant to issuance of patent.

[2] The filing of an application of withdrawal of public lands by a federal agency segregates the land from location, sale, selection, entry, lease or other forms of disposal under the public land laws to the extent that the withdrawal or reservation, if effected, would prevent such forms of disposal. Segregation of the lands becomes effective on the

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date the proposed withdrawal is noted in the tract book or on the official plats maintained by the proper office. *William J. Smith, Sr., et al.*, 33 IBLA 47 (1977).

The Air Force application to withdraw the lands, properly noted on the land records, clearly segregated the land. The issue now raised is whether such lands, by reason of the segregation, constitute "lands withdrawn or reserved for National defense purposes" as contemplated by the exception in § 11 of ANCSA.

[3] The words "withdrawn" and "reserved" are frequently used interchangeably and in conjunction with each other and cannot be distinguished with separate precise meanings.

Authority for military withdrawals is derived from the General Withdrawal Act of June 25, 1910 (The Pickett Act), which authorized the President to "temporarily withdraw from settlement, location, sale or entry any of the public lands * * * and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes * * *" (43 U.S.C. § 141 (1970)). Executive Order No. 10355, 17 FR 4831 (May 26, 1952) delegates to the Secretary of the Interior the President's authority to "withdraw or reserve lands of the public domain."

The word "reservation," in the context of public land law, has been defined as, " * * * a tract of land, more or less considerable in extent, which is by public authority *withdrawn* from sale or settlement, and

appropriated to specific public uses; such as parks, military posts, Indian lands, etc., *Jackson v. Wilcox*, 2 Ill. 344; *Meehan v. Jones*, 70 F. 453 (C.C.D. Minn. (1895)). (Italics added.)

In a decision interpreting the effect of the Antiquities Act of June 8, 1906, on public lands of potential historical significance, the Interior Board of Land Appeals found that while the Act authorizes the *reservation* of such lands, by Presidential proclamation, it does not of itself *withdraw* such lands. (Italics added.) *Vernard E. Jones*, 76 I.D. 133 (1969). The decision also refers to lands "*withdrawn or reserved* from future entry under the homestead law." (Italics added.) *Vernard E. Jones, supra*, at 139.

Interpreting ANCSA, the Interior Board of Land Appeals has ruled, "where a Public Land Order *withdraws* public lands and *reserves* them for selection by a Native Village Corporation, * * * the sale of such lands under the Small Tract Act * * * is foreclosed unless in furtherance of a valid existing right existing at the time of the *withdrawal*." (Italics added.) *Emil I. Stadler*, 15 IBLA 180, 182 (1974).

Discussing public land law terminology in connection with legislation limiting the size of military withdrawals by the Executive, Senate Report No. 857 states:

The term "withdraw" is used interchangeably with the term "reserve" to describe the statutory or administrative action which restricts or segregates a designated area of Federal real prop-

erty from the full operation of the public-land laws relating to settlement, entry, location, and sales, which action holds them for a specific—and usually limited—public purpose. (Sen. R. No. 857, U.S. Code Cong. & Adm. News 2233 (1958).)

Examples of such reservations include: national forest reserve lands; national parks, monuments, and other units of the national park system; fish and wildlife refuges; petroleum, oil shale, coal, and other mineral reserves; recreation and wilderness areas; reclamation and power withdrawals or reservations; military reservations, and similar areas, all of which are held by some Federal agency for specified public purposes, * * * (Sen. R. No. 857, U.S. Code Cong. & Adm. News, *supra*.)

[4] The Pickett Act speaks in terms of “temporary” withdrawals; however, which such withdrawals fall short of alienation; *i.e.*, disposal of the land, they are in fact of a permanent, continuing nature in that they remain in effect until revoked by the President or by act of Congress.

[5] A distinction must be drawn between the administrative segregation of land under application for withdrawal pending action on the application, and the completed withdrawal itself. IBLA commented in *United States v. Harlan H. Foresyth*, 15 IBLA 43, 47 (1974), “* * * At the outset we desire to make crystal clear what we are *not* dealing with. We are not dealing with a withdrawal, but rather only with an application for a withdrawal. Nor are we dealing with the substantive basis of the application for withdrawal. * * * We hold that posting of the appli-

cation to the records effects the segregation of the described land.”

Considering the question of whether the noting of the records has a segregative effect independent of final acceptance of the application for withdrawal, the Interior Board of Land Appeals rules “* * * notation on tract records of prior appropriations effectively precludes the acceptance of a subsequent application, even if the notation itself is in error.” * * * *United States v. Harlan H. Foresyth, supra*, at 54.

Thus, through temporary segregation, land covered by an application for withdrawal is treated as if it were already withdrawn—even if the application is defective and would be eventually rejected.

If the Secretary in his discretion rejects the application, the segregation ends and the land returns to its former status. To hold segregation legally equivalent to withdrawal, as urged by the State, would deny the Secretary his exercise of discretion over withdrawals.

[6] Segregation is an administrative procedure preliminary to favorable or unfavorable action on a withdrawal application by the Secretary in the exercise of his delegated authority under the Pickett Act, 43 U.S.C. § 141 (1970), and is not legally equivalent in its effect on the status of the land, to a completed withdrawal or reservation of land.

The State argues that the exception for “lands withdrawn or reserved for national defense purposes” in sec. 11(a)(1) was drafted in response to an Air Force request

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to Congress to protect lands used for defense purposes by means other than withdrawal.

S. 1830, the bill developed by the Federal Field Committee, and its House companion, H.R. 10193, in sec. 8(a), withdrew public lands in the "core" townships enclosing listed villages, from all forms of appropriation under the public land laws, "except lands withdrawn for national defense purposes other than Petroleum Reserve Numbered 4. * * *" Sec. 8(a)(2) also withdraws public lands in two townships adjacent to the "core" township as needed for various purposes, except for "lands described in paragraph (1) of this subsection."

Commenting on this exception in a letter dated Aug. 2, 1969, to the Chairman of the Senate Committee on Interior and Insular Affairs, Phillip N. Whittaker, Assistant Secretary for the Air Force, Installations and Logistics, stated:

The Department of Defense has numerous military installations throughout Alaska located on public lands that have been withdrawn, reserved, or otherwise restricted from further appropriation under the public land laws. It is necessary that the integrity of these lands be preserved in the interest of national defense. The exception in sec. 8(a)(1) with respect to lands withdrawn for national defense purposes other than petroleum reserve numbered 4 would appear to recognize this interest. However, in order to assure that public lands used for defense purposes by means other than withdrawal, such as by special use permit or notation on the public land records, are also excepted, it is suggested that line 11, page 16, be revised to read, "State of Alaska, except lands withdrawn or other-

wise reserved for national defense." Paragraph (2) of sec. 8(a) should also be revised by the insertion of "withdrawn or otherwise reserved for national defense" as between "lands" and "described" in line 8 of page 25 of the bill. (Hearings on H.R. 13142 and H.R. 10193 before the Subcomm. on Indian Affairs, House Comm. on Interior and Insular Affairs, 91st Cong., 1st Sess., Part 1, 47, 48 (1969)).

It should be noted that Mr. Whittaker describes lands "reserved or otherwise restricted" as "public lands used for defense purposes by means other than withdrawal, *such as by special use permit or notation on the public land records.*" (Italics added.) The Whittaker letter does not provide more specific examples of national defense use of lands without withdrawals for this purpose, nor does the legislative history of the Act.

However, Mr. Whittaker refers to "notation on the records" as a "means other than withdrawal"; *i.e.*, as an alternative to withdrawal, rather than a preliminary step toward withdrawal. This would be consistent with a public purpose use under the administrative practice discussed in a Departmental decision, Instructions, 44 L.D. 513 (19-16), which has been used as an alternative to withdrawal.

That 1916 Departmental decision held that where certain improvements, funded under the Act of Mar. 4, 1915, were actually constructed on public lands, including National Forest lands, and the location of such improvements was properly noted on the tract books,

then the improvements were excluded from disposal under the public land laws and would be excepted from any patents later issued. The Air Force's initial use, under a permit arrangement with FAA, followed by application for formal withdrawal to succeed the FAA, would not be treated as a use under 44 L.D. 513; in the present situation, the Air Force has operated within an existing federal withdrawal for another agency which it now seeks to transfer to its own jurisdiction.

H.R. 13142, the Department of the Interior's alternative bill to H.R. 10193, was introduced July 29, 1969. It excepted from withdrawal for Native selection, in sec. 8(a)(1), the same lands excepted in sec. 11(a)(1) of ANCSA: "Lands withdrawn or reserved for national defense purposes * * *." Introduction of H.R. 13142 preceded the Whittaker letter by several days. The legislative history is silent as to whether this choice of language, differing from that in H.R. 10193, was influenced by communications between the Department of Defense and the Interior Department.

H.R. 13142, in sec. 3(e), defined "public land" as "all Federal and interests therein situated in Alaska, except any improved land used in connection with the administration of any Federal installation." This may be compared to sec. 3(e) of ANCSA, which excepts from "public lands" "the smallest practicable Tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation."

The Department of Defense accepted the language of H.R. 13142. Helen E. Fry, speaking for the Air Force as representative of the Department of Defense, offered the following testimony on H.R. 13142:

As stated in our report to the chairman of the full committee, the Department of Defense is in complete accord with the objective of the legislation. It is our understanding that, except for petroleum reserve no. 4, lands *withdrawn for national defense purposes or used in connection with the administration of any defense installation would not be affected by this legislation.* In our report to the committee, we suggested certain amendatory language only to clarify this understanding.

While it is difficult, if not impossible, to determine the effects of the bill on any future military land requirements in Alaska, we are satisfied that the intent of the bill in its present form is to preserve the integrity of existing military installations. (Hearings on H.R. 13142 and H.R. 10193 before the Subcom. on Indian Affairs, House Comm. on Interior and Insular Affairs, 91st Cong., 1st Sess., Part 1, 353 (1969).)

Thus, the Defense Department was apparently satisfied with an exception covering lands actually withdrawn for national defense purposes, and in the wording of H.R. 13142, "any improved land used in connection with the administration of any Federal installation."

[7] ANCSA, through provisions in secs. 11 and 3, gives military withdrawals broader protection; all formally withdrawn lands are protected by secs. 11 and 3(e) protects not only *improved* lands, but *all lands* actually used in connection with the administration of a federal installation. The Board

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therefore cannot conclude based on legislative history of ANCSA that sec. 11 excepts from Native selection any lands not formally withdrawn or reserved for national defense purposes.

The Board, therefore, finds that segregation of lands covered by a withdrawal application filed by a military agency, accomplished by a notation of the land records, does not prevent statutory withdrawal of such lands for selection by a Native Corporation pursuant to sec. 11 of ANCSA.

ISSUE IA

QUESTIONS OF LAW UNDER SECTION 3(e)

Having found that the Air Force installation is not excepted from selection under sec. 11(a) as lands withdrawn or reserved for national defense purposes, the Board must address the effect of sec. 3(e) on the availability of the disputed land for selection by Paug-Vik. Lands withdrawn for selection by sec. 11 (a) are public lands, and sec. 3(e) defines public lands as follows:

"Public lands" means all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation, * * *.

The Secretary has not made the required determination with regard to Air Force use of the disputed lands. The Board is here asked to decide the following legal question

related to the Secretary's factual determination:

In order for the Secretary to determine that a tract of land is "actually used in connection with the administration of any Federal installation," must that land be formally withdrawn for the federal agency for whose benefit the determination is sought?

The Board finds that land need not be formally withdrawn for the agency seeking such a determination.

The language of the Act in sec. 3 (e) is clear. Under the plain meaning rule, clear and unambiguous statutory language must be held to mean what it plainly expresses. (Vol. 2A; SUTHERLAND, STATUTORY CONSTRUCTION, Sec. 46.01 (4th ed. C. Dallas Sands 1973)). (See also, *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917), *Hill v. T.V.A.*, 549 F. 2d 1064 (6th Cir. 1977), *Stern v. U.S. Gypsum, Inc.*, 547 F. 2d 1329 (7th Cir. 1977)).

Sec. 3(e) clearly contemplates protecting lands actually used in administration of a federal installation, a classification much broader than the more restrictive category of lands formally withdrawn for the agency using them. It is undisputed on the record of this appeal that the Air Force has made extensive use of lands in the vicinity of Naknek, while these lands were withdrawn for another agency, the FAA. The FAA has given formal notice of its intent to relinquish the withdrawn lands. The Air Force has applied for a withdrawal of the same lands, indicating that the Air

Force intends its use to continue. Subject to the Secretary's factual determination of the size of the tract actually used, the Board sees no justification to deny the Air Force the benefit of the exception in sec. 3(e).

[8] The Board rules as a matter of law that the exception in sec. 3(e) of ANCSA for the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any federal installation, can apply to lands which are not formally withdrawn for the agency using such lands and seeking to protect its use under the exception.

The Board, therefore, remands this appeal to the BLM for a determination pursuant to sec. 3(e) of ANCSA and the Board's ruling herein, whether the lands contained in Air Force application #AA-2838 and selected by Paug-Vik, Inc., are within the smallest practicable tract enclosing land actually used in connection with the administration of any federal installation.

ISSUE 2

PERMIT ISSUANCE UNDER INTERIM ADMINISTRATION

The second issue referred to the Board by IBLA was:

2. Assuming that the lands were available for selection by Appellant under the Alaska Native Claims Settlement Act, can issuance of permits be justified under the interim administration authority of the Department, granted by § 22(1) of the Alaska Native Claims Settlement Act,

43 U.S.C. § 1621(1), particularly in light of 30 U.S.C. § 601 (1970)?

The parties have asked the Board to defer ruling on this issue pending resolution of the issues decided herein.

Paug-Vik's appeal is from the issuance by BLM of free use permits #AA-6595, 50-0105-FUP-125, and AK-0101-FUP-228. The effect of BLM's decision to issue these permits has been stayed pending this appeal, pursuant to 43 CFR 4.21.

On Aug. 3, 1977, Paug-Vik, Inc., filed with the Board a stipulation entered into by the State of Alaska and Paug-Vik, Inc., allowing the State to remove up to 60,000 cubic yards of gravel from the disputed gravel pit for the purpose of paving the Naknek/King Salmon road, at the price of \$.60 per cubic yard to be deposited in escrow with the State Director, BLM.

The Bureau of Land Management's current policy on issuance of free use permits is set forth by BLM in a statement filed Sept. 6, 1977, and in a supplemental response filed Sept. 14, 1977. In the initial document, the Regional Solicitor states, "By Secretarial Order No. 2997 issued Jan. 11, 1977, the Department adopted the policy that no free use permits would be issued for Native selected lands."

Departmental policy, in fact, is set forth in S.O. No. 2997, in conjunction with a Memorandum dated Sept. 23, 1976, to the Director, Bureau of Land Management, from Assistant Secretary Ronald M. Coleman. S.O. No. 2997 deals with

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procedures for deposit in an escrow account of proceeds from leases, contracts, permits, rights-of-way, or easements pertaining to lands withdrawn for Native selection, as required by sec. 2 of the Act of Jan. 2, 1976.

With regard to lands withdrawn for Native selection under ANCSA, Assistant Secretary Coleman's Memorandum prohibits free use permits or sales of material under 30 U.S.C. sec. 601, sec. 602 (1970), without the written consent of the Native Corporation affected. The only exception is for cases where a federal, state, or local government agency shows a "pressing public need and public benefit to be derived from sale of such material and * * * it does not appear that a conveyance to the Native Corporation can be made in time for the agency to acquire the material from that Corporation," in which case, at the discretion of the BLM State Director, the material may be sold at no less than appraised value with the proceeds deposited in escrow.

In view of Paug-Vik's stipulation as to the 1977 gravel extraction by the State and the Departmental policies discussed above, the issue of Departmental authority to issue free use permits under sec. 22(i) of ANCSA appears to the Board to be moot. The Board will, however, leave the record open for 30 days from the date of this decision so that the parties may, if they desire, file briefs or motions on this issue. In the absence of such filings, the Board will dismiss the appeal as to

this issue upon the expiration of the 30 day period.

ISSUE 3

EFFECT OF NATIVE USE AND OCCUPANCY ON AIR FORCE WITHDRAWAL APPLICATION

The Interior Board of Land Appeals, referring this appeal to the Board, raised a third issue over which it reserved jurisdiction:

3. Assuming that a property application to withdraw the lands would prevent their selection by a Native village corporation, was the application proper in this case if, as it is alleged, prior Native use and occupancy made the land unavailable for withdrawal on behalf of the Army Corps of Engineers in 1968; if the land was determined to be not subject to a withdrawal, what is the effect of the notation of the application for withdrawal? See *United States v. Foresyth*, 15 IBLA 43 (1974).

IBLA stated, in its referral order,

* * * * *

* * * to the extent that the appeal deals with the question of the effect of Native use and occupancy prior to 1968 on the availability of the land for application by the Army Corps of Engineers in the first instance, it does not deal with matters arising out of ANCSA, but with essential questions of general public land law, and jurisdiction to determine that question resides in the Board of Land Appeals.

* * * * *

The Board of Land Appeals concluded that immediate referral of the case to this Board was appropriate because other issues would have to be decided by ANCAB.

The Board has found that the lands here in dispute are withdrawn for Paug-Vik subject to a sec. 3(e) determination, and has remanded the appeal to BLM for a determination under sec. 3(e) as to the lands actually used by the Air Force. The interest of the Air Force is thus derived from sec. 3(e) rather than from their pending application for withdrawal. It appears to the Board that any issue as to the validity of the Air Force withdrawal application as it relates to this appeal is therefore moot. However, the Board has not addressed such issues and defers to IBLA's jurisdictional ruling. In order to conclude the administrative appeal process without foreclosing the parties' rights to pursue the last-cited issue before the Board of Land Appeals, the Board hereby rules that questions of the validity of the Air Force withdrawal application raised in the present appeal are moot, subject to the right of all parties within 30 days from the date of this decision to file with the Board a motion for referral of the appeal back to the Interior Board of Land Appeals for reconsideration of such issue.

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
*Chairman, Alaska Native
Claims Appeal Board.*

ABIGAIL F. DUNNING,
Board Member.

LAWRENCE MATSON,
Board Member.

APPEAL OF J. A. LAPORTE, INC.

IBCA-1146-3-77

Decided *July 6, 1978*

Contract No. CX500031057, National Park Service.

Appeal sustained in part.

1. Contracts: Disputes and Remedies: Equitable Adjustments

In a contract for placement of sand on a beach at Cape Hatteras where the contracting officer's formula for computing an equitable adjustment for changed work did not consider the increased pumping time and increased maintenance caused by the change and did not allow for profit on the increased costs, the Board found that the contractor was entitled to an equitable adjustment based on those factors.

2. Contracts: Construction and Operations: Contract Clauses—Contracts: Disputes and Remedies: Equitable Adjustments

Where a contractor accepted a contract containing a clause limiting an equitable adjustment for profit to 15 percent of the cost of changed work, he is bound by the limitation even though his contract price of \$1.31 per cubic yard of sand exceeded his estimated contract costs of 75 cents per cubic yard by more than 15 percent.

3. Contracts: Construction and Operation: Contract Clauses—Contracts: Construction and Operation: Contracting Officer

Where the Board finds an interest clause to be incorporated into a contract by operation of law and the clause requires the contracting officer to make certain findings thereunder but the contractor's claim for interest has been presented only to the Board and not to the contracting

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officer, the Board remands the claim for interest to the contracting officer for a determination of the interest due in accordance with the clause.

APPEARANCES: Mr. Dillard C. Laughlin, Attorney at Law, Phillips, Kendrick, Gearheart & Aylor, Arlington, Va., for the appellant; Mr. Donald M. Spillman, Department Counsel, Atlanta, Ga., for the Government.

OPINION BY ADMINISTRATIVE JUDGE PACKWOOD

INTERIOR BOARD OF CONTRACT APPEALS

This appeal is now before the Board for a second time. By stipulation of the parties, the initial decision was concerned only with liability. The Board sustained appellant's contention that the Government-directed placement of sand on the beach at Cape Hatteras constituted a change and remanded the matter to the contracting officer for determination of the amount of the equitable adjustment due appellant in accordance with the decision. The contracting officer found that appellant was entitled to an equitable adjustment of \$79,573.57 and that an extension of time eliminated the imposition of \$1,400 of liquidated damages. Appellant asserts that it is entitled to an equitable adjustment of \$496,080 and has again appealed to the Board.

Contract No. CX500031057, under which this appeal is brought, was awarded to appellant on Nov. 16, 1972. It called for furnishing all of the labor, material, and equipment required to dredge ap-

proximately 1,000,000 cubic yards of sand from a designated borrow area and to place the sand on a 10,200-foot portion of the beach at Cape Hatteras. The estimated contract price of \$1,460,000 included a unit price of \$1.31 per cubic yard for the sand and a lump sum of \$150,000 for mobilization and demobilization. The contract amount of sand was amended by change order to add 250,000 cubic yards at the contract unit price of \$1.31 per cubic yard. As a result of conditions which were unforeseeable to the parties at the time the contract was awarded (storms in Feb. and Mar. of 1973 which caused considerable beach erosion), the Government chose to direct placement of the entire contract quantity of sand in the northern two-thirds of the beach which was farthest from the borrow area. As a result of the Government's action, the Board found that appellant was entitled to an equitable adjustment under the changes clause since appellant's costs were increased over those costs compensable through unit price payments.¹

When the appeal was remanded to the contracting officer for determination of the amount of the equitable adjustment, he made the computation of the equitable adjustment as follows:

Daily production, as determined from borrow pit soundings, has been plotted on the attached Exhibit B where dis-

¹J. A. LaPorte, Inc., IBCA-1014-12-73 (Sept. 29, 1975), 82 I.D. 459, 75-2 BCA par. 11,486.

charged on the beach. From this plot and related information, the means pumping distance for the beach fill was determined to be 17,319 feet from the dredge. The corresponding mean pumping distance as per contract was 15,964 feet or 1355 feet less.

Using these pumping distances, the following relationship can be established:

(Total pay quantity in cubic yards) times (costs per cubic yard as stated by the contractor) times (the difference between the mean actual and contract pipe length) divided by (the mean contract pipe length) equals (the equitable adjustment): $(1,250,000 \text{ C.Y.}) \times (\$0.75/\text{cy}) \times (1355') / (15,964') = \$79,573.57^{[2]}$

Appellant did not agree with the amount of equitable adjustment allowed by the contracting officer, alleging instead that the amount should be \$496,080, based on calculations by appellant's consulting engineer.

The contracting officer's determination of the amount of the equitable adjustment used a computation of the shift in the center of mass of the sand pumped on the beach, a concept which did not take into consideration the increased pumping time involved.³ It is equally clear from an examination of the computations that the contracting officer's formula made no provision for increased maintenance costs resulting from the increased pumping time over longer lines than were contemplated in the contract. These two deficiencies, together with the contracting officer's failure to allow

for profit on the increased costs, make the formula devised by the contracting officer completely unusable as a basis for computation of the equitable adjustment.

The expert witness who testified for appellant is a consulting engineer with 20 years' experience in the dredging industry, who has worked closely with appellant in the past and who designed most of the equipment used on this contract (2 Tr. 127-128). During the bidding process for this contract, the consulting engineer made the pump calculations and furnished other technical information to appellant and then appellant's president took over and assigned dollar values to these inputs in order to arrive at the bid (2 Tr. 128-129).

Appellant's consulting engineer made computations with respect to the amount of change resulting from the Government's direction of the placement of the sand on the beach in a different location than contemplated in the contract (2 Tr. 130). Appellant's exhibit A-4 sets forth the computations. First, a uniform distribution of the sand as called for in the contract was plotted. Then, using surveyors' graphs made at the completion of the job and appellant's pumping records, the consulting engineer plotted the actual distribution of sand on the beach in accordance with the Government's directions as to its placement (2 Tr. 130-133). He testified that 500,000 cubic yards were placed approximately 5,000 feet farther away from the borrow area than would have been the case if the sand

² Appeal File, Findings of Fact and Decision by the contracting officer dated Feb. 7, 1977.

³ Transcript of second hearing on Sept. 13, 1977, pages 134-142. References to the transcript of this hearing are hereafter referred to as 2 Tr. followed by page numbers.

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had been distributed evenly, as called for in the contract (2 Tr. 134). Even distribution of the sand would have required 2,424.64 hours of pumping, while 2,748.40 hours of pumping were required to place the sand in the locations directed by the Government (Appellant's exhibit A-4).

Appellant's consulting engineer further testified that the increase of 323.76 pumping hours amounted to an increase of 13.3 percent over the 2,424.64 hours required for the unchanged work (2 Tr. 135-136). In addition, the increased pumping time over lines that were longer than originally contemplated caused additional maintenance. He testified at length about the problems arising from increased wear on liners, impellers and pump shells, and on the engines and gear boxes driving the pumps. Also, there was an increase in the amount of time required to wash out the lines when siltation occurred due to slower velocities in the further reaches of the lines (2 Tr. 137-140). The consulting engineer estimated that the result was an additional 15 percent increase in maintenance costs (2 Tr. 141).

The Government did not dispute the testimony that pumping time was increased by 323.76 hours. Instead, the Government offered testimony from a dredging engineer, employed by the Corps of Engineers since 1954, who characterized the 15 percent increase in maintenance costs as an arbitrary figure. The Government's expert stated

that appellant's engineer could have said 10 percent or 30 percent (2 Tr. 163).

The testimony on behalf of the Government ignores the extended explanation of the basis for the estimate by appellant's consulting engineer. To state that 10 percent or 30 percent could have been used instead of the 15 percent actually selected does not refute the accuracy of the estimate. On the contrary, it indicates that appellant is relying on a conservative estimate toward the lower end of the range of possible estimates of increased maintenance costs.

Accordingly, the Board finds: that appellant's computation of an increase of 323.76 hours of pumping time over the pumping time of 2,424.64 hours needed for even distribution of the work is accurate; that an increase of 15 percent in maintenance costs due to increased pumping time over longer lines is reasonable; and that these figures may properly be used in computing the equitable adjustment due appellant.

The above finding does not extend, however, to the manner in which those figures have been used by appellant's consulting engineer. Since his participation in the bidding process was limited to making pump calculations and furnishing other technical information, leaving his client to assign dollar amounts, his attempt to go beyond engineering calculations and to compute the dollar amount of the

equitable adjustment is outside his area of expertise.

One of the basic rules for determining an equitable adjustment is that it cannot include expenses which the contractor would have had to expend had there been no change. *Dale Ingram, Inc. v. United States*, 201 Ct. Cl. 56, 71 (1973). One of the Government engineers pointed out that not all of the work was changed (2 Tr. 170). The unstated corollary of the testimony of appellant's engineer, that 500,000 cubic yards were placed farther north on the beach than called for in the contract, is that the remainder of the contract quantity was placed in the location required by the contract. We must therefore exclude all costs related to accomplishment of the unchanged work and deal only with the 500,000 cubic yards or 40 percent of the contract quantity which was changed.

Had there been no change, the 500,000 cubic yards could have been pumped in 40 percent of the estimated pumping time of 2,424.64 hours, or 969.86 hours. The increased pumping time of 323.76 hours amounts to 33.3 percent of the hours required (323.76 divided by 969.86) if this portion of the work had not changed. We reject appellant's computation that pumping time was increased by 13.3 percent, since that computation was based on the total contract quantity which includes both changed and unchanged work.

Appellant estimated his costs for

bidding purposes at 75 cents per cubic yard, based on his previous experience with a successfully completed contract utilizing the same borrow area and the same dredging and pumping equipment.⁴ This figure was accepted by the contracting officer and we also accept 75 cents per cubic yard as a reasonable cost. We are now in a position to compute the increase in costs due to the change:

500,000	cubic yards changed
\$.75	cost per cubic yard as bid
<hr/>	
\$375,000	cost before increases due to change
1.333	increased costs for increase in pumping hours
<hr/>	
\$500,000	subtotal
1.15	increase maintenance for changed work
<hr/>	
\$575,000	total cost of changed work
375,000	less cost of work if unchanged
<hr/>	
\$200,000	increased costs due to change

Appellant has asserted that it should be allowed the same markup for profit that it enjoyed under the contract. The markup from appellant's cost of 75 cents per cubic yard to the contract price of \$1.31 per cubic yard is 56 cents, or 74.66 percent of cost. While appellant may have been justified in taking the markup in his bid, due to the high cost of the equipment involved and its exposure to possible loss or damage by storms on the Cape Hatteras beach (2 Tr. 24, 37), the contract

⁴ 2 Tr. 23, 26.

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sets a limit of 15 percent of costs for profit on the changed work.⁵ Having accepted a contract containing a clause limiting the percentage of profit on changed work, appellant is bound by the limitation. *Cf. R. C. Hedreen Co.*, ASBCA No. 20004

⁵ General Provision No. 32 of the contract provides:

"32 CHANGE ORDERS:

"(a) *Additional costs.* In conformance with Clause 3, 4 and 10 of these General Provisions the cost of any change ordered in writing by the Contracting Officer which results in an increase in the contract price will be determined by one or the other of the following methods, at the election of the Contracting Officer:

"(1) On the basis of a stated lump sum price, or other consideration fixed and agreed upon by negotiation between the Contracting Officer and the Contractor in advance, or if this procedure is impracticable because of the nature of the work or for any other reason,

"(2) On the basis of the actual necessary cost as determined by the Contracting Officer, plus a fixed fee to cover general supervisory and office expense and profit. The fixed fee shall not exceed fifteen percent of the actual necessary costs. The actual necessary cost will include all reasonable expenditures for material, labor, and supplies furnished by the Contractor and a reasonable allowance for the use of his plant and equipment where required, but will in no case include any allowance for general superintendent, office expense or other general expense not directly attributable to the extra work. In addition to the foregoing the following will be allowed: the actual payment by the Contractor for workman's compensation and public liability insurance, performance and payment bonds (if any), and all unemployment and other social security contributions (if any) made by the Contractor pursuant to Federal or State statutes, when such additional payments are necessitated by such extra work.

"An appropriate extension of the working time, if such be necessary, also will be fixed and agreed upon, and stated in the written order.

"(b) *Reduced Costs.* In conformance with Clause 3 and 4 of these General Provisions the cost of any change ordered in writing by the Contracting Officer which results in a decrease in the contract price will be determined in a manner conformable with Clause (a) (2) under additional costs."

(Oct. 29, 1976), 76-2 BCA par. 12,202.

In view of the disparity between the markup of costs in the contract price and the limitation of profit in the changes clause, the Board finds that appellant is entitled to the full 15 percent allowed by the clause. Fifteen percent of \$200,000 is \$30,000 bringing the total equitable adjustment for the changed work to \$230,000.

Decision on Interest

On the question of interest to be paid on the amount finally determined to be owed by the Government, the Board observes that the interest claim was not asserted as part of the original claim; nor was it presented to the contracting officer when the matter was remanded to him for a determination of the amount of the equitable adjustment. Instead, the interest claim was raised for the first time by appellant's timely notice of appeal dated Mar. 8, 1977, which appealed the contracting officer's finding on the equitable adjustment.

Subsequent to the filing of the notice of appeal, the Board decided in another appeal that an amendment of the Federal Procurement Regulations (41 CFR 1-1.322, effective Sept. 21, 1972)⁶ required inclu-

⁶ The text of the clause is as follows:

"Payment of Interest on Contractors' Claims.

"(a) If an appeal is filed by the contractor from a final decision of the contracting officer under the disputes clause of this contract, denying a claim arising under the contract,

(Continued)

sion, in contracts of this nature, of a clause for payment of interest on a contractor's claim which is ultimately decided in favor of the contractor. *Commonwealth Electric Co.*, IBCA-1048-11-74 (July 15, 1977), 84 I.D. 407, 77-2 BCA par. 12,649, affirmed on reconsideration, Sept. 30, 1977, 84 I.D. 867, 77-2 BCA par. 12,781.

On Aug. 8, 1977, the Board notified the parties in writing that interest would be one of the issues in the scheduled hearing on quantum and directed the attention of the parties to the *Commonwealth*, supra, decision.

At the hearing, the parties stipulated that if interest were considered applicable it should start to run on Dec. 27, 1973 (2 Tr. 17). Appellant introduced evidence as to applicable interest rates as determined by the Secretary of the Treasury pursuant to P.L. 92-41 (Appellant's exhibit

1). The Government's sole argument on the interest question in its post-hearing brief was that the Board should reverse *Commonwealth* based on a concurring opinion at 84 I.D. 874, 77-2 BCA par. 12,781 at 62,106.

Recently, two other boards of contract appeals have cited with approval and followed this Board's application of the *Christian* doctrine⁷ in *Commonwealth. Mr's Landscaping and Nursery*, HUD BCA No. 76-29 (Mar. 21, 1978), 78-1 BCA par. 13,077; *Transcontinental Cleaning Co.*, NASA BCA No. 1075-9 (Dec. 29, 1977), 78-1 BCA par. 13,081. The Government has advanced no cogent reason for reversing *Commonwealth* and we decline to do so.

Accordingly, the Board finds that the payment of interest clause set forth in footnote 6, and required by the regulation in effect at the time the contract was awarded, is incorporated into the contract and is applicable to this appeal.

Although evidence as to interest was submitted at the hearing and the matter was treated in posthearing briefs, the Board is not in a position to make a final disposition with respect to interest. Even if the Board were to render a decision on the interest question, it would still be necessary for the contracting officer to make a determination as to the interest due from the date of the Board's decision to the date of mailing to the contractor of a con-

(Continued)

simple interest on the amount of the claim finally determined owed by the Government shall be payable to the contractor. Such interest shall be at the rate determined by the Secretary of the Treasury pursuant to Public Law 92-41, 85 Stat. 97, from the date the contractor furnishes to the contracting officer his written appeal under the disputes clause of this contract, to the date of (1) a final judgment by a court of competent jurisdiction, or (2) mailing to the contractor of a supplemental agreement for execution either confirming completed negotiations between the parties or carrying out a decision of a board of contract appeals.

"(b) Notwithstanding (a), above, (1) interest shall be applied only from the date payment was due, if such date is later than the filing of appeal, and (2) interest shall not be paid for any period of time that the contracting officer determines the contractor has unduly delayed in pursuing his remedies before a board of contract appeals or a court of competent jurisdiction." (Clause added by 37 FR 15151, effective Sept. 21, 1972.)

⁷ *G. L. Christian and Associates v. United States*, 160 Ct. Cl. 1, reh. den., 160 Ct. Cl. 58, cert. den., 375 U.S. 954 (1963), reh. den., 376 U.S. 929, 377 U.S. 1010 (1964).

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tract modification carrying out the Board's decision. Since a determination by the contracting officer will be required in any event and since appellant did not submit its claim for interest to the contracting officer for decision, we remand the entire question of interest to the contracting officer for handling in accordance with the payment of interest clause. In view of this disposition, we do not reach the question of the propriety of an appeal board rendering a decision on a question which has not yet been decided by the contracting officer.

Summary

The Board finds that appellant is entitled to an equitable adjustment of \$230,000 and remands the question of interest to the contracting officer for determination of the amount to be paid pursuant to the payment of interest clause.

G. HERBERT PACKWOOD,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

CONCURRING AND DISSENTING OPINION OF JUDGE STEELE:

I concur in the principal opinion except that I believe we are required to decide the amount of interest under the "appeal interest" clause. I would allow \$77,915.21¹ interest and remand to the contracting officer to calculate the balance of appeal interest from Jan. 1, 1978, to the date of mailing of a settlement modification. My reasoning follows.

There are two broad principles that require analysis and choice to decide this matter. The first is that the disputes clause provides that the BCA decide an issue *after* the contracting officer has had the *opportunity* to decide it. This idea is contained under the rubric of "premature appeals." See for example, *VTN Colorado, Inc.*, IBCA-1073-8-75 (Oct. 29, 1975), 82 I.D. 527, 75-2 BCA par. 11,542; *Contract Claims Before the ASBCA*, Briefing Paper No. 70-4, Aug. 1970, Federal Publications, Inc., p. 6, par. 9, footnote 59. *Contract Claims Before the GSBCA*, Briefing Paper 74-6, p. 2, par. (1), footnote 14. The

¹ Calculated as follows:

Period	Calculation	Rate	Amount
Dec. 28-31, 1975.....	$\$230,000 \times \frac{3}{365}$ days	$\times \frac{7.75}{100}$	= \$146.51
Jan. 1, 1975 to Dec. 31, 1977.....	$230,000 \times 4$ years	$\times \frac{8.45312}{100}$	= $\frac{77,768.70}{\$77,915.21}$

plus interest at 8.25 (FCR C-2, 1-23-78).

From Jan. 1, 1978, to the date of mailing of a settlement modification.

second major principle or idea is that litigation should end disputes, not proliferate them. This idea finds expression in various ways, for example, the requirement that a defendant must assert all affirmative defenses and all compulsory counter claims or it will be considered to have waived those it failed to assert.²

² See res judicata, 1B Moore's Federal Practice, sects. 0.401 and 0.405. "[Res Judicata] * * * operates as a bar-prevents re-litigation of all grounds for, or defenses to, recovery that were then available to the parties * * * regardless of whether all grounds for recovery or defenses were judicially determined," p. 622, see also pages 624 and 628. Note also FRCP 8(c) and 2A Moore's sections 8.7[1] and [3] and page 1858, footnote 3 (laches). See also, U.S. Court of Claims rule 37(b). Note also, the following decisions: *Mecom Co.*, ASBCA No. 13620 (June 19, 1969), 69-2 BCA par. 7786, p. 36, 144 (Decision on merits by C.O. waives defense of a general release); *S. W. Electronics & Manufacturing Corp.*, ASBCA No. 17523 (May 23, 1974), 74-2 BCA par. 10,650, pp. 50, 567-8 (Even though release literally barred claim C.O. did not so construe it or act as if it barred claim, therefore, it did not); *Cf. M. A. Santander Construction, Inc.*, ASBCA No. 15,882 (Feb. 12, 1976), 76-1 BCA par. 11,798 at p. 56,823 (C.O. decision that denied claim on the merits and because of an accord and satisfaction waives defense of accord and satisfaction, or none found any way); *cf. Dittmore-Freimuth Corp. v. United States*, 182 Ct. Cl. 507, 511 (1968) (dictum that consideration of merits of claim waives defense of failure to protest); *cf. Wickes Industries, Inc.*, ASBCA No. 17376 (Mar. 12, 1975), 75-1 BCA par. 11,180, pp. 53,259-60 (Where after passage of delivery date Government asks for proposed adjustments in schedule and prices the Government has waived its right to default for failure to deliver on time); see also, *Amecom Division, Litton Systems, Inc.*, ASBCA No. 19687 (Jan. 21, 1977), 77-1 BCA par. 12,329 at p. 59,567-8; *cf. G&M Electrical Contractors Co., Inc.*, GSECA 4512 *et al.* (Sept. 30, 1977), 77-2 BCA par. 12,787 (Appellant's motion, filed after the hearing, to strike claim, in notice of appeal and complaint, for extension of time, was denied even though neither the claim nor the C.O.'s decision expressly considered the issue because the par-

Thus, the questions are whether the defenses inherent in the appeal interest clause were presented to the contracting officer or has the Government waived some of those defenses in the circumstances of the conduct of this appeal?

Of course, the contracting officer had legal notice of the clause when GSA published its notice in the *Federal Register* on July 21, 1972 (37 FR 15152). The Government is also presumed to have knowledge of the court's decision in *Christian* (footnote 7 in the principal opinion). Likewise, it is presumed to know of this Board's decision in July 1977 in *Commonwealth Electric Co.* IBCA 1048-11-74 (July 15, 1977), 84 I.D. 407, 77-2 BCA par. 12,649; reconsidered at 84 I.D. 867 (Sept. 30, 1977), 77-2 BCA par. 12,781.

Now the facts in the instant appeal are as follows. The claim letters were filed about Aug. 15, 1973 (AF 19), and asked for compensation and time because of the change in method of placement of sand. The contracting officer denied liability and did not discuss quantum issues in his decision dated Nov. 29, 1973 (AF 12). The notice of ap-

ties had introduced evidence on the issue at the hearing).

McBride, Wachtel and Touhey, *Government Contracts*, p. 6-219.

Furthermore, our rules 43 CFR 4.110 and 4.111 give us the duty and authority to clarify the issues. The Aug. 3 order was intended to do just that, to make it clear that all the issues raised by the contractor's request for interest, the apparent absence of an interest clause, the *Christian* and *Commonwealth* rules incorporating the GSA interest clause and the possible issues in the interest clause itself were "in issue."

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peal said the appellant's costs exceeded \$500,000 and the Complaint asked for an equitable adjustment. Likewise, the Answer did not mention interest. The parties, with the Board's approval, then stipulated that the first hearing would encompass entitlement only. The Board found entitlement in a decision published Sept. 29, 1975. The contractor then claimed \$496,080 in a letter dated Feb. 26, 1976 (AF Doc. B-19). Interest was not mentioned. The contracting officer allowed \$79,573.57 cost. The second notice of appeal (dated Mar. 8, 1977) asked for interest at 8 percent per annum from Sept. 18, 1973, the date when the work was allegedly accepted. The quantum complaint reiterated this request. The quantum answer denied the interest claim saying that "there is no provision in the contract under which such interest can be paid." On Aug. 8, 1977 (the quantum hearing being scheduled for Sept. 12, 1977), the Board notified the parties in writing it had reviewed the first decision and understood that the upcoming hearing would involve four quantum issues as follows: (a) added costs, (b) profit on the original contract, (c) profit due appellant on the added work, and (d) interest. As to interest, the Board's order read as follows: "(a) Whether appellant is entitled to interest at all, and the legal basis therefor, see, in this regard, *Commonwealth Electric Co.*, IBCA-1048-11-74 (July 15, 1977) [77-2 BCA par. 12,649 and 12,781]. (b) The princi-

pal amount to which the interest rate would apply. (c) The rate of interest. (d) The time period of interest." (The complete order is set out in the margin.³)

³ *First Pre-Hearing Order*

Part I—Preliminaries

"1. The Board has reviewed the first appeal, IBCA-1014-12-73, the Complaint, Answer and Notice of Appeal and understands the purpose of the second appeal is to determine the equitable adjustment due appellant caused by the constructive change order to place the fill as actually placed rather than approximately evenly about 10,200 feet along the 100' berm with tapers at the North and South end shown on a typical cross section.

Part II—Major Issues

"The Board assumes that one method of proof of appellant's 'damages' would be to establish the following:

(1) The difference between the contractor's actual reasonable costs arising from the work actually performed and the reasonable costs that the contractor would have incurred if the work had been performed by placement of the fill, 10,200 feet evenly along the 100' berm with the tapers at the North and South ends. This includes finding both the 'reasonable actual' and the 'reasonable would-have-cost' figures so as to determine the difference.

(2) The profit the contractor would have made if the work had been performed by placement of the fill 10,200 feet evenly along the 100' berm with the tapers at the North and South ends.

(3) The profit, if any, that should be awarded appellant in the instant appeal and the legal basis therefor.

(4) Interest.

(a) Whether appellant is entitled to interest at all, and the legal basis therefor, see, in this regard, *Commonwealth Electric Co.*, IBCA-1048-11-74 (July 15, 1977), 77-2 BCA par. 12,649.

(b) The principal amount to which the interest rate would apply.

(c) The rate of interest.

(d) The time period of interest.

Part III—Discussion and Requests

"The parties having agreed to a hearing commencing on Sept. 12, 1977, it does not appear that there is sufficient time for any pretrial conferences or briefs to sort out and refine the legal and factual issues per rules 4.110 and 4.111. Thus, the Board does not presently intend to direct the parties to attend such conferences or file such briefs.

(Continued)

At the hearing counsel stipulated that if interest was applicable it should start to run on Dec. 27, 1973 (2 Tr. 17). See footnote⁴ for more of the discussion on the issue. Ap-

(Continued)

"Nevertheless, the Board will ask counsel to make opening statements the first day of the hearing—wherein they may explain their views of (a) the legal issues, if any, (b) the areas of factual agreement and factual dispute and (c) outline the major or representative legal authorities, if any, which they say support their positions.

"Furthermore, counsel are requested—but not directed—to confer—if sufficient time exists before hearing without interference with their hearing preparation—and attempt to stipulate as to those factual issues (a) which are not in dispute, and (b) those for which one party has no contradicting evidence, and (c) as to exhibits to which no objection will be made on the basis of authenticity.

Part IV

Order

"1. Appellant by a 'Supplemental Designation of Record on Appeal' dated Apr. 19, 1977, has requested that 25 specifically listed documents and all of appellant's exhibits in the first appeal be admitted into the record in the instant appeal.

"Counsel for the parties are requested—but not ordered—to confer, appellant to state its reasons supporting the admission of these documents, and Respondent to state its position thereon.

"Thereafter, to the extent that Department counsel does not agree to the admission of a document—appellant shall show cause, by oral argument the first day of hearing, as to why each of said documents is relevant to the decision of the instant appeal.

"2. The Board takes official notice of its prior decision, IBCA-1014-12-73."

⁴ Appellant's opening statement Sept. 13, 1977. (2 Tr. 9.)

"[A]nd that number is \$496,080.00 plus interest from the time we've noted our first appeal in this case, which was Dec. 27th, 1973."

The Government's opening statement included the following (2 Tr. 16-18):

"We recognize the * * * on the question of interest, we recognize the existence of the decision of the Board in appeal of *Commonwealth Electric Co.*, and we recognize that that decision may be controlling in this case. If it is, we are still in dispute with the contractor on the date from which interest runs. The contractor apparently thinks that interest should run from Sept. 19th, 1973; the

pellant introduced evidence of the P.L. 92-41 interest rates (AX-1), and the Government's only objec-

Government's position is that on that date there remained to be done clean up and demobilization and final inspection was not made until Dec. 5th, 1973, and we would submit that interest should not begin to run until Dec. 5th, 1973.

"MR. LAUGHLIN: Our date, I think, according to the decision as I understand the decision, it would be from the time of our first notice of appeal, and that date, as I recall was Dec. 27, 1973, so I don't really think that, based on Mr. Spillman's observation, there's any dispute on the time from which it would run in that context.

"MR. SPILLMAN: Page 8 of your Complaint is a contradiction of that.

"MR. LAUGHLIN: That is cor * * * in terms of the date I asked for, you're correct, yes, sir.

"MR. SPILLMAN: Yes, now * * *

"MR. LAUGHLIN: We're amending our request to * * * in accordance with what we understand the law to be, which would be from the date of the first notice of appeal, which we believe was Dec. 27, 1973.

"MR. SPILLMAN: Then there does not appear to be any dispute then on that subject?"

"MR. LAUGHLIN: And insofar as the rate that would be pertinent, our position is that that has been determined by the Secretary of the Treasury and been published from time to time. I have a compilation of that rate in various six-month increments here which I would propose to tender, subject to anybody showing that it's not accurate. I received these from the renegotiation Board. It is my understanding that these rates are determined every six months and it would be our position that whatever the award comes down, it would change as these rates change for the applicable pertinent periods. My off-hand compilation of the average through the end of this year would be an average of about 8.5 percent, taking them all and averaging them in, but our position would be that it would be for the rate during the period, during this four-year period.

"JUDGE STEELE: I have marked this as LaPorte's Exhibit A-1 for identification. Does the Government have any objection to receipt of it as an exhibit?"

"MR. SPILLMAN: We would have no objection to receipt of it as exhibit, reserving, however, the right to verify that these are in fact the rates which were in effect at the time.

"MR. LAUGHLIN: That would be understood.

"JUDGE STEELE: Fine, I will accept it on that basis."

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tion was that it wanted time to check the accuracy of the rates. The Government's only interest argument in its posthearing brief was that the Board should reverse *Commonwealth Electric Co., supra*, based on Judge Lynch's opinion at 84 I.D. 874, 77-2 BCA par. 62,106.

Thus, we come to decide whether all the issues inherent in *Commonwealth Electric Co., supra*, and in the "appeal interest" clause are "in issue" in this appeal and ripe for Board decision. In my opinion the above circumstances bring the matter within the second sentence of our rule, section 4.108 (b), and must be decided by us. The sentence reads as follows:

When issues within the proper scope of the appeal, but not raised by the pleadings or the appeal file described in § 4.103 (b) (1) are tried by the express or implied consent of the parties, or by permission of the Board, they shall be treated in all respects as if they had been raised therein.

(43 CFR 4.108 (b)).

The Government counsel received the Board's order on Aug. 8, 1977 (receipt in Appeal File). The appellant introduced evidence, and counsel argued the issue to the extent they desired in their posthearing briefs. I believe the whole interest dispute is now ripe for decision. However, one might argue that the "appeal interest" clause and *VTN Colorado, Inc., supra*, first requires an express decision by the contracting officer. On this rec-

ord we do not have clear evidence whether or not the contracting officer considered any of the issues relating to interest. We must assume that his agent (Government counsel) sent him copies of the pleadings and orders. But the matter can and should be decided by use of two other theories. First, Government counsel (not the contracting officer) speaks for the Government during an appeal. The Interior Department regulations says that "Department counsel designated by the Solicitor of the Department to represent the agencies, bureaus, and offices cognizant of the disputes brought before the Board shall file notices of appearance with the Board and shall notify the appellant or his attorney that they represent the Government." 43 CFR 4.106. Similarly, sec. 4.3 (b) says that Government counsel "shall represent the Government agency in the same manner as a private advocate represents a client." Secondly, in my view the Government (including the contracting officer) has had a fair *opportunity* to raise all issues and defenses relative to the interest clause and has waived those possible defensive issues which it has not raised or argued. Thus, I would calculate interest from Dec. 28, 1973, the date we (and presumably the contracting officer) received the first notice of appeal.

GEORGE S. STEELE, JR.

**APPLICATION OF THE ACREAGE
LIMITATION AND RESIDENCY
REQUIREMENTS TO SMALL RECLAMATION
PROJECTS ACT
PROJECTS**

**Bureau of Reclamation: Small Projects
Program**

The Small Reclamation Projects Act (SRPA), 43 U.S.C. § 422a *et seq.* (1970) has two principal objectives: (1) to provide more direct involvement of nonfederal public agencies in water development, and (2) to simplify the authorization procedures for smaller projects.

**Bureau of Reclamation: Small Projects
Program**

The SRPA does not incorporate general reclamation law.

**Bureau of Reclamation: Small Projects
Program—Bureau of Reclamation:
Excess Lands**

Congress intended to replace the excess land provisions of the general reclamation laws when it passed the SRPA by providing in sec. 5(c) thereof that excess landowners could receive federally subsidized water on their excess holdings if they would repay with interest "a pro rata share of the loan which is attributable to furnishing irrigation benefits * * * to land held * * * in excess of 160 acres."

**Bureau of Reclamation: Small Projects
Program—Statutory Construction:
Generally**

When those provisions of reclamation law which are specifically incorporated by SRPA are added to the provisions of SRPA itself, they form a complete scheme which is capable of standing by itself without need to incorporate the general body of reclamation law.

Bureau of Reclamation: Generally

The federal reclamation laws are limited by their own terms to application in the seventeen Western "reclamation states."

**Statutory Construction: Generally
(Supplemental Acts)**

When a statute is enacted as being "supplemental" to a general law, it will incorporate the provisions of that other law to the extent the provisions of the general law are not inconsistent with the supplemental statute, unless the intent is otherwise clear that Congress did not intend incorporation.

**Bureau of Reclamation: Small Projects
Program—Bureau of Reclamation:
Residency Requirements**

Even though Congress stated that the SRPA was to be a supplement to the reclamation law, SRPA's legislative history indicates that the Act was not intended to include the remainder of reclamation law, including the residency requirement.

**Bureau of Reclamation: Small Projects
Program—Bureau of Reclamation:
Excess Lands—Bureau of Reclamation:
Residency Requirements—Reclamation
Lands: Generally**

Where lands are receiving benefits from both an SRPA loan project and an ordinary reclamation project, general reclamation law, including residency and acreage limitations, apply to those lands.

Distinguished cases: Solicitor's Opinion (Applicability of the Excess Land Laws Imperial Irrigation District Lands), M-36675, 71 I.D. 496 (1964), distinguished; Solicitor's Opinion (Applicability of the Excess-Land Provisions of the Federal Reclamation

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Law to the Boulder Canyon Project Act), M-33902 May 31, 1945), distinguished.

M-36904

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OPINION BY

OFFICE OF THE SOLICITOR

TO: COMMISSIONER OF RECLAMATION

FROM: SOLICITOR

SUBJECT: APPLICATION OF THE ACREAGE LIMITATION AND RESIDENCY REQUIREMENTS TO SMALL RECLAMATION PROJECTS ACT PROJECTS

I. Introduction and Summary of Conclusions

You have asked me for an opinion of how the acreage limitation and residency requirements of reclamation law are to be treated in those areas receiving reclamation benefits by means of interest-free loans pursuant to the Small Reclamation Projects Act.¹ This opinion addresses that question, and reaches the following conclusions: First, SRPA exempts its beneficiaries from the divestiture requirements of the excess land law upon payment of interest as provided in the Act. Second, the Act does not automatically incorporate the remainder of the

body of reclamation law, including the residency requirement.

II. The Acreage Limitation, Divestiture and Residency Requirements of Reclamation Law

Sec. 5 of the Reclamation Act of 1902 (43 U.S.C. § 431 (1970)) 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.

The key restrictions of sec. 5 were carried forward, explicitly or implicitly, by subsequent Congressional amendments modifying and strengthening the means to achieve the basic objectives of the 1902 Act.²

Sec. 46 of the 1926 Omnibus Adjustment Act modified the procedure by which compliance with the excess land law is obtained, by requiring excess landowners to sign recordable contracts to dispose of their excess land to qualified non-excess purchasers within a certain time in order to receive reclamation water on their excess land. This so-called divestiture requirement remains in effect. See 43 U.S.C. § 423e (1970).

¹ See 43 U.S.C. § 422a *et seq.* (1970) (hereafter "SRPA").

² See, e.g., Act of Feb. 13, 1911 (36 Stat. 902), 43 U.S.C. § 468 (1970); Act of Aug. 13, 1914, 38 Stat. 868; Act of May 25, 1926 (44 Stat. 636), 43 U.S.C. § 423e (1970).

Although the Department ceased enforcing the residency requirement after passage of the 1926 Omnibus Adjustment Act, the residency requirement remains on the books as a basic part of reclamation law.³

Although Congress discussed the excess land law at some length in debating SRPA, which debate is analyzed in Part IV, below, Congress did not discuss the residency requirement. How residency should be regarded under that Act turns principally on how SRPA's provision making it a "supplement" to reclamation law is interpreted; a question which is dealt with in part V of this opinion.

III. The Small Reclamation Projects Act

The objectives and key provisions of this Act have been succinctly summarized by Professor Joseph Sax, a leading authority on reclamation law, in his treatise on "Federal Reclamation Law":⁴

The Small Reclamation Projects Act⁷⁸ has two principal objectives. One is a more direct involvement of nonfederal public agencies, including irrigation and conservancy districts in water development; the plans developed and projects constructed by these agencies may be financed by the federal government through loans and grants. The other purpose of the act is to simplify authorization procedures for smaller projects which, as was observed by a

³ No formal Solicitor's Opinion explaining the nonenforcement of residency after 1926 was ever prepared. A formal opinion is now in preparation explaining the reasons it remains a basic part of reclamation law.

⁴ J. Sax, "Federal Reclamation Law," in *II Water and Water Rights* (Clark Ed. 1967), ¶ 125.2 (hereafter, "Sax").

House committee,⁷⁹ for the most part, do not have the weight to pull their way through the long procedure required for specific authorization by the Congress.

In brief, the act provides that in the seventeen reclamation states and Hawaii⁸⁰ the United States may provide up to six and a half million dollars for a project the total cost of which does not exceed ten million dollars, upon a local agency's proposal meeting the general tests for feasibility under the reclamation laws. Grants are to be made to cover expenses of the types which would be nonreimbursable under reclamation plus half of recreation and fish and wildlife costs, and loans are to cover costs of the reimbursable type. The local organization must provide, at its own cost, the necessary land and water rights, and the Secretary is authorized to require it to bear other costs of construction, with the proviso that it must not be made to bear more than 25% of costs which would be reimbursable.

Repayment is to be completed not more than fifty years from the time when benefits first become available; irrigation loans are generally to be without interest, but where water for domestic, industrial, municipal or commercial power uses is provided, the loan must be returned with interest. The usual preference requirements for the sale of electric power are included.

⁷⁸ Act of Aug. 6, 1956, ch. 972, 70 Stat. 1044-1047, as amended by Act of July 12, 1960, sec. 31, 74 Stat. 421 and by Act of Sept. 2, 1966, P.L. 89-553, 80 Stat. 376, 43 U.S.C. 422a to 422f.

⁷⁹ H.R. Rep. No. 481, 84th Congress, 1st Sess., p. 2 (1956).

⁸⁰ The original bill covered the entire country, but was limited at the behest of the Department of Agriculture, which urged that outside the reclamation states it would be best to do the job in the context of the existing Agriculture efforts under the Watershed Protection and Flood Prevention Act of Aug. 4, 1954, ch. 656, 68 Stat. 666-668, 16 U.S.C. 1001 *et seq.* See Conference Report to Accompany H.R. 5881, H.R. Rep. No. 2200, 84th Congress, 2d Sess. — (1956).

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The Act's limit on the maximum federal contribution has been raised several times, with the current limit standing at the equivalent of ten million in Jan. 1971 dollars as the composite construction cost base.⁵ The federal share can be no greater than two-thirds of the maximum total project cost, the remainder being the local contribution.

IV. 160-Acre Limitation Under the Small Reclamation Projects Act

Sec. 5(c) of the Act (43 U.S.C. § 422e(c)) provides that, in repaying loans, beneficiaries shall repay *with interest* that

pro-rata share of the loan which is attributable to furnishing irrigation benefits in each particular year to land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres.

On its face, the precise effect of this section is ambiguous. Either it is a general and permanent exemption from the 160-acre limitation for those paying interest on that portion of the federal loan attributable to their excess lands, or it is merely a mechanism for temporarily recovering interest on those benefits accruing to excess lands during the period the land is under recordable contract. Because general reclamation law provides for the delivery of project water to

excess land under recordable contract without interest, this provision might be a device to limit the subsidy flowing to the excess landowner during this period. This would be consistent with Congress' consistent commitment to break up excess lands which receive federally subsidized water in the form of interest-free loans to construct irrigation works; especially since a substantial part of the subsidy accrues during the early years, when the excess landowner—rather than the intended project beneficiaries, the non-excess small family farmers—receives project benefits pursuant to the recordable contract.

The Department has, since passage of the Act, assumed that this interest repayment requirement effectively repeals the 160-acre limitation and its accompanying divestiture requirement. There has not, however, been a Solicitor's Opinion on the subject.

This interpretation has been criticized by Professor Sax. He suggests that no case can be made out of the legislative history for an express repeal.⁶ He also believes that it cannot be squared with Congress' express regard for the Act as a "supplement" to the reclamation laws,⁷

⁵ See 89 Stat. 104 (Dec. 27, 1975). The amount was originally \$5 million, and was raised to \$6.5 million by the Act of Sept. 2, 1966, 80 Stat. 376; and to \$10 million in 1971, 85 Stat. 488 (Nov. 24, 1971).

⁶ See Sax, ¶ 125.2. By contrast, the analysis of the legislative history by another noted expert on the reclamation program, Professor Paul Taylor, leads him to conclude that the divestiture requirement was repealed. See Taylor, "The Excess Land Law: Legislative Erosion of a Public Policy," 30 Rocky Mt.L. Rev. 480, 499-506 (1958).

⁷ See 43 U.S.C. § 422k (Supp. V. 1975).

which he believes makes the 160-acre limitation automatically applicable unless expressly repealed.⁸

I cannot agree with Professor Sax's view. Although the evidence is not totally consistent, several passages in the legislative history reveal an intent by Congress to replace the requirement of divestiture of excess lands with the interest payment provision. This evidence is sufficient to overcome any presumption regarding the character of SRPA as a "supplement" to reclamation law.⁹

This intent to replace the excess lands divestiture requirement with a payment of interest is found in Committee reports, House and Senate debates and the legal analysis of the bill provided by this Department. It is also supported by subsequent Congressional action.

The Senate Report described the pertinent provision of S. 2442, the same interest payment language as the final bill, as follows:

Landholdings may be in excess of 160 acres for any individual, but owners of excess land are required to pay interest on loans prorated to such excess irrigable holdings.¹⁰

This places no time limit on the holders of excess lands, as would have to be the case if the divestiture

requirement remained intact. That Congress intended to replace the excess land limitation is also shown by the fact that Senator Neuberger, a supporter of the ordinary excess land requirement, concurred separately to the Report solely to express the hope that the bill would be amended, on the Senate floor to include a provision making all projects under the bill subject to the 160-acre limitation. *Id.*, 10.

The legislative report of the Department of the Interior, contained in a letter of Assistant Secretary Aandahl to the Act's principal sponsor, Congressman Engle of California, makes several references to the excess lands issue. Aandahl compared several competing bills and found that only one contained a provision which would trigger the divestiture provisions of the excess land laws.¹¹ That provision is not contained in the Act which was adopted. Neither Aandahl nor the Department took a position on the excess lands issue, leaving it up to the Congress as a whole to decide, but his letter did suggest language and a structural change which would have made clear any intent to make the excess lands law appli-

⁸ The term "Federal reclamation law" is defined by 43 U.S.C. § 422b(b) as "the Act of June 17, 1902 (32 Stat. 388); and Acts amendatory thereof or supplementary thereto."

⁹ The meaning and effect of the term "supplement" to reclamation law is discussed fully in part V, below, dealing with residency.

¹⁰ S. Rep. No. 1073, 84th Cong., 1st Sess., 2 (July 21, 1955).

¹¹ "H.R. 104 requires that every contract executed under it shall, except as otherwise provided in the bill, conform to the provisions of the Federal reclamation laws with respect to repayment contracts entered into by irrigation districts and the delivery of water thereunder * * *. This provision, which is omitted in H.R. 384, would make the so-called excess land provisions of the Federal reclamation laws applicable to irrigation projects otherwise subject to the terms of the bill." H.R. Rep. No. 481, 84th Cong., 1st Sess., 6.

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cable.¹² Neither the suggested language nor the structural change was included in the Act as it came out of Congress.

A. *The Senate Debates*

The floor debates dealt with the issue in more detail than the Committee reports. During the Senate debate on S. 2442 on July 28, 1955, Senators Morse and Douglas offered amendments which would have created a bifurcated scheme under which interest would be paid on excess lands as a substitute for divestiture on *existing* projects, while divestiture of excess lands would be required for *new* projects. In order to accomplish this second objective, the Morse-Douglas amendments would have inserted an additional subsection (f) into sec. 5 which specifically incorporated the traditional 160-acre limitation.¹³ Debate on the Morse-Douglas amendments demonstrated considerable support

for the traditional divestiture requirement, and they were adopted by the Senate.¹⁴

The bill remained in conference nearly a full year. The Morse-Douglas amendments were dropped in the conference. Their absence led to a colloquy between Senators Douglas and Anderson which provides the strongest evidence in support of the argument that divestiture is required for new small projects:

DOUGLAS: * * * is my understanding correct that when the small projects reclamation bill passed the Senate, it included an amendment, sponsored by the Senator from Illinois, which provided that the present 160-acre limitation should be continued?

ANDERSON: That is correct; that provision was in the bill and *the conference report preserved the 160-acre principle as to all new land.*

DOUGLAS: The wording, however, which the Senator from Illinois inserted, was eliminated; is not that true? I do not find it in the bill as it has come back from conference.

ANDERSON: I think the exact language which the Senator from Illinois placed in the bill was eliminated, *but I am certain when I say to him that on all new land which will be brought in by the Small Projects Act the 160-acre limitation will apply.*

DOUGLAS: That is, land which previously had not received irrigation water?

ANDERSON: Land which never had been irrigated. *As to land which has*

¹² "We also recommend that, if your committee concludes that the excess land provisions of the reclamation laws shall be included in contracts for irrigation works under H.R. 104, provision therefor be made in a form other than that used in the bill. More specifically, we suggest that the bulk of lines 18-21, p. 6, be deleted at that point and reinserted on p. 8 before (d) as a separate subdivision of the section in which it occurs and that it be made clear that the requirement is applicable only in those cases in which a loan is made for irrigation works." *Id.*, 7.

¹³ The Secretary would not be authorized to approve contracts in the absence of "[p]rovisions conforming to the excess land requirements set forth in the third sentence of sec. 46 of the Act of May 25, 1926 (44 Stat. 649), if the new project or unit of a new project furnished irrigation service." 101 Cong. Rec. 11821 (1955).

¹⁴ See, e.g., 101 Cong. Rec. 11823 (1955) (Statement of Sen. Knowland); 101 Cong. Rec. 11825 (1955) (Statement of Sen. Morse); 101 Cong. Rec. 11826 (1955) (Statement of Sen. Douglas). The full debate and adoption of the amendment as reported at 101 Cong. Rec. 11820-11829 (1955).

been irrigated previously, of course, Congress has had a fairly consistent practice of not applying the 160-acre limitation to such tracts.

I call the attention of the able Senator from Illinois to the fact that in some cases there has been an attempt to limit the acreage. In this particular instance, for his information, I may say that if the area exceeds 160 acres, *then there must be a special payment of interest, beyond the 160 acres, during the entire period, at the rate which the Government is paying for its money, so long as that money is furnished.* That will tend to discourage the use of this type of water on supplemental land. That applies to everything over 160 acres.

* * * * *

ANDERSON: It was the will of Congress; but I point out to the Senator that we have come a long way toward meeting his objection. We have come from several thousand acres provided in the Big Thompson to 480 acres in the San Luis; and from the 480 acres in the San Luis, we came to 160 acres in this bill. The bill meets exactly the 160-acre limitation.

DOUGLAS: But on supplemental water one can go up to 480 acres in this bill provided he pays the interest.

ANDERSON: In this bill he will start to pay interest at 160 acres, whereas in the San Luis project there was an exemption up to 480 acres. No interest was paid up to 480 acres. So the bill is as close to a 160-acre limitation as it can come and still recognize supplemental water rights.

DOUGLAS: The 160-acre limitation, which was placed in the original Reclamation Act by Senator Newlands, of Nevada, and which was approved, as I remember it, by President Theodore Roosevelt, is basic to our water policy; namely, that the Government should make these expenditures in order to build up small farms rather than huge farms.

ANDERSON: Precisely; but I may say to the Senator from Illinois that the original Reclamation Act was related to areas in regions where the climate was extremely favorable, and the 160 acres

was sufficient for a farm. But in the areas at higher levels, where there is a shorter growing season and a rather limited time in which to grow a crop, the Bureau of Reclamation itself has recognized that the 160-acre limitation is not workable.¹⁵

Anderson's understanding of the bill does not seem to comport precisely with the bill to which he was directing his comments.^{15A} In fact, Assistant Secretary Aandahl sent a letter dated January 11, 1956 to Senator Anderson, specifically pointing out the difference between the House and Senate versions.¹⁶

Immediately after the vote on the Conference Report, Senator Douglas described the vote and its surrounding circumstances:

At the time the conference report was agreed to, I was not on the floor, although I had given notice that I wished to be notified when the conference report was brought up. Through an unavoidable error, that was not done. The Senator from New Mexico is perfectly innocent in the matter. He should in no sense be blamed for it. But the truth is that the conference report was agreed to with a very small attendance of Senators on the floor, and I did not have an opportunity to inquire about the bill as I had hoped to do.¹⁷

¹⁵ 102 Cong. Rec. 13659 (1956).

^{15A} In particular, Senator Anderson's remarks that all newly irrigated land under SRPA will be subject to the 160-acre limit, and assumedly the divestiture requirement, is plainly in error. His remark that Congress has fairly consistently not applied the 160-acre limit to previously irrigated lands is also not correct. Many, if not most, projects serve at least some lands which were already irrigated when the project was built, and Congress has exempted only a few of those projects, and always expressly by statute. See P. Taylor, "The Excess Land Law: Legislative Erosion of Public Policy," 30 Rocky Mt. L. Rev. 480, 485-99, 506-07 (1958).

¹⁶ The debates and legislative maneuvering on the issue are fully described in Taylor, *op. cit.* 30 Rocky Mt. L. Rev. at 499-506 (1958).

¹⁷ 102 Cong. Rec. 13659 (1956).

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Nearly a year later, Senator Morse described the atmosphere leading up to the approval of the Conference Report which approved deletion of the Morse-Douglas amendments:

* * * the bill was reported to the Senate on May 4, 1955, but the bill was not scheduled for consideration until July 28, 1955, in the closing days of the session of the Senate. I think there is real doubt that Senate passage would have been possible had an extended debate developed on the proposed amendment.

The bill remained in conference almost 1 year. Once again it came to the floor of the Senate very late in the session, on July 20, 1956. In the confusion of the closing days of the session the 160-acre provision was lost in the shuffle. Public supporters of the antimonopoly provision had little opportunity to mobilize. * * *¹⁸

Earlier that same day, Senator Douglas also referred to the vote: "I have always felt very unhappy about the speed with which that report was acted on by the Senate, before I could reach the floor, make a protest, and ask the Senate to stand by its original decision."¹⁹

Although such after-the-fact statements are not entitled to great weight, the reaction of the propo-

¹⁸ 103 Cong. Rec. 6740 (1957).

¹⁹ 103 Cong. Rec. 6737 (1957). Senator Anderson responded by saying that "no attempt" was made to "slide past the Senator from Illinois." *ibid.* Senator Anderson elaborated: "I think I might remind the Senator from Illinois that there was no yea-and-nay vote on the amendment. * * * If a yea-and-nay vote had been had on the floor, the Senator's 160-acre amendment would have met the same fate. I am quite certain * * * [He] was very anxious to have his amendment included. We agreed to take it to conference and see if the House conferees would agree to it. The House was adamant in refusing to accept [the Morse-Douglas amendment] because it is not a practical limitation to apply when supplemental water is being supplied."

nents of the divestiture requirements clearly reflects their feeling of failure to include the provision in SRPA.

B. The House Debates

The House debates similarly militate against the divestiture requirement. At one time, part of H.R. 5881 applied not only to the 17 reclamation states, but to the other states and Alaska and Hawaii as well. Congressman Saylor, an opponent of the bill on its merits, protested against the application of the 160-acre limitation:

Yet this bill which you have before you states that the 160-acre law will apply to all small projects [East and West] and they come along with a provision saying that anything that is over 160 acres the farmer will pay interest on.²⁰

Saylor made the same point later in the debates.²¹ As an opponent of the bill in general, Saylor had every reason to make the 160-acre limitation seem as onerous as possible, yet he did not suggest in his comments that divestiture would still be required even with the payment of interest.

Nor is there any suggestion of divestiture in the statement of Congressman Engle regarding the incorporation by reference issue. (*See* pp. 19-20, *infra*.)²²

²⁰ 101 Cong. Rec. 7145 (1955).

²¹ 101 Cong. Rec. 7146 (1955).

²² "[O]nly to the extent that this bill itself incorporates the law. For instance, the gentleman from Pennsylvania referred to the application of the 160-acre limitation with the proviso that areas in excess of 160 acres should be required to pay an amount which represented the interest on the capital investment in the excess areas." 101 Cong. Rec. 7148 (1955).

From the debates, then, we get a rather clear picture of Congress deliberately substituting the interest payment on 160 acres for the divestiture requirement. Given this Congressional intent behind the interest payment formula, the fact that SRPA's status as a "supplement" to general reclamation may arguably incorporate general reclamation law cannot be dispositive on whether the 160-acre limitation applies. In any event, I conclude below that SRPA does not incorporate general reclamation law.

Congress' use of what became known as the "Engle formula" (interest payment for excess lands) has an interesting history in connection with authorizations for other projects. Five days before the President signed SRPA into law, he signed a bill authorizing the Washoe Project in Nevada and California.²³ This law provided that any contract for supplemental irrigation water did not have to include the divestiture requirement of the 1926 Act if such contract, "in lieu of such provisions, provides that" interest shall be paid on the allocation to the excess lands served.²⁴

The difference between the provisions in the Washoe Project Act and those in SRPA can apparently be attributed to the way in which the interest payment sections were included in the respective acts, rather than to any desire by Congress to adopt a scheme for the Washoe Project different from that found in

SRPA. The original bills to authorize the Washoe Project introduced in both the House and the Senate contained a blanket exemption from the excess land laws.²⁵

The House substituted the less drastic interest payment formula and the Senate agreed.²⁶ Presumably those who favored elimination of the 160-acre requirement shared the belief expressed by some in the debates on SRPA, that a bill could not pass Congress without some excess land provision. The language of the Conference Report supports the view that the same compromise reflected in SRPA occurred here.²⁷

Three years later, Congress authorized construction of the Merced Division on the Lower Rio Grande Project in Texas, and incorporated the interest payment formula for excess lands in terms nearly identical to SRPA.²⁸ But the Act went on to provide specifically as follows:

²³ See Sen. Rept. No. 1829, 84th Cong., 2d Sess. 7 (1956); H.R. Rept. No. 2055, 84th Cong., 2d Sess. 6 (1956).

²⁴ H.R. Rep. No. 2834, 84th Cong., 2d Sess. 5 (1956).

²⁷ "The other change adopted by the conference committee to the House-passed bill relates to project excess lands. The Senate passed bill exempted lands receiving supplemental water under the Washoe project from the excess lands provisions of reclamation law. The House-passed bill retained such excess lands provisions but provided an alternative procedure which the organizations could follow if they desired water service to lands without compliance with excess lands provisions. The alternative procedure would require that interest be paid on the pro rata share of the irrigation allocation attributable to furnishing irrigation benefits to excess lands receiving supplemental water. Such a procedure would remove the interest subsidy from service to excess lands." *Id.*

²⁸ Act of Apr. 7, 1958 (72 Stat. 82), sec. 1.

²³ Act of Aug. 1, 1956, 70 Stat. 775, ch. 809.

²⁴ *Id.*, sec. 2(b).

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The excess-land provision of the Federal Reclamation laws shall not be applicable to lands in this project which now have an irrigation water supply from sources other than a Federal reclamation project, and for which no new waters are being developed.²⁹

Although such an express clarification of the effect of the interest payment formula was not included in SRPA, the Senate Report implies that the interest payment formula was included as an amendment to conform to authorization to SRPA. The Report describes the provision as requiring a "premium payment in the form of interest for the delivery of water to land held in private ownership by any one owner in excess of 160 irrigable acres." S.Rep. No. 603, 85th Cong., 1st Sess. 1 (1957). Again, no time limit was expressed on this substitution of interest payment for the excess land law, as would be expected if the interest was only to be paid prior to divestiture of the excess lands. The amendment had in fact been recommended by the Bureau of the Budget to the Senate Interior and Insular Affairs which letter is included in the Senate Report at p. 5.

The House Report also makes no reference to SRPA, but implies the same thing:

The committee added language requiring the district to pay interest on that part of the cost attributable to furnishing service to excess lands. The purpose of this amendment is to remove the Federal subsidy, by reason of interest-free

money, from serving excess lands. Other than this provision, the legislation contains no further limitation on ownership. The lands are exempt from the usual excess-lands provisions of reclamation law.³⁰

A letter from Assistant Secretary Aandahl to Congressman Aspinall included in the House Report explains this provision expressly with reference to SRPA:

H.R. 4279 would provide in lieu of the excess land's provisions of the Federal reclamation laws, for the payment of interest by the owners of excess lands *similar to the requirement of section 5 (c) (2) of the Small Reclamation Projects Act of 1956* (70 Stat. 1044), as amended. An identical provision is contained in the Act of April 7, 1958 (72 Stat. 83) relating to the Mercedes division of the same Lower Rio Grande rehabilitation project.³¹

Thus, despite the differences in formulation, none of these analogous acts cast doubt on the conclusion reached above concerning the proper construction to be placed on SPRA's interest repayment provision.

One other factor supports the conclusion I reach on this point. Small Reclamation Project Act loans are repaid in full, although without interest except on excess

²⁹ H. Rep. No. 1002 (85th Cong. 1st Sess. p. 3) (1957).

³¹ H.R. Rep. No. 971, 86th Cong., 1st Sess. 4 (1959) (Italics added). The next year, Congress authorized the La Feria Division of the same Rio Grande Project, and incorporated the interest payment formula for excess lands. Here again, as in the Washoe project authorization, Congress specifically provided that the provision was "*in lieu of the excess-lands provisions of the Federal reclamation laws.*" (73 Stat. 641, Sept. 22, 1959) sec. 1.

²⁹ *Id.*, § 3.

lands. There is no additional subsidy to project beneficiaries in the form of a subsidy to irrigators from other project functions, notably power revenues. In other, non-SRPA reclamation projects, these additional subsidies from power revenues can become quite large, because irrigation beneficiaries have usually been charged for water up to their "ability to pay." The difference in type and amount of subsidy is an additional reason to suppose that Congress intended the interest payment in SRPA to substitute completely for the excess land divestiture requirement, and the matter would perhaps not be so easy if the subsidy from power revenues were present.

IV. Residency Under the Small Reclamation Projects Act

Sec. 11 of SRPA, 43 U.S.C. § 422k, provides:

This Act shall be a supplement to the Federal reclamation laws and may be cited as the Small Reclamation Projects Act of 1956.

If this language is construed as incorporating the general reclamation laws, the residency requirement applies to SRPA projects because nothing in SRPA is inconsistent with the residency requirement. If the word "supplement" is construed to mean that federal reclamation law is not incorporated except for those provisions specifically set out in SRPA, then the residency requirement does not apply.

Unfortunately, the evidence on this point is extremely conflicting. It may be summarized as follows:

Basically, the bill's sponsors clearly indicated in hearings and floor debates that they did not intend to incorporate the general federal reclamation laws. On the other hand, the Senate Report and the Conference Report both state, albeit in more general language, that the reclamation laws generally would apply. This latter view was also supported by an opponent of the bill on the floor.

One other reclamation statute, the Boulder Canyon Project Act, Dec. 21, 1928 (45 Stat. 1057) 43 U.S.C. § 617 *et seq.* (1970), specifically provides that it is both supplemental to *and governed by* the reclamation laws. 43 U.S.C. § 617m (1970). While the difference in language suggests that sec. 11 of SRPA is insufficient to cause incorporation, a previous Solicitor's Opinion analyzing the Boulder Canyon Project Act treats the second part of sec. 14 as if it were surplusage.

Case law interpreting the nature of supplemental statutes (almost exclusively from state courts), generally militates in favor of incorporation.

The remainder of this memorandum sets out and discusses in detail the conflicting evidence in the order of dignity generally accorded the document in which the statement is found, beginning with the general structure of the SRPA, continuing with the legislative history, and then discussing the Boulder Canyon Project Act, applicable federal and state case law, and the Bureau's administration of the Act.

A. *SRPA's language and structure*

The language and structure of SRPA itself offer clues as to the meaning of sec. 11. Sec. 1 provides:

That the purpose of this Act is to encourage State and local participation in the development of projects *under the Federal reclamation laws* and to provide for Federal assistance in the *development of similar projects* in the seventeen western reclamation States *by non-Federal organizations.*³² (Italics added)

The italicized reference to federal reclamation law was raised several times during the hearings and debates for the proposition that the general reclamation laws would apply to small projects.

The response from the sponsors, who opposed the "general incorporation" theory, was that the bill had two purposes. The local participation in the development of projects under the federal reclamation laws is provided for in sec. 6.³³ The main portion of the Act with which we are concerned deals with small projects which are the "similar projects" constructed by non-Federal organizations. This, the sponsors imply, means that general reclamation laws should not apply merely because these projects are similar.

Sec. 2(b) of SRPA, 43 U.S.C. § 422b(b) 1970, states that the "Federal reclamation laws shall mean

the Act of June 17, 1902 (32 Stat. 388), and Acts amendatory thereof *or supplementary thereto.*" (Italics added)

The italicized phrase suggests that incorporation was intended. If the general concept of "Federal reclamation law" embraces supplemental acts, and SRPA is supplemental, then it incorporates general reclamation law.

On the other hand, SRPA specifically incorporates or otherwise references a significant amount of general reclamation law. *See, e.g.;* sec. 2(c), 43 U.S.C. § 422b(c) (1970) (definition of "organization" as, *inter alia*, having capacity to contract with the United States "under the Federal reclamation laws"); sec. 4(a), 43 U.S.C. § 422d(a) (1970) (applicants for funds must submit plans "comparable to those included in preauthorization reports required for a Federal reclamation project"); sec. 5(b), 43 U.S.C. § 422e(b) (1970) (one of the elements setting the monetary ceiling for the SRPA contract is "* * * that portion of the estimated cost of constructing the project which, if it were constructed as a Federal reclamation project," would be properly allocable to nonreimbursable functions such as recreation); sec. 7, 43 U.S.C. § 422g (1970) (to the same effect); and sec. 8, 43 U.S.C. § 422h (1970) (Fish and Wildlife Coordination Act applicable).

These express references might be viewed as superfluous if general

³² 43 U.S.C. § 422a (1970) (Italics added).

³³ 43 U.S.C. § 422f (1970). *See* letter from Assistant Secretary Aandahl to Congressman Engle in H.R. Rep. No. 481, 94th Cong., 1st Sess., 6 (1955).

reclamation laws were incorporated into the Act. The detail of SRPA and the extent it specifically incorporates other reclamation laws by reference makes SRPA able to stand alone without reference to other reclamation laws.

It should also be noted that ordinary Federal reclamation projects are partially paid for out of the Reclamation Fund, which is generated from public land mineral fees and royalties. SRPA funds are appropriated annually out of the General Treasury, subject to an authorized cost ceiling which has been periodically raised by Congress. *See Note 5, supra.* This supports an inference of non-incorporation.

On balance, though, a review of the statutory language is not conclusive either way. We must then look to the legislative history for further guidance.

B. The Conference Report

The Conference Report contains one suggestion that incorporation was intended. The statement of the managers on the part of the House explains the deletion in the final bill of provisions which would have extended the benefits of at least part of SRPA to the nonreclamation states:

Recently, the House passed H.R. 8750, which would amend the Watershed Protection and Flood Prevention Act, and this legislation is presently pending in the Senate. Enactment of H.R. 8750 or similar legislation would give the non-reclamation areas of the Nation a program similar to that provided by H.R. 5881 but *without the problems inherent in attempting to administer basic rec-*

*lamation legislation in non-reclamation states.*³⁴

The obvious inference from this statement is that federal reclamation law will be incorporated in the reclamation states. Other interpretations are, however, possible. As we have seen above, some sections of SRPA expressly incorporate other parts of reclamation law. *See pp. 16-17, supra.* Some of these standards may have been ill-suited to the East. The House managers might also have been referring to the fact that the Department of Agriculture, which would have supervised projects in the East under the Senate version, would have been applying laws with which it was unfamiliar.

The statement in the Conference Report was signed by Congressmen Engle, Aspinall, Miller and O'Brien. As will be explained below, the first two made very clear statements in the hearings and floor debates that incorporation was not intended (*See pp. 19-20, 23-24, infra*). There is no evidence that they later changed their minds, nor did the wording of section 11 change. If the House conferees were consistent, their caution about nationwide application should probably be construed to mean something other than incorporation.

C. Senate Report

In describing the purpose and provisions of Title I (that title applicable to the reclamation states), the Senate Report on S. 2442 states:

³⁴ H.R. Rep. No. 2200, 84th Cong., 2d Sess., 7 (1956) (Italics added).

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The provisions of the reclamation laws, generally, will apply in the operation of these small enterprises. They must be shown to be justified under criteria used in normal reclamation procedures with respect to approval and authorization.³⁵

Although this statement directly supports incorporation, it might be construed merely to refer to the fact that sec. 4(a) of SRPA requires applicants to submit plans "comparable to those included in pre-authorization reports required for a Federal reclamation project." 43 U.S.C. § 422e(b) (1970).

It is interesting to note that the Senate bill had two titles, one applying to the seventeen western states which already enjoyed the benefits of the reclamation program and the other applying to the rest of the country. Only the title dealing with the western states defined the program as a "supplement" to reclamation law.

D. House Report

The House Report on H.R. 5881, H.R. Rep. No. 481, 84th Cong., 1st Sess. (1955), contains little support for either theory. Unlike the Senate bill, H.R. 5881 had only one title, applying to all states. That title did contain a section describing the proposed bill as a "supplement" to reclamation law.

E. Debates

The floor debates, particularly those in the House, tend to support nonincorporation.

Congressman Engle, the sponsor of the House bill, stated during the debate of May 26, 1955:

* * * All the reclamation laws that apply to this legislation are written within the four corners of this bill, which is 10 pages long, and to the extent that the reclamation laws appear in this bill it is applicable to these projects and not otherwise. This legislation does not incorporate by reference a volume an inch and a half thick containing the reclamation laws, with all the additions, amendments and supplements since 1902. Such portion of the reclamation laws as apply to these projects are within the four corners of the bill.

* * * * *

There are 1 or 2 provisions like that [interest payment on excess lands] where standards for instance, with reference to the engineering projects as required under reclamation law are indicated, and only those, not the general reclamation law.³⁶

To the charge that SRPA would bring the East under the reclamation laws, Engle replied:

I am sorry to disagree, but we have taken this matter up with the legal experts in the Department of the Interior and we have gotten legal opinions on it.³⁷ It does not. *It is a supplement to the reclamation law. It is not an amendment of the reclamation law.* The reclamation law applies only to the extent mentioned in the bill itself. The reclamation law generally does not apply.

* * * * *

[O]nly to the extent that the reclamation law itself is specifically referred to

³⁵ 101 Cong. Rec. 7148 (1955).

³⁷ We have been unable to locate this legal opinion or any record of it. Mr. Engle is perhaps referring to the testimony of Mr. Witmer from the Solicitor's Office who testified during the House hearings (*see*, pp. 21-23, *infra*).

³⁵ S. Rep. No. 1073, 94th Cong., 1st Sess. p. 2 (1955).

and made applicable within the four corners of the bill does it apply.³⁸

Other Congressmen, including those closely associated with the bill, voiced the identical analysis.³⁹

Congressman Saylor, an opponent of the bill, dissented from this view, arguing that extension of the bill to the East would bring general reclamation law to the East.

I disagree violently with the distinguished chairman [Engle] * * * who says that the only place the reclamation law is tied in is within the four corners of this bill. He has not read very carefully the bill which now bears his name because this bill will incorporate every one of the reclamation laws that are written in the books; not those that affect particular projects, no; but the general reclamation law of 1902 and the reclamation law of 1939 are in this bill.⁴⁰

The two views of the same bill are polar opposites, although Congressman Saylor's view as a project opponent perhaps deserves less weight than the views of the sponsors. *Mas-*

tro Plastics Corp. v. NLRB, 350 U.S. 270, 288 (1956).

It might be argued that each of the quoted statements against incorporation was made in the context of countering fears that the reclamation law *in toto* would be extended to the East. But since the federal reclamation laws are limited by their own terms to the reclamation states, they might not apply to the East even if incorporation did occur; that is, there would be incorporation in the West but not in the East. However, the opponents of incorporation, the bill's sponsors, made almost exactly the same statements in the hearings in response to questions totally divorced from the issue of the applicability of the reclamation laws to the East (see discussion at pp. 23-24, *infra*).

F. Hearings

During the House Hearings in Feb. 1955, the following interchange occurred between Mr. Witmer, testifying on behalf of the Department's Solicitor Office, and a number of Congressmen:

MR. YOUNG: In the present form of these bills does the 160-acre limitation apply?

MR. WITMER: In H.R. 104 the land limitation provision would be required. In H.R. 384 it would not be applicable.

MR. YOUNG: The power preference would apply in both of them?

MR. WITMER: The power preference is not mentioned in either of them.

MR. YOUNG: In that case it would not apply?

MR. WITMER: My answer—and I speak only for myself—is that it would not be applicable. In other words, powerplants that would be built under these

³⁸ 101 Cong. Rec. 7152 (1955) (Italics added).

³⁹ MR. ASPINALL: * * * May I suggest, Mr. Chairman, that this legislation is supplementary to the reclamation act as such; that it does not take the place of the reclamation law now on the statute books, but is supplementary thereto; and, only where the legislation now before us makes direct reference to the general reclamation law will the general reclamation law be followed, otherwise the bill now being discussed will be followed. 101 Cong. Rec. 7142f (1955).

MR. JONES OF ALABAMA: Let me say emphatically and positively that the amendment I expect to offer [to include the non-reclamation states] will not touch side, edge, nor body, any provision of the reclamation law or any other law as far as amending it, superseding it, or bringing into play anything that is not already before us in this bill. 101 Cong. Rec. 7151 (1955).

⁴⁰ 101 Cong. Rec. 7151 (1955).

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bills will be the local interest power-plants.

MR. DAWSON: Will the gentleman yield at that point?

MR. YOUNG: Yes.

MR. DAWSON: Would not that be covered on page 2, subdivision (b), that the Federal reclamation laws shall be applicable to these projects? Does that not include the power preference?

MR. WITMER: Sir, what you have just referred to is merely a definition of the term "Federal reclamation laws." It does not at that point say that the Federal reclamation laws shall be applicable. The bills, both of them, provide in their last section that the act shall be a supplement to the Federal reclamation laws.

Again, *speaking only for myself, it is my judgment that saying it is a supplement to the Federal reclamation laws does not make all the reclamation laws applicable, without more.*⁴³

Later during the same hearing:

MR. YOUNG: Page 1 of the bill states the purpose of the act is to encourage State and local participation in the development of projects under the Federal reclamation laws. Would that raise any doubt as to whether or not Federal laws applied? It seems possible to me to argue that Federal reclamation laws might.

MR. WITMER: And it goes on further—and to provide for Federal assistance in the development of similar projects in the seventeen western reclamation states by non-Federal organizations.

I think both the title and the state-

⁴³ *Federal Assistance for Small Reclamation Projects: Hearings on H.R. 104, H.R. 348, and H.R. 3817. Before the Subcommittee on Irrigation and Reclamation of the House Committee on Interior and Insular Affairs, 84th Cong., 1st Sess., 2526 (1955) (Italics added).* This off-the-cuff opinion was contrary to a published opinion of the Solicitor issued ten years earlier. See *Sol. Op.*, M-33902 (May 31, 1945) discussed at p. 25, *infra*.

ment of purpose make it clear that it is double barreled.⁴³

Congressman Aspinall voiced much the same view.⁴³

Commissioner of Reclamation Dexheimer testified that the feasibility and reasonable risk provisions did not refer back to the reclamation law and reclamation standards.⁴⁴

In addition to these specific references to incorporation, there are numerous instances in the hearings in both the House and the Senate where it is obvious that the Representatives, Senators and witnesses clearly assumed that if a specific provision were not spelled out in the bill, it would not apply.⁴⁵

⁴² *House Hearings, supra*, at 27.

⁴³ " * * * Now I am not quite sure that we have defined the situation clearly enough in this bill with reference to what portions of the reclamation laws should and should not apply, and no doubt this bill needs some clarification on that point.

There are a great many things in the reclamation law; it is quite a book, if you get it out and read it. We would not want for instance, to impose upon these local districts the construction standards and some of those other things that are specifically set forth in the reclamation law." *House Hearings, supra*, at 26.

⁴⁴ *House Hearings, supra*, at 30. This of course is contrary to the statement in the Senate Report quoted above; see text accompanying n. 35.

⁴⁵ Because the instances in which a speaker at the hearings assumed nonincorporation are so numerous, and because it is often necessary to reproduce an entire page to make the assumption clear, the following summary gives only the speaker, the specific provision of the reclamation laws at issue, and the page number in the hearings: (a) House hearings cited above: Doyle Boen, National Reclamation Association (160-acre limitation) (p. 50); Congressman Engle (160-acre limitation) (p. 61); Interchange between Congressmen Westland and Engle regarding power preference

(Continued)

With the exception of Congressman Saylor's direct statement to the contrary, it seems fair to conclude that, at least at the time of the hearings and debates, both Houses were working on the assumption of non-incorporation.

G. *The use of "supplement" in the Boulder Canyon Project Act*

Sec. 14 of the Boulder Canyon Project Act, enacted in 1928, provides:

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.*⁴⁶ [Italics added.]

(Continued)

clause (p. 73); Interchange between Congressmen Christopher, Aspinall, Sisk and witnesses (160-acre limitation) (pp. 75-76); Lloyd Halvorsen, National Grange and various Congressmen (160-acre limitation and power preference clause) (pp. 85-86); Written statement of James Patton, National Farmers Union (160-acre limitation, power preference clause) (p. 99); (b) the Senate Hearings reported in *Small Projects—Distribution Systems, Hearings on S. 164, S. 105, H.R. 103, H.R. 513, Before the Senate Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, 84th Cong., 1st Sess., (1955)*: Interchange between Senator Anderson and John Bliss, National Reclamation Association (160-acre limitation) (p. 9); Senator Jackson (160-acre limitation) (p. 17); Mr. Doyle Boen, Eastern Municipal Water District, Hemet, California (160-acre limitation) (p. 29); Written statement of William Welsh, National Reclamation Association (160-acre limitation) (pp. 71-72); William Welsh, National Reclamation Association (160-acre limitation, power preference clause) (p. 87); Letter from Paul Rowell, Upper Columbia River Basin Commission of Oregon to Senator Anderson (160-acre limitation) (p. 98); Interchange between Senators Anderson, Kuchel, and Elmer Bennett, Department of the Interior (issue of who will hold title to small projects when they are paid out) (p. 101).

⁴⁶ 43 U.S.C. § 617m (1970).

On its face, the inclusion of the second clause in sec. 14 suggests that Congress believed the first clause alone was insufficient to cause incorporation.

However, a Solicitor's Opinion on this section, issued eleven years before SRPA's passage, treated the second clause as if it were surplusage and interpreted the first clause as sufficient by itself to cause incorporation. In this opinion, the Solicitor determined that the Coachella Valley was subject to the 160-acre limitation. *Solicitor's Opinion, M-33902* (May 31, 1945). The Solicitor concluded (p. 5):

When Congress in sec. 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, "supplement," as used in the Boulder Canyon Act, means an addition to legislative enactments already existing.

In support of his interpretation of the term "supplemental," the Solicitor cited numerous federal and state cases which are discussed below.

In a related opinion nineteen years later, the Solicitor advised that the excess land laws applied to the Imperial Irrigation District. *Solicitor's Opinion, M-36675, 71 I.D. 496* (1964) 1964. The Solicitor found a Congressional directive outside sec. 14 of the Boulder Canyon Project Act to apply the 160-acre

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limitation to the Imperial Valley, but also stated:

This conclusion is reinforced by sec. 14 which provides that reclamation law "except as otherwise herein provided" shall govern "the construction, operation, and management" of the project works. *Id.* at 5.

Thus the 1964 opinion relies on the second, rather than the first clause of sec. 14. An appendix to the opinion sets forth Footnote 5 of the Memorandum in Behalf of the United States with Respect to Relevance of Non-Compliance with Acreage Limitation of Reclamation Law, filed in the case of *Arizona v. California*, No. 10 Orig., Oct. Term 1957, Before the Honorable Simon H. Rifkind, Special Master. In that memorandum, Solicitor General Rankin argued that sec. 14 incorporated the general reclamation laws, but relied more heavily on the second clause than the first.

Sec. 14 is written in such a way that the sufficiency of the first clause alone need never arise. Although the 1945 *Solicitor's Opinion* is the only one of the three that directly suggests that the first clause is sufficient to cause incorporation, it contains the most in depth analysis of sec. 14. It also was the only one written before Congress debated and enacted SRPA.

H. Federal Court Decisions

Solicitor Harper's 1945 opinion cited a federal court case, *Six Companies, Inc. v. De Vinney County Assessor*, 2 F. Supp. 693 (D. Nev.

1933). That case held that the Secretary had no authority under either the Boulder Canyon Project Act or the reclamation law to accept the cession from the State of Nevada of exclusive jurisdiction over the Boulder Canyon Project Reservation. The court looked beyond the Boulder Canyon Project Act to general reclamation law because, in its words, "the Project Act is deemed a supplement to the Reclamation Law."

Two more recent decisions from the Ninth Circuit have wrestled with the meaning of "supplemental to the reclamation laws." In *United States v. Imperial Irrigation District*, 559 F.2d 509 (9th Cir. 1977), the court upheld Solicitor Barry's 1964 opinion that the 160-acre limitation does apply to the Imperial Valley. In reaching this conclusion, the court reasoned:

* * * Sec. 14 of the [Boulder Canyon] Project Act stated that the Act was a "supplement" to the reclamation law. 43 U.S.C. § 617m. By the operation of Sections 12 and 14, the Project Act was incorporated into the framework of the reclamation laws * * *.⁴⁷

Although the court there relied on the first clause, later in the opinion primary emphasis is placed upon the second clause of sec. 14 of the Boulder Canyon Project Act:

Sec. 14 of the Project Act reinforces the command of Sec. 4(b) by providing that the "reclamation law shall govern the construction, operation, and management of the works herein authorized except as otherwise herein provided." 43

⁴⁷ 559 F. 2d at 527.

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had to decide the precise question whether the word "supplement" is sufficient to incorporate all reclamation law not inconsistent with SRPA. In *United States v. Imperial Irrigation District, supra*, the court could depend on the second clause of sec. 14 of the Boulder Canyon Project Act. In *Molokai, supra*, the provision in the reclamation laws actually was inconsistent with SRPA. In addition, the Ninth Circuit held that 43 U.S.C. § 521 (1970) would not apply by its own terms since that section applies only to sales of water and the contract in *Molokai* was for space in the irrigation system's ditches through which the resort complex would run its own water.

I. State Court Decisions

The 1945 *Solicitor's Opinion* cites a sizable number of state decisions for the proposition that a supplemental law incorporates the general body of law it supplements. My review of state cases indicates that they do indeed support that proposition, and that Mr. Witmer was probably in error when he testified in the House hearings that the language in sec. 11 was insufficient to cause incorporation. (See pp. 21-23, *supra*.) Of particular interest is *First State Banks of Shelby v. Bottineau County Bank*, 56 Mont. 363, 185 P. 162 (1919). In that case, the issue was whether the Enlarged Homestead Act, Feb. 19, 1909, 35 Stat. 639, incorporated the general body of homestead law such that

the entire 360 acres would be exempt from execution on a judgment. The Enlarged Homestead Act contains no language making it supplementary to the homestead laws. In other ways, however, it does resemble the SRPA. Both Acts attempt to fill a gap in existing legislation. Neither represents a totally new idea or program. Both refer on numerous occasions to standards found in the general legislation. The court held:

The Enlarged Homestead Act is merely supplementary to the original Homestead Law and is to be construed as a part of it. *Id.*

Despite the similarities, the SRPA and Enlarged Homestead Act differ in many important respects. The Enlarged Homestead Act is considerably shorter than SRPA. More important, the basic structure of the Enlarged Homestead Act suggests that the relationship between it and the basic homestead law differs from that between SRPA and the reclamation laws. The Enlarged Homestead Act refers to the provisions of the homestead laws only where it imposes a requirement in addition to those in the homestead laws and wants to make clear that the addition is not to be interpreted so as to supplant the original requirements. For example, sec. 2 provides:

That any person applying to enter land under the provisions of this Act shall make and subscribe before the proper officer an affidavit as required by section twenty-two hundred and ninety of the

Revised Statutes, and *in addition there-to shall make affidavit that the land sought to be entered is of the character described in section one of this Act.* * * * [Italics added]

Sec. 5 does not follow this pattern. It provides that nothing in the Enlarged Homestead Act affects the rights of entrymen to make a regular homestead entry in the Enlarged Homestead states.

In the SRPA, references to the reclamation laws are generally not accompanied by requirements additional to those in the reclamation laws. Nor are they similar to sec. 5 of the Enlarged Homestead Act. *First State Bank of Shelby v. Bottineau County Bank, supra*, is, therefore, not necessarily controlling of the SRPA.

J. Administrative Practice

The administrative practice of the Bureau of Reclamation has been to apply only those standards of the reclamation laws which are contained within the four corners of the Act. Nonetheless, SRPA contracts state that they are made:

* * * in pursuance generally of the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory or supplementary thereto, and particularly pursuant to the Small Reclamation Projects Act of 1956 (Aug. 6, 1956; 70 Stat. 1044) as amended, all herein collectively styled the "Federal Reclamation Laws."²²

It is not clear why this broad incorporating language is used. The body of the contract does not cite to or incorporate provisions of the reclamation laws other than those specifically required by SRPA. It

might be boiler-plate language inserted without reflection; or because it was viewed as necessary in order to give effect to those provisions of the reclamation laws specifically required by SRPA.

The authorization clause does not by itself impose contractual obligations. It merely designates those statutes upon which the Department relies for authority to enter the contract. Given what is apparently a consistent administrative practice of not including the general reclamation standards in the body of a SRPA contract, it is not clear whether that threshold authorization represents an administrative practice of considering the SRPA part and parcel of the general reclamation laws.

K. Conclusion

The record on this point is mixed. The use of the word "supplement" in this statute is ambiguous and must be defined by reference to the legislative history of this Act. The Act's sponsors were insistent in the debates that "supplement" did not mean wholesale incorporation, although the better view would probably be to hold that wholesale incorporation should result. Certainly the view of the state cases and prior opinions construing similar language in other acts argues strongly for such a conclusion.

It is likely that Congressman Engle and other sponsors (as well as Mr. Witmer from the Solicitor's Office) were in error when they asserted positively that a "supplement" does not incorporate the general law, but they asserted it nevertheless. I must assume—Congressman

²² Contract No. 14-06-500-1388 Amendment No. 1 between United States of America and the Hidalgo and Willacy Counties Water Control and Improvement District No. 1.

SPECIES ACT (DEC. 28, 1973, 87 STAT. 884, 892)

July 19, 1978

Saylor's lone voice to the contrary notwithstanding—that Congress as a whole made SRPA a “supplement” to reclamation law on the basis of that understanding. Therefore, I conclude that the Act does not incorporate the remainder of reclamation law, including the residency requirement. In future instances where the sponsors are not so clear, however, a different result might obtain.

One final *caveat*: I understand that SRPA loans are being used with increasing frequency to build facilities for projects which receive benefits from other, ordinary reclamation projects. It should be clear that the non-application of residency under SRPA does not waive the residency requirement for those lands also receiving water from projects authorized under reclamation law. Specifically, where lands are receiving benefits from both an SRPA loan and an ordinary reclamation project, the residency requirement attaching to the latter would apply. The same holds true for the acreage limitation and its divestiture requirement. Excess lands receiving non-SRPA benefits under reclamation law must be divested according to that law, even if interest is paid on that portion of the SRPA loan serving excess lands.

This opinion was prepared with the assistance of John D. Leshy, Associate Solicitor, Energy and Resources, and Bruce Landon, attorney in the Solicitor's Office.

LEO KRULITZ,
Solicitor.

CUMULATIVE IMPACTS—SECTION
7 OF THE ENDANGERED SPECIES
ACT (DEC. 28, 1973, 87 STAT. 884,
892)

Endangered Species Act of 1973: Sec.
7: Consultation

Sec. 7 of the Endangered Species Act and the Secretary's regulations require consideration of not only the impacts of the particular activity subject to consultation, but also the cumulative effects of other activities or programs which may have similar impacts on a listed species or its habitat.

In determining which projects or activities should be evaluated while reviewing cumulative impacts to endangered species or their habitat, a “rule of reason” should be applied which considers *inter alia*, the sequence of those impacts, the degree of administrative discretion remaining to be exercised, and similar factors.

M-36905

July 19, 1978

OPINION BY

OFFICE OF THE SOLICITOR

TO: DIRECTOR, FISH AND
WILDLIFE SERVICE

FROM: SOLICITOR

SUBJECT: CUMULATIVE IM-
PACTS—SEC. 7 OF THE
ENDANGERED SPECIES
ACT

This responds to your request for our views on the extent to which the cumulative impacts of other projects or activities are required to be considered during Sec. 7 consultation.

In a memorandum dated Mar. 28, 1978 the Commissioner of the Bureau of Reclamation requested the

initiation of Sec. 7 consultation for the Narrows Project on the South Platte River in east central Colorado. On Apr. 21, 1978, the Department received a similar request for Sec. 7 consultation from the Rural Electrification Administration concerning that agency's involvement in the Grayrocks Dam and Reservoir Project on the North Platte river in Wyoming. Both of these requests for consultation concern the anticipated impact of the proposed projects upon the habitat in the Overton to Chapman reach of the Platte River in Central Nebraska. This area has been utilized by the Whopping Crane during the annual migrations to and from its nesting grounds in northern Canada. Critical Habitat for the Crane was published as proposed rulemaking in the *Federal Register* on Dec. 16, 1975, and we understand that the final rulemaking will be published soon. The Overton to Chapman reach of the Platte River was included within that proposed designation.

Following the initiation of consultation on the Narrows Project, the Departmental consultation team was confronted with several questions concerning the consideration to be given other proposed projects and activities which are in the planning or construction phases and which may also impact this habitat. Specifically, does sec. 7 require the consideration of the effect of other activities or programs whose impacts might be cumulative to the proposal at hand, and, if so, how immediate must the prospect of

these other activities or programs be before they should be considered.

In our view, sec. 7 and the Secretary's regulations require the consideration of not only the impacts of the particular project subject to consultation, but also the cumulative effects of other activities or programs which may have similar impacts on a listed species or its habitat. The focus of sec. 7 consultation should not be limited to the individual impacts of the activity under review. Rather, consultation should also look at the cumulative impacts of all similar projects in the area.

Sec. 7 of the Endangered Species Act provides:

The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal departments and agencies shall, in consultations with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to sec. 1533 of this title and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

16 U.S.C. § 1536 (1976).

Regulations implementing sec. 7 were published as final rulemaking on Jan. 4, 1978. The consultation regulations, in addition to describ-

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ing the consultation procedures, also define the significant terms used in sec. 7.

The Act and the regulations, when read together, make it clear that the responsibility for compliance with sec. 7 falls on Federal agencies. However, the Act and regulations are silent as to whether cumulative impacts are to be addressed or the degree of imminence of such impacts before they must be considered. In order to answer these questions it is necessary to analyze the intent of the Congress when passing sec. 7 as well as to review judicial interpretations and to draw analogies from similar statutes.

The Congressional intent as expressed in the purposes section of the Endangered Species Act was to provide a means "whereby the ecosystems upon which endangered and threatened species depend may be conserved, * * *" 16 U.S.C. § 1531(b) (1976). The Fifth Circuit Court of Appeals in the Mississippi Sandhill Crane case, *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976) recognized the need to consider the cumulative effects which were occurring on the entire habitat. While reviewing the anticipated impacts from the construction of Interstate 10, the court noted that the habitat was also being impacted by timber management practices and land development. After discussing these other impacts the court stated:

* * * appellees [Department of Transportation] have a duty to insure that

the highway and the development generated by it do not *further threaten* the crane and its habitat. (Italics added.)

529 F.2d at 374.

When reading the ecosystems protection provision together with this judicial interpretation, it is apparent that Congress intended that the Department not limit its consultation role to a piece-meal analysis of the impacts of individual projects or activities on endangered species habitat. Rather, a reasoned interpretation of these provisions requires an analysis of all pending impacts upon the ecosystem, before determining whether the more limited impacts of any one particular proposal will violate the prohibitions of sec. 7.

The Corps of Engineers has established this type of standard for review of permit applications to conduct activities in navigable waters of the United States (including sec. 10 and sec. 404 permits). In determining the "public interest" under that program, the corps is constrained by its regulations to examine "the probable impact of [the] proposal in relation to the cumulative effect created by other existing or anticipated structures or works." 33 CFR 320.4(a)(2)(iv), 42 FR 37122-37164 (July 19, 1977).

Likewise, the Fish and Wildlife Service's own guidelines for review of the activities in navigable waters pursuant to the Fish and Wildlife Coordination Act require an examination of "* * * cumulative effects when viewed in the context of other

already existing or foreseeable works, structures, or activities." 40 FR 55813 (Dec. 1, 1975).

We now turn to the second issue—the degree of imminence and the likelihood of completion of other projects and activities which must be considered. In the factual context of the possible projects on the Platte which may impact the Whooping Crane habitat, we find a wide range in the likelihood of completion. Some projects are presently under construction and their anticipated impacts are well documented. Other projects, however, are subject to such major legal, economic and other restrictions as to have little probability of ever being undertaken.

Again, neither the Endangered Species Act nor the regulations provide any specific guidance on this point. Nevertheless, a sizable body of law has been developed in the area of predictive analysis under NEPA. Federal agencies have been challenged in court for failing to include an adequate analysis of other future projects or of all possible alternatives to the proposed action. The courts have developed a "rule of reason" in determining the scope of analysis in these situations.

The Chairman of the CEQ, in a memorandum to Federal agencies, reviewed the status of the law in this area:

* * * [C]ourt decisions have established that NEPA requires reasonable forecasting and prediction of actions, impacts, and alternatives. *NRDC v. Morton*, 458 F. 2d 827, 837-38 (D.C.

Cir. 1972); *Scientists' Inst. for Public Information Inc. v. AEC*, 481 F. 2d 1079, 1092, n. 8 (D.C. Cir. 1973) (SIPI). This does not mean that agencies must look into crystal balls [*NRDC v. Morton*, *supra* n. 28, m 458 F. 2d 837-38], but neither does it mean that agencies can avoid NEPA responsibilities by labelling discussions of future projects or impacts as "crystal ball inquiry." *SIPI*, *supra* n. 8, 481 F. 2d at 1092. In sum, a rule of reason pervades the Act's application to predictive analysis.*

In our view, this "rule of reason" approach is the appropriate standard to apply in determining which projects should be evaluated while reviewing cumulative impacts. This test should take into consideration and give appropriate weight to the likelihood that the impact from other projects or activities will occur, the sequence of those impacts and the degree of administrative discretion which can be exercised on those projects or activities to diminish the impact on the subject species. Impacts which are unlikely to occur or projects and activities which have little probability of being undertaken need not be considered in determining the cumulative impact.

In summary, we view sec. 7 as requiring consideration of the cumulative impacts on an endangered or threatened species ecosystem before determining whether a particular Federal project will violate the prohibitions of sec. 7. A rule of rea-

*Memorandum from Chairman, CEQ, to Heads of Agencies, dated Sept. 16, 1976, on *Kleppe v. Sierra Club and Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma*, 426 U.S. 776 (1976).

July 20, 1978

son should be used in determining which impacts should be considered because of the likelihood of completion.

LEO KRULITZ,
Solicitor.

APPEAL OF ZURN ENGINEERS

IBCA-1176-12-77

Decided July 20, 1978

Contract No. 14-06-D-7346, Specifications No. DC-6935, Tehama-Colusa Canal, Reach 3, Central Valley Project, Bureau of Reclamation.

Permission to Northbrook Insurance Company to Directly Participate in Prosecution of Appeal Denied.

1. Contracts: Construction and Operation: Privity of Contract—Contracts: Construction and Operation: Third Persons—Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Appeals: Standing to Appeal

An insurance company is refused permission to participate directly in prosecution of an appeal proceeding with a view to recovering the amount paid to the contractor under a builder's risk insurance policy as part of the contractor's differing site conditions claim, where the grounds assigned for the participation are that the interests of the contractor and the insurance company may well prove to be adverse and that the insurance company has the right to participate directly by reason of its status as a partial subrogee, the Board finding (i) that the privity of contract rule rather than the real party in interest rule is controlling in appeal proceedings and (ii) that it has no authority under the Disputes clause to adjudicate the rights of the con-

tractor and the insurance company should they prove to be adverse, irrespective of whether such rights are asserted by the insurance company under a release and assignment of interest executed by the contractor or as a partial subrogee and without regard to the fact that the appellant had authorized the insurance company to file a separate complaint and to prosecute its claim through its own attorneys in the appellant's name.

APPEARANCES: Messrs. David P. Yaffe, C. Kerry Fields, Attorneys at Law, Monteleone & McCrory, Los Angeles, California, for appellant; Mr. Irving L. Halpern, Ms. Frances Ehrmann, Attorneys at Law, Los Angeles, California, for Northbrook Insurance Company, as amicus curiae; Mr. William A. Perry, Department Counsel, Denver, Colorado, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE MCGRAW

INTERIOR BOARD OF CONTRACT APPEALS

With the approval of the prime construction contractor involved in the instant appeal, the Northbrook Insurance Co. seeks to participate directly in these proceedings by filing a separate complaint in the name of the contractor and by otherwise actively pursuing its interests therein through its own attorneys, even though the contractor has already filed its complaint for a differing site conditions claim on behalf of itself and a subcontractor.

Addressing a question framed by the Board for briefing by the parties (why was it considered neces-

sary for two complaints to be filed in support of an appeal from a single finding of fact and the justification for requesting that the appellant be represented by two sets of attorneys in the same case),¹ appellant's counsel states:

On Aug. 25, 1976, the appellant presented its claim to the Contracting Officer in the usual manner, incorporating therein a right of recovery against the government claimed by its builder's risk insurance carrier, Northbrook Insurance Co. Thereafter, during the course of negotiations with the Contracting Officer, it became apparent that the scope and extent of Northbrook's monetary interest in the claim presented to the Contracting Officer is a matter of dispute or potential dispute between Zurn and Northbrook.

By the time it became necessary to file this appeal from the Contracting Officer's decision, I had formed the opinion that neither I nor any single lawyer could properly or ethically represent the interests of both Zurn and Northbrook in this appeal proceeding. My judgment in this matter is based primarily on Canon 5 of the Code of Professional Responsibility of the American Bar Association, Ethical Consideration 5-15 * * *²

¹ Supplemental Order dated Feb. 14, 1978. Other questions the Board desired briefed were set forth in its Order of Feb. 10, 1978, as follows: "1. The legal consequences of having apparently failed to except the claim from the release executed by the contractor on May 17, 1977. 2. The effect of the apparent failure to present the claim of the insurance company to the contracting officer for his consideration and decision. 3. The legal theory upon which the Government's liability for \$694,569.18 is predicated (including a reference to the contract clause or clauses relied upon). 4. Whether the assignment of claim referred to in Paragraph 11 of the Complaint was accomplished in the manner prescribed by the Assignment of Claims Act of 1940 (31 U.S.C. § 203 (1970); 41 U.S.C. § 15 (1970)) and is in compliance therewith." (See 43 CFR 4.105.)

² Letter brief dated Feb. 21, 1978, pp. 1, 2. In a prior letter brief appellant's counsel had

Northbrook Insurance Co. has been permitted to submit briefs in the capacity of amicus curiae and has addressed the questions raised by the Board (note 1, *supra*), as have counsel for the appellant and the Department counsel. One of the grounds advanced in support of Northbrook participation is that the insurance company had paid a substantial sum to the contractor under a builder's risk insurance policy and had received a partial assignment of the contractor's interest. In especially pertinent part the assignment of interest captioned RELEASE³ reads:

RECITALS

A. "Zurn Engineers and/or McKnight-Zurn, a Joint Venture," was the designation of the named insureds in policy No. 63500182 issued by Northbrook effective Sept. 20, 1973. Said policy insured Zurn Engineers and/or McKnight-Zurn against loss as therein specifically set forth to certain property described in said policy. Said policy was cancelled effective on or about Jan. 31, 1975.

* * * * *

stated: "When Zurn presented its differing site condition claim to the Contracting Officer on Aug. 25, 1976, it included therein the portion of the claim owned by Northbrook Insurance Co., identifying it as an amount paid in settlement by its builder's risk insurance carrier. Since that time, disputes have arisen between Zurn and Northbrook concerning the loss in question, and the interests of those parties are adverse to one another to the extent that we do not believe that it would be proper or wise for one lawyer to attempt to represent the interests of both. We have authorized Northbrook to file a separate complaint in this proceeding in Zurn's name so that it can engage its own counsel to pursue its interests." (Letter brief dated Feb. 13, 1978, p. 2.)

³ The document quoted from in the text was executed before a notary public by the then officers of Pascal & Ludwig, Inc. (formerly Zurn Engineers) on June 13, 1975.

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C. P & L made claim for payment under said policy for damages which it contends were caused by rainfalls in Dec., 1973, Jan., 1974 and Dec., 1974 to a project under construction by P & L near Orland, California and described in said policy as "Owner-United States Department of Interior, Bureau of Reclamation, Project-construction of earth work, concrete lining, and structure, Tehama-Colusa, canal-reach 3-Specifications number DC-6935."

D. Prior to the date hereof, Northbrook paid to P & L the sum of \$438,569.19 regarding its claim for damages to said project as a result of the rainfalls of Dec., 1973 and Jan., 1974.

E. Thereafter, disputes arose between P & L and Northbrook regarding the extent of Northbrook's liability under said policy in connection with the claims of Zurn arising from the alleged damages to said project.

F. It is hereby intended to fully compromise and settle all claims and demands of any nature whatsoever which P & L and McKnight-Zurn, or either of them, presently have or may hereafter have against Northbrook arising under or related to said policy No. 63500182, including but not limited to those claims hereinabove referred to.

In consideration of payment of the sum of \$256,000.00 by Northbrook to P & L, the receipt of which is hereby acknowledged, P & L and McKnight-Zurn hereby warrant, represent and agree as follows: * * *. [Release, pp. 1, 2.]

* * * * *

3. P & L and McKnight-Zurn hereby assign and transfer to Northbrook, to the extent of the total payment of \$694,569.18 made by Northbrook to P & L, any and all claims and causes of action of whatever kind and nature which they or either of them now has or may hereafter have against anyone who may be liable for the cause of the damages arising from the occurrences hereinabove described, and any and all claims and rights which they or either of them may have for pay-

ment by the United States Department of Interior, Bureau of Reclamation, regarding the damages arising from said occurrences. The claims and causes of actions herein assigned may be enforced by Northbrook in such manner as shall be necessary or appropriate for the use and benefit of Northbrook, either in its own name or in the name of Pascal & Ludwig, Inc., Zurn Engineers and/or McKnight-Zurn. P & L and McKnight-Zurn agree to furnish such papers, information and evidence as shall be within their possession or control for the purpose of prosecuting such claims, demands and causes of action and shall render whatever additional cooperation may be reasonably requested by Northbrook. * * * P & L and McKnight-Zurn further agree that Northbrook may retain the first \$694,569.18 of any gross recovery made regarding said occurrences. [Release, p. 4.]

The insurance company asserts that without regard to the assignment, however, it has standing to prosecute its claim before the Board because by reason of the payments made under the insurance policy in question, it became a partial subrogee of the contractor's differing site conditions claim against the Government.

Opposing participation by the insurance company in these appeal proceedings, the Department counsel points to the fact that no specific exception of the claim of the insurance company was made in release executed by the contractor⁴ at the

⁴ The document entitled "Release of Claims" was executed on behalf of the contractor under date of May 17, 1977, in accordance with a cited requirement of the contract that "after completion of all work, and prior to final payment, the contractor will furnish the United States with a release of all claims."

(Continued)

time the final payment voucher was submitted; that a separate claim by the insurance company⁵ was never presented to the contracting officer or considered by him in the findings

(Continued)

Thereafter, after noting the amount of the final payment, the instrument continues:

"[T]he contractor hereby remises, releases, and forever discharges the United States, its officers, agents, and employees, of and from all manner of debts, dues, liabilities, obligations, accounts, claims, and demands whatsoever, in law and equity, under or by virtue of said contract except:

- "1. Differing site conditions claim as submitted Aug. 25, 1976, for the sum of \$2,305,707 plus an extension of time of 194 calendar days.

"2. Claims on behalf of RAHCO of California for differing site conditions as submitted on Nov. 12, 1976 in the sum of \$1,493,840.

"3. Claim for an extension of time for sealing random cracks sealing of 82 calendar days in excess of the 88 Calendar days granted by Part 2 of Change Order No. 3.

"4. Claim for monies withheld by the Bureau of Reclamation for crop damage to Mr. Walter Lohse in the sum of \$12,544.50." (Appeal File, Exh. 1.)

⁵The Northbrook Insurance Co. is not named in the voluminous documents which accompanied appellant's claim letter of Aug. 25, 1976, all of which were arranged under tabs marked "Text, Correspondence, Schedule, Geology and Accounting." In the latter section, however, there are figures and references clearly reflecting the settlement reached between Northbrook Insurance Company and the appellant. (Text accompanying note 3, *supra*.)

On the accounting schedule captioned "Recapitulation of Excess Costs," and opposite the item identified as "Repair of Storm Damage South of Orland Sewer Crossing," the figure \$690,273.00 appears. On the subsidiary accounting schedule entitled "Repair of Storm Damage South of Orland Sewer Crossing," and opposite the item described as "Repair of storm damage under Insurance policy No. 63-500-182-Note 4," the figure \$694,569 is shown. In the "Notes and Comments" section of the accounting information, there appears the following statement:

"Note 4. The sum of \$694,569 was paid in settlement of claims by the builders risk insurance carrier. 81.76% was allocated to the area south of Orland Sewer Crossing based on the ratio of the areas involved in addition to specific items of damage located south of the Orland Sewer Crossing." (Appeal File, Exh. 28.)

from which the instant appeal was taken; that the insurance company does not qualify as a financial institution; that the assignment on which it relies, *supra*, does not otherwise comply with the requirements of the anti-assignment statutes; that the payments made by the insurance company were made as a volunteer and, consequently, do not come within the recognized exceptions to the anti-assignments statutes for transfers effected by operation of law including subrogation; and that neither the "Disputes" clause nor the Board's rules authorize the active participation by the insurance company in the appeal proceedings as a party.

Chronology

The above-captioned contract (Exhibit 1) was entered into under date of June 8, 1972, in the estimated amount of \$8,451,349 (all references to exhibits are to those contained in the appeal file). Prepared on Standard Forms for construction contracts including the General Provisions of Standard Form 23-A (October 1969 Edition), the contract called for the construction of a concrete-lined canal, together with appurtenant structures, at Reach 3 of the Tehama-Colusa Canal, a part of the Central Valley Project of the Bureau of Reclamation. The notice to proceed was received by the contractor on June 16, 1972. The contract was originally scheduled to be performed within 660 calendar days thereafter or by Apr. 7, 1974.

By letter dated June 14, 1973, the contractor gave notice to the Bu-

July 20, 1978

reau that it had encountered differing site conditions between stations 1602 + 50 and 2239 + 40 with regard to unwatering the canal. Thereafter, in a letter written under date of June 28, 1973, the contractor notified the Bureau that, pursuant to its directive, it was installing a great number of Type 5 finger drains in the same area and that the contractor considered the addition of so many finger drains to be a change under Para. 3 of the General Provisions (Exhibits 10 and 12).

By reason of change orders and extensions of time granted for excusable delays, the time for completion of performance was extended to Apr. 30, 1975. The work under the contract was accepted as substantially complete on July 2, 1975.

Under date of May 17, 1977, the contractor executed a release of all claims arising under or by virtue of the contract except for such claims as were specifically reserved therein (note 4, *supra*).

The contracting officer's decision (Exh. 5) from which the instant appeal was taken embraced the differing site conditions claims submitted by Zurn on behalf of itself⁶ in the amount of \$2,305,797 (Exh. 28) and the differing site conditions claim

submitted by letter dated Nov. 12, 1976, on behalf of its subcontractor, RAHCO of California in the amount of \$1,493,840 (Exhibits 5, 28, and 29). Thus the aggregate claim for differing site conditions totals \$3,799,637. When the contractor's claim for moneys withheld by the Bureau of Reclamation for crop damage, amounting to \$12,544.50 (n. 4, *supra*), is considered, the total monetary claim (not including liquidated damages assessed for delayed performance) is in the amount of \$3,812,181.50 or \$690,273⁷ more than the aggregate figure reflected in Para. 12 of the complaint.⁸

Positions of the Parties

The appellant fully supports the participation of Northbrook Insurance Co. in these proceedings and to that end has undertaken to authorize the company to file a separate

⁶ The figure \$690,273 is shown under the tab "Accounting" and opposite the item described, as "Repair of Storm Damage South of Orland Sewer Crossing." (N. 5, *supra*.)

⁷ The Complaint transmitted to the Board on Jan. 25, 1978, includes the following paragraph:

"11. About Sept., 1973, Northbrook Insurance Co. issued a builder's risk insurance policy to Claimant which covered the subject canal against damage while it was being constructed. Claimant was paid \$694,569.18 under said policy for damage to the canal caused by rainfalls during the 1973 and 1974 winter seasons. In consideration of said payment Claimant assigned any and all claims and causes of action which Claimant possessed and which arose out of the occurrences relating to said rainfall to Northbrook Insurance Co. to the extent of the total payment of \$694,569.18 made by Northbrook to Claimant. Claimant has also authorized Northbrook Insurance Company to file a separate complaint in this proceeding in the Claimant's name against the Government to recover reimbursement of said payment to Claimant." (Complaint, 5, 6.)

⁸ In the reply brief dated Apr. 4, 1978, appellant's counsel states at p. 5:

"[N]orthbrook's interest have been, up to the time of the filing of the complaint before the Board simultaneously advanced with those of Appellant by counsel retained by Appellant. Appellant would have continued to represent the interests of Northbrook throughout these proceedings but for a conflict which arose between the two of them immediately prior to the filing of the Complaint. * * *"

complaint and be represented by separate counsel.⁹

With respect to the release question, the appellant asserts that Northbrook's claim was excepted from the release executed by the appellant on May 17, 1977 (note 4, *supra*). In support of this statement counsel for Zurn points to the information contained under the tab marked "accounting"¹⁰ in the claim transmitted by letter dated Aug. 25, 1976 (Exh. 28).¹¹ Amplifying its position in the reply brief dated Apr. 4, 1978, appellant's counsel states at pp. 1 and 2:

[T]he Government has cited three cases [¹²] to this Board that hold, according to the Government, that the alleged failure of the Appellant to specifically include Northbrook Insurance Company as a *claimant* on the release precludes this Board from considering any claim which Northbrook may now advance. * * * [T]he cited cases do not support that proposition, but instead actually support a related proposition, namely, that the Board may hear only *claims* which have been excepted from a general release.

In support of the position that the Northbrook claim was presented to and considered by the contracting officer, the appellant again points to the information included with its Aug. 25, 1976, claim submission

under the tab "Accounting" (n. 5, *supra*).¹³

A succinct statement of the arguments for recognizing Northbrook's right to actively participate in the appeals proceedings appears in an amicus curiae brief of the insurance company from which the following is quoted:

Northbrook does not contend it has acquired rights against the Government by way of subrogation except insofar as Zurn has such rights against the Government. Whether or not Zurn, and through Zurn, Northbrook have rights against the Government can only be determined by this Board after a full hearing. To the extent that it is shown that Northbrook's payments were, in fact, for losses caused by differing site conditions, Northbrook will be entitled to recover from the Government. * * *¹⁴

With the approval of appellant's counsel¹⁵ Northbrook has undertaken to address the questions raised concerning the anti-assignment statutes and its right to participate in these proceedings by operation of law by reason of its

⁹ Letter brief dated Feb. 13, 1978, 1, 2; appellant's reply brief, dated Apr. 4, 1978, 3.

¹⁰ Northbrook's Supplemental Brief, p. 1. Immediately after the quoted language, the following comments appear:

"The fact that such proof might, at the same time, show that those losses were, in fact, not covered by the policy would not deprive Northbrook of its rights to equitable subrogation nor render it a mere 'volunteer.' Where, as here, the insurer pays a disputed claim in order to provide protection to its insured, to avoid litigation with its insured or for other reasons in protection of its interest, the insurer is not considered a 'volunteer.'" (Supplemented Brief, 1, 2.)

¹⁵ Letter brief dated Feb. 13, 1978, 2, 3. Counsel for appellant specifically incorporates Northbrook's treatment of these issues into its reply brief by reference. Appellant's reply brief dated Apr. 4, 1978, 5, 6.

⁹ Note 8, *supra*; letter brief dated Feb. 21, 1978, 2, 3.

¹⁰ See n. 5, *supra*.

¹¹ Letter brief dated Feb. 13, 1978, 2, 3.

¹² *Halvorson-Lents, A Joint Venture*, IBCA-1059-2-75 (Mar. 3, 1977), 77-1 BCA par. 12-382; *Hiebert Contracting Co.*, IBCA-521-10-65 (Feb. 15, 1967), 67-1 BCA par. 6138; and *E. A. Heintz Construction Co.*, IBCA-403 (June 30, 1966), 73 I.D. 196, 66-1 BCA par. 5663.

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status as a partial subrogee. In an amicus curiae brief transmitted with its letter of Mar. 20, 1978, Northbrook advances the contentions that its legal theory of recovery against the Government is predicated upon its right of subrogation; that any rights Zurn has against the Government to recover all or a portion of the sum of \$694,569.18 paid by Northbrook has, by operation of law, passed to Northbrook; and that the Assignment of Claims Act of 1940 (31 U.S.C. § 203 (1970); 41 U.S.C. § 15 (1970)), does not apply to subrogees. Cited in support of these contentions are *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366 (1949); *Thompson v. Commissioner of Internal Revenue*, 205 F. 2d 73 (3d Cir. 1953); *United States v. South Carolina State Highway Department*, 171 F. 2d 893 (4th Cir. 1948); *State Farm Mutual Liability Insurance Co. v. United States*, 172 F. 2d 737 (1st Cir. 1949); *Quarles Petroleum Co., Inc. v. United States*, (Slip Op.), 428-75 Ct. Cl. No. (Feb. 23, 1977), 551 F. 2d 1201; and *United States v. Certain Parcels of Land in the City of Philadelphia, Commonwealth of Pennsylvania*, 213 Fed. Supp. 904 (E.D.Pa. 1963).

Addressing the question of Northbrook filing a separate complaint, counsel for Northbrook states that such action is both necessary and proper. As counsel views the matter, the basic issues involved here is who is the real party in interest as between a subrogor and a

partial subrogee.¹⁶ Noting the absence of objection by the contracting officer to the presentation of the subrogee's interest by Zurn in one complaint, Northbrook's counsel states: "Because a possible conflict has developed, both parties should and are entitled to pursue their respective interests in the claim against the Government separately."¹⁷

The Government is squarely opposed to recognizing any right in Northbrook Insurance Co. to actively participate in these proceedings. The Department counsel asserts that the first indication the Government had of Northbrook's intention to pursue a separate claim against the Government was the letter from its counsel to the Board dated Jan. 18, 1978.¹⁸

As to the effect of the release (note 4, *supra*), the Government's view is that the release is a bar to Northbrook's claim only when it is presented and prosecuted sepa-

¹⁶ Opening Northbrook Brief, pp. 17, 18.

¹⁷ *Ibid.*, 19, 20.

¹⁸ Opening Government Brief, 2. The question was first raised by appellant's counsel in a telephone conversation with a member of the Board on Jan. 3, 1978. As stated in the letter brief of appellant dated Feb. 21, 1978, the Board member advised that he knew of no rule prohibiting the filing of separate complaints but that the claim would have to be prosecuted in the name of the appellant and that the two complaints would undoubtedly be consolidated for hearing and disposition if they presented common questions of law or fact. It was not the intention of the Board member concerned, however, to commit the Board to a particular course of action in a contested case by a telephone conversation in which no controlling precedents were cited and in which Government counsel did not participate.

rately,¹⁹ rather than by the prime contractor. In its opening brief the Government notes the absence from the release of any claim identified as belonging to Northbrook but refers to the amounts included in the accounting information which accompanied the claim letter of Aug. 25, 1976 (note 5, *supra*), after which it states: "These sums were presented, however, as a part of the contractor's claim of excess costs for the alleged differing site condition. There is no allegation in the claim that the Government owes anything to Northbrook Insurance Co."²⁰

Respecting the apparent failure to present the claim of the insurance company to the contracting officer for his consideration and decision, the Government asserts (i) that Northbrook never filed its own claim through the contractor with the contracting officer; (ii) that it did not participate in any discussions with the contracting officer concerning any claims; (iii) and that the question of whether Northbrook had a separate right against the Government to entitlement was

never submitted to nor considered by the contracting officer. The Government does acknowledge that the total dollar amount of the claim submitted to the contracting officer by the contractor did include the \$694,569 which Northbrook now seeks from the Government (n. 5, *supra*).²¹ It denies, however, that Northbrook's claim could have been considered even if it had been properly submitted to the contracting officer. This view is based on the absence of any privity of contract between Northbrook and the Government and the assertion by the Government that nothing could have been done in the circumstances of this case to establish the requisite privity (Opening Government Brief, 3-6).

Concerning the question of the legal theory for Northbrook's participation, the Government states that the insurance company appears to be relying entirely upon what ever rights were created in it by virtue of the release agreement executed between Northbrook and the contractor. As to the agreement, Government counsel makes the following observations:

[A]side from any rights and obligations which may exist between Northbrook and the contractor,²² the question

¹⁹ This is subject to the qualification that irrespective of how the claims are presented or treated, the aggregate sum cannot exceed the amount excepted from the release. According to the Government, "the dollar amounts alleged in paragraphs 11 and 12 of the complaint total more than the amount excepted on the release by approximately \$4,400.00." (Opening Government brief, 3.)

²⁰ Government's opening brief, 2. The brief also states at p. 4:

"[N]orthbrook's attempt to participate as a party to this appeal arises solely out of the assignment of a portion of the contractor's differing site condition claim to Northbrook. Northbrook was not identified as a claimant on the release. Under these circumstances, we submit that Northbrook Insurance Co. is barred from participating in this appeal."

²¹ See, however, n. 19, *supra*.

²² See *United Pacific Insurance Co. v. United States et al.*, 175 Ct. Cl. 118, 125 (1966), in which the Government was found to be a mere stakeholder but where the Court stated:

"There is no need to discuss whether the assignment in question complies with all the provisions of the Assignment of Claims Act, for whether or not the transaction is valid as against the United States, it is in any event effective and binding on the parties [citations

(Continued)

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is whether the purported assignment created any rights in Northbrook as against the Government under the disputes clause of the contract. In our view it does not. There are no contract clauses which operate to vest any rights against the Government in third party builder's risk insurers * * *.

(Opening Government Brief, 7). Appropos the Assignment of Claims Act (31 U.S.C. § 203 (1970), 41 U.S.C. § 15 (1970)), the Government advances a number of contentions including the following: (i) By reason of the anti-assignment statutes, all assignments of claims under Government contracts are prohibited except those to banks, trust companies, or other financial institutions; (ii) that Northbrook is not a financial institution but rather an insurance company (*Brown v. United States*, 207 Ct. Cl. 768, 777 (1975)); and (iii) that Northbrook failed to follow the statutory path with respect to giving the required notice of an assignment (Comp. Gen. Dec. B-188473 (Aug. 3, 1977), 77-2 CPD par. 74).²³ While the Department counsel denies that the assignment involved here binds the Government in any way, he says that even if the

(Continued)

omitted]. The statute was designed to protect the United States against frauds on the Treasury and a multiplicity of conflicting claims and to save the United States defenses which it may have to claim by assignors—not to regulate the equities of individual claimants as between themselves. * * *

²³ See also *Uniroyal, Inc. v. United States*, 197 Ct. Cl. 258, 262 (1972) (“[E]ven if plaintiff were found to be a financing institution to whom assignment could be made enforceable against the United States, plaintiff could not recover because of the lack of notice.”)

assignment in question (text, *supra*) were assumed to be valid, Northbrook would still have no standing to participate in this appeal since (i) the Board's rules make no provision for third party intervention,²⁴ (ii) the Disputes clause limits the consideration of claims to those of parties to the contract,²⁵ (iii) Northbrook is neither a party²⁶ to the contract, nor a qualified successor;²⁷ and (iv) the only issue which Northbrook could separately present to the Board would be the legal

²⁴ The Board is not entirely without authority to fashion a remedy for a matter not specifically covered by our rules. It will exercise such authority in order “to secure a just and inexpensive determination of appeals without unnecessary delay.” 43 CFR 4.100(b). Consolidation of appeals for briefing, hearing and decision, involves the exercise of this general authority, as does the granting of summary judgment. See *Armstrong & Armstrong, Inc.*, IBCA-1061-3-75 and IBCA-1072-7-75 (Apr. 7, 1976), 83 I.D. 148, 76-1 BCA par. 11,826.

²⁵ See *MacDonald Construction Co.*, IBCA-589-9-66, et al. (Mar. 22, 1967), 67-1 BCA par. 6214 at 28,757 (“We have ruled that as between MacDonald and Bi-State the Supplement did not contemplate the pursuit of an administrative remedy under the Disputes clause. That clause by its terms applies solely to the contractor (MacDonald) and the Government, with respect to disputes arising under the other standard clauses such as Changes, Changed Conditions and provisions for excusable delays. No modification whatever had been made in the Supplement for the participation of Bi-State in the administration of the work or as a party to the Disputes clause. * * *”).

²⁶ Among the cases cited is *United States v. Blair*, 321 U.S. 730, 737 (1944) (“Clearly the subcontractor could not recover this claim in a suit against the United States, for there was no express or implied contract between him and the Government. *Merritt v. United States*, 267 U.S. 338. But it does not follow that respondent is barred from suing for this amount. * * *”).

²⁷ Citing *Mancon Liquidating Corp.*, ASBCA No. 18304; *International Manufacturing Co., Inc.*, ASBCA No. 18218 (Jan. 24, 1974), 74-1 BCA par. 10,470.

issue²⁸ of its right to participate in any award the contractor might ultimately receive which is not an issue the Board may properly consider (Opening Government Brief, 8-12).

The Government sees no necessity for the filing of two complaints with respect to this appeal or for having the appellant represented by two sets of attorneys. In the Government's view the issues in the appeal are limited to those considered by the contracting officer in the findings from which the appeal was taken and any additional issues raised by the second complaint which were not considered by the contracting officer would be premature and beyond the Board's jurisdiction.²⁹

All parties filed reply briefs. In its reply brief the Government confined itself to addressing the question of what rights, if any, North-

brook acquired against the Government by reason of subrogation. It distinguishes the cases cited and relied upon by Northbrook in its opening brief from the situation involved in the instant appeal on the ground that in all of the cases relied upon the Government was liable in the first instance to the insured for the event covered by the insurance and for which payment under the policy was made. Denying the involuntary nature of the assignment (text, *supra*), the Government says "[N]orthbrook was a volunteer in taking an assignment of a claim³⁰ which only Zurn has the right to pursue." (Government Reply Brief, 4.)

Responding to the Government's Reply Brief Northbrook states: "[W]here, as here, the insurer pays a disputed claim in order to provide protection to its insured, to avoid litigation with its insured or for other reasons in protection of its interest, the insurer is not considered a 'volunteer.'" (Supplemen-

²⁸ The various boards of contract appeals do undertake to resolve legal issues in connection with determining the relief available under equitable adjustment provisions contained in the particular contract involved in the appeal. This is in accord with the limited nature of the jurisdiction conferred by the Disputes clause and has the sanction of the courts. See *United States v. Utah Construction and Mining Co.*, 384 U.S. 394 (1966); *United States v. Callahan Walker Construction Co.*, 317 U.S. 56 (1942); *American Cement Corp.*, IBCA-496-5-65 and IBCA-578-7-66 (Sept. 21, 1966), 73 I.D. 266, 66-2 BCA par. 5849, *aff'd on reconsideration*, 74 I.D. 15, 66-2 BCA par. 6065.

²⁹ See, *VTN Colorado, Inc.*, IBCA-1073-8-75 (Oct. 29, 1975), 82 I.D. 527, 530, 75-2 BCA par. 11,542, at 55,088 ("We have consistently adhered to the view that our jurisdiction is appellate in nature and that we may not consider claims presented for the first time in the notice of appeal or in the documents filed thereafter."). (Citations omitted.)

³⁰ "[T]his assignment was purely contractual and not by operation of law. Northbrook was under no compulsion to pay a disputed claim. Under the circumstances of this case there was no liability running from the Government to Zurn, the rights to which Northbrook could succeed by merely paying Zurn under the policy. Zurn did not have the right to recover from the Government damages caused solely by rainstorms because the contract does not provide for compensation for Acts of God. Northbrook was not obligated under the policy to pay Zurn for damage caused by differing site conditions. Therefore, insofar as the insurance coverage, there was nothing to which Northbrook could be subrogated as against the Government" (Government Reply Brief, 3, 4).

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tal Brief, 1, 2.) A number of cases³¹ are cited in support of this position (Supplemental Brief, pp. 2-7).

Discussion

Since we conclude that Northbrook is without standing before the Board to file a separate complaint in the name of the prime contractor and to otherwise prosecute its claim against the Government through its own attorneys, we need not finally determine³² the effect of the prime contractor having failed to specifically except the claim of Northbrook from the release executed on May 17, 1977 (n. 4, *supra*). Because of the adverse conclusion we reach on the question of the standing of Northbrook to actively participate in this appeal, we need not pass on the question of whether

in different circumstances its claim would have to be remanded to the contracting officer for findings and decision before the Board could undertake to exercise its appellate jurisdiction.

As to the release question, we note that if Northbrook had been found to have standing and if the complaint filed and the proof offered in these proceedings were to show Northbrook's claim to be in conflict with the claim of the prime contractor, then a question would be presented to the Board as to whether such conflicting claim of Northbrook could be said to have been excepted from the general release executed by the contractor (n. 4, *supra* and accompanying test). As to whether Northbrook's claim was presented to and considered by the contracting officer, a natural question arises as to why that officer should have considered Northbrook's claim separate and apart from appellant's own claim when, according to appellant's counsel, no necessity for treating Northbrook's claim separately was perceived by him until *after* the findings were issued from which the instant appeal was taken.³³

Remaining for consideration are the questions related to the legal theory upon which the Government's liability to Northbrook is predicated. At the outset we note that no one is contending that the Government is liable to Northbrook

³¹ Including *Atlantic Mutual Insurance Co. v. Cooney*, 303 F. 2d 253, 262 (9th Cir. 1962), where the court stated:

" * * * It may well be, as National contends, that in making the payment Atlantic was promoting its own business interests with a valuable and substantial insurance client. But it was not a mere officious volunteer. It could properly take the position that it had at least a moral obligation to Exchange [the insured] to pay the loss.

"Under these circumstances, it is our conclusion that, under the California law Atlantic may not be deemed a 'volunteer' and lose its right to subrogation. * * *"

As to the law governing the interpretation of Government contracts, see *The Padblac Co., Inc. v. United States*, 161 Ct. Cl. 369, 377 (1963). ("* * * This is not to be measured by state law (the parties seem to think that New York law controls) but by the uniform federal 'common law' which governs the contracts of the United States. * * *"). See also *McBride and Wachtel, Government Contracts*, par. 2.10[2].

³² All the decisions pertaining to releases cited by the Government (n. 12, *supra*), involved cases in which hearings were held.

³³ Note 6. *supra*.

by way of subrogation except insofar as Zurn has such rights against the Government.³⁴ Neither the appellant nor Northbrook has disputed the flat assertions by the Government (i) that Northbrook is not a financial institution and (ii) that the notice provisions of the anti-assignment statutes (31 U.S.C. § 203 (1970); 41 U.S.C. § 15 (1970)) were not complied with.³⁵ The parties are apart on the question of whether; in the circumstances here involved, the provisions of the anti-assignment statutes are inapplicable, because, by operation of law, Northbrook has become subrogated to the rights of the appellant to the extent of the payments made under the builder's risk insurance policy (note 3, *supra*). They also disagree as to whether assuming Northbrook has become subrogated to the rights of the appellant to the extent indicated, it has any standing to separately present and prosecute its claim before this Board.

Anti-Assignment Statutes

In its opening brief at page 5, Northbrook states: "The assignment of claims act of 1940 [31 U.S.C. § 203 (1970); 41 U.S.C. § 15 (1970)] does not apply to subrogees." Of the six cases cited in support of this position, three of them (*United States v. Aetna Casualty & Surety Co., supra*; *United States v. South Carolina State Highway Department, supra*; and *State Farm Mutual Liability In-*

urance Co. supra), involved the Federal Tort Claims Act; one of them (*Thompson v. Commissioner of Internal Revenue, supra*), held that the value of assigned contracts could properly be used as the basis for an amortization deduction in computing income tax; one of them (*Quarles Petroleum Co., Inc. v. United States, supra*) was concerned with an action brought in the Court of Claims under the Federal Water Pollution Control Act for and on behalf of its insurance carrier, as subrogee, to recover costs incurred in clearing up an oil spill); and one of them (*United States v. Certain Parcels of Land in the City of Philadelphia, supra*)³⁶ entailed a contract action brought against the United States.

In support of its right to actively participate in the proceeding, Northbrook places great reliance upon the "real party in interest" rule as enunciated in Rule 17(a) of the Federal Rules of Civil Procedure. After quoting the rule³⁷ and

³⁶ Concerning this case, Northbrook states: "[T]he subrogee brought suit in its own name and no mention was made of the impropriety of such a suit" (Opening Brief, p. 21).

³⁷ Rule 17(a) provides as follows:

"Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been

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³⁴ N. 14, *supra*, and accompanying text.

³⁵ N. 23, *supra*, and accompanying text.

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comments upon the rule from Moore's *Federal Practice*, Northbrook's counsel states at p. 22 of the opening brief: "Under Rule 17(a) justice requires that Northbrook as partial subrogee be allowed to present its portion of the claim separately. Under Rule 17(a) a subrogor may bring suit in its own name on behalf of its subrogee."

In the leading case cited by Northbrook, *United States v. Aetna Casualty & Surety Co.*, *supra*, the Court found that under the Federal Tort Claims Act, *Aetna* had the right to bring suit in its own name, despite the prohibitory language contained in the anti-assignment statute (31 U.S.C. § 203 (1970)). In the course of its opinion the Court had occasion to invoke the real party in interest rule, stating:

If, then, R.S. 3477 is inapplicable, the Government must defend suits by subrogees as if it were a private person. Rule 17(a) of the Federal Rules of Civil Procedure, which were specifically made applicable to Tort Claims litigation, provides that "Every action shall be prosecuted in the name of the real party in interest," and of course an insurer-subrogee, who has substantive equitable rights, qualifies as such. If the subrogee has paid an entire loss suffered by the insured, it is the only real party in interest and must sue in its own name. 3 Moore, *Federal Practice* (2d ed.) p. 1339. If it has paid only part of the loss, both

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allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest" (Northbrook's opening brief, p. 21).

the insured and insurer (and other insurers, if any, who have also paid portions of the loss) have substantive rights against the tort-feasor which qualify them as real parties in interest. [Footnote omitted.]³⁸

There is no statute, however, making the Federal Rules of Civil Procedure applicable to boards of contract appeals proceedings; our rules neither incorporate nor make reference to them; and we have found that such rules are not binding on administrative agencies. *Carl W. Olson & Sons Co.*, IBCA-930-9-71 (Apr. 18, 1973), 73-1 BCA par. 10,009 at 46,959.³⁹

Standing to present and prosecute claims before a board of contract appeals is determined by applying the privity of contract rule as enunciated in such cases as *United States v. Blair* (n. 26, *supra*). In the years that have intervened since *Blair*, this Board and other boards have had occasion to apply the privity of contract rule⁴⁰ in numerous cases.

³⁸ 338 U.S. 380-381.

³⁹ The Court of Claims has such a real party in interest rule. See, for example, *Consumers Ice Co. v. United States*, 201 Ct. Cl. 116, 119 (1973).

⁴⁰ See, for example, *Divide Constructors, Inc., Subcontractor to Granite Construction Co.*, IBCA-1134-12-76 (Mar. 29, 1977), 84 I.D. 119, 77-1 BCA par. 12,430; *Aerospace Support Equipment, Inc.*, ASBCA No. 13579 (May 25, 1971), 71-1 BCA par. 8904. *Cf. TRW, Inc.*, ASBCA No. 11373 (Sept. 19, 1966), 66-2 BCA par. 5847, *aff'd on reconsideration*, 66-2 BCA par. 5882 (subcontractor may appeal in prime contractor's name pursuant to the authority of a special provision contained in its CPEFF subcontract which was approved by the Government, even though the CPEFF prime contractor and the Government agreed that the cost upon which the subcontractor's claim was predicated were not allowable).

Very recently, the Armed Services Board of Contract Appeals had occasion to consider the question of whether a surety who had recommended a substitute contractor to which award was made for completion of performance under defaulted contracts could bring an appeal in its own name. Addressing this question in *Sentry Insurance*, ASBCA No. 21918 (Aug. 5, 1977), 77-2 BCA par. 12,721 at 61,837, the Board stated:

We are disinclined to follow, and prefer to lay to rest, dicta in *Golden Gate* and *United States Fidelity* suggesting that a surety may prosecute an appeal in its own name under its principal's original defaulted contract by "taking over" performance thereof. Although a surety is a party to the bond with its principal, and accedes, by right of subrogation, to certain of its principal's rights, the surety does not become a party to the defaulted contract entitled to take appeals under the Disputes clause thereof. We hold that the only manner by which a surety may appeal under the Disputes clause of its principal's original defaulted contract is in a representative capacity [21] with the consent of its principal. *See e.g., Golden Gate, supra.*⁴¹

⁴¹ *See United States v. Munsey Trust Co.*, 332 U.S. 234, 242 (1947) ("* * * One who rests on subrogation stands in the place of one whose claim he has paid, as if the payment giving rise to the subrogation had not been made * * *").

⁴² A concurring opinion in the same cases addresses the question of multi-party litigation, stating:

"* * * In the present case, it is apparent that Tufaro is either unable or unwilling to be the appellant here, although the absence of Tufaro's appearance has not been explained. Thus Sentry appears to be the only party in interest to the instant dispute. However, in another case, involving a viable, active contractor, both the principal and the surety might wish to be appellants before us, desiring that this Board determine their respective interests in a claim wherever they may

The limited nature of the Board's jurisdiction is well established.⁴³ While the Board does have authority to determine legal issues incident to determining the rights of the parties under equitable adjustment provisions contained in the contract before them,⁴⁴ it does not undertake to pass upon law questions outside the scope of its jurisdiction. In *Wyoming National Bank of Wilkes-Barre, Pennsylvania v. United States*, 154 Ct. Cl. 590, 594-95 (1961),⁴⁵ the Court found that the

appear. In still another case, assignees, sub-contractors, or suppliers might also wish their respective interests to be adjudicated.

"Perhaps the Board should be equipped to deal with multi-party litigation. But unless or until it is, the Board's jurisdiction must be limited to disputes between the contractor and the Government. * * *" (77-2 BCA par. 12,721 at 61,838).

⁴³ *Peter Kiewit Sons' Co.*, IBCA-405 (Mar. 13, 1964), 1964 BCA par. 4141 at 20,175:

"* * * The Board's power to grant relief must be found within the 'four corners' of the contract, for that power is not granted by statute, as alleged in appellant's reply brief, but by the contract itself. The authority of the Board to decide questions of law does not include authority to grant relief for breach of contract since it is not a dispute arising "Under the contract." (Footnote omitted).

⁴⁴ *Clack v. United States*, 184 Ct. Cl. 40, 54 (1968):

"Even where the predominant issue of a claim is one of law, such as the interpretation of contract provisions, the findings of a contract appeals board as to facts directly related to the legal issue are accorded finality under the *Wunderlich* Act, as long as the claim is one upon which the board could grant relief under the contract. *Morrison-Knudsen Co. v. United States*, 170 Ct. Cl. 757, 345 F.2d 833 (1965)."

⁴⁵ The fact that the prime contractor and a third party are agreeable to having the Board entertain their dispute does not have the effect of enlarging our jurisdiction. *See MacDonald Construction Co.*, IBCA-572-5-66 (Mar. 17, 1967), 67-1 BCA par. 6202, footnote 3 ("MacDonald's final brief withdrew its previous opposition to the intervention of B1-State as a party to the dispute and asked that the Board

(Continued)

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Armed Services Board had properly refused to permit a successor to the assignee of a Government contractor to intervene in the Board's proceeding, stating:

* * * The Board denied intervention, ruling that its jurisdiction was limited to ruling on the matter of the assessment of the liquidated damages and that it had no jurisdiction to determine the priority of the Government to payment of such claim for liquidated damages as against an assignee of the appellant. In this we think the Board was clearly correct. The dispute was a factual one with the contractor and involved facts relating to the performance of the contract.* * *

The attempted intervention by the Bank was for the purpose of getting Board action on a question of law and clearly the disputes clause relates only to questions of fact.

The Board is empowered to determine the equitable adjustment, if any, to which the appellant is entitled under the Differing Site Conditions clause. This determination will be based on applying the tests enunciated in the clause to the facts established at the hearing to be held. The question of Northbrook's right to participate directly in these proceedings did not arise until after the contractor had filed the appeal with which we are here concerned. There is no indication in the record before us that the Northbrook Insurance

Co. was involved in any way in the performance of the contract.

Decision

[1] Northbrook Insurance Co. seeks to participate directly in this appeal and the appellant purports to authorize it to do so on the common assumption that the interest of the parties are or may be adverse to one another. Neither the appellant nor Northbrook have undertaken to address the question of how Northbrook could continue in a representative capacity once the pleadings filed or the proof offered showed the interest of Northbrook to be adverse to that of the appellant. (See n. 41 and accompanying text.)

If such participation were to be allowed in these circumstances, there is a real prospect that the Board would be confronted with the intricacies of multi-party litigation for which it is not well equipped⁴⁶ and for which it has not been staffed. In the event a differing site condition were found to exist and if, as anticipated, the interests of the appellant and Northbrook were found to be adverse, the Board would necessarily be involved in determining their respective rights. This would entail construing the written release and assignment of interest executed by the appellant under date of June 13, 1975 (n. 3, *supra*), or determining the extent of Northbrook's recovery by reason of its status as a subrogee.⁴⁷ However the questions were to be resolved, the board would be passing

(Continued)
entertain and dispose of the appeal. This stipulation cannot, of course, enlarge the Board's jurisdiction or amend the terms of the contract.")

The scope of the Board's jurisdiction, however, may be either enlarged (*General Dynamics Corp. v. United States*, No. 76-21, slip op. at — (Ct. Cl. July 8, 1977), 558 F.2d 985, 991-994) or restricted (*Nager Electric Co., Inc. v. United States*, 184 Ct. Cl. 390, 399-401), by the conduct of the parties.

⁴⁶ Note 42, *supra*.

⁴⁷ Since our decision is grounded upon the limited nature of our jurisdiction under the (Continued)

upon questions of law extrinsic to determining the rights of the parties to the contract and, therefore, acting outside the purview of its limited jurisdiction.⁴⁸ The fact that there may be serious obstacles to presenting the claim of Northbrook Insurance Company as part of the appellant's claim is unfortunate;⁴⁹ however, it is not a factor for consideration in determining our jurisdiction.

For the reasons stated, Northbrook Insurance Company is denied permission to participate directly in these proceedings. Within 30 days from the date of receipt of this decision, the Government shall file the Answer with the Board.

WILLIAM F. MCGRAW,
Chairman, Administrative Judge.

WE CONCUR:

G. HERBERT PACKWOOD,
Administrative Judge.

RUSSEL C. LYNCH,
Administrative Judge.

DAVID DOANE,
Administrative Judge.

(Continued)

Disputes clause, we have assumed for the purposes of the ruling that Northbrook is a subrogee and would qualify as a real party in interest under Rule 17(a) of the Federal Rules of Civil Procedure (Notes 30 and 37). The Federal Rules of Civil Procedure do not, however, govern board proceedings. *Carl W. Olson & Sons Co.*, text *supra*.

⁴⁸ Notes 28 and 42-45, *supra* and accompanying text.

⁴⁹ The fact that a complaint may contain multiple counts based upon different theories of recovery allow a considerable degree of flexibility. Amendment of pleadings are provided for in our rules (43 CFR 4.108).

ESTATE OF CLARK JOSEPH
ROBINSON

7 IBIA 74

Decided July 26, 1976

Appeal from an administrative law judge's decision denying petition for rehearing.

Reversed and remanded.

1. Indian Probate: Tribal Courts:
Generally—

Decrees of Tribal courts regarding domestic relations of Indians have generally been recognized by the Department of the Interior, State courts, and Federal courts.

APPEARANCES: Thomas A. Danehey, Esq., of Reddish, Curtiss, and Moravek, for appellant Gretchen Robinson.

OPINION BY CHIEF ADMINISTRATIVE JUDGE WILSON
INTERIOR BOARD OF INDIAN APPEALS

Clark Joseph Robinson, Oglala Sioux Allottee No. 7488, hereafter referred to as decedent, died intestate Jan. 29, 1974, seized of certain trust lands situated on the Pine Ridge Reservation in South Dakota.

A hearing was held and concluded by Administrative Law Judge Garry V. Fisher at Pine Ridge, South Dakota, on Sept. 25, 1974. Thereafter, on Sept. 16, 1977, the judge issued an Order Determining Heirs wherein Trix Lynn Harris and Rene Robinson, decedent's daughters, were found to be

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the heirs, each entitled to an undivided one-half interest in the decedent's trust estate. In the same order the judge found that Gretchen Robinson, the appellant herein, was not the decedent's surviving spouse as claimed by the appellant.

The appellant on Nov. 7, 1977, timely filed a petition for rehearing contending that she was the decedent's surviving spouse and therefore entitled to share in his estate in such capacity. The following grounds were given by the appellant in support of her petition:

1. The Administrative Law Judge erred as a matter of law in determining that Gretchen Robinson was not the wife of Clark Joseph Robinson at the time of Clark Joseph Robinson's death on January 29, 1974.

2. The Administrative Law Judge erred as a matter of law in determining that the death of Clark Joseph Robinson precluded Petitioner from challenging the validity of the divorce obtained by Clark Joseph Robinson from Petitioner.

3. The Administrative Law Judge erred in finding that the "marital status at that time" (time of death) was controlling, since it is the question of marital status which is to be determined.

4. The Administrative Law Judge erred in not finding that the divorce obtained by Clark Joseph Robinson from Petitioner in the Oglala Sioux Tribal Court on Oct. 18, 1968, was void because of the lack of jurisdiction over Petitioner at the time the decree was entered.

5. The Administrative Law Judge erred in not recognizing the order entered by the Oglala Sioux Tribal Court on Apr. 24, 1974, setting aside the divorce decree entered by that Court on Oct. 18, 1968.

6. The Administrative Law Judge erred in not recognizing the portions of the Decree of Divorce entered by the

Oglala Sioux Tribal Court of Oct. 18, 1968, making provision for Petitioner in the form of annual payments in cash and that the defendant (Petitioner) is to receive her just and equitable share (if trust lands were sold).

The petition was denied by Judge Fisher on Jan. 17, 1978, on the basis that the petition did not cite any factual issues or newly discovered evidence which would require further hearing and that all errors specified therein could be resolved on appeal.

The appellant on Mar. 13, 1978, filed a notice of appeal with this Board based on the identical grounds set forth in the petition for rehearing. In view thereof the grounds are not repeated at this point.

The crux of the appeal as we conclude from review of the record is whether the judge as a matter of law was required to give recognition to the order entered by the Oglala Sioux Tribal Court on Apr. 24, 1974, setting aside the Divorce Decree entered by that court on October 18, 1968.

At the outset it is noted that none of the parties involved in this appeal questions the authority and jurisdiction of the Oglala Sioux Tribal Court to entertain and hear domestic matters such as are involved in this case.

[1] Decrees of Tribal courts regarding domestic relations have generally been recognized by the Department of the Interior in connection with probate proceedings and other purposes. State courts

have likewise recognized Tribal court decrees on domestic relations. *Begay v. Miller*, 222 P. 2d 624 (Sup. Ct. Ariz. (1950)). Federal courts have also recognized the validity of decrees issued by Tribal courts concerning domestic relations. See *Conroy v. Frizzell et al.*, 429 F. Supp. 918 (D.S.D. 1977) which addresses the validity of a divorce decree of the Oglala Sioux Tribal Court, *aff'd*, *Conroy v. Conroy*, No. 77-1343 (8th Cir., April 20, 1978).

In the instant case the judge gave recognition to the decedent's two divorces obtained through the Tribal court in determining the decedent's heirs. In view of the foregoing recognition, why then did the judge not give recognition to the Tribal court order of Apr. 24, 1974, which set aside the Divorce Decree of Oct. 18, 1968? No reason for failing to do so is given by the judge. Instead he found the intervening death of decedent and his marital status at that time (Jan. 29, 1974) controlling insofar as the determination of heirs was concerned. In effect the judge gave no recognition to the Tribal court's Vacating Order of Apr. 24, 1974.

We are in agreement with the appellant's contention No. 5 that the judge was in error in not giving recognition to the Tribal court's order of Apr. 24, 1974, and we so find. We, further, find it was incumbent on the judge as a matter of law to give recognition to the order of Apr. 24, 1974, during the hearing of September 25, 1974, on which the

order of Sept. 16, 1977, was based. We further find that any and all issues regarding the validity or invalidity of the Tribal order of Oct. 18, 1968, were properly considered and adjudicated by the Oglala Tribal Court, thereby resulting in the order of Apr. 24, 1974.

Under the circumstances it was incumbent upon the judge to recognize the Tribal order of Apr. 24, 1974, in determining the decedent's heirs and in so doing the appellant should have been found to be entitled to share in the estate as the surviving spouse.

In view of the foregoing, we find it unnecessary to address the other grounds specified by appellant in her appeal.

There remains only the question of Trix Harris' request for reimbursement of funds she advanced to the decedent's estate during the pendency of the appeal herein. The advancements represent mortgage payments on the lands involved, fees for preparation of income tax returns for the estate, and income taxes paid for the estate. There appears to be no reason why Trix Harris should not be reimbursed in such amounts as determined by the judge to be due and owing her by the estate for advancements made on behalf of the estate.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Order Denying Petition for Rehearing dated Jan. 17, 1978, be,

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and the same is hereby REVERSED, and the matter is REMANDED for the purpose of modifying the Order Determining Heirs of Sept. 16, 1977, to reflect the Board's findings set forth herein regarding the decedent's heirs and Trix Harris' request for reimbursement of funds advanced in behalf of the estate.

ALEXANDER H. WILSON,
Chief Administrative Judge.

WE CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

WM. PHILIP HORTON,
Administrative Judge.

WESTLANDS WATER DISTRICT— LEGAL QUESTIONS

Bureau of Reclamation: Repayment and Water Service Contracts— Contracts: Construction and Operation: Generally

A short-term or temporary contract will not rescind a long-term contract under the doctrine of superseding contracts unless the parties clearly intended that to be the effect of the new agreement and the terms of the new agreement are flatly inconsistent with the former agreement.

Contracts: Formation and Validity: Negotiated Contracts

Mere negotiations for a new contract do not imply rescission of an existing contract.

Bureau of Reclamation: Authorization

When Congress is relatively specific in authorizing a government project, it takes equally specific Congressional action to change that authorization.

Bureau of Reclamation: Authoriza- tion—Reclamation Lands: Irrigable Lands

Certification that lands are irrigable is a separate and distinct process from authorizing a Bureau of Reclamation project and cannot be construed as authorization to serve lands in excess of those specifically authorized in the project act.

Bureau of Reclamation: Authorization

The agencies have the responsibility in cases where authority to act may be in question to bring the matter to the direct and specific attention of Congress and to request clarifying legislation.

Bureau of Reclamation: Authorization

Congressional ratification of a significant modification in an authorized project ordinarily cannot be gained through mere references in testimony or documents presented to Congress for appropriation purposes; the intent of Congress as a whole to ratify must be clearly expressed and manifested in the record.

Contracts: Construction and Opera- tion: Generally

Laws in existence at the time a contract is entered into become a part of the contract whether or not expressly referred to in the contract or incorporated in its terms.

Bureau of Reclamation: Authoriza- tion—Bureau of Reclamation: Repay- ment and Water Service Contracts—

Reclamation Lands: Inclusion and Exclusion of Within Irrigation District

Sec. 9(e) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(e) (1970), does not give the Secretary any independent authority for entering water service contracts for areas except as separately authorized by Congress.

Bureau of Reclamation: Repayment and Water Service Contracts

No water may be delivered to a reclamation district until the district has signed a repayment contract which establishes a sufficient repayment obligation guaranteeing that the United States will recover the costs of the project as provided by law.

Contracts: Construction and Operation: Waiver and Estoppel

The United States is not bound or estopped by the acts of its agents who may enter into a contract or an agreement to do or cause to be done what the law does not sanction or permit.

Contracts: Construction and Operation: Waiver and Estoppel

The burden is on the individual or entity contracting with the Government to ascertain whether the government agent with whom he is dealing is acting within the scope of his authority.

Contracts: Formation and Validity: Generally

An internal decision memorandum signed by the Secretary of the Interior which recommends a contract negotiating position cannot ripen into a binding contract with an entity who has relied and acted upon some position recommended in the memorandum.

Contracts: Construction and Operation: Waiver and Estoppel

Estoppel has been imposed against the Government by the Ninth Circuit Court

of Appeals only if it can be shown that there was "affirmative misconduct" by the Government.

M-36901

July 31, 1978

OPINION BY OFFICE OF THE SOLICITOR

June 1, 1978

TO: SECRETARY OF THE INTERIOR

FROM: SOLICITOR

SUBJECT: WESTLANDS WATER DISTRICT—LEGAL QUESTIONS

I. Introduction and Summary of Conclusions

A. Introduction

This memorandum deals with three issues: (1) whether the 1963 water service contract between the Westlands Water District and the United States¹ is still in effect or whether it has been superseded or rescinded by mutual consent of the parties; (2) whether water is authorized to be delivered under that contract to areas outside the 500,000 acre Federal service area of the San Luis Unit authorized by Congress in 1960 as described in the Feasibility Report on the Unit;² and (3) whether the United States has a binding legal commitment to deliver 1.1 million acre-feet of water from the San Luis Unit to the Westlands Water District, at a rate of \$7.50

¹ Contract No. 14-06-200-495-A, dated June 5, 1963 (hereafter referred to as the "1963 Contract").

² Act of June 3, 1960, 74 Stat. 156 (hereafter referred to as the "San Luis Act"). This Act is not codified in the United States Code. See III *Federal Reclamation and Related Laws Annotated*, p. 1524.

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per acre-foot, plus a 50 cent per acre-foot service charge for the San Luis Drain, because of the so-called "Holum memorandum" discussed below, and subsequent events.³

B. Summary of Conclusions

1. The 1963 contract has not been superseded or rescinded by mutual consent of the parties. It authorizes delivery of the amount of water, at the price and under the conditions stated therein to the area of the Westlands Water District lying within the Federal service area of the San Luis Unit authorized by Congress in 1960 to be served.^{3A}

2. In 1960, Congress authorized delivery of federal reclamation water to a service area of approximately 500,000 acres, part of which lies within the current boundaries of the Westlands Water District. Post-authorization expansion of this service area by some 150,000 acres has not been approved or ratified by Congress and accordingly cannot be regarded as authorized.

3. Apart from the 1963 contract (and the short-term contracts which

expire at the end of 1978), the United States is under no legal obligation to deliver water to the Westlands Water District. Such a legal obligation could arise only from the execution of a valid written contract pursuant to longstanding statutory procedures for execution of reclamation contracts. Whatever validity the doctrines of implied contract and estoppel have in other contexts, they plainly are not applicable to these facts. The government's legal obligations are limited to those under the 1963 Contract.

II. Discussion

A. The 1963 Contract has not been superseded or rescinded by mutual consent.

The 1963 water service contract has never been used as a basis for water deliveries by the United States to the District. From initiation of water service in 1968 to the present, various temporary, short-term contractual arrangements have been used for water deliveries. From commencement of project water delivery in 1968 to 1972, a short-term contract providing for the recoupment of advances furnished by Westlands was in effect. Since 1972, water delivery has been made pursuant to annual temporary contracts, except for 1978, where two short-term sequential contracts are being used. These contracts have been in substantially the same form each year. Throughout this interim period, certain terms and conditions of the 1963 Contract have been

³ At my request, counsel for the Westlands Water District supplied me with a legal memorandum dated Mar. 14, 1978 which argued that, among other things, the United States has such a legal obligation. This argument was based on doctrines of implied contract and estoppel. Part II(C) of this opinion responds to that argument although, like that memorandum, it is based only upon our research to date, and should not necessarily be regarded as an exhaustive discussion of the facts or legal authorities on the point. See Westlands' Mar. 14, 1978 memorandum, p. 3.

^{3A} The memorandum submitted by Westlands, see Note 3, *supra*, also argues that the so-called "excess lands" provisions contained in this contract cannot be modified by Departmental regulations. This opinion does not deal with that issue.

maintained although negotiations were initiated in 1964 for a long-term contract to replace the 1963 Contract.

The use of such interim contracts, coupled with the fact that negotiations were proceeding on a replacement contract, requires a determination whether the 1963 Contract was either expressly or implicitly rescinded by the parties or whether the 1963 Contract has been rescinded by operation of law through application of the doctrine of merger or superseding contracts.

The doctrine of superseding contracts provides that when parties execute inconsistent contracts, the provisions of which are mutually exclusive, the terms of the later contract prevails. *See, e.g. In re Ferrero's Estate*, 298 P. 2d 604, 142 C.A. 2d 473 (1956); *Decca Records, Inc. v. Republic Recording Co., Inc.*, 235 F. 2d 360 (6th Cir. 1956).

The application of the doctrine to any particular fact situation, like most contract law doctrines, ultimately turns on the intent of the parties. *Hoston v. J. R. Watkins Co.*, 300 F. 2d 869 (9th Cir. 1962). It will be invoked only if it is found that the later contract was intended to be a new and complete expression of the agreement of the parties. That the later contract merely supplements or clarifies the former will not suffice. *See, e.g. George Foreman Associates, Ltd. v. Foreman*, 389 F. Supp. 1308 (N.D. Cal. 1974), *aff'd*, 517 F. 2d 354 (9th Cir. 1975).

Applying these principles to the interim contracts established subse-

quent to the 1963 Contract, there has been no rescission through application of this doctrine. The short-term contracts were not flatly inconsistent with the 1963 agreement and were seen as short-term replacements for it. Meanwhile, negotiations were taking place on a long-term contract to replace the earlier contract.

Indeed, all the temporary contracts since 1972 contained recitals which referred to the ongoing negotiations for the new replacement contract which would "amend and consolidate the existing water service and distribution system contracts and upon execution" would provide a long-term basis for water deliveries to the District. Paragraph 2 of each contract provided that the short-term contract would expire at the end of the year or "upon the effective date of the amendatory contract, whichever occurs first." Thus, it appears that the clear intent of the parties was neither expressly nor implicitly to rescind the 1963 Contract. Furthermore, it should be noted that negotiations by themselves do not imply rescission. Implicit rescission through negotiation has been found to render a former contract unenforceable, but only when the negotiations have culminated in a new contract. *See, e.g. Hoston v. J. R. Watkins Co., supra.*

Based on the preceding, it is my opinion that the 1963 water service contract has not been rescinded either expressly or implicitly by the interim use of temporary contracts

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and the ongoing negotiations for a new, long-term contract. The intent of the parties, as shown by the recitals in the interim contracts, is that the 1963 Contract would remain in effect until it expired of its own terms, or until it was superseded by a new, duly executed replacement contract.

B. The Department may not contract for firm delivery of water to areas outside the Federal San Luis Service Area authorized by Congress in 1960

As you know, this issue received extensive consideration by the San Luis Task Force.⁴ The Task Force concluded that the expansion of the service area of the San Luis Unit from the approximately 500,000 acres described in the authorizing legislation to more than 650,000 acres has not been authorized by Congress.⁵ I reach the same conclusion, for substantially the same reasons which persuaded the Task Force.

The problem may be succinctly described as follows: Congress au-

thorized the San Luis Unit in 1960 “[f]or the principal purpose of furnishing water for the irrigation of approximately five hundred thousand acres. * * *”⁶

The San Luis and Panoche Water District combined occupy less than 100,000 acres in the service area, and the Westlands Water District now occupies the remaining more than 400,000 acres.

At the time the Unit was authorized in 1960, the area now occupied only by the Westlands Water District was divided into two districts, the original Westlands District and the Westplains Water Storage District. Approximately 116,000 acres of the original Westlands District lay outside of the service area to the east. The area to the west of the original Westlands District became the former Westplains Water Storage District in 1962, of which approximately 40,000 acres lay outside the service area to the west.

The Westlands and Westplains Districts were merged in June 1965 to form an expanded Westlands District. Of this enlarged District, some 156,000 acres lie outside the service area indicated in the authorizing Act—40,000 on the west and 116,000 on the east.

The principal issue is whether service to these additional areas has been authorized by Congress. There

⁴ The Task Force was created by Congress to “review the management, organization, and operation of the San Luis Unit to determine the extent to which they conform to the purposes and intent” of the Reclamation Act of 1902 and the San Luis Act, 91 Stat. 225, June 15, 1977, Sec. 2(a). The Report is published as *Special Task Force Report on San Luis Unit, Central Valley Project, California* (1978) (hereafter, “Task Force Report”).

⁵ See *Task Force Report*, pp. 18-27 and 50-52. Two members of the Task Force, Curtis D. Lynn and Adolph Moskovitz (the latter being the representative of the Westlands Water District), filed dissenting opinions on this point. See *Task Force Report*, pp. 239, 249-52.

⁶ The amounts referred to in the Act, and throughout this opinion (except where otherwise noted), are gross acres, not irrigable acres. The difference has no legal significance in this context, and is not the subject of dispute.

is no dispute that water service is properly authorized to Westlands' lands in the original service area referred to in the Act, which includes portions of the original Westlands District and a portion of the former Westplains District.⁷

The distribution and drainage system has been constructed in the 116,000-acre area on the east. Work is not finished on the system in the 40,000 acres to the west.

1. The service area authorized by Congress in 1960

The first sentence of the San Luis Act (sec. 1(a)), provides:

[F]or the principal purpose of furnishing water for the irrigation of approximately 500,000 acres of land in Merced, Fresno, and Kings Counties, California, hereinafter referred to as the Federal San Luis unit service area, and as incidents thereto of furnishing water for municipal and domestic use and providing recreation and fish and wildlife benefits, the Secretary of the Interior (hereinafter referred to as the Secretary) is authorized to construct, operate, and maintain the San Luis unit as an integral part of the Central Valley project. (Italics added.)

Sec. 1(a) continues by describing the principal engineering features of the Unit and describes which of those facilities may be constructed

⁷ It is useful to refer to the maps contained in Appendix K to the *Task Force Report*. Map No. 6 shows the authorized service area in the solid black line, while the colored portions show the approximate current boundaries of the Westlands Water District. The former Westplains and the original Westlands are not indicated, but the San Luis Canal (shown by the dotted line) approximately indicates the common boundary between the Districts—Westplains lying to the west (the bottom of the map) and original Westlands to the east (the top of the map).

to provide for their joint use by both the United States and the State of California.

Sec. 2 authorizes the Secretary to negotiate and reach agreement with the State of California for "coordinated operation" of the Unit, including the joint-use facilities, for the following purpose:

[I]n order that the State may, without cost to the United States, deliver water in service areas outside the Federal San Luis unit service area described in the report of the Department of the Interior, entitled "San Luis Unit, Central Valley Project," dated Dec. 17, 1956.⁸

Later in that same section, Congress provides for enlargement by the State of the joint-use facilities so long as the State paid an "equitable share" of the cost, the enlargement would not interfere "unduly" with operations of the federal portion of the project, and "the use of the additional capacity for water service shall be limited to service outside the Federal San Luis service area."⁹

⁸ This report (hereafter "Feasibility Report") is the standard feasibility report required by reclamation law to be prepared by the Secretary and submitted to Congress prior to expending money for construction of new project works. See 43 U.S.C. § 485h (1970); 43 U.S.C. § 412 (1970).

⁹ There are other references as well. Sec. 1(b) prohibits delivery of water to newly irrigated lands in the "Federal San Luis service area" for use on surplus crops. Sec. 3(f) of the Act ensures that the State will not be restricted in its right to use the joint-use facilities for "water service outside the Federal San Luis service area," and sec. 3(j) prohibits the State from serving any lands within the "Federal San Luis unit service area" except to the extent "such service is required as a consequence of" the State's assumption of the responsibility for operation and maintenance of the joint-use facilities. (Such assumption is permitted, but not required, by sec. 3(g)).

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These numerous references demonstrate beyond question that the Congress had a definite service area in mind when it authorized the Unit. Congress could not have been more explicit short of including a map or metes and bounds description of the service area in the authorizing legislation—a practice Congress has never employed, to my knowledge.

Many Acts of Congress authorizing reclamation projects do not even refer to a service area, much less state its approximate acreage. Some authorizing Acts refer to a service area only by reference to the project feasibility report, which describes and maps the project's service area.¹⁰ Some contain no reference to either a service area or the project's feasibility report.¹¹ Still others contain a general geographic reference by river valley.¹²

By contrast, the San Luis Act opens with a reference to the approximate size of the service area, and describes the project's principal purpose as furnishing water to ir-

rigate this area. Sec. 2 links the service area described in sec. 1 to that described in the feasibility report, and the remainder of the Act contains several other references to the service area. It is plain, then, that in comparison to other Congressional authorizations, including some in the Central Valley Project itself, Congress was moved to speak carefully on the face of the San Luis Act itself about its intent regarding the Unit's service area.

An examination of the legislative history fully supports this conclusion regarding Congress' intent. The report on S. 44, the bill that was eventually enacted, contains language which clarifies the concern of Congress with respect to the Federal service area, in the context of preventing the State from infringing the Federal service area.¹³ That report sets forth certain amendments made to the bill, the first two of which made more specific reference to the Federal San Luis Unit service area and the joint-use arrangements. The report explains that these amendments were "designed to precisely define the San Luis Unit of the Central Valley Project that is specifically authorized by this bill."¹⁴

It is appropriate at this juncture to point out that there could have been several reasons behind Congress' decision to define the service area carefully. One was to provide a firm basis for the State-Federal

¹⁰ See, e.g., Fryingpan-Arkansas Project, Aug. 16, 1962 (76 Stat. 389), 43 U.S.C. § 616 (1970), which directs the Secretary to build the project "in substantial accordance with the engineering plans * * * set forth in [the feasibility report] * * *." See also, Savery-Pot Hook, Bostwick Park and Fruitland Mesa Projects, 78 Stat. 852 (Sept. 2, 1964).

¹¹ See, e.g., San Felipe Division, Central Valley Project, Aug. 27, 1967 (81 Stat. 173), 43 U.S.C. § 616fff-1; and Upper Division, Baker Project, Sept. 27, 1962 (76 Stat. 634).

¹² See, e.g., Lower Teton Division, Teton Basin Project Act, Sept. 7, 1964 (78 Stat. 925), 43 U.S.C. § 616 nn, which authorizes the project in order to "assist in the irrigation of arid and semiarid lands in the upper Snake River Valley, Idaho, * * *"

¹³ Sen. Rep. 154, 86th Cong., 1st Sess., Apr. 8, 1959.

¹⁴ *Id.*, p. 7.

partnership and to define clearly where the benefits from the State and the Federal investments were intended to be provided—to protect the federal investment against encroachment from the State since that could jeopardize the repayment potential of the Federal project. Another reason to locate the service area exactly could have been to facilitate defining where the excess land limitations of reclamation law would apply, *see*, generally, 68 I.D. 370; M-36635, 68 I.D. 412 (1961) (*Solicitor's Opinions* on application of the excess land law to the State service area), and to be fully aware of the amount of excess lands in the area to be served, to gauge the extent to which break-up of excess holdings would be required.¹⁵ And finally, the size, elevation and location of the service area determines the size of the distribution and drainage system which must be constructed, and the number of pumping plants and amount of power required to pump the water. Because the Federal Government bears most of this cost (it is repaid by the users over a 50-year period without interest), the extent of this system can affect the financial feasibility and cost/benefit ratio of the project. There were, in other words, numerous reasons here to be concerned about the size of the service area.

¹⁵ The Feasibility Report pointed out, for example, that 65% of the proposed 500,000-acre service area was in excess holdings (p. 88). That the problem has remained a serious one is documented in the *Task Force Report*, Chap. 9, *passim*.

The Report on the House version of the bill contains an even more specific description of the service area:

[the] lands which would be irrigated lie between elevations of about 200 and 500 feet above sea level on a broad, gently sloping plain extending eastward from the coast range. The area forms a strip of about 65 miles long and 13 miles wide, totaling about 480,000 acres. At the present time, there are about 400,000 acres within the service area developed for irrigation and served by pumping from groundwater sources.¹⁶

The House version of the bill required that the San Luis Dam and reservoir be designed and constructed to allow for expansion should a subsequent joint-use agreement with the State be executed. This approach was estimated to cost an additional \$10 million. There was understandable concern that this initial federal expenditure should not be wasted in the event no agreement was reached, in which case the enlarged facilities might be used to accommodate "expansion of the Federal San Luis Unit."¹⁷ The House Report cautioned, however, that such "expansion," should it become necessary, "is, of course, subject to further authorization processes."¹⁸

¹⁶ House Rep. 399, 86th Cong., 1st Sess., p. 2.

¹⁷ *Ibid.*, p. 5.

¹⁸ *Ibid.* The Report goes on to state that "[t]he modifications for future enlargement of the reservoir and the pumping plant to accommodate the State's Feather River Project would be essentially the same as those contemplated to accommodate expansion of the Federal San Luis Unit."

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Further review of the legislative history indicates that the future expansion of the Federal service area contemplated in these references was probably to extend the project further south into the Avenal Gap area of the San Joaquin Valley.¹⁹ In any event, these repeated references to the San Luis service area in the Committee Reports show that the authorizing Committees were acutely aware of the size and location of the area to be served by the principal works authorized in the Act. It also suggests, as the House Committee expressly acknowledged, that Congress thought that expansion of the Federal Service area would require additional authorization by Congress.

This conclusion is reinforced by examination of the Feasibility Report prepared by the Bureau of Reclamation and submitted to Congress in 1956. As noted above, Congress specifically referred, in sec. 2 of the San Luis Act, to the description of the service area contained in that Report. Plate 1 of that document is a map depicting the major project features of the Unit and the service area. The report of the Regional Director, which prefaces the full report, indicates that the area to be irrigated would consist of about 496,000 acres and that this land would be located at elevations between 200 and 485 feet on a broad, gently sloping plain extending east-

ward from the coast range in a strip about 65 miles long and 13 miles wide.²⁰ This description is nearly identical to that in the House Report quoted above and clearly indicates that Congress, in sec. 1 of the Act, was authorizing service from the Unit to a precisely defined area. No other defined area was before Congress when the authorizing bill was enacted.²¹

At the time of authorization, then, there can be no doubt that Congress intended the Unit to supply irrigation water to approximately 500,000 acres and that the location of that 500,000 acres is clearly defined in the Feasibility Report Congress cited in the Act.

²⁰ *Feasibility Report*, p. 2.

²¹ The Feasibility Report itself is of course replete with references to the San Luis Unit service area. As might be anticipated, all are fully consistent with that described in the Act. For example, p. 1 of the "Substantiating Report," containing the meat of the Feasibility Report, states: "The service area of the San Luis Unit of the Central Valley Project contains a gross area of 496,000 acres on the west side of the San Joaquin Valley of California." Later, under the heading "San Luis Service Area," the following appears (pp. 23-24): "The irrigated area of the San Luis Unit would contain about 458,500 irrigable acres. The western boundary of the service area would be elevation 485 as far south as the Pleasant Valley Canal, and, from there it would average 455 feet in elevation, the grade of the Pleasant Valley Canal. The eastern boundary of the proposed service area is an irregular line representing the eastern edge of the better quality soils. Before construction begins minor modifications in these service area boundaries would be possible, but the irrigable acreage to be served now cannot be increased because of water supply limitations. The service area boundary is shown on plate 1." Congress' use of the word "approximately" in the Act is obviously meant to cover the rounding-off of the 496,000 acre figure in the Feasibility Report to the 500,000 acre figure used in the Act.

¹⁹ This was referred to in the *Feasibility Report* at pp. 151, 155-58.

2. *Arguments that Congress subsequently approved expansion of the service area*

As we have seen, the Act authorized irrigation service on "approximately five hundred thousand acres of land in Merced, Fresno and Kings Counties, * * *" Act, sec. 1(a). The Feasibility Report listed the total gross area within the service area as containing 496,124 acres, of which 458,460 acres were then classified as irrigable. (p. 31.) Currently the Bureau of Reclamation considers a total of 650,377 acres to be within the Federal service area, of which 584,852 acres are considered irrigable. A number of arguments have been advanced to sustain the increase in the size of the service area, based mostly on Congressional approval allegedly conferred after the passage of the San Luis Act in 1960. These arguments will be treated in turn below.

First, however, given the fact that Congress was careful initially to define the San Luis service area, the standard for determining whether expansion can be regarded as authorized is relatively clear. In *National Wildlife Federation v. Andrus*, 440 F. Supp. 1245 (D.D.C. 1977), for example, the court held that a powerplant was not authorized at the dam which was part of the Navajo Irrigation Project authorized by Congress. (See 43 U.S.C. §§ 620, 615ii-oo (1970)). The court pointed out that the original 1956 authorizing Act ap-

peared to exclude a powerplant at the Navajo dam.²²

Although a 1970 amendment to the authorizing legislation also did not mention a powerplant, the Senate Committee report to that amendment stated that the project "includes a powerplant at Navajo dam," and another earlier report also mentioned the powerplant. See 440 F. Supp. at 1249. The court observed:

Clearly the appropriate officials have some discretion to modify aspects of various programs within the * * * Project. But such modifications must occur within the statutory authority granted by Congress. Where Congress has been specific in its authorization or lack thereof, the discretion of the officials is accordingly diminished.

The conclusion is equally applicable here. In fact, the instant case is even stronger because in *National Wildlife, supra*, a Committee report had approved the powerplant. Here, by contrast, there has been no affirmative statement in a Committee report that the expansion had been approved.

Another closely analogous case is *Ryan v. Chicago B. & Q. R. Co.*, 59 F. 2d 137, 143 (7th Cir. 1932), a suit by a riparian railroad company alleging that a Corps of Engineers flood control dam had been enlarged

²² Specifically, the Act authorized the Secretary to construct, operate and maintain several project units, "consisting of dams, reservoirs, powerplants, transmission facilities and appurtenant works." (Italics added.) But when the Navajo dam was listed, it was followed by the parenthetical "caveat" "(dam and reservoir only)." See 43 U.S.C. § 620 (1970).

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without authorization, to the railroad's detriment. The court stated:

* * * Congress having once authorized the project, or any part thereof, to be done according to certain detailed and specified plans, we think the discretion of the Secretary * * * to that extent would be limited, and any subsequent material change or substitution with respect thereto by the Secretary * * * could not be said to be authorized by Congress until approved by it.

The Court of Appeals went on to find that "great doubt and uncertainty" had existed about whether the modifications in the project had been authorized. After the district court ruled that the modifications were unauthorized, however, Congress amended the authorizing act to give the Corps wide authority to make such "*modification * * * as in the discretion of the Chief of Engineers may be advisable.*" 59 F. 2d at 144. The Court of Appeals held that this amendment was sufficient to authorize the modification, and vacated the district court's ruling.

Both of these cases lead to the conclusion that, once Congress has been relatively specific in authorizing a project, it takes equally specific action by Congress to change that authorization. With this in mind, I now turn to the arguments asserted to support a finding that Congress has ratified the service area expansion.

a. Land Classification

Reclamation law requires that as a condition precedent of expending any appropriation for the "initiation of construction under the terms

of reclamation law" of any new project facility, the Secretary of the Interior must certify to Congress that an adequate soil survey and land classification has been made of the lands to be served by the project and that such lands are irrigable.²³ In May of 1962, the Secretary of the Interior, in compliance with this requirement, certified to Congress that a soil survey and land classification had been completed for the lands in the San Luis unit. The report concluded that out of a total area of 610,444 acres which were classified, 589,576 acres were found to be arable.²⁴

A report accompanying the certification indicated that a 1951 land classification study had found that a total of 112,400 acres in the proposed project area were of marginal value for irrigation purposes. These lands were referred to as class 5 lands and on that basis were excluded from the service area.²⁵ The

²³ 43 U.S.C. § 390a (1970). This provision was first included as part of the Interior Department's 1953 Appropriation Act, 66 Stat. 451 (July 9, 1952) and was repeated with an amendment the following year, 67 Stat. 261 (July 31, 1953).

²⁴ A description of the Bureau's soil classification studies in the San Luis Unit is contained in Appendix D to the Task Force Report, pp. 281-83. Although the Secretary certified that some 589,576 acres were arable, it has recently come to our attention that some 59,746 acres in Westlands has not in fact been certified as irrigable as of this date. The Bureau expects to complete this certification process in the near future.

²⁵ The "Substantiating Report" included in the Feasibility Report discussed the land classification undertaken prior to authorization in considerable detail. (pp. 26-31.) It reflects that only those lands within the service area were classified. (p. 27.) The accompanying plate 3 is a map depicting the land classifica-

(Continued)

report goes on to state that in 1961, additional investigations were conducted to determine the economic feasibility of providing project service to this 112,400 acres of class 5 land. This additional investigation found that most of these lands could be successfully irrigated as a part of the project if proper drainage were provided and the soil were periodically leached to reduce salinity. It was this reclassification and the addition of those lands formerly classified as marginal which resulted in expanding the total gross area within the Unit from approximately 496,000 acres to approximately 610,000 acres.²⁶

The statute that requires the Secretary to certify to Congress that lands to be served by new projects are irrigable is separate and distinct from the authorization of any particular project. Because it refers to the initiation of construction of a project under the terms of reclamation law,²⁷ it is plain on its

face that it presumes, but does not itself provide, Congressional authority to serve lands in reclamation projects. It is designed simply to ensure that the project as authorized will not be constructed unless, upon further analysis, the land already authorized to be irrigated by the project is indeed suitable for sustained irrigation. As such, it neither serves nor purports to serve as authority for a project to serve substantial additional lands if service to those lands was not initially provided for in the project authorization.

Accordingly, the submission of certification that the legal requirements for project initiation have been met cannot be construed as authorization to serve lands significantly in excess of those amounts expressly authorized in the project Act. The procedure requires Congress to take no action with respect to such certifications and, in view of their clear purpose, no Congressional action could be intended or expected. Most particularly, Congressional inaction after receiving this certification cannot legitimately be presumed as Congressional acquiescence in the expansion of the service area. To do otherwise would make a mockery of the pains Congress took to define the service area in the 1960 Act. Had Congress intended to allow such a significant expansion by administrative action after authorization, based on a subsequent determination that more land was irrigable than previously thought, it could easily have so provided in the Act itself. Congress did

(Continued)

tion within the service area shown on plate 1. (This map is included as Map #3 in Appendix K to the *Task Force Report*.) The accompanying Table 2 (p. 31) summarizes, in the words of the Substantiating Report, "the irrigable and productive acreages for the area involved in the proposed San Luis Unit." (p. 28, italics added.) It shows that a gross area of 496,124 acres were classified as of the time Congress authorized the Unit. No mention is made anywhere in the Feasibility Report of the 112,400 acres of marginal land supposedly excluded from the service area.

²⁶ The argument that the land classification certification increased the size of the authorized service area goes only to 112,000 acres lying to the east of the original service area. It does not justify the expansion of the service area to include the 40,000 acres of the former Westplains Water Storage District lying to the west of the original service area.

²⁷ The San Luis Act is a part of reclamation law.

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not do so, and instead exercised unusual care in defining the service area. The classification procedure arguably might justifiably be used in the right circumstances to make minor adjustments in the project's service area, given the use of the qualifiers "approximately" in the Act and "about" in the Feasibility Report, in reference to the service area size. It cannot, however, be used to justify this large expansion in the San Luis Unit.²⁸

The addition of acreage to the original service area apparently would not, because of changes in project area cropping patterns, require the use of additional water. Because the total supply of water to the Unit would apparently not be increased,²⁹ Westlands representative on the San Luis Task Force argued that the expansion of the service area should be considered authorized.³⁰ The difficulty with this

argument is that, in authorizing the project, Congress did not specify an amount of water to be delivered; instead, it specified the service area to which (an unspecified amount of) water would be delivered. Thus, I am unable to conclude, as the Westlands dissent argues, that the words "[f]or the principal purpose of furnishing water for the irrigation of approximately five hundred thousand acres of land * * *" are without significance. Congress may well have been, and still be, amendable to increasing the size of the service area because more land is irrigable than originally thought, but it is a decision for the Congress to make—and a decision it must make affirmatively, rather than silently.³¹

b. Memorandum of Regional Solicitor

In an Oct. 30, 1962 memorandum to the Associate Solicitor for Water and Power, the Regional Solicitor in Sacramento addressed the question of whether permanent water service, rather than temporary service, could be provided to the entire Westlands Water District as it existed at that time, including the area of some 116,000 acres on the eastern side of the District which was not included in the service area referred to in the authorizing Act and outlined in the Feasibility Re-

²⁸ The total expansion of the authorized service area to include lands outside the original service area on both the east and west comprises an area of over 150,000 acres. This is a 30% expansion from the original service area. The area added is larger than the areas served by most reclamation projects in their entirety. (Westlands is itself the largest irrigation district in the country.)

²⁹ It is not clear whether, or to what extent, this change in the expected cropping patterns and the estimated per acre water requirement is due to the failure of excess land law enforcement to break up large operating units in Westlands. The San Luis Task Force was critical of the maintenance of large (1977 average size 2200 acres) operatorships in Westlands. See *Task Force Report*, Chap. 9, *passim*.

³⁰ See Moskovitz dissent, *Task Force Report*, pp. 250-51.

³¹ I note that this Department has recently submitted a bill to Congress which, if enacted, would reauthorize the project and expressly authorize expansion of the service area to include that portion of the entire Westlands

District, as it existed on Apr. 1, 1978, which was certified as irrigable. Thus, we have already taken the initiative to give the Congress a clear opportunity to make this necessary affirmative decision.

port.³² Noting that the question had "[n]o easy answer," (p. 1), he concluded that, despite the language in the authorizing Act and Feasibility Report, the project had sufficient flexibility to justify entering a firm contract to serve all areas included in the Westlands Water District, including the 116,000 acres.

To support his conclusion, the Regional Solicitor relied on the fact that sec. 1 of the San Luis Act authorized the Secretary to "construct, operate and maintain the San Luis Unit as an integral part of the Central Valley Project." (p. 5.) He also referred to other Central Valley Project unit authorizations which contained similar language, and which also generally authorized delivery of water to the Central Valley in California, and noted that the San Joaquin Valley was sometimes referred to in Bureau feasibility reports as an area where there was a need for supplemental water supplies. (p. 6.)

Other reasons cited by the Regional Solicitor to justify full service to Westlands Water District included the fact that the Secretary had notified Congress that all rights to water necessary to fulfill the purposes of the San Luis Unit had been acquired;³³ the assertion that the mapped area in the Feasibility Re-

port "was simply a designation of the class one lands in the general area,"³⁴ the fact that Westlands Water District had lobbied in Congress for the authorization, and there was no indication at the Congressional hearings that the service area did not include all of Westlands,³⁵ and the fact that correspondence between the Bureau and the District had assumed a full water supply to the entire District.³⁶

For all these reasons, the Regional Solicitor concluded that the language in the Act and the Feasibility Report did not prevent the Bureau from entering into a contract with Westlands for a firm supply of water to serve the entire Westlands District, including the 116,000 acres lying outside the authorized service area.

I have carefully reviewed the Regional Solicitor's memorandum, and, while the Bureau of Reclamation was justified in relying upon it in the past, to the extent that he finds the Department has authority to enter into a long-term water service contract for a firm supply of water to areas outside the service area referred to in the Act, I disagree and his conclusion is overruled.

As noted above, the Act plainly states that the purpose of the Unit is to serve approximately 500,000 acres. The Feasibility Report referred to in sec. 2 of the Act plainly defines the area composing this 500,000 acres. The fact that the Unit is to be operated as an "integral

³² The Regional Solicitor's memorandum was drafted to serve as a backup for a proposed Departmental reply to an inquiry from Congressman Sisk, and it expressly stated that its "comments" were made for the "consideration" of the Associate Solicitor, *Id.*, p. 3. There is no evidence that the memorandum was passed upon either by the Solicitor or the addressee, the Associate Solicitor.

³³ *Id.*, pp. 2-3.

³⁴ *Id.*, p. 5.

³⁵ *Id.*, pp. 7-8, 13.

³⁶ *Id.*, pp. 8-9.

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part" of the Central Valley Project does not justify ignoring the plain language on the face of the Act. Had Congress intended such a result, it would not have taken such pains to define the service area.

The Regional Solicitor's references to the Congressional direction to integrate the operation of the San Luis Unit with the rest of the Central Valley Project, and to the authorizations of other units of the Central Valley Project as generally permitting the delivery of water to areas adjacent to, but outside of, the San Luis service area cannot justify this expansion. As noted above, the question regarding expansion of the service area is not principally related to water supply but to the acreage served. The fact that additional water may be available from other units of the Central Valley Project cannot by itself justify overriding Congress' specific instructions regarding which acreage is to be served out of San Luis reservoir via the San Luis canal. And Congress' direction to integrate the operation of San Luis with the rest of the Central Valley Project is obviously necessary because of the crucial role the Delta-Mendota canal—a previously constructed feature of the Central Valley Project—plays in supplying water to the San Luis reservoir for storage and eventual use in the San Luis service area.³⁷

³⁷ This role was well-recognized and explained in the Feasibility Report (p. 45):

"The Delta-Mendota canal is an important feature in the operation of both the Central

Again, this does not justify overriding the plain language of the Act.

The Regional Solicitor similarly erred in allowing such relatively minor less probative facts as Westlands' support for the project, assumptions in correspondence between Westlands and the Bureau that a full supply would be available, and vague references in other feasibility reports to the need for water in the Central Valley, including the San Joaquin, to outweigh the plain words of the Act, the description in the Feasibility Report referred to in the Act,³⁸ and the legislative history.

At its heart the memorandum reflects the view that, regardless of the language Congress chooses to employ, it authorizes a project like San Luis on a most general, unrestricted basis, and vests the Department with authority to operate it as it deems appropriate. What-

Valley Project and the San Luis Unit * * *. With the San Luis Unit included, the canal still is required to meet these commitments [to the Delta-Mendota canal service area] and in addition, deliver an average 1,257,000 acre-feet per year to the San Luis pumps for the San Luis Unit. This will be accomplished by using the conveyance capacity of the Delta-Mendota canal to transport San Luis water during months when irrigation along the Delta-Mendota canal and San Joaquin River does not demand the full capacity of the canal."

³⁸ The memorandum rejects the service area described in the Feasibility Report as "simply a designation of the class one lands in the general area." *Id.*, p. 5. That is not the case. The Feasibility Report shows that, of the 496,000 acres in the service area, 199,000 acres were class 1 land, 231,000 acres were class 2, 64,000 acres were class 3, and 2,000 acres were class 6. See Feasibility Report, p. 28, and plate 3 (included as Map #3 in Appendix K to the *Task Force Report*).

ever may be the case with other projects or other units of the Central Valley Project,³⁹ the above discussion of the San Luis Act and its legislative history makes manifestly clear that Congress did not hand the Department a blank check here. I recently had occasion to observe that, in determining whether post-authorization modifications are consistent with the intent of Congress, the authorizing act itself provides the best evidence of Congress' intent.⁴⁰ The Act here is clear, and compels a conclusion contrary to that reached by the Regional Solicitor.⁴¹

c. Post-Authorization Ratification by Appropriation

I have concluded that the San Luis Act authorized the Secretary to serve approximately 500,000 acres from the San Luis Unit and that the location of this area was specifically defined in the Feasibility Report referred to in the Act. The question now is whether Con-

gress, by subsequently appropriating funds for the project (including funds for the distribution and drainage system in areas outside the authorized service area), modified its original authorization by ratifying the post-authorization expansion of the San Luis service area.

Beginning in 1967, budget documents submitted by the Bureau of Reclamation to the Congress for appropriation purposes have reflected that the San Luis service area consisted of anywhere from 550,000 to 614,000 acres. Some of the references were contained in footnotes to the project data sheets; others were in testimony of the Department witnesses,⁴² and still others referred only to the size of the area to be served by the distribution and drainage system. Almost all of these references were contained in several pages of budget material for the CVP and San Luis

³⁹ See, e.g., the San Felipe Unit authorizing Act, 43 U.S.C. § 616fff-1 (1970).

⁴⁰ See my opinion on the San Felipe Unit, May 1, 1978, pp. 3-5.

⁴¹ The San Luis Task Force reached an identical conclusion. See *Task Force Report*, pp. 21, 27. That Congress itself was deeply disturbed by the allegations involving the San Luis Unit is manifested in the Act creating the Task Force, Pub. L. 95-46 (June 15, 1977). Congress charged the Task Force with the responsibility to review the "management, organization, and operations of the San Luis Unit to determine the extent to which they conform to the purposes and intent of" the San Luis Act and the Reclamation Act. (Sec. 2a.) Congress also asked the Task Force to determine, among other things, the "specific legislative authority for each feature of the project," (Sec. 2(b)(1)) and to analyze the "compatibility of the present design and plan of the San Luis Unit with the original feasibility report * * *." (Sec. 2(b)(2)).

⁴² Bureau officials testified without any elaboration at the 1967 and 1968 Appropriations Subcommittee hearings in the House that the Westlands District had been "enlarged" by the merger with Westplains. Although given a clear opportunity by Subcommittee questions to explain the enlargement of the service area and to describe the Department's view of its legal authority to effect such enlargement, the Bureau officials failed to do so, relying instead on general statements about the merger of the two districts. As far as I am aware, these were the only occasions the issue was ever touched upon in the appropriation process. Moreover, the budget justifications submitted to Congress each year from 1967 to 1977 show that the cost of the distribution and drainage system remained constant at \$192 million, the amount authorized in the 1960 Act. It was not until 1977 that the project data sheet showed an increase of \$177 million for the distribution and drainage system explaining the massive increase in part on the basis of "the addition of the former Westplains area to the Westlands Water District."

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submitted to Congress along with several hundred pages of similar material for every other ongoing Bureau project. Westlands argues that, since Congress appropriated funds based on these documents, the changes contained therein were ratified by the appropriation acts of the Congress.

Several reported decisions have dealt with the general issue of legislation by appropriation. I will discuss the most applicable ones here. First, in 1941 the United States Supreme Court held that where Congress repeatedly appropriates money for a program, having specific knowledge of administrative practice from annual reports of the agency, from disclosure of the practice at the hearings of appropriations subcommittees of both Houses, and from statements made on the floor, the agency action was ratified. *Brooks v. Dewar*, 313 U.S. 354 (1941). The case involved the issuance by the Secretary of the Interior of temporary grazing licenses at a uniform fee per head of livestock grazed, an action allegedly inconsistent with the requirement of sec. 3 of the Taylor Grazing Act that renewable term permits be issued at fees adjusted to individual situations.⁴³

The repeated appropriations for range improvement of the fees so

collected, made with the specific knowledge that the Secretary was issuing temporary licenses at uniform fees available in four annual reports of the Secretary, disclosed at appropriations Subcommittee hearings in three years, and mentioned on the floor by members of Congress in three separate sessions, was held to constitute confirmation of the Secretary's construction of the Act, as well as ratification of the Secretary's action. See 313 U.S. at 360-61.

A similar question arose more recently in *National Wildlife Federation v. Andrus*, 440 F. Supp. 1245 (D. D.C. 1977), discussed earlier in this opinion. There the court held that, despite the fact that the Navajo dam powerplant proposal was included in a report submitted to Congress in 1970 and made part of House Subcommittee files, and was mentioned in a Senate Report that year, repeated appropriation of funds for the project from 1974 to 1977 did not constitute ratification of the Department's decision to build the Navajo dam powerplant. As noted above, the court relied heavily on the fact that the only relevant pre-existing statutory language (the 1962 authorization) seemed directly contrary to the Department's action. The important difference between this case and *Brooks v. Dewar*, *supra*, was that here Congress had, in the court's words, no "specific knowledge" of the powerplant at Navajo dam. "[R]eferences to the powerplant buried as they are amid many other

⁴³The Secretary argued that sec. 3 did not necessarily require individual adjustments of fee charges when read against the broad authority he had been granted by Congress in sec. 2 of the same Act to issue rules and regulations to "accomplish the purpose of" the Act.

proposals related to NIIP, hardly seem sufficient to alert Congress to the possibility that it is being asked to appropriate funds for an unauthorized project." *National Wildlife Federation v. Andrus, supra* at 1250 (Italics added.)

It has also been held that a ratification of an administrative exercise of authority by appropriation "will not be accepted where prior knowledge of the specific disputed action cannot be demonstrated clearly." *Thompson v. Clifford*, 408 F. 2d 154, 166 (D.C. Cir. 1968). Under this rule, continuing appropriation of funds for operation of national cemeteries did not authorize the specific action of the Secretary of the Army in prohibiting the burial in a national cemetery of deceased veterans sentenced to prison for terms exceeding five years. Said the court (*Id.* at 166, footnotes omitted):

[R]atification by appropriation, * * * requires affirmative evidence that Congress actually knew of the administrative policy. As we said recently, "ratification by appropriation is not favored and will not be accepted where prior knowledge of the specific disputed action cannot be demonstrated clearly." Moreover, to constitute ratification, an appropriation must plainly show a purpose to bestow the precise authority which is claimed.

In another case, continuation of appropriations for the Central Arizona Project did not constitute legislative authorization for the Secretary of the Interior to deny a preference right to bid for interim low-cost, federally owned electric power in contravention of a prefer-

ence clause in the reclamation laws, even though Congress had before it committee reports listing the entities which were to receive interim power. *Arizona Power Pooling Ass'n. v. Morton*, 527 F. 2d 721 (9th Cir. 1975), *cert. den.*, 425 U.S. 911 (1976). There is no indication that Congress was specifically informed that particular preference right customers had sought and been refused the opportunity to purchase interim power, so Congress did not have knowledge of the "precise course of action" of the agency which is essential for a finding of ratification. *Id.* at 725 (Italics added).

In a very recent case involving a similar situation, it was held that Congress had not ratified by appropriation the scheme of allocation of power from California's Central Valley Project despite the fact that the scheme had been explained in Interior Department reports to the House and Senate Appropriations Committees. *City of Santa Clara v. United States*, — F. 2d — (9th Cir. 1978), *aff'g*, 418 F. Supp. 1243, as modified by 428 F. Supp. 315 (N.D. Cal. 1976). The United States must, the court said, sustain a "heavy burden of demonstrating Congressional knowledge of the precise course of action alleged to have been acquiesced in."

The notice given Congress of the expansion of the San Luis service area does not meet the straightforward test outlined in these decisions. It simply cannot be said that Congress was specifically informed and

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precisely knew that its appropriations would ratify the expansion of the service area by over 150,000 acres.

The test outlined in the decisions discussed above is rooted in common sense and based on a clear understanding of how Congress works. Congress has great masses of material placed before it each year in budget submissions. The Bureau's 1978 appropriation request itself totaled 488 pages of often complex statistical and financial material. It is unlikely that many, if any, individual legislators were familiar with details of the request. Anyone familiar with the legislative appropriations process, in fact, knows that Congress as a whole does not often consciously approve the details of a program submitted to it for funding as part of the funding process. It is therefore in a sense naive to attach a presumption of approval of that material to a line-item appropriation. Recognizing this, the courts have wisely placed the burden on the agency to bring the matter to Congress attention in a direct and expository way. It is, then, the agency's responsibility, in cases where authority may be in question, to act affirmatively to bring the matter directly to Congress attention and to request clarifying legislation.

Finally in this connection, it must be pointed out that Congress has sometimes acted to change or modify reclamation project authorizations through the appropriation

process.⁴⁴ Indeed, it has done so with respect to the San Luis Unit itself.⁴⁵ But it has always done so through specific, substantive language included in the appropriations Act itself. Mere line-item appropriations of sums of money can rarely, if ever, accomplish this without ample evidence that Congress as a whole specifically knew of the issue and manifested its approval or acquiescence in some distinct, affirmative way. *Cf. Friends of the Earth v. Armstrong*, 485 F. 2d 1, 7-10 (10th Cir. 1973), *cert. den.*, 414 U.S. 1171 (1974).

d. Ratification Through Congressional Failure to Object to the Distribution and Drainage System Contract

Sec. 8 of the San Luis Act provides that no funds would be appropriated for construction of the Unit's distribution and drainage system prior to ninety days after the proposed repayment contract for that system had been submitted to Congress. No affirmative action by Congress is required.

⁴⁴ See, e.g., 66 Stat. 549, 552 (Act of July 10, 1952); 65 Stat., 248, 258 (Aug. 31, 1951); and 74 Stat. 743 (Sept. 2, 1960) (denying funds for protection to the Rainbow Bridge; see *Friends of the Earth v. Armstrong*, cited below in the text).

⁴⁵ See 1966 Public Works Appropriation Act, 79 Stat. 1096, 1101 (Oct. 28, 1965), which provided that the final point of discharge for the San Luis Drain should not be determined until HEW completed a pollution study, a plan was developed to minimize any detriment the drain waters might have on the San Francisco Bay, and agreement was reached with the State of California on sharing of construction costs. See, also 78 Stat. 682, 686 (Aug. 30, 1964), the preceding year's appropriation Act containing a more limited restriction on the same subject.

The repayment contract with the Westlands District was submitted to Congress on Apr. 24, 1964. On May 6, 1964, the House Committee on Interior and Insular Affairs adopted a resolution approving the contract. The Senate Committee did not act during the 90-day period, except to hold a hearing on July 8, 1964. At this hearing, the Assistant Secretary of Interior testified, *inter alia*, that the service area "includes a gross area of approximately 500,000 acres," which was, of course, completely consistent with the authorizing Act. In later testimony, the Commissioner of Reclamation referred to the possible merger of Westlands and Westplains, but did not disclose that the service area had already been expanded, or could be even further expanded by the merger. Furthermore, the distribution and drainage system contract which was the subject of the hearing itself provided that the system contained facilities for the delivery of water from the San Luis canal "to such units of a total of approximately 400,000 acres of irrigable land as mutually agreed upon by the District and the Contracting Office. * * * 46

⁴⁶ Para. 2(b), Contract No. 14-06-200-2020A (executed Apr. 1, 1965). Attached to the contract as Exhibit A was a map which indicated that the distribution system was to be constructed throughout the entire original Westlands District, including the 116,000 acres lying east of the authorized service area. (This map was referred to in Para. 2 of the contract as "generally" illustrating the system planned for construction. It is reproduced as Map #4 in Appendix K to the *Task Force Report*.) There was no effect by any witness at the Senate hearing to call attention to the fact that the distribution and drainage system was proposed for construction partially

Finally, Westlands argues that, because a memorandum prepared by the Assistant Secretary after the July 8 hearing was subsequently included in an appendix to the Senate Committee's hearing record, Congress was put on notice of the expansion of the service area. But the Assistant Secretary's memorandum (the so-called "Holum memorandum" discussed in more detail below) never directly broaches the subject of the expanded service area and, as we have seen, the Assistant Secretary's testimony at the hearing itself was that the service area consisted of approximately 500,000 acres.⁴⁷

From the above, it is clear that in neither the repayment contract itself, the Senate hearing, nor any other related event was Congress put on notice that the service area had been significantly enlarged. Congress' failure to object to the repayment contract can therefore not be construed as ratifying enlargement of the service area. The legal authorities discussed in the previous section support, and indeed require, this conclusion.

outside the authorized service area. Given the fact that the reference in the contract to the size of the system (400,000 acres) would not have by itself triggered a warning signal that the service area was being expanded, the inclusion of the map cannot be deemed sufficient to do so either. The expansion would be disclosed only by carefully comparing the map attached to the contract with the map of the service area contained in the project Feasibility Report sent to Congress some eight years earlier.

⁴⁷ This memorandum, and the July 8, 1964 hearing before the Senate Committee, are thoroughly discussed in the *Task Force Report*, pp. 22-24. The text of the memorandum is set forth in Appendix G to the Report.

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e. The 1963 contract can be construed to be consistent with the San Luis Act

The 1963 contract between the Westlands Water District and the United States authorizes delivery of a stated amount of water to Westlands, without indicating a precise service area. The question now is, given the conclusion I have reached above that the delivery of water outside the original service area is unlawful, whether this contract is consistent with the authorizing Act, or whether it conflicts with the Act by authorizing delivery of water to areas outside the authorized service area.

This contract does not specifically refer to any service area. It is a contract for delivery of water to the Westlands Water District pursuant to the 1902 Reclamation Act and "acts amendatory thereof or supplementary thereto," which includes the San Luis Unit authorizing Act. Par. 5 of the contract provides that water furnished to the District under the contract "shall not be sold or otherwise disposed of for use outside the District without the written consent of the Contracting Officer." This could be read to imply that the parties did contemplate that the contract authorized delivery of water to all areas within the Westlands District at the time, including 116,000 acres outside the service area described in the Feasibility Report. That implication is, of course, consistent with the Re-

gional Solicitor's Opinion discussed in detail above.

Nevertheless, the 1963 Contract does not constitute or reflect an express promise by the United States to deliver federally subsidized reclamation water to that part of Westlands lying outside the authorized service area. Although it can be read to imply such a commitment Westlands could have, given the doubts about the legally authorized size of the service area, perhaps bolstered its case by obtaining a crystal clear commitment in the contract.

In this connection, it is important to remember the basic contract law doctrine that laws in existence at the time the contract is entered become part of the contract between the parties, "as fully as if they had been expressly referred to or incorporated in its terms. This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge." *Farmers and Merchants' Bank v. Federal Reserve Bank*, 262 U.S. 649, 660 (1923); see also, *United Van Lines v. United States*, 448 F. 2d 1190, 1195 (D.C. Cir. 1971); cf. *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961); *G. L. Christian & Assoc. v. United States*, 320 F. 2d 345, 351 (Ct. Cl. 1963).

The 1963 Contract was a so-called 9(e) water service contract, entered into under sec. 9(e) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(e) (1970). But that Act does not provide any independent au-

thority for entering water service contracts for areas except as independently authorized by Congress. Sec. 9(e) provides an alternative method of water contracting to sec. 9(d).⁴⁸ Sec. 9(d) prohibits delivery of water for irrigation of lands "in connection with any new project, new division of a project, or supplemental works on a project * * *" without an irrigation district first entering into a repayment contract. The term "project" is defined in the Act as follows (43 U.S.C. § 485a (c) (1970)):

The term "project" shall mean any reclamation or irrigation project, including incidental features thereof, *authorized by the Federal reclamation laws*, or constructed by the United States *pursuant to said laws*, or in connection with which there is a repayment contract executed by the United States, *pursuant to said laws*, or any project constructed or operated and maintained by the Secretary through the Bureau of Reclamation for the reclamation of arid lands or other purposes. (Italics added.)

The term project refers, then, to those projects authorized by federal reclamation laws like the San Luis Act, and does not provide general authority to execute contracts for water delivery inconsistent with Congressional legislation authorizing the project. Put another way, the 1939 Act was designed to overhaul the repayment scheme for reclamation but was not designed to grant blanket authority in the Secretary to override subsequent Congressional authorization of particular projects like San Luis. There-

fore, sec. 9(e) does not provide an independent base for delivering water to areas outside of the authorized San Luis service area.

To the extent that the 1963 Contract authorizes long-term, firm delivery of water to the 116,000 acres outside the authorized service area, it would have to be held inconsistent with the authorizing Act which is also, by incorporation, part of the contract.^{48A} The obvious solution is to construe the 1963 Contract to be consistent with the authorizing Act—to permit delivery of water only to those areas of Westlands lying within the authorized service area. Given the specific limitations placed by Congress on this Department, we cannot deliver water to a wider area than authorized by Congress.⁴⁹

^{48A} An agency determination which is contrary to law cannot prevent the United States from subsequently reversing its position to make it consistent with the law. *Atlantic Richfield Co. v. Hikel*, 432 F. 2d 587, 591-92 (10th Cir. 1970). If the agency position does not accurately express the meaning contained in the statutory provision, it cannot operate. *Enfield v. Kleppe*, 566 F. 2d 1139, 1142 (10th Cir. 1977). Westlands had no right to rely upon the contract if it is interpreted to allow delivery to the 116,000 acres in question, because Congress, not the agency, prescribes the law. *See Dixon v. United States*, 381 U.S. 68, 73 (1965); *cf. Wilderness Society v. Morton*, 479 F. 2d 842, 865 (D.C. Cir. 1973), *cert. den.* 411 U.S. 917 (1973); *McDale v. Morton*, 353 F. Supp. 1006, 1012 (D. D.C. 1973), *aff'd without opinion*, 494 F. 2d 1156 (D.C. Cir. 1974).

⁴⁹ As noted earlier, in his October 1962 memorandum, the Regional Solicitor hinted that water from other units of the CVP could be used to supply water to these 116,000 acres. But the issue is not the availability of water or the amount to be supplied to the San Luis Unit—Congress was not specific in that regard. It was specific about the service area, and the availability of water from other project units cannot, absent further direction from Congress, justify delivery of federal water to these additional acres.

⁴⁸ The first sentence of sec. 9(c) begins: "In lieu of entering into a repayment contract pursuant to the provisions of subsection (d) of this section * * *."

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The remaining issue in this connection is whether the 1963 Contract authorizes delivery of water only to 284,000 acres of the original Westlands lying within the authorized service area, or whether it can also be used to deliver water to the area of old Westplains—now a part of Westlands by virtue of the 1965 merger of Westplains and Westlands—which lies within the authorized service area.

Congress has directed that the area of Westplains lying within the authorized project service area may be served with water, and thus it is entitled to receive water service under the general terms of the 1963 Contract, by operation of the merger of the two districts. The 1963 Contract is a sec. 9(e) contract, which authorizes delivery of water to the authorized service area once a repayment contract is entered into recovering the cost of any irrigation distribution works constructed by the United States in connection with the project.⁵⁰

The 1965 repayment contract is a general obligation by Westlands to repay \$157,048,000 used for construction of the distribution and drainage system in the Unit. This amount is, however, not sufficient to cover the costs expended to date. First, it does not cover the cost of the San Luis interceptor drain,

which is part of the distribution and drainage system. Under sec. 8 of the San Luis Act, this cost (except interest) must be fully recovered from the users within the Unit over a period of not to exceed forty years from the date the system is placed in service. The 1965 repayment contract does not provide for repayment of Westlands' share of the cost of the drain.^{50A}

Second, the Act creating the San Luis Task Force authorized an additional \$31,050,000 to be appropriated for construction of the distribution and drainage system, but required Westlands to pledge, prior to any expenditure of that money, "to repay the costs associated with construction * * *." (91 Stat. 225, June 15, 1977 sec. 1.) Although Westlands has "pledged" to repay, it has not signed a repayment contract obligating itself to repay.

Therefore, the existing repayment contract is inadequate to recover the costs which the United States must by law recover. Until a repayment contract is in place which establishes a sufficient repayment obligation on the part of Westlands, the law is clear that no water may be delivered to the District. Once a sufficient repayment contract is entered, however, the 1963 Contract authorizes delivery of

⁵⁰ See sec. 9(e), referring to sec. 9(d) of the Reclamation Project Act of 1939, 43 U.S.C. §§ 485h(d) and (e) (1970). See also *Task Force Report*, pp. 52-54. Sec. 9(d) provides that no water may be delivered for irrigation of lands in connection with any new project or division thereof until a repayment contract is entered for that part of the construction costs allocated to irrigation.

^{50A} At the time the 1963 Contract was entered, the interceptor drain was classified as a sec. 9(e) feature rather than a sec. 9(d) feature. The 1963 Contract rate included a 50 cent per acre-foot drain service charge which, although providing some repayment toward the drain's cost, is clearly not sufficient to repay the costs as they have escalated. See *Task Force Report*, pp. 15-16, 25-26.

water to that part of Westlands occupying the authorized service area.

I do not believe, however, that water service now being provided to the District need be interrupted until a repayment contract is entered which provides for full recovery of the costs. As the *Task Force Report* and the previous part of this opinion have reflected, the San Luis Unit has been tangled in uncertainty and controversy nearly since its inception. The finding that the repayment obligation included the San Luis drain was not made until relatively recently, and Westlands has "pledged" to repay the \$31 million now being spent on additional distribution systems. Moreover, questions regarding the authorized service area are only being definitively resolved now, in this opinion.

Finally, farmers in Westlands have planted crops this year in the expectation that they will continue to receive federally subsidized and delivered water under the short-term contracts entered earlier this year.

Considering all these factors, most of which relate to the peculiar history of this Project and this District, I, therefore, believe that water service to Westlands may be continued so long as the parties move immediately to enter a repayment contract which obligates Westlands to repay all the costs the United States is obliged by law to recover from the District. I hasten to add, however, that the new repayment obligations must be contractually assumed by Westlands, fully and clearly, within a reasonable time.

Because the parties' legal obligations are now clear, the pattern of previous negotiations—which dragged on unsuccessfully for more than a decade on an amended repayment and water service contract—cannot be repeated. Unless the required adjustment in repayment obligations is swiftly brought to a close, water service must cease.

C. The Department Has No Legal Obligation to Deliver 1.1 Million Acre-Feet of Water to the Westlands Water District at a Rate of \$7.50 Per Acre-Foot

Although the Westlands Water District had been organized in 1952, the San Luis Act does not mention Westlands or any irrigation district, and likewise fails to specify any amount of water to be supplied to it or any other district. Indeed, as we have seen, the Act speaks only of the project's objective of supplying irrigation water to approximately 500,000 acres of land in three specific California counties, and expressly refers to the service area indicated in the Feasibility Report. Therefore, it is obvious that any commitment flowing from the United States to Westlands was not required, or even recognized, by Congress in authorizing the project.

On June 5, 1963, Westlands and the United States entered into a water service contract for the delivery of irrigation water to the District at a rate of \$7.50 per acre-foot plus a 50 cent per acre-foot drain service charge. The contract obligated the United States to deliver up to 1,008,000 acre-feet annually

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through 1979, and between 783,000 and 900,000 acre-feet per year thereafter, depending upon the results of certain groundwater studies.

While this contract was being negotiated and executed, the United States was also negotiating a separate contract with the adjacent Westplains Water Storage District for water service from the San Luis Unit. Negotiations for such a long-term water service contract with Westplains were never completed.

Also at this time, Westlands was negotiating a repayment contract for the construction of distribution and drainage facilities. As discussed in some detail above, this contract was submitted to Congress in Apr. 1964 for oversight. A Senate Subcommittee held a hearing on the contract in July 1964. As a result of that hearing, then Assistant Secretary Holum prepared a memorandum to the Secretary setting out suggestions which had been made by various parties for improving both the pending contract, and the existing 1963 water service contract involving Westlands. He also made specific recommendations concerning provisions which the United States should seek to include in these contracts.⁵¹

Westlands sees the Holum memorandum as containing a promise by the United States to provide an additional 200,000 to 367,000 acre-feet of water to Westlands at the

same rate as that contained in the 1963 Contract, on the sole condition that Westlands would merge with the Westplains Water Storage District. The nub of Westlands' argument is that, Westlands having relied on this "promise" by merging with Westplains, the United States is now estopped from failing to deliver the increased amount of water at the same price. In the alternative to estoppel, Westlands argues that the Holum memorandum and the subsequent statements and representations of the parties have given rise to an "implied contract" for the delivery of 1.1 million acre-feet of water at the old price.⁵²

The courts have generally held that the United States is neither bound nor estopped by the acts of a government agent "[who enters into a contract or an] arrangement or agreement to do or cause to be done what the law does not sanction or permit." *Utah Power and Light Co. v. United States*, 243 U.S. 389, 409 (1916), and the cases cited therein. Furthermore, the Supreme Court has also stated that it " * * * cannot accept the contention that the administrative rulings * * * can thwart the plain purpose of a valid law." *United States v. San Francisco*, 310 U.S. 16, 31 (1940), and "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. * * *

⁵¹ The text of this so-called "Holum memorandum" is included in the *Task Force Report* as Appendix G.

⁵² See Westlands' March 14, 1978 memorandum, *passim*, esp. pp. 14-20, 25-30.

And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority." *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947). See also, *United States Immigration and Naturalization Service v. Hibi*, 414 U.S. 5 (1973).

One appellate circuit has recently limited the traditional view that the government is not estopped by the unauthorized acts of its agents, and it is on these cases that Westlands relies. The rule in the Ninth Circuit was stated in *United States v. Lazy FC Ranch*, 481 F. 2d 985 (9th Cir. 1973), as follows:

Estoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel, * * *.

See also, *United States v. Georgia-Pacific Co.*, 421 F. 2d 92 (9th Cir. 1970); *Brandt v. Hickel*, 427 F. 2d 53 (9th Cir. 1970); *Fox v. Morton*, 505 F. 2d 254 (9th Cir. 1974). But estoppel does not lie against the government even in that circuit unless there has been "affirmative misconduct" by the government. *Santiago v. Immigration & Naturalization Service*, 526 F. 2d 488, 491 (9th Cir. 1975), citing *United States Immigration and Naturalization Service v. Hibi*, *supra* at 8.

To meet this test, Westlands must show reasonable reliance, to its detriment, on an inaccurate representation by the United States when the District did not know the true facts while the United States not only

did, but engaged in what must be regarded as "affirmative misconduct." The public interest must also be with Westlands. Westlands fails each of these tests.

Congress has carefully spelled out the circumstances under which reclamation contracts shall become binding on the United States (Act of May 15, 1922; 43 U.S.C. § 511 (1970)):

* * * [N]o contract with an irrigation district * * * 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.

For well over half a century, this requirement has been well known to the Bureau and to reclamation beneficiaries like Westlands.⁵³

The 1963 water service and 1965 repayment contracts which Westlands entered into both contained express provisions parroting this statutory requirement,⁵⁴ and neither contract became effective until after it was confirmed by a state court in an *in rem* action by Westlands. Thus Westlands' argument that it had a legal right to rely on

⁵³ Moreover, even confirmation by a state court itself does not automatically bind the United States, which is not a party to the state court proceeding; rather, it is merely a condition precedent to the United States' being bound. *Sol. Op. M-36675*, 71 I.D. 496, 517-18 (1964). The rights and duties of the United States under the contract are matters of federal law. See *Ivanhoe Irr. Dist. et al. v. McCracken et al.*, 357 U.S. 275, 289 (1958).

⁵⁴ *E.g.*, sec. 32(b) of the 1963 Contract provides that the contract "shall not be binding on the United States * * * unless validated in each and all of its terms and conditions as executed by the parties."

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the Holum memorandum is spurious.⁵⁵

It is also apparent that Westlands had no legitimate expectation that the United States had a legal obligation to serve the expanded District when we consider the role of irrigation districts in reclamation projects. The Westlands Water District was organized in 1952 under the laws of the State of California. No one, including Westlands, has ever argued that the mere organization of a water district created any obligation on the part of the United States to deliver water to the district. It was not until Congress authorized the San Luis Unit in 1960 that construction of the project was authorized and, once constructed, it was and remains well-established law that no water can be delivered to the District without a binding contract being duly executed with the United States.

Similarly, the enlargement of the Westlands District upon its merger with the Westplains District could not create any binding legal obligation on the United States to deliver more water to serve the expanded district. Even if that merger were partially at the invitation of officials in the Interior Department by the Holum memorandum, Westlands neither had nor could have,

⁵⁵ One other fact is relevant here. During the entire period in question, Westlands' General Manager and Chief Counsel was an individual who had earlier spent several years with the Department of the Interior, and was therefore intimately familiar with these requirements.

given the clear requirements of reclamation law, and legitimate expectation that the merger alone would create a legal obligation. The fact is that the negotiations on a new contract to serve the expanded new Westlands District dragged on for ten years. During this time, Westlands received project water pursuant to short-term, temporary contracts. Each such contract contained recitals describing the negotiations and expressly acknowledging that the replacement contract being negotiated would not become binding until it was "executed."

Perhaps the clearest reason that the United States assumed no binding obligation emerges from consideration of the language of the Holum memorandum itself, because its own language precluded any sort of reliance upon it. That is, it is plain from the face of the Holum memorandum that its suggested amendments were in fact just that: mere suggestions of the starting point for negotiations to lead up to possible agreement on a new or revised contract. For example, before reciting the proposed amendments, the Assistant Secretary laid out for the Secretary the expected course of action:

The proposed amendments are discussed below and if approved by you, the Commissioner of Reclamation *will be authorized to initiate negotiations on these amendments* with the Westlands District. (Italics added.)

Near the end of the memorandum, the tentative and conditional na-

ture of the proposal is again mentioned by the Assistant Secretary:

In reopening negotiations to amend the executed water service contract between the United States and the District, the District may seek other adjustments. (Italics added.)

And the last paragraph in the memorandum could not be more explicit in emphasizing that the Secretary's approval of the suggested negotiating stance did not legally bind the United States to its terms:

Your approval of the proposal to amend the water service contract is recommended, with the understanding that execution of the contract will be withheld until the negotiations have been successfully completed and until we have reviewed the outcome of these negotiations and have approved the contract. (Italics added.)

It was thus patently clear to the Assistant Secretary, the Secretary, and the Westlands Water District that negotiations had to be "successfully completed" and the contract had to be "approved" by the Secretary and "executed" in due course before Westlands had a right to rely on any of the suggestions made in the memorandum.

That the proposals made in the Holum memorandum were subject to negotiation and change (and in many cases, deletion) is also apparent from the subsequent actions both parties took with respect to the recommendations it contained. Consider the following:

First, the central theme of the Holum memorandum was that the 1963 water service contract should be amended, but that the proposed

repayment contract approved as to form on Apr. 23, 1964, should be maintained and executed as drafted, once the water service contract was amended.⁵⁶ This did not happen. The water service contract has never been amended, and the repayment contract was nevertheless executed on Apr. 1, 1965.

Thereafter, negotiations began with the District on a *new* combined water service and repayment contract to replace both the 1963 and the 1965 Contracts. These negotiations continued for over ten years, and although at one point it appeared that a final agreement might be reached, the contract was never executed.⁵⁷

It is also instructive to compare, point by point, the recommendations of the Holum memorandum with what actually happened during the course of the subsequent negotiations. Such a comparison shows, in sum, that in fact *most* of the Holum memorandum suggestions were never carried out.

To take a few more glaring examples, the Holum memorandum recommended that the so-called "unavoidable" clause concerning

⁵⁶ As noted above, the Holum memorandum was written as a result of questions which had been raised and criticisms which had been leveled at the proposed repayment contract. Because of these criticisms, the Assistant Secretary states in the memorandum that he had "carefully reviewed the matter" and, on the basis of that review, suggested "amending" the 1963 water service contract with Westlands "as a prerequisite to your [the Secretary's] execution of the distribution system repayment contract."

⁵⁷ The rather tortured history of negotiating this so-called "amendatory contract" is described at pp. 61-62 of the *Task Force Report*.

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pumping of groundwater enhanced by the project for use on excess lands be deleted from the 1963 water service contract. It was not; in fact, it not only remained in the 1963 Contract, but was incorporated by reference into the 1965 Contract, appeared in the proposed amendatory contract forwarded to Congress, and also appeared in most of the interim contracts authorizing water delivery in the years after 1967.

Assistant Secretary Holum also recommended that the 1963 Contract be amended to set out a maximum quantity of water to be delivered per acre for various crops. This has not been done, except in the 1965 Operating Agreement between the United States and Westlands, which terminated when 76% of the Districts' land became eligible to receive project water. He also suggested amending the 1963 Contract to require Westlands to pump project water that becomes groundwater for use on eligible lands. This has never been included in any proposed or executed contract, except for the 1965 Operating Agreement.⁵⁸ Finally, Holum suggested including a requirement that Westlands levy an *ad valorem* tax on all District lands to promote the entry of recordable contracts for the sale of excess lands. This has never been

included in any subsequent contract.

It is, therefore, obvious that Westlands seeks to extract from the Holum memorandum a single suggestion—the delivery to the merged Districts of a greater amount of water at the same price—and elevate it to a binding legal commitment, all the while ignoring the many other suggestions the memorandum contains which have never been carried out. It is certainly no coincidence that most, if not all, of the other provisions not carried out were for the benefit of the United States, not Westlands. It is sufficient to say once again that the subsequent actions taken by both parties show beyond peradventure that the Holum memorandum's suggestions were simply that—suggestions.

In short, it simply could not be clearer—both from its face and from the parties' subsequent treatment of it—that the Holum memorandum was merely a description of a negotiating stance. It did not purport to, and could not, legally bind the United States to its contents. Indeed, the disruptive effect of so holding on the conduct of government business would be absolutely disastrous. If every discussion of a tentative course of action by policy-makers—explicitly subject to further approval—were somehow translated into a binding legal commitment, the machinery of government would be brought to a screeching halt. Expressed another way, if the Holum memorandum's key

⁵⁸ The failure to so provide was in fact subsequently criticized by the General Accounting Office. See "Questionable Aspects Concerning Information Presented to the Congress on Construction and Operation of the San Luis Unit, Central Valley Project," B-125045 (Feb. 12, 1970), pp. 1-2.

words ("execution of the contract will be withheld until the negotiations have been successfully completed and until we have reviewed the outcome * * * and have approved the contract") are not sufficient to prevent an estoppel, then there is simply no way that the English language can be used to prevent such policy advice from being construed as a legal commitment.

This opinion was prepared with the assistance of John D. Leshy, Associate Solicitor for Energy and Resources, and Steve Weather- spoon, Staff Attorney, Branch of Water and Power, Division of Energy and Resources.

LEO KRULITZ,
Solicitor.

**AUTHORITY TO DIVERT FLOWS
FROM HUNTER CREEK TRIBU-
TARIES, FRYINGPAN-ARKAN-
SAS PROJECT, COLORADO**

Bureau of Reclamation: Authoriza-
tion—Bureau of Reclamation: Con-
struction—Bureau of Reclamation:
Operation and Maintenance

Where there is no clear Congressional authority to operate a Bureau of Reclamation project one way as opposed to another and there are proposed inconsistent methods of operation contained in the draft set of Operating Principles and feasibility report, it is the responsibility of the agency to seek additional and clarifying authority from Congress as to how the project is to be operated, par-

ticularly when important and controver-
sial economic and environmental inter-
ests are involved.

M-36902

July 31, 1978

OPINION BY
OFFICE OF THE SOLICITOR

June 28, 1978

TO: ASSISTANT SECRETARY, LAND
AND WATER RESOURCES

FROM: SOLICITOR

SUBJECT: AUTHORITY TO DIVERT
FLOWS FROM HUNTER CREEK
TRIBUTARIES, FRYINGPAN-AR-
KANSAS PROJECT, COLORADO

A. Introduction

Your request for an opinion on this subject, dated Nov. 22, 1977, referred to a letter from Mr. David Dominick which raised a number of legal issues relating to Bureau of Reclamation plans to divert water for the Fryingpan-Arkansas project (Fry-Ark) from the South Forks of Hunter Creek. Specifically, Mr. Dominick asserts that current Bureau plans for these diversions differ so substantially from the plans existing at the time Congress authorized the project that the proposed diversions are unauthorized and "ultra vires."

I have reviewed this matter in detail and have determined that the Bureau plans for operation of the project call for larger diversions from the south tributaries of Hunter Creek than originally contemplated and for a purpose different from the one originally intended. On the basis of this determination,

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I have reached the following conclusion: The Bureau may not operate the project under its current plans that call for diversions from the south tributaries of Hunter Creek in excess of 3,000 acre-feet annually and for purposes other than the proposed Twin Lakes Canal Company exchange until such time as additional clarifying authority to so operate the project is obtained from Congress.

B. Project Authorization

Fry-Ark was authorized by Congress in 1962¹ after many years of planning and negotiations at the State, local and Federal levels. The project consists of a trans-basin diversion in central Colorado through which approximately 69,200 acre-feet will be transported from the Colorado River Basin on the western slope of the Continental Divide for use in the Arkansas River Valley on the eastern slope.

Sec. 1 of the authorizing Act provides in pertinent part as follows:

* * * That for the purposes of supplying water for irrigation, municipal, domestic, and industrial uses, generating and transmitting hydroelectric power and energy, and controlling floods, and for other useful and beneficial purposes incidental thereto, including recreation and the conservation and development of fish and wildlife, the Secretary of the Interior is authorized to construct, operate, and maintain the Fryingpan-Arkansas project, Colorado, in substantial accordance with the engineering plans therefor set forth in House Docu-

ment Numbered 187, Eighty-third Congress, modified as proposed in the Sept. 1959 report of the Bureau of Reclamation entitled "Ruedi Dam and Reservoir, Colorado", with such minor modifications of, omissions from, or additions to the works described in those reports as he may find necessary or proper for accomplishing the objectives of the project.

The reports referred to are feasibility reports prepared by the Bureau of Reclamation for purposes of project authorization.² House Document No. 187 (H.D. 187 or "feasibility report") was prepared in 1953 and described the general plan and scope of the project.³

Major Fry-Ark features were planned for both the eastern and western slopes of the Continental Divide. Only those on the western slope relate to Hunter Creek. Other than Ruedi Dam and Reservoir, the major western slope features consist of a series of canals, conduits and tunnels designed to intercept and collect flows high in the watersheds of the Fryingpan River and Hunter Creek.⁴ The facilities planned for the area north of the Fryingpan River were generally referred to as the northside collection system and those to the south, in-

² 43 U.S.C. § 485h(a) (1970) requires the Secretary to submit reports to Congress demonstrating the financial and engineering feasibility of the project prior to the expenditure of funds for construction. See also, 43 U.S.C. § 412 (1970).

³ The second report referred to in the Act, a 1959 report on Ruedi Dam and Reservoir, did not change the original plan set forth in H.D. 187 in any way pertinent to the instant inquiry.

⁴ Appendix A depicts the western slope diversion area as set forth in H.D. 187.

¹ Act of Aug. 16, 1962, 76 Stat. 389, codified at 43 U.S.C. §§ 616-616f (1970).

cluding part of Hunter Creek, made up the southside collection system. The collection system on the south tributaries of Hunter Creek—consisting of small diversion structures on several high mountain creeks and streams connected by a series of canals—was referred to as the Hunter Creek Extension.

When intercepted, these western slope flows would be conveyed by gravity to the portal of the Fry-Ark Tunnel⁵ which passes under the Continental Divide and discharges to a tributary of the Arkansas River. On the eastern slope, the project includes several reservoirs, power generation facilities, and distribution works which are not generally pertinent to the issues under discussion.

A detailed description of the southside collection system, including the Hunter Creek extension, was contained in the feasibility report. In the main, the feasibility report indicates that the extension of the project into the South Forks of Hunter Creek was for the purpose of obtaining replacement water to be shipped to the eastern slope and delivered to the Twin Lakes Reservoir and Canal Co. This water would replace an equivalent amount of water that the Twin Lakes Co. holds rights to from the Roaring Fork River. The Company already diverts some water from the Roaring Fork across the divide to its reservoir on the eastern slope; the contemplated exchange would involve its foregoing additional di-

⁵ This Tunnel has since been renamed the Boustead Tunnel.

versions from the Roaring Fork in return for an equivalent supply delivered through project facilities. The purpose of the exchange is to protect the fishery value of the Roaring Fork by maintaining minimum flows in that River.

The feasibility report is replete with references to the fact that the project's collection system was "extended" to the South Forks of Hunter Creek to protect the Roaring Fork fishery,⁶ that "the purpose of" the South Forks Hunter Creek collection was to implement the proposed exchange agreement;⁷ and that the plan "hinges on the execution of" an exchange agreement with the Twin Lakes Co.⁸ The original estimate of the cost of the South Forks Hunter Creek extension and enlargements of other project facilities to convey the exchange water was nearly \$2.2 million, all of which was allocated to fish and wildlife. These were the only project costs so allocated.⁹

The feasibility report also described the size and type of the diversion facilities contemplated; namely, an open canal with a capacity ranging from 20 to 100 second-feet and a total length of eight miles. The remainder of the system,

⁶ See, e.g., H.D. 187, pp. 27, 64-65, 120; see also, Project Planning Report No. 7-8A-49.1 on Roaring Fork Diversion of Gunnison-Arkansas Project, Appendix D, p. 57. This report is a more detailed description of the material contained in H.D. 187 and is hereinafter referred to as "Appendix D."

⁷ See, e.g., *id.*, pp. 64-65, 120.

⁸ See *id.*, p. 27.

⁹ See *id.*, pp. 6, 27, 33, 126. All cost figures, except those in the table on p. 6, were based on 1949 prices. The figures on p. 6 reflect 1953 construction costs and total \$2.83 million.

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including the divide tunnel, was sized to account for the 100 second-foot capacity added by the South Fork Hunter Creek extension.¹⁰

The feasibility report also estimates that—although the diversion of water from the South Forks would be necessary only when needed to maintain minimum flows on the Roaring Fork (assumedly in dry years)—the amount of water to be collected, diverted and exchanged is about 3000 acre-feet.¹¹

Within the feasibility report itself, there is no dispute about the purpose of the diversion or the facilities to be built to make the diversions out of the South Forks of Hunter Creek. But House Document 187 also contains a draft set of Operating Principles for the project as then contemplated. These Operating Principles repeated the obligation to supply minimum streamflow to the Roaring Fork by means of the proposed Twin Lakes exchange, but para. 10 also described this as a project obligation "to be supplied from any waters diverted from the south tributaries of Hunter Creek, Lime Creek, Last Chance Creek, or any of them."¹² Because Lime and Last Chance Creeks are part of the northside collection system, this raises several

important questions: Was the exchange to be implemented (a) by only South Forks Hunter Creek water, (b) by waters from any of the three places; (c) or can it—because Hunter Creek is in the southside collection system and Lime and Last Chance Creeks are in the northside collection system—be viewed as a general project obligation? If either of the latter two, does that mean that South Forks Hunter Creek water can be used for other project purposes? Or can South Forks Hunter Creek water not be used at all if the water for the Twin Lakes exchange comes from elsewhere?

These questions are complicated by the fact that the Bureau currently does not plan to construct the Lime Creek intercept and the Last Chance tunnel, so that no diversions are anticipated from Lime Creek and Last Chance Creek. Thus under current plans the water for the proposed Twin Lakes exchange must come from the South Forks of Hunter Creek, or somewhere else other than Lime or Last Chance Creeks. These questions will be discussed in more detail below.

C. Post-Authorization Modifications in Operation Plans

After Congress authorized the project in 1962, local interests began to express concern about the envi-

¹⁰ See *id.*, pp. 27, 64–65; Appendix D, p. 57.

¹¹ See *id.*, p. 120. This estimate was reaffirmed in two letters the Bureau sent to a concerned local resident several months before the project was authorized. Letters to Dr. M. W. McGehee from Acting Assistant Commissioner of Reclamation, dated Dec. 27, 1961 and Feb. 13, 1962.

¹² See H.D. 187, p. 38; Operating Principles, § 10. An amended version of these Operating Principles was adopted by the State of Colo-

rado in 1959 and was twice amended thereafter in parts not pertinent to this question. See House Document No. 130, 87th Cong. Sec. 11 of the current Operating Principles contains the same language as quoted above. See discussion on pp. 7–9, *infra*.

ronmental impacts of the western slope diversion facilities. Many of the objections related to the adverse impact of constructing a 12-mile-long road up Hunter Valley to provide access for project construction, operation and maintenance. The road would have penetrated a heavily timbered area, with very steep side slopes, allegedly having wilderness values.

In response to those concerns, the Bureau eliminated plans for canals and conduits, and instead planned an all-tunnel system. The tunnels were sized large enough to provide access for equipment to construction sites, thus eliminating the need for the road. Their size was also partially dictated by the Bureau's decision not to line the tunnels fully, by omitting concrete lining where steel set supports were not installed. This decision resulted in lower hydraulic efficiency which, in turn, reinforced the need for larger sized tunnels.

The diversion facilities on the two South Forks of Hunter Creek (No-Name and Midway), were also relocated several thousand feet from the original locations, for engineering reasons connected with the decision to construct tunnels rather than canals (to provide sufficient ground cover over the tunnels).¹³

¹³ The tunnels were constructed with a capacity of 95 c.f.s. at No-Name, 85 c.f.s. at Midway, and 140 c.f.s. at Hunter Creek. The constructed total diversion capacity is 320 c.f.s. at the headgates, although actual diversion is limited to 270 c.f.s. by the size of Hunter tunnel. House Document 187 listed a capacity of 20, 100 and 155 c.f.s. respectively for No-Name, Midway and Hunter Creeks. The question has been raised whether these capaci-

ties are cumulative or separate; i.e., whether they contemplate total diversion capacity out of the Hunter Creek drainage of 275 c.f.s., or only 155 c.f.s. If Congress intended the capacities to be separate, so that there is 275 c.f.s. of capacity to take water out of the Hunter Creek drainage, this could be construed as an indication that Congress intended the South Forks Hunter Creek water to be used for other purposes besides the exchange. Unfortunately, what evidence is available to resolve this question is inconclusive. This is discussed further below on p. 333.

Construction has largely been completed. These modifications were made for reasons independent of questions concerning the purposes and amount of diversion from the South Forks of Hunter Creek. Because I conclude below that the Bureau may not operate the project as currently planned until clear Congressional authority to do so is obtained, and because the Congressional deliberations on the authorization issue will necessarily entail consideration of the Hunter Creek diversion facilities, there is no present need to reach a conclusion about the Bureau's authority to convert from an open canal to a larger all-tunnel diversion system on Hunter Creek.

D. Project Operation.

After the 1962 authorization, more detailed hydrologic studies of the western slope diversion area were conducted by the Bureau in order to make final design plans for the collection facilities. The Bureau concluded from these studies that (a) previous estimates of flows planned for diversion into the northside collection system had been overestimated during the feasibility planning stage; and (b) greater

ties are cumulative or separate; i.e., whether they contemplate total diversion capacity out of the Hunter Creek drainage of 275 c.f.s., or only 155 c.f.s. If Congress intended the capacities to be separate, so that there is 275 c.f.s. of capacity to take water out of the Hunter Creek drainage, this could be construed as an indication that Congress intended the South Forks Hunter Creek water to be used for other purposes besides the exchange. Unfortunately, what evidence is available to resolve this question is inconclusive. This is discussed further below on p. 333.

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yields could be obtained from the southside collection area, including Hunter Creek and its tributaries.

As noted earlier, the Bureau also decided at this time not to construct the Lime and Last Chance Creek collector facilities which were designed to be part of the northside collection system. This, plus more detailed hydrologic data, resulted in the Bureau's modifying its plans to increase the planned diversions from the Hunter Creek drainage to the east slope of the divide, to be used for general project purposes other than the proposed Twin Lakes exchange. The diversions planned from the South Forks of Hunter Creek (Midway and No-Name) increased from 3,000 acre-feet to 10,300 acre-feet.

The proposed exchange agreement which was referred to in the feasibility report as the basis for the original trans-basin diversion of 3,000 acre-feet from these Creeks¹⁴ has not, however, been consummated, although an agreement is still possible.

The increased diversion from the South Forks of Hunter Creek has met with substantial local objection because of its anticipated deleterious effect on fishing and aesthetic values in lower Hunter Creek, a degradation opponents have charged was not authorized by Congress. Thus the issue joined for decision in this opinion is whether the

project may be operated as the Bureau currently plans.

There is no dispute that up to 3,000 acre-feet of water may be diverted from the South Forks of Hunter Creek to implement the proposed Twin Lakes exchange, if and when it is ever consummated. The questions remaining are: (a) whether any water can be diverted from these forks if the exchange is not consummated; and (b) whether additional water, over and above that required to effect the exchange, can be diverted from these forks for general project purposes.

The Fryingpan-Arkansas Authorization Act contains three distinct Congressional directions for project operation. The first is in sec. 1(a), which provides, in pertinent part:

[T]he Secretary * * * is authorized to construct, *operate*, and maintain the Fryingpan-Arkansas project, Colorado, in substantial accordance with the engineering plans therefor set forth in House Document Numbered 187, * * * with such minor modifications of, omissions from, or additions to the works described in those reports as he may find necessary or proper for accomplishing the objectives of the project. (Italics added.)

The second is in sec. 3(a) of the Act, which provides:

The Fryingpan-Arkansas project shall be *operated* under the direction of the Secretary in accordance with the operating principles adopted by the State of Colorado on Dec. 9, 1960, and reproduced in House Document Numbered 130, Eighty-seventh Congress. (Italics added.)

¹⁴ See p. 328 above.

The third is in sec. 5(e) of the Act, which provides that the Secretary shall, in the "operation and maintenance of all facilities under * * * [his] jurisdiction and supervision * * * comply with [*inter alia*] * * * the laws of the State of Colorado relating to the control, appropriation, use, and distribution of water therein. * * *" (Italics added.)

I have discussed above the references to the Hunter Creek diversion in the feasibility report (House Document 187). (See pp. 3-5, *supra*.) The report contained an early version of a series of Operating Principles for the project as then contemplated.¹⁵ These Operating Principles were revised and amended and on Dec. 9, 1960, assumed the form in which they were incorporated into House Document 130 and referred to in section 3(a) of the authorizing legislation. Sec. 9 of those Principles provides, in pertinent part:

The respective decrees which may be or have been awarded to the parties hereto as a part of the Fryingpan-Arkansas project and Basalt project shall be administered by the proper officials of the State of Colorado in accordance with the applicable laws of the State of Colorado, and with the following principles and procedures, to wit:

(1) That the demand on the waters available under such decrees shall be allocated in the following sequence:

(a) For diversion to the Arkansas Valley through the collection system and the facilities of the Fryingpan-Arkansas project in an amount not exceeding an aggregate of 120,000 acre-feet of water in any year, but not to exceed a total aggregate of 2,352,800 acre-feet in any

period of 34 consecutive years reckoned in continuing progressive series starting with the first full year of diversions, both limitations herein being exclusive of Roaring Fork exchanges as provided in (c) below, and exclusive of diversions for the Busk-Ivanhoe decree;

* * * * *

(c) For 3,000 acre-feet annually, to the extent that it is available in excess of (a) and (b) above, or such part thereof as may be required, to be delivered to the Twin Lakes Reservoir & Canal Co. in exchange for equivalent releases from the headwaters of the Roaring Fork River which would otherwise be diverted through such Twin Lakes Reservoir & Canal Co. collection and diversion system. (Italics added.)

Para. 11 provides, in pertinent part:

An appropriate written contract may be made whereby Twin Lakes Reservoir & Canal Co. shall refrain from diverting water whenever the natural flow of the Roaring Fork River and its tributaries shall be only sufficient to maintain a flow equal to or less than that required to maintain the recommended average flows in the Roaring Fork River immediately above its confluence with Difficult Creek in a quantity proportionate to the respective natural flow of the Roaring Fork River. The recommended average flows above mentioned are flows in quantities equal to those recommended as a minimum immediately above its confluence with Difficult Creek according to the following schedule submitted by the United States Fish and Wildlife Service and the Colorado Game and Fish Commission:

[Table omitted]

In maintaining the above averages, at no time shall the flow be reduced below 15 c.f.s. during the months of Aug. to Apr., inclusive, or below 60 c.f.s. during the months of May to July, inclusive, providing the natural flow during said period is not less than these amounts. The obligation to supply the minimum streamflow as set forth in the above table on the Roaring Fork River shall, to the

¹⁵ See H.D. 187, p. 36.

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extent of 3,000 acre-feet annually, be a project obligation to be supplied from any waters diverted from the south tributaries of Hunter Creek, Lime Creek, Last Chance Creek, or any of them.

The Twin Lakes Reservoir & Canal Co. shall not be required to refrain from diverting water under its existing decrees from the Roaring Fork River except to the extent that a like quantity of replacement water is furnished to said company without charge therefor through and by means of project diversions and storage. (Italics added.)

Both the Operating Principles and the feasibility report¹⁶ state a limit on the amount of water available for the Twin Lakes exchange of 3,000 acre-feet. The facilities to accomplish this exchange are described in the feasibility report in terms of cubic feet per second of capacity.¹⁷ It is uncertain how to reconcile these two figures and, as noted above,¹⁸ it is uncertain whether the capacity figures for the facilities between each fork are separate or cumulative.

Also, as noted above, sec. 5(e) of the authorizing legislation requires the Secretary, in the operation and maintenance of the project, to comply with, among others, "the operating principles" and "the laws of the State of Colorado relating to the control, appropriation, use, and distribution of water therein." In 1959, a district judge entered a conditional water rights decree for the project. The decree contains a description of the water rights

granted for each point of diversion in the northside and southside collection systems. The paragraphs of the decree referring to No-Name Creek, Midway Creek and Hunter Creek were identical, with differing amounts listed:

The source of supply of said canal is No-Name [Midway] [Hunter] Creek, and the amount of water claimed by and awarded to said canal is 20. [100] [150] cubic feet of water per second of time.

This can be read to mean that the amounts from each canal are cumulative, and that the water rights were for a total of 120 c.f.s. out of the South Forks. Of course, having rights to the water does not mean they have to be exercised or that Congress intended that the full amount be taken, or even that § 5(e) requires such a result. Because water would be needed to implement the Twin Lakes exchange only at certain times of the year, diversion capacity or water rights are not necessarily a true indication of Congressional intent regarding project operation. The water rights decreed for the project cannot, in and of themselves, justify or constitute authority for the current operational plans of the Bureau.

Like the earlier version of the Operating Principles appearing in the feasibility report,¹⁹ para. 11 of the Operating Principles refers to "the south tributaries of Hunter Creek, Lime Creek, Last Chance Creek, or any of them" as bearing

¹⁶ See H.D. 187, pp. 31, 120.

¹⁷ *Id.*, p. 65.

¹⁸ See n. 13, *supra*.

¹⁹ See text accompanying note 12, *supra*.

the obligation to provide 3,000 acre-feet for the Twin Lakes exchange. It is unclear how to relate that language to the feasibility report. It could be construed in various and partially inconsistent ways; for example:

(1) Since the Lime and Last Chance facilities will not, under current plans, be built, the reference in the Operating Principles to them in connection with the Twin Lakes exchange is arguably irrelevant. The failure to build the other mentioned facilities means the obligation to fulfill the requirements of the exchange remains on the South Forks of Hunter Creek.

(2) Hunter Creek water can be used only for the Twin Lakes exchange, and if Hunter Creek water is not to be used for that purpose, it should not be used at all.

(3) The reference to the other creeks on the northside arguably reflects the fact that the Twin Lakes exchange is a general project obligation, and thus the water from the South Forks of Hunter Creek can be used for general project purposes.

(4) The feasibility report embodied the Bureau's own project plan, and contains the more explicit and repeated references to the South Fork Hunter Creek facilities and diversions. By contrast, the Operating Principles, not drafted by the Bureau, contain only a cryptic reference to the other two Creeks on the northside. Since the clearest expression is that found in the feasibility

report, it should control to the extent of an inconsistency.

(5) Conversely, the Operating Principles are arguably a source of higher dignity because they are more recent²⁰ and were drafted not by the Federal Government, but by representatives of the State of Colorado and organizations representing both east and west slope Colorado interests.

The question is how to construe these ambiguities where there is no clear record. If Congress' original intent was that the South Forks of Hunter Creek be used only for the Twin Lakes exchange, there is no doubt that the Bureau's current operating plans have changed not only that purpose but the amounts contemplated to be diverted out of Hunter Creek. It is not surprising, then, that the Bureau's current operating plans are controversial. They have important implications for the environment of both the east and west slopes, and the economic viability of the project as a whole. When, as here, such fundamental values collide and various interests clash openly, it is far better for Congress, most directly expressing the will of the people, to resolve such disputes than for the constructing and operating agency to do it.

Therefore, I conclude that there is no clear authority for the Bureau

²⁰The Operating Principles went through several revisions after the date of the report of the Regional Director of the Bureau which formed the backbone of the feasibility report.

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to carry out its current operating plans with respect to diversions from the south tributaries of Hunter Creek and accordingly those plans may not be implemented until such time as affirmative authority is received from Congress. In making this determination, I am acutely aware that the record is not clear and that inconsistent inferences and conclusions can be drawn from the authorizing Act and its legislative history; however, my decision is that the better reading of these authorities supports and compels the conclusion stated above.

In cases where important and controversial economic and environmental interests are involved, caution is demanded. It is, in close cases, the better rule to seek additional and clarifying Congressional authority than to take questionable actions that may seriously affect important resources through means and in a manner which, it can be seriously argued, Congress has not endorsed.

CONCLUSION

For the reasons set forth above, I conclude that the Bureau of Reclamation may not operate the project to divert water out of the South Forks of Hunter Creek other than to implement the proposed Twin Lakes exchange agreement, if and when that agreement is consummated, until it has received express authority from the Congress that the project may be otherwise operated. The Bureau may, of course, propose legislation through ordinary Administration processes to obtain that guidance.

This opinion was prepared with the assistance of John D. Lesly, Associate Solicitor for Energy and Resources, John R. Little, Jr., Regional Solicitor, Denver Region, and Steve Weatherspoon, attorney, Branch of Water and Power, Division of Energy and Resources.

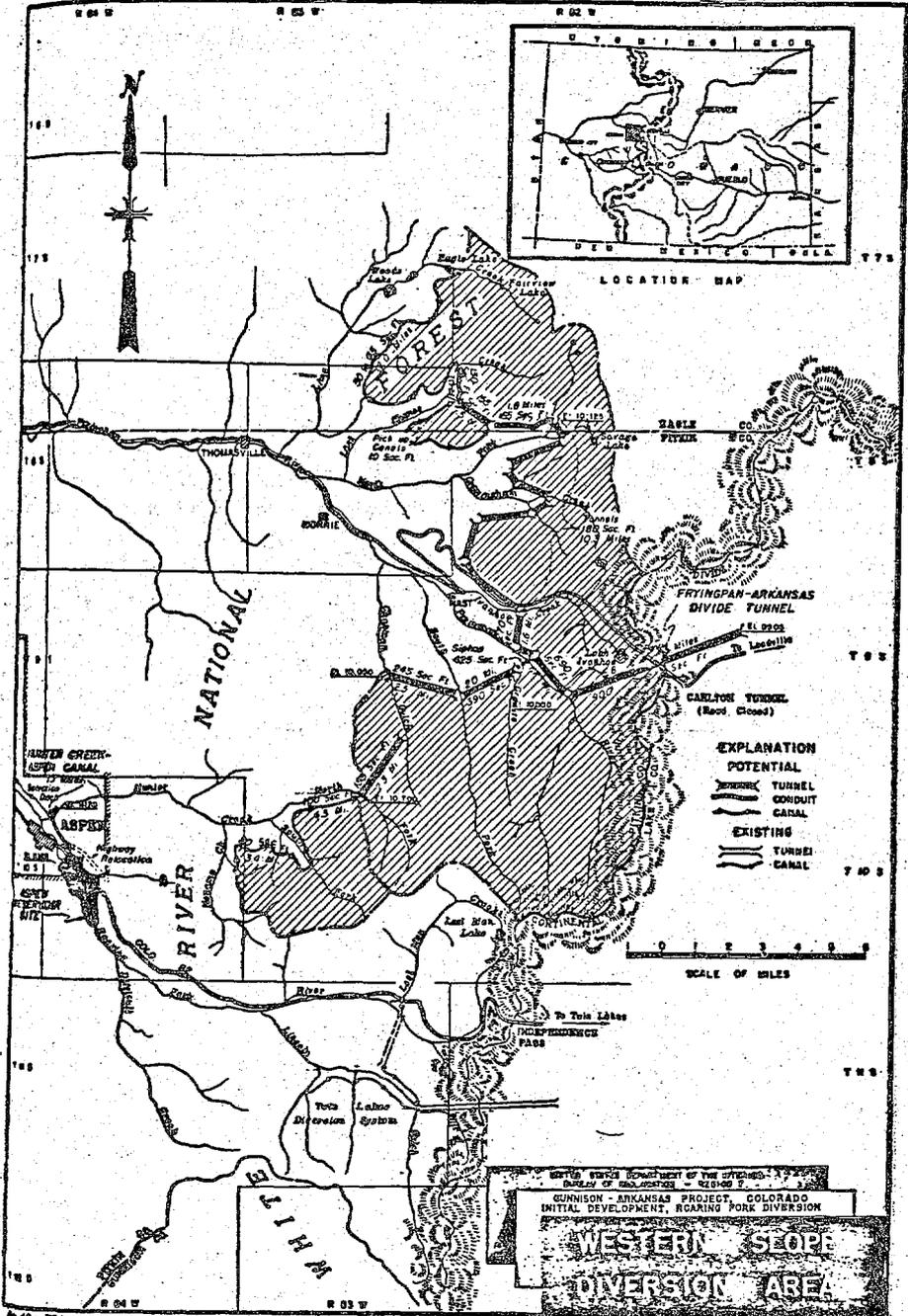
LEO M. KRULITZ,

Solicitor.

ATTACHMENT

APPENDIX A

EXHIBIT 5



July 31, 1978

ADEQUACY OF LEGISLATIVE AUTHORIZATION FOR THE SAN FELIPE DIVISION, CENTRAL VALLEY PROJECT, CALIFORNIA

Bureau of Reclamation: Authorization—Bureau of Reclamation: Construction—Bureau of Reclamation: Findings of Feasibility

The Secretary of the Interior has discretion to modify the physical features or plans of a Bureau of Reclamation project after Congressional authorization when the authorizing legislation only states what the general features of the project are to be and does not specifically incorporate any detailed feasibility report into the legislation. The Secretary cannot, however, deviate from the general plans or facilities specifically defined by Congress to be part of the project without obtaining the approval of Congress.

Bureau of Reclamation: Authorization—Bureau of Reclamation: Construction

When Congress places a cost ceiling in legislation authorizing construction of a project, the agency must obtain additional authority from Congress to continue construction of the project if it is projected that the cost ceiling will be exceeded.

Bureau of Reclamation: Authorization—Bureau of Reclamation: Construction

The Bureau of Reclamation is required to seek additional Congressional authority to continue a project at the earliest point in time that it determines the authorized cost ceiling will be exceeded so that Congress can determine whether

the project should be completed at the increased cost.

M-36903

July 31, 1978

*OPINION BY
OFFICE OF THE SOLICITOR*

May 1, 1978

TO: ASSISTANT SECRETARY-LAND AND WATER RESOURCES

FROM: SOLICITOR

SUBJECT: ADEQUACY OF LEGISLATIVE AUTHORIZATION FOR THE SAN FELIPE DIVISION, CENTRAL VALLEY PROJECT, CALIFORNIA

I. Summary

Your memorandum on this subject, dated Jan. 20, 1978, raises two questions concerning whether current project plans are consistent with Congress' authorization of the project. The first is whether the post-authorization modifications in the project plans are consistent with Congress' authorization, and the second is whether the projected increased costs of the Division have exceeded the authorized appropriation level, so that additional Congressional authorization is needed at this time.

I have concluded, based on the facts furnished by your office and the Bureau of Reclamation, that there is no current need to seek additional Congressional authority to accommodate the project modifications. Current Bureau estimates indicate that the project cannot be completed within the currently au-

thorized appropriation level, although appropriations requested for this year will not exceed the present authorized ceiling. Both the appropriations and the authorizing Committees should be notified immediately that the Bureau estimates that the project cannot be completed within the present level of authorization. Legislation should be forwarded to increase the authorization of the project in line with current Bureau estimates. Until such time as the appropriations and authorizing Committees have had an opportunity to act based on such notice, the project should proceed on schedule.

II. Background

The San Felipe Division, Central Valley Project, California, was authorized by the Act of Aug. 27, 1967, 81 Stat. 174.¹ Sec. 1 of that Act provides:

For the purposes of providing irrigation and municipal and industrial water supplies, conserving and developing fish and wildlife resources, enhancing outdoor recreation opportunities and other related purposes, the Secretary of the Interior acting pursuant to the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), is authorized to construct, operate, and maintain, as an addition to, and an integral part of, the Central Valley project, California, the San Felipe division. The principal works of the division shall consist of the Pacheco tunnel, pumping plants, power transmission facilities, canals, pipelines, regulating reservoirs, and distribution facilities. No facilities shall be constructed for electric transmission and distribution

service which the Secretary determines, on the basis of an offer of a firm fifty-year contract from a local public or private agency, can through such a contract be obtained at less cost to the Federal Government than by construction and operation of Government facilities.² (*Italics added.*)

The general purpose of the Act is to provide a supplemental water supply to an area south of San Francisco Bay consisting of portions of Santa Clara, San Benito, Santa Cruz and Monterey Counties. Water for the project will be pumped from the Sacramento-San Joaquin Delta and transported either through the Federal Delta-Mendota Canal or the California Aqueduct for storage in San Luis Reservoir. From that point the water will be transported beneath the Diablo Range by means of the Pacheco Tunnel, which terminates in the valley of Pacheco Creek, a tributary of the Pajaro River. At the terminus of the Pacheco Tunnel two canals will carry project water both north to the Santa Clara County area and south and west to the San Benito County area.

At the time of authorization a major project justification was that water use in the area was greater than water supply, and declining groundwater levels caused problems of land surface subsidence and salt water intrusion from San Francisco Bay. The project imports were planned to reduce agricultural, municipal and industrial demands on the groundwater supply and directly contribute to groundwater

¹ The authorization is codified in 43 U.S.C. § 616fff-1 through 43 U.S.C. § 616fff-7 (1970).

² 43 U.S.C. § 616fff-1 (1970).

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recharge, thus alleviating or at least mitigating the groundwater overdraft condition.

III. Modifications in Physical Project Features

Since Congressional authorization, the overall purpose of the project has remained the same as described above. However, the actual engineering features originally planned to accomplish this purpose have been modified in many respects in the intervening years. These changes have developed in response to cost constraints, changed conditions and revised projections of water demand and availability.

It is not necessary to detail such and every modification made to the project plan since the Department submitted a feasibility report to Congress in Sept. 1966.³ Major modifications include: 1) reducing the length and capacity of the Pacheco Tunnel; 2) substituting conduits and tunnels for originally contemplated open canals; 3) substituting the San Justo Reservoir for the previously planned Holister and Hudner Reservoirs thus increasing the available storage in the project area; 4) changing the capacity and location of project pumping plants; and 5) deferring project service to the Watsonville subarea. Current project plans dif-

fer in these and other ways from those contemplated in the Feasibility Report which Congress had before it when authorizing the project. These modifications require a view of the legal effect of the project Feasibility Report and a comparison of it to the authorizing legislation.

First, the San Felipe authorizing Act did not specifically refer to House Document No. 500, 89th Cong., 2d Sess. The authorization simply, and generally, required the Secretary to construct "the Pacheco tunnel, pumping plants, power transmission facilities, canals, pipelines, regulating reservoirs and distribution facilities." The Act did not specify the capacities, locations or costs or any of these features. This suggests that Congress meant to accord the Secretary substantial discretion to modify the project features to fit changing needs, so long as the basic facilities Congress described were built to carry out the project purposes.⁴

³ See Report on the San Felipe Division, Central Valley Project, California. House Document No. 500, 89th Cong., 2d Sess., Sept. 1966. 43 U.S.C. § 485h (1970) requires the Secretary to submit this type of report to Congress prior to expending money for construction of new project works. See also 43 U.S.C. § 412 (1970).

⁴ The authorizing language should be compared with other Congressional authorizations of Bureau projects; e.g., the Frypan-Arkansas Project authorizing Act, 43 U.S.C. § 616 (1970), which directs the Secretary to build the project "in substantial accordance with the engineering plans therefor set forth in [the feasibility report] * * * with such minor modifications, omissions from, or additions to the works described in those reports as he may find necessary or proper for accomplishing the objectives of the project; * * *" authorizing Act for the Auburn-Folsom South Unit, 43 U.S.C. § 616bbb (1970), which specifies the actual maximum height and capacity of the dam and reservoir in the legislation itself; and the authorizing Act for the Garrison Diversion Unit, 79 Stat. 433, Aug. 5, 1965, which authorizes construction of a development "substantially in accordance with" the Bureau's feasibility report.

This conclusion is supported by sec. 4 of the authorizing Act which provides:

Sec. 4. In locating and designing the works and facilities authorized for construction by this Act, and in acquiring or withdrawing any lands as authorized by this Act, the Secretary shall give due consideration to reports prepared by the State of California on the California water plan, and shall consult with local interests who may be affected by the construction and operations of said works and facilities or by the acquisition or withdrawal of lands, through public hearings or in such manner as in his discretion may be found best suited to a maximum expression of the views of such local interest.⁵

The intent of Congress reflected in this section is that the Secretary should plan the San Felipe Division works in consonance with the plans, views and preferences of the State of California and the local interests affected by the project. If Congress had intended to tie the Secretary to the project plans as set out in the Feasibility Report, it would have been meaningless to require the Secretary to provide for and respond to these forms of public participation in facility location and design decisions.

This discretion is, however, constrained by the plain terms and requirements of the Act as to what facilities shall be constructed—namely, “the Pacheco tunnel, pumping plants, power transmission facilities, canals, pipelines, regulating reservoirs and distribution facilities.” According to the Bureau of Reclamation, the general features mentioned in the authorizing Act

continue to be part of the project plan. Although substantial deviations from those general requirements, either by additions to or deletions from the project plans, would violate the Congressional authorization and purpose of the Division, the Bureau assures this is not the case. Therefore, I find the modifications authorized.

This conclusion finds support in reported decisions. For example, *Thetford v. United States*, 404 F. 2d 301 (10th Cir. 1968), was a condemnation action initiated on behalf of the Secretary of the Interior in furtherance of the Arbuckle Project in Oklahoma.⁶ The landowners challenged the authority of the Secretary to take their land for the project.

They relied on the fact that the Feasibility Report⁷ specifically defined the areas surrounding the reservoir site which were to be acquired for recreational purposes and the defendants' land were without this area.

The language used in the Arbuckle authorization was similar to that used in the San Felipe Act.⁸ No specific reference to the Feasibility Report was contained in the Act. The court noted that the initiation of these projects had traditionally been by means of a letter

⁵ Authorized by Act of Aug. 24, 1962, 76 Stat. 395; codified in 43 U.S.C. §§ 616k through 616s (1970).

⁷ House Document No. 242, 87th Cong., 1st Sess.

⁸ The pertinent portion reads: “The project shall consist of the following principal works: A reservoir * * *, pumping plants, pipelines, and other conduits * * *.” 43 U.S.C. § 616k (1970).

⁵ 43 U.S.C. § 616fff-4 (1970).

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report from the Department to the Congress and found that the evidence in the record showed "* * * that such a report is merely a feasibility report and at most is only a tentative plan for the project being initiated." * * * 404 F. 2d at 302.

In dismissing defendants' argument that the taking was unlawful because defendants' land was outside the take line as shown on a map in the Feasibility Report, the court stated (404 F. 2d at 302):

"* * * The fallacy in this argument results from their use of the feasibility report to read into the Act restrictions that do not exist. All such projects must in some way be initiated for consideration by the Congress and it is appropriate for the Secretary of the Interior to take this first step after determining, by a preliminary examination of the proposed project, that the project is feasible and what the probable costs will be. In this determination, and in preparing the report, the Secretary must in a broad way define the project in terms of acreage and probable facilities. Nevertheless, the report is not a part of the Act and we believe it is inappropriate to use the report, or any other part of the legislative history, to arrive at an interpretation of the meaning of the Act. Such practice becomes necessary only if the act in question is ambiguous. The Act here is clear and unambiguous thus we find no reason to look behind the plain language of it. (citations omitted) ⁹

⁹ The court found additional support for its position, that Congress intended the Secretary to have discretion in determining the land needed for recreational purposes, in sec. 6 of the Act which limits federal costs for constructing the project "* * * to the non-reimbursable costs of the Arbuckle project for minimum basic recreational facilities as determined by the Secretary." 43 U.S.C. § 616p (1970). The fact that the Arbuckle Act on its

The *Thetford* case was an eminent domain proceeding. Courts traditionally have been very reticent to question the actual necessity or authorized purpose of a taking. *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99, L.Ed. 29 (1954). *United States v. Bowman*, 367 F.2d 768 (7th Cir. 1966); *United States v. 80.5 Acres, of Land, More or Less, in the County of Shasta, State of Calif.*, 448 F.2d 980 (9th Cir. 1971). As the court stated in *United States v. 2,606.84 Acres of Land in Tarrant County, Texas*, 432 F.2d 1286, 1289 (5th Cir. 1970): "* * * It is perfectly clear that the judicial role in examining condemnation cases does not extend to determining whether the land sought is actually necessary for operation of the project. * * *" Although the analogy to this case is therefore admittedly not perfect; nevertheless, the *Thetford* court's remarks concerning the status of the feasibility report, when the authorizing statute is nearly identical to the San Felipe Act, is supportive of the result we reach.

Other cases have evaluated situations when project plans were changed subsequent to authorization. Each of these cases has involved somewhat different authorizing language,¹⁰ and the differing

face contemplated the Secretary having discretionary authority is similar to the inference I draw above from sec. 4 of the San Felipe Act, contemplating public participation in final project facility location and design.

¹⁰ See n. 4, *supra*.

results reached suggest that a case-by-case review is necessary to make such determinations. Compare *Sierra Club v. Froehlke*, 345 F. Supp. 440 (W.D. Wis. 1972);¹¹ with *National Wildlife Federation v. Andrus*, 440 F. Supp. 1245 (D. D.C. 1977);¹² see also, *Ryan v. Chicago B. & Q.R. Co.*, 59 F.2d 137 (7th Cir. 1932).

In San Felipe the Bureau of Reclamation is proceeding to build or plans to build all of the principal project features listed in the Act, and is not to my knowledge building any facilities not so listed. Giv-

¹¹ In this case the authorization Act stated that the Kickapoo Project "is hereby authorized substantially as recommended by the Chief of Engineers in House Document Numbered 557. Eighty Seventh Congress * * *." The following changes had been made from the feasibility report plans: 1) the dam was enlarged from 71.5 feet high and 1440 feet long to 103 feet high and 3960 feet long; 2) lands to be acquired increased from 3000 to 9560 acres; 3) water surface area was expanded from 800 to 1780 acres; and 4) the storage capacity was expanded from 66,000 to 124,000 acre feet. The court found that the plaintiffs had "failed to show a significant chance of success" that the changes were unauthorized to justify a preliminary injunction, but a full decision on the merits was never made.

¹² In this case none of the authorizing Acts for the Navajo Indian Irrigation Project specifically mentioned a powerplant to be built in connection with the concededly authorized dam and reservoir. See 43 U.S.C. §§ 620 and 615ii-oo (1970). The original 1956 authorizing Act appeared to exclude a powerplant at the Navajo dam. Although a 1970 amendment to the authorization did not mention a powerplant, the Senate Committee Report on that amendment did mention that the project included a powerplant at the dam. S. Rep. No. 363 (91st Cong., 1st Sess. 1969) p. 2. The court held the powerplant was not authorized, noting that "* * * [w]here Congress has been specific in its authorization or lack thereof, the discretion of the officials is accordingly diminished. * * *" 440 F. Supp. at 1250. (The original 1962 authorizing legislation authorized a project "substantially" as proposed in the 1957 coordinated report of the Acting Commissioner of Reclamation and the Commissioner of Indian Affairs.)

en these facts, it is my judgment that the modifications in the San Felipe Division which have been made since 1967, and which deviate from those plans set forth in the feasibility report, are currently within the scope of the Congressional authorization, subject to the discussion below.

IV. Authorized Appropriation Ceiling

From the above, it is clear that Congress did not regard the feasibility report as having talismanic significance in constructing the San Felipe Unit. Congress did not, however, relinquish to the Department total control over project design and construction. Instead, Congress placed a limit, in the authorizing legislation, on the money which could be spent for the project. Through this cost ceiling, Congress retained the power to approve project changes which require spending more public funds than originally contemplated.

Specifically, sec. 7 of the San Felipe authorizing Act¹³ provides as follows:

Section 7. There are hereby authorized to be appropriated for construction of the new works involved in the San Felipe division \$92,380 (Oct. 1966 prices), plus or minus such amounts, if any, as may be required by reason of changes in the cost of construction work of the types involved therein as shown by engineering cost indexes and, in addition thereto, such sums as may be required to operate and maintain said division.

This sec. was added during Committee deliberations in both the

¹³ See 43 U.S.C. § 616fff-7 (1970).

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Senate and the House.¹⁴ Sec. 5 in the original bills as introduced in the House and Senate merely provided that "[t]here are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act."

An explanation of the amendment incorporating the authorized appropriation ceiling was provided by Congressman Haley of Florida. During a hearing conducted by the House Subcommittee on Irrigation and Reclamation, the following colloquy took place between Congressman Haley and Congressmen Gubser and Edwards, primary sponsors of the bill in the House:¹⁵

MR. HALEY. Of course we are considering your bill H.R. 43, and if and when the committee comes to the markup of the bill, do you have any objections to putting the so-called Haley amendment on our section 5 to find out exactly how much this project is going to cost, rather than leaving this open end [sic] phraseology which authorizes any sums?

MR. GUBSER. I am not familiar with the provisions of the amendment, but I certainly am willing to abide by the wisdom of this committee.

MR. HALEY. The so-called Haley amendment merely puts a ceiling, where *if these wild spenders that we have in this Department want to spend more money than we think they should, they have to come back to the committee and get additional authorization.*

¹⁴ See Senate Report No. 232 (90th Cong., 1st Sess.) pp. 5-7; House Report No. 523 (90th Cong., 1st Sess.) p. 6.

¹⁵ See Hearings before the Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, House of Representatives (90th Cong., 1st Sess.) on H.R. 43 and related bills; pp. 17-18 (Italics added).

MR. GUBSER. I might say, Mr. Haley, that a number of amendments have been suggested by the Department and were suggested in the Senate, and the local interests are thoroughly familiar with them and approve of the amendments which the Department has suggested.

MR. HALEY. I might say apparently the various departments downtown are beginning to recognize that the Congress should know how much these projects are going to cost and they are even beginning to put it into amendments that they send up here along with the bill.

There was no objection to Congressman Haley's amendment and it was subsequently adopted by the full Congress. The intent of the ceiling is clear. Congress demands the right to decide whether to continue a project which cannot be completed within the authorized cost ceiling.

The precise issue involved here is *when* Congress should be notified that the cost ceiling is likely to be exceeded. It is not open to question that before money in excess of the ceiling can be spent, additional authority must be obtained. But may the Bureau wait until the point at which the ceiling is about to be exceeded before asking Congress for additional authority? Is it obligated to seek additional authority from Congress at the earliest possible moment it estimates that the cost ceiling will be exceeded? Based on the reasons set out below, I conclude that the purpose of the so-called "Haley amendment" is best served if the Bureau is required to seek additional Congressional au-

thority at the earliest point the Bureau's calculations reflect that the statutory cost ceiling will be exceeded.

The record of planning and development of the San Felipe Division reflects two things: (a) continuous cost escalation, and (b) corresponding adjustments in project design in an attempt to maintain the estimate of total federal obligation¹⁶ within the authorized cost ceiling as indexed for inflation. In spite of these efforts the most recent calculations by the Bureau of Reclamation indicate that while the appropriation ceiling for the San Felipe Division, as indexed, is \$192,225,000, the estimate of total federal obligation is \$200,311,000. Thus the cost ceiling will be exceeded by more than \$8,000,000 under current projections.

With the exception of Congressman Haley's expressions of the purpose of his amendment,¹⁷ no direct legal authority defining the Secretary's obligation with regard to project expenditures has been found. Certain indirect guidance can be found in 31 U.S.C. § 665 (1970). This statute, commonly referred to as the Anti-Deficiency Act, has a long history and reflects how Congress has exercised control

over the Executive Branch through control over the purse strings. Simply put, the effect and intent of the Anti-Deficiency Act is to prohibit government officials from making binding contractual commitments for a given purpose which exceed the amount of funds appropriated in the current fiscal year for that purpose. It has been generally held that the statute makes a nullity any attempt by a government agency to create a binding contractual commitment in the absence of the authority of an adequate and existing appropriation. See *Robert F. Simmons and Associates v. United States*, 360 F. 2d 962 (Ct. Cl. 1966) and *Hooe v. United States*, 218 U.S. 322 (1910). This suggests that, at a minimum, government officials must be very cautious in deciding to approve expenditures where the authority to do so is in doubt.

This limitation, together with the purposes of the limitation in the San Felipe authorizing Act, define the Bureau's obligations regarding when additional authority should be requested from Congress.

The San Felipe Act requires the Secretary to construct certain facilities and fulfill certain general purposes in the area to be served by the project. As stated earlier the Secretary is bound to carry out the purposes of the Act as defined by Congress and lacks the discretion to alter, exclude or add to the stated purposes. The authorized appropriation ceiling is a flat Congressional requirement that, unless Congress subsequently provides other-

¹⁶ This is the sum of (a) the expenditures to date and (b) the estimated cost to complete the project.

¹⁷ It should be emphasized that Congressman Haley said that the limitation applies when Departmental officials "want to spend more money than we think they should." See p. 343, *supra*. Regardless of whether the Bureau "wants" to spend money above the ceiling, its current estimates show that it will exceed the ceiling.

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wise, the stated purposes must be accomplished within that fiscal limitation. That this requirement is conceded as binding is reflected in the Bureau's efforts over the past few years to modify the project design to stay within the ceiling, while at the same time fulfill the project purposes as defined by Congress.

It now appears that project modifications have been unsuccessful in keeping costs within the ceiling. Current estimates of total federal obligation exceed the authorized appropriation ceiling as indexed for inflation. In these circumstances, I hold that, once the estimates exceed the authorized appropriation ceiling, as indexed, the appropriations and authorizing Committees should be notified immediately and the Bureau should request an increase in the authorized ceiling in order to give the Congress the opportunity to determine whether the project should be completed at the increased cost level. This additional authority should be sought at the time it is first determined that the estimate exceeds the ceiling, regardless of the amount of appropriations actually made for that project.

To do otherwise would make the Haley amendment a hollow act. If the spending agency waits until the ceiling to the whole project is about to be exceeded before informing Congress of cost overruns, Congress, and particularly the committees which initiated the legislation authorizing the project in the first

place,¹⁸ have little opportunity to make a reasoned choice about whether the additional expenditures are merited. The Congressional control over project expenditures which furnishes the whole purpose of the cost ceiling requirement would be frustrated.

Expressed another way, Congress did not authorize the San Felipe project to carry out certain purposes regardless of costs. Rather, it authorized the project only if the cost were kept within acceptable limits. Once it is estimated that the project cannot be completed within those limits, Congress must be given an opportunity to reassess the costs and benefits and make a new decision about the project's future. To do otherwise would effectively read the cost ceiling out of the law, because the equities shift in favor of completing the project the more money has been spent on it and the more facilities have been completed. Congress must be given a real rather than an essentially hollow choice in deciding whether to continue, and this requires a Congressional decision at the earliest possible date.

In the case of the San Felipe Division the current estimate of total federal obligation now exceeds the authorized appropriation ceiling by at least \$8,000,000. Although

¹⁸ It is important to note that, in describing the effect of his amendment, Congressman Haley emphasized that if the ceiling is to be exceeded, the Department must "come back to the committee [i.e., the authorizing committee] and get additional authorization." Quoted in full at p. 343, *supra* (Italics added).

it might be argued that it is too early to tell whether this condition will persist in view of pending construction contract negotiations and other uncertainties, it is my opinion that this estimated overrun is significant enough that the purpose of the Congressionally established cost ceiling requires that Congress be given an opportunity now to decide whether to proceed by raising the cost ceiling.¹⁹

¹⁹ I must take note of the well-known fact that Bureau projects, like most construction projects in recent years, have often exceeded cost estimates. See, e.g., 2 Task Force on Water Resources and Power, *Report Prepared for the Commission on Organization of the Executive Branch of the Government*, table following p. 716 (1955); *Reclamation—Accomplishments and Contributions*, Legis. Reference Service, Library of Congress, 86th Cong., 1st Sess., Committee Print No. 1, pp. 47-48 (1959). In light of current difficulties

However, because we are dealing with estimates and cannot say with certainty in this case that the project cannot be completed within the existing authorization level, the project should continue on schedule until such time as the appropriations and authorizing Committees have an opportunity to act after notice of the estimated cost overrun.

LEO M. KRULITZ,

Solicitor.

with San Felipe, including unexpectedly high bids received for construction of a principal project feature (the Pacheco tunnel), I have no evidence before me that the Bureau's current estimates are wrong, and that the cost ceiling will not be exceeded. As noted above, the Bureau has attempted to redesign the project to stay within the authorized cost ceiling but its current estimates reflect that this effort has failed.

August 1, 1978

EXXON CORPORATION

36 IBLA 185

Decided August 1, 1978

Appeal from decision of the Director, Geological Survey, which affirmed the requirement of an OCS order that wells be shut in during welding and burning operations. (GS-94-O&G.)

Affirmed.

**1. Oil and Gas Leases: Generally—
Oil and Gas Leases: Production—Outer
Continental Shelf Lands Act: Oil and
Gas Leases—Outer Continental Shelf
Lands Act: Operating Procedures**

The Department of the Interior has the authority to issue orders to oil and gas lessees to protect all of the natural resources of the Continental Shelf. An order which requires lessees to shut in wells during welding or burning operations will be sustained on appeal as not being arbitrary or unjustified where the record shows that a number of companies had followed the practice even when it was not required, where the order is not so prohibitive as to effect a *pro tanto* cancellation of the lease, and where departures from the order may be granted in certain situations.

APPEARANCES: A. C. Garner, Jr., Manager, Production Department, Southeastern Division, Exxon Corporation, and John F. Reid, Esq., for appellant.

**OPINION BY ADMINISTRATIVE
JUDGE THOMPSON
INTERIOR BOARD OF LAND
APPEALS**

Exxon Corporation has appealed from a decision of the Director, U.S.

Geological Survey, GS-94-O&G, which sustained the requirement of section 4.D(2)(d)(i)(g) of OSC Order No. 8 for the Gulf of Mexico, 41 FR 37616, 37622 (Sept. 7, 1976), effective Oct. 1, 1976, which states: "All other producible wells should be shut-in at the surface safety valves while welding or burning in the wellhead or production area."

Appellant's basic contention is that with proper precautions these operations may be safely conducted without stopping production and that the requirement of shutting in the well is unreasonable because it diminishes production. These contentions were made in comments by the industry on the proposed order, as well as in the appeal before the Director. In his decision sustaining the order, the Director stated:

The Geological Survey responded to the industry comments with the following rationale (published at 41 FR 37619, Sept. 7, 1976):

USGS rationale. This subparagraph was not changed. We believe that all welding or burning operations in the area of the wellhead, well bay, or production areas are potentially hazardous, and the possibility of potential fire and/or explosion should be precluded by all means. Except in emergencies, welding operations should be scheduled when the platform is shut-in.

In reaching the conclusion stated above, the Area Supervisor was clearly balancing the nation's need for immediate production versus the benefits achieved with prudent operating procedures and the accompanying short-term production decrease. In all but exceptional circumstances, production interruptions merely delay production and do not diminish the total petroleum recov-

ery from a field. Therefore, there is no net energy loss to the nation from the requirement of subsec. (g).

The Director further noted that a safety manual prepared for internal use by several oil companies similarly required wells to be shut in during welding or burning operations. Finally, the Director noted that departures from this requirement may be permitted on a case-by-case basis pursuant to 30 CFR 250.12(b). Indeed, appellant states it has obtained departures to allow welding on platforms in the well bay or production area while maintaining production.

Appellant hypothesizes that recovery may be diminished in situations where shut-in wells are not returned to production, but this would clearly be due to factors in addition to the requirement of subsec. (g). Appellant offers no satisfactory reason why such exceptional situations are not adequately treated on a case-by-case basis as the current procedures provide. Appellant further contends that the order is arbitrary and unjustified as it:

[I]s not supportable in the face of (1) actual OCS accident experience; (2) the detailed welding practices and procedures requirements included in revised OCS Order No. 8 under Sec. 4.D(2) (d); and (3) the new requirement contained in Section 4.D(2) (c) of revised OCS Order No. 8 for a contingency plan covering simultaneous conduct of production operations and other activities.

(Statement of Reasons, 4). Appellant's arguments do not persuade us to reverse the Director.¹

[1] Appellant does not question the authority of this Department to promulgate OCS orders necessary to protect all of the natural resources of the Outer Continental Shelf. It is clear this Department has such authority. 43 U.S.C. § 1334 (a) (1) (1970); 30 CFR 250.12(a); see *Union Oil Co. of California v. Morton*, 512 F.2d 743 (9th Cir. 1975). Nor does appellant contend that the requirement is so restrictive that it effects a *pro tanto* cancellation of the lease. See *Union Oil Co. of California v. Morton*, *supra*. It is clear it does not. The fact that a number of companies had voluntarily adopted the practice prior to the promulgation of the revised OCS order belies appellant's claim that the practice is unreasonable. Indeed, the fact that relief from subsection (g) may be granted pursuant to 30 CFR 250.12(b) suggests that the real issue appellant raises in this appeal is not the reasonableness of the requirement itself but,

¹ Appellant points to a table of welding-related accidents which occurred prior to the time when subsec. (g) became effective, and generally concludes that the severity of the accidents bears no relation to the continuation of production, an analysis with which the Director disagrees. We only note that although continued production was not prohibited during welding and burning operations, we cannot assume on the basis of this record that production was in fact continued in each incident in view of the practice of a number of companies to voluntarily shut-in wells during such operations. Thus, the table by itself does not sustain appellant's conclusion that continuing production does not pose a significant hazard during welding and burning operations.

August 15, 1978

rather, the reasonableness of the procedure by which a lessee may obtain permission to carry on welding and burning without shutting in the well.

The effect of the present rule structure ensures a case-by-case review of requests to allow welding and burning operations while production continues. Although this process may be more time-consuming, we do not find it unreasonably so. In view of the hazard involved, the procedure is not inconsistent with the oil and gas supervisor's responsibility under 30 CFR 250.12 (a) "to issue OCS Orders and other orders and rules necessary for him to effectively supervise operations and to prevent damage to, or waste of [f], any natural resource, or injury to life or property." We find that the general requirement is not arbitrary or unjustified.

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

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

EDWARD W. STUEBING,
Administrative Judge.

NEWTON FRISHBERG,
Chief Administrative Judge.

**APPEAL OF ENVIRONMENTAL
ASSOCIATES, INC.**

IBCA-1128-10-76

Decided August 15, 1978

Contract No. 68-91-1526, Environmental Protection Agency.

Sustained in Part.

1. Contracts: Construction and Operation: Allowable Costs

Where a cost-plus-fixed-fee contract contains specified ceilings on reimbursement for general and administrative expenses and rates for certain consultants, such ceilings are found to apply to the entire contract, including a second phase initiated by the timely exercise of an option in the contract.

2. Contracts: Construction and Operation: Allowable Costs

Costs reimbursable to a contractor under a cost-plus-fixed-fee contract are found to exclude those portions of an executive's salary properly chargeable to work outside the scope of the contract, but the costs of low-cost cameras and recorders necessary to performance are allowed as materials and supplies because the conditions under which they were used made them expendable material.

APPEARANCES: Mr. Peter L. Barnhisel, Attorney at Law, Fenner & Barnhisel, Corvallis, Oregon, for the appellant; Mr. Donnell L. Nantkes, Government Counsel, Environmental Protection Agency, Washington, D.C. for the Government.

*OPINION BY ADMINISTRATIVE JUDGE LYNCH IN-
TERIOR BOARD OF CON-
TRACT APPEALS*

Appellant was awarded a cost-plus-fixed-fee contract for the development of data and recommendations for industrial effluent limitation guidelines and standards of performance for the canned and preserved fish and seafood processing industry. The contract divided the work into Phases I and II with only Phase I initially funded, and Phase II to be undertaken only upon the exercise of an option by the Government. The contract work was authorized by a notice of award dated Feb. 16, 1973, which was replaced by a definitive contract on June 3, 1973. The contract funding for Phase I was \$172,718 and the option for Phase II was \$194,053, including costs and fee. Article X of the contract included the following language: "The Contractor agrees to accept reimbursement for overhead and G&A expense subject to the ceilings, as set for the [*sic*] below, or actuals whichever is less. Overhead Ceiling 30%. G&A Ceiling 15%." Additionally, the contract contained in Article XX—*Approval of Consultants*—a provision approving "Consultants from CH₂M/Hill at rates not to exceed" specified hourly rates.

The Government timely exercised its options for the performance of Phase II, and with 15 modifications, the contract performance was completed on Nov. 30, 1974. The

final estimated cost of \$498,677 and fixed fee of \$29,901 totaled \$528,578.

Appellant appeals an adverse decision of the contracting officer disallowing the following costs:

1. General and Administrative expenses of \$18,820.06, which resulted from G&A exceeding the 15 percent contract ceiling during the performance of Phase II.

2. \$1,136.75 disallowed costs for CH₂M consultant payments in excess of the contract rates specified.

3. \$757 disallowed costs for appellant's president Mr. Soderquist for time (76 hours) worked on other company business.¹

4. \$465 for disallowance of the cost of certain cameras and tape recorders.

The contract under which this appeal arose was the first contract awarded to the newly formed corporation, Environmental Associates, Inc., Mr. Soderquist, the founder and President of Environmental Associates, Inc., was the sole owner of the stock when awarded the instant contract. The firm was incorporated in Nov. 1972 during the negotiations for the contract, with Mr. Soderquist as the sole employee. At that time, and for several preceding years, Mr. Soderquist was on the faculty of Oregon State University and performed similar studies for respondent as a consultant under the name of Environmental Associates, employing up to 20 people (Tr. 17).

¹ Tr. 31. Complaint was amended to add \$552 disallowance under Phase II to the \$205 disallowed under Phase I.

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The disallowed costs result from the final audit of the contract dated Dec. 22, 1975 (AF-E), which findings and conclusions were adopted by the contracting officer in a final decision dated Aug. 31, 1976 (AF-K). Each of the disallowed costs will be discussed separately below.

Findings and Decision

1. General and Administrative expense. Appellant contends that it was a new organization without historical records on which to accurately project a G&A rate and that it did not consider the ceiling rate of 15 percent to be binding for Phase II because there was no certainty that the Government would exercise the option to fund that phase. As a result of the continuation of the contract through Phase II, and the consequent increase in administrative expenses, the G&A rate experienced for Nov. 1, 1973, through Oct. 31, 1974, was 29.26 percent versus 11.5 percent for the preceding fiscal year.

Appellant urges that both its personnel and certain technical personnel of respondent (AX-2, Certified Statement of George Webster, former Chief, Technical Analysis and Information Branch of Respondent) expected the ceiling G&A rate to be renegotiated in the event the Government exercised the option to require performance of Phase II. There is nothing in the record to indicate that anyone in the contracting office, with authority to do so, did anything to support this

expectation. To the contrary, the contract language limiting reimbursement for G&A expenses is clear and unambiguous. The contract includes the option for Phase II at a negotiated funding level, which required nothing more than for the Government to exercise the option prior to Aug. 17, 1973. The Government exercised the option by issuing unilaterally Modification 3 dated June 6, 1973. Neither the contract nor the record contains any basis for determining that the negotiated ceiling rate for G&A would be changed during the life of the contract.

Therefore, we find that the disallowance of that portion of G&A expenses which exceeded the 15 percent ceiling was proper under the contract.

2. Excess payments to CH₂M consultants. The audit report allowed the maximum rate of \$17.75 per hour permitted under Article XX of the contract for CH₂M consultants, regardless of the personnel rating. The contract provision for rates not to exceed specified amounts for such consultants is a binding agreement for maximum reimbursements for such costs. Appellant's contention that much higher rates were paid without resulting in a contract overrun ignores the contract agreement limiting reimbursement to the specified rates.

We find the disallowance of costs for payments to CH₂M consultants exceeding the specified rates was proper under the contract terms.

3. Disallowance of costs by reason of Mr. Soderquist's work on projects other than the contract.

Mr. Taylor, office manager for appellant, testified that Mr. Soderquist was a salaried employee who did not get paid additional compensation for additional hours worked for commercial clients of the company (Tr. 47-48). The audit determined that the hourly rate charged to the instant contract was computed to cover his entire salary and associated G&A expense. In addition to his work on the contract, Mr. Soderquist worked 76 hours for commercial clients. The auditor recomputed the hourly rate for his salary and G&A expense to include the 76 hours of other work, with the result that \$757 in salary and \$63 of G&A expense (totaling \$820) of charges for Mr. Soderquist's work were disallowed by the contracting officer.

Appellant did not pay Mr. Soderquist any additional money for the hours worked for commercial clients, although there is no suggestion that such work was gratuitous and did not result in added revenues for appellant.

Clause 19—Allowable Cost, Fixed Fee, and Payment—provides for the reimbursement of the allowable costs for the performance of this contract. Clearly, if appellant recovered a portion of Mr. Soderquist's salary and G&A from the sale of his services to other clients, his total salary plus G&A were not costs to appellant in the performance of this contract. Mr. Taylor

testified that this experience resulted in a change in policy so that all employees were placed on an hourly pay basis and thereafter paid for all hours worked. However, prior to this policy change, the cost to appellant under a given contract was decreased by any amount of fixed salary costs recovered from unrelated work.

We find the disallowance of the salary and G&A expenses for Mr. Soderquist's work outside the contract to be proper.

4. Disallowance for the cost of cameras and tape recorders. The parties do not disagree that appellant purchased and used \$465 worth of cameras and tape recorders in the performance of the contract. Appellant contends that these low-cost items (\$60 and \$39 respectively) were expendable materials which were either lost, damaged or rendered valueless in the performance of the contract (Tr. 48). The auditor reported that appellant's practice was to capitalize low dollar value nonexpendable items such as wastebaskets, chairs and stools. In adopting the conclusions and recommendations of the auditor, the contracting officer denied payment for this item of material and supplies charges out of a total of \$7,699 of such costs claimed.

The operative word for determining whether a material item is properly expensed against the contract or capitalized is the expendability of the item. The appellant purchased these low-cost items for use by crew members on and under

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docks in Alaska, Puerto Rico, and various contract performance sites. An inventory after the contract revealed only two cameras left, both broken and repaired with plastic tape. These were offered and sent to the Government (Tr. 48).

We perceive a distinction between the expendability of low-cost items such as wastebaskets, chairs, and stools which are intended for use in the protected environment of offices and other low-cost items intended to be used in unprotected environments where the risk of loss or damage is greatly increased. Respondent does not contest the fact that appellant's judgment to expense the cameras and recorders was proved by actual experience. Neither does respondent suggest that such items were of continuing value and necessary to the prospective business of appellant in relation to similar items maintained by appellant in its capital equipment inventory. The evidence in the record indicates the cameras and tape recorders were needed for performance of the contract and were purchased and expended during performance of the contract work.

We find that the cameras and recorders were properly charged as reimbursable costs for expendable material and supplies in the performance of the contract.

Decision

The appeal is sustained in the amount of \$465 plus interest to be computed by the contracting officer

in accordance with Clause 23—Interest and is otherwise denied.

RUSSELL C. LYNCH,
Administrative Judge.

WE CONCUR:

GEORGE S. STEELE, JR.,
Administrative Judge.

WILLIAM F. MCGRAW, CHAIRMAN,
Administrative Judge.

BURN CONSTRUCTION CO.

IBCA-1042-9-74

Decided August 30, 1978

Contract No. M00C14201319, Bureau of Indian Affairs.

Sustained in Part.

1. Contracts: Disputes and Remedies: Burden of Proof—Contracts: Performance or Default: Inspection

Where the contract specifies a particular test procedure to be used by the Government for compliance testing, and the contractor alleges improper test procedures by the Government, contractor has the burden of proving that the test procedures actually used by the Government were contrary to those specified, and that it incurred extra costs as a result thereof. Contractor failed to sustain its burden of proof, except with respect to the superspan claim.

2. Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Contract Clauses—Contracts: Construction and Operation: Construction Against Drafter

August 30, 1978

docks in Alaska, Puerto Rico, and various contract performance sites. An inventory after the contract revealed only two cameras left, both broken and repaired with plastic tape. These were offered and sent to the Government (Tr. 48).

We perceive a distinction between the expendability of low-cost items such as wastebaskets, chairs, and stools which are intended for use in the protected environment of offices and other low-cost items intended to be used in unprotected environments where the risk of loss or damage is greatly increased. Respondent does not contest the fact that appellant's judgment to expense the cameras and recorders was proved by actual experience. Neither does respondent suggest that such items were of continuing value and necessary to the prospective business of appellant in relation to similar items maintained by appellant in its capital equipment inventory. The evidence in the record indicates the cameras and tape recorders were needed for performance of the contract and were purchased and expended during performance of the contract work.

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Decision

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in accordance with Clause 23—Interest and is otherwise denied.

RUSSELL C. LYNCH,
Administrative Judge.

WE CONCUR:

GEORGE S. STEELE, JR.,
Administrative Judge.

WILLIAM F. MCGRAW, CHAIRMAN,
Administrative Judge.

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2. Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Contract Clauses—Contracts: Construction and Operation: Construction Against Drafter

The contractor's claim that the Government's use of the word "subgrade" in the earthwork specifications created an ambiguity which should be construed against the drafter was denied. The "contra proferentem" rule is not applicable in this instance because the definition propounded by the contractor was not reasonable, use of the word in the specified context did not create an ambiguity, the contractor did not register an objection when informed of the Government's interpretation, and no evidence was presented to show that the contractor relied on its alleged interpretation at the time of bidding.

3. Contracts: Construction and Operation: Contract Clauses—Contracts: Construction and Operation: Contracting Officer

Where the contracting officer by contract was given discretion in setting the moisture requirement for high volume change soils, the contractor's claim of extra compaction work due to rigid moisture requirements was denied because the contractor failed to show that the contracting officer abused his discretion or that the discretion exercised caused the contractor extra contract costs.

4. Contracts: Disputes and Remedies: Burden of Proof

Contractor's claims for extra costs allegedly incurred as a result of constructive changes under the earthwork requirements of the contract were denied because the contractor failed to sustain its burden of proof on the merits.

5. Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Notices

Where the Government's engineer recorded in his daily diary a verbal protest made by the contractor about embankment compaction difficulties and the inaccuracy of the proctor information furnished by the Government, this satisfied the 20-day notice requirement of the

changes clause with respect to some of the claims. It was unnecessary to finally decide the scope of such notice, however, where the Board found the claims to be without merit in any event.

6. Contracts: Disputes and Remedies: Equitable Adjustments

Appellant is entitled to an equitable adjustment of the contract price for costs incurred as a result of the changes under the superspan specifications. Since the contractor was unable to establish the amount of its damages by reliable evidence, the total cost approach of pricing the contract adjustment was rejected. The total cost approach is disfavored as a measure of compensation because it assumes that the original bid was accurate, that the change was the sole cause of cost increases, and that the cost incurred was reasonable. The jury verdict approach was used since mathematical exactness is not necessary and there existed some evidence which was deemed sufficient for that purpose. The Board also found the contractor had been excusably delayed by actions attributable to the Government.

APPEARANCES: Messrs. C. Stanley Dees, D. Joe Smith, Jr., Attorneys at Law, Sellers, Conner and Cuneo, Washington, D.C., for the appellant; Mr. Barry K. Berkson, Department Counsel, Albuquerque, New Mexico, for the Government.

*OPINION BY ADMINISTRATIVE
JUDGE LYNCH*

*INTERIOR BOARD OF CONTRACT
APPEALS*

Appellant, Burn Construction Co., was awarded fixed price contract No. M00C14201319 on Apr. 11, 1973, by the Bureau of Indian Affairs (BIA) to construct a 2.005

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mile roadway, and connecting underpass hereinafter referred to as a "superspan," in the Carrizo Canyon area of the Mescalero Apache Reservation, Otero County, New Mexico. This contract was awarded pursuant to an invitation for bids. Burn's bid of \$389,605.50 was the lowest of the four (4) received. A further comparison of the bids shows that Burn was approximately \$5,000 higher than the Government's estimate and approximately \$77,000 lower than the second lowest bidder.

By this appeal, Burn seeks to recover costs for work attributed to alleged constructive change orders during the performance of the earthwork portion of the subject contract, and alleged constructive change orders during performance of work pursuant to a formal change order relating to construction of the "superspan." In addition, the contractor contests the assessment of liquidated damages in the amount of \$15,500 (62 days at \$250 per day).¹

The contract was executed on Standard Form 23 (Jan. 1961 Ed.). It contained Standard Form 23-A, General Provisions (Oct. 1969 Ed.), and Additions to Standard Form 23-A. Section 100—*General Provisions* deleted sec. 100 of FP-69 and inserted a number of contract provisions to be used in lieu

thereof. The substitute provisions included sec. 105.04, "Coordination of Plans, Specifications, and General Provisions," sec. 106.03, "Samples, Tests, Cited Specifications," and sec. 108.07, "Liquidated Damages." The *Special Provisions—Construction Details* modifying FP-69 included sec. 203.10, "Construction of Embankment and Treatment of Cut Areas with Moisture and Density Control," and sec. 703.03, "Aggregate for Plant-Mix Bituminous Base."

Notice to proceed, mailed on Apr. 23, 1973, was acknowledged by Burn on May 6, 1973. The time allotted for completion was 210 days after receipt of notice to proceed, thus, establishing Dec. 2, 1973, as the original completion date.

A preconstruction conference was held on Apr. 24, 1973. At the conference, a document containing the names, addresses, and telephone numbers of parties directly responsible for the contract, in addition to other pertinent information, was handed out (Exh. S, Tr. 1018).² Mr. L. H. Craig, the contracting officer, designated Mr. Lawrence Kozlowski as the contracting officer's representative who, in turn designated Mr. Kenneth Lee as project engineer or inspector. Mr. Al Bruner was Burn's project superintendent throughout the contract period (AF III-1, p. 42). The contract

¹ Appellant does not contend that \$250 was an unreasonable amount to assess per day, but that the 62 days of delay in completion of the work were Government-caused and, therefore, excusable.

² Abbreviations used:

AF—Appeal File document.

Exh.—Exhibits introduced at the hearing.

Tr.—Transcript of the hearing.

contained the following provision under *General Provisions*, sec. 101.02, Definitions: "Engineer—wherever the term 'engineer' is used in the 'Construction Details' sec. of FP-69 or elsewhere in these specifications, it is changed to contracting officer."

Contract time commenced on May 7, 1973, although work actually started on May 9, 1973. During the early stages of contract work, the contractor was orally advised that a contract change order was forthcoming which would require excavation of earth, and placement of bedding material under the superspan. On June 1, 1973, Mr. Lee personally delivered to Mr. Bruner a letter (with attached sketch) signed by Mr. Kozlowski and addressed to Burn, advising of the additional requirement of a well-graded compacted sand and gravel bedding under the superspan, and requesting a cost proposal therefor (Tr. 1070, AF III-1, p. 35). The second paragraph of that letter stated: "The sand and gravel material shall meet the specification requirements for bituminous base materials, Item 301(1)." The attached sketch contained the following notation in reference to the superspan bedding material: "Compacted sand and gravel (1" Max.) (Well graded)." The contract specified the following gradation requirement for bituminous base course, Item 301(1) ³:

Sieve:	Percent passing
1" _____	100
3/8" _____	60-80
No. 4 _____	45-65
No. 10 _____	35-55
No. 40 _____	15-30
No. 200 _____	4-10

By letter dated June 13, 1973, Burn responded to the proposal request of June 1, 1973, for compacted sand and gravel bedding, submitting a price of \$8,115.80 for 1,159.4 cubic yards at \$7 per cubic yard (AF III-1, p. 37). On June 22, 1973, Burn offered the following material for the superspan bedding with gradations not meeting those specified for bituminous base material, Item 301(1) :

Sieve:	Percent passing
5/8" _____	95.1
1/2" _____	84
3/8" _____	54.7
No. 4 _____	19.3
No. 10 _____	5.5
No. 40 _____	1.5
No. 200 _____	0.6

On June 27, 1973, Mr. Lee advised Mr. Bruner by handwritten note ⁴ that the gradations offered were not satisfactory and that the following gradations were required:

Sieve:	Percent passing
3/4" _____	100
3/8" _____	60-80
No. 4 _____	45-65
No. 10 _____	35-55
No. 40 _____	15-30
No. 200 _____	4-10

³ This is set forth in the contract's *Special Provisions*, p. 20, Sec. 703.03.

⁴ Exh. 4.

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The largest sieve specified in this gradation chart differs from that originally specified, *supra*.

On several other occasions in June 1973, tests were run by Government lab men or helpers on sample materials for the superspan bedding which were given to them by Burn personnel (Tr. 354). The tests showed that samplings did not meet gradation specifications for bituminous base course (Exh. 27).

By letter dated June 28, 1973, the contracting officer gave Burn written authority "to proceed with placement of the compacted sand and gravel bedding under the superspan in accordance with the aggregate gradation requirements for bituminous base materials," and advised that the price would be left open to further discussion (AF III-1, p. 41). From June 30, through July 8, 1973, Burn chose to suspend performance on the subject contract in commemoration of the July 4 holiday.

During the course of performance of the subject project, designated by Burn as Job 932, Burn had two other construction contracts in the same vicinity, designated as Jobs 935 and 937. Job 935, consisting of paving parking lots and sidewalks at the Cienegita hotel-site, was entered into on June 27, 1973, and substantially completed in Nov. 1974. Job 937, consisting in part of base course preparation and paving of existing streets in the nearby village of Ruidoso, was entered into May 11, 1973, and substantially completed on Oct. 18, 1973. Both Jobs 935 and

937 utilized material from the pit, crusher, and hot mix plant set up for Job 932, the subject project.⁵

Mr. Elmer Winte, quality control officer for Burn arrived at the project site on July 11, 1973 (Tr. 375). He performed tests on sample material for the superspan bedding and results revealed that samplings did not meet the gradation requirements (Exh. 8). On July 16, 1973, a meeting was held at the request of Burn. A number of representatives from both the Government and Burn were present and, among other things, discussions were had on procedures employed by the Government in testing materials offered by Burn for the "bathtub."⁶ (See Exh. 5, AF III-2-memo dated Aug. 2, 1973, and AF IV-4, p. 25.)

During this period, Burn was producing material through the crusher and receiving gradation failures. On July 20 and 21, 1973, Burn placed 400 cubic yards of backfill in the "bathtub." Burn stopped further placement of the materials after tests revealed that the materials were not within proper gradation. The Government, however, did not require removal of the nonconforming materials (AF IV-4, page 51).

Instead of continuing to process materials through the crusher, Burn had begun to move in its hot mix plant. The moving in and setting up of the hot mix plant took

⁵ This was set forth in a document signed by both parties entitled, Stipulation of Facts Not in Issue.

⁶ "Bathtub"—large fill area under the superspan.

approximately 5 weeks, from July 12 until Aug. 15, 1973 (approximately 2 weeks to move it in and 3 weeks to set it up). After this time, tests run by the Government showed material to be out of specification mainly on the No. 200 sieve, with the exception of one sample which passed specifications (Exh. 41, Tr. 547). Base course material was again placed in the "bathtub" on Aug. 29, Sept. 4 and Sept. 5, 1973. Government tests showed this material to be out of specification on the No. 200 sieve. The Government again allowed the out-of-specification material to remain (AF IV-4, p. 51). Meanwhile, on Aug. 28, 1973, the Government orally notified Mr. Bruner of a field change (AF IV-4, p. 45). This change was formally conveyed to Burn by letter dated Aug. 30, 1973, from the contracting officer's representative. Under the change the top 9 inches of the "bathtub" were required to be filled with material meeting the specifications for Granular Backfill Filter Material for Underdrains, Item 605(19), which was a coarser aggregate than Item 301(1) (AF III-1, p. 56). This coarser aggregate was placed in the top 9 inches of the "bathtub" with no apparent difficulty.⁷

Actual construction of the superspan commenced on Sept. 7, 1973. During the course of the contract, discussions were ongoing between

⁷ Appellant accepted \$1,824 as payment for the material comprising the top 9 inches of the "bathtub" (228 cubic yards at \$8 per cubic yard). Payment for the remaining aggregate placed under the superspan is being sought under this appeal, no agreement having been reached.

Burn and Government personnel regarding the phases of work being performed, working conditions at the site, specification requirements, and various and sundry other construction items. By letter dated Sept. 25, 1973, Burn notified the Government of its intent to file a claim "in connection with the change orders on the superspan fill and material" (AF III-1, p. 63). Work was officially shut down from Nov. 14, 1973, until Apr. 1, 1974, a period of 137 days. The contract completion date was extended for that period, with a revised completion date of Apr. 18, 1974 (AF III-1, p. 92). After returning in Apr. 1974, the contract work went smoothly (Tr. 198). The contract was deemed substantially complete on June 25, 1974.

During the winter shutdown, Burn filed, on Feb. 5, 1974, seven claims with the contracting officer seeking additional compensation for alleged constructive changes. These claims were designated by the Burn job number as Claims 932A through 932G and totaled \$273,247.17. The claims were set out by the contractor as follows:

832A—Erroneous field tests	\$28,786.80
932B—Erroneous laboratory tests	15,592.24
932C—Culvert backfill	3,872.48
932D—Native soil treatment	26,417.25
932E—Erroneous treatment of soil	60,754.74
932F—Extra compaction of subgrade	24,216.43
932G—Superspan "bathtub"	113,607.23
Total Claim	\$273,247.17

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A time extension of 84 days was also requested by Burn for alleged Government-caused delays.

These claims will hereafter be discussed under the categories of *earthwork* (Claims 932A through F), and *superspan* (Claim 932G). By letter dated Aug. 1, 1974, the contracting officer rendered his findings of fact and final decision denying all claims filed by Burn.

A 6-day time extension was granted, as the Government deemed that to be a reasonable time in which to perform the work under Change Order 1. The contractor timely appealed.

ISSUES

Whether the Government required or caused appellant to perform work not required by the contract and to incur additional expenses as a result thereof.

Whether appellant gave timely notice of its claim as required under the Changes Clause of the contract.

Earthwork Claims

Appellant appealed five earthwork claims as follows:

Claim 932A—That the Government conducted field density tests which were not in accordance with Specification FP-69,⁸ paragraph 203.10, and that incorrect testing caused appellant to expend extra time and effort to rework the soil. \$28,786.80.

Claim 932B—That the Government collected and treated soil samples contrary to AASHO⁹ Designation T-180 Method C as specified in the contract and the improper procedures caused confusion, extra work, and project delay. \$15,592.24.

Claim 932C—Not appealed.

Claim 932D—That the Government, contrary to the contract clause entitled "Specifications and Drawings," improperly enforced drawings over specifications which created dual and contradictory specifications, the improper interpretation of "subgrade," resulting in improper compaction requirements and causing the contractor extra time and effort. \$26,417.25.

Claim 932E—That the Government represented that the soil was not high volume change soil when, in fact, it was, thus, causing improper treatment of the soil and extra work. \$60,754.74.

Claim 932F—That the Government's failure to recognize the high volume change soil classification caused the top 6 inches of subgrade to be compacted to 95 percent density which was contrary to the specifications set forth in FP-69, paragraph 203.10. \$24,216.43.

Appellant contends that because of the Government's improper testing, improper contract interpretations, and improper soil classifications, it was required to perform various phases of earthwork in a manner not specified in the contract,

⁸ FP-69 sets forth the standard specifications for construction of roads and bridges on Federal highway projects.

⁹ AASHO is the abbreviation for the American Association of State Highway Officials.

causing extra work for which it is entitled to compensation.

The Government contends that the Government's testing was proper, that the contract requirements were clear and that the contractor was not required to do any work not specified in the contract, that the Government did not misrepresent soil classifications; and that, in any event, the contractor did not perform extra work entitling it to additional compensation.

The total dollar amount claimed by appellant under earthwork was adjusted downward after Government auditing and further review by the appellant.

[1] Since the facts, issues, and contentions of each of the earthwork claims are to a large degree interrelated, the merits of the claims will be discussed together to the extent possible. It has generally been held that Government laboratory test procedures are presumed to be proper. *John G. Carlsen & Co.*, GSBICA No. 2913 (Dec. 10, 1970), 71-1 BCA par. 8612. This presumption, of course, can be overcome by specific evidence to the contrary. Appellant has the burden of proving that Government testing was improper and that it was detrimentally affected as a result of such testing.

To determine whether or not compacted soil meets moisture and density requirements, the density and moisture of the compacted bed are compared to the maximum density and optimum moisture of a proctor from the same type of soil. Several

proctor tests were made on behalf of BIA prior to the solicitation of bids, two by the Albuquerque Testing Lab and five by McMillan and Associates, Inc. After this time, but prior to the start of work, the BIA Lab. made five proctor tests; and during the course of performance, BIA had two proctor tests made by Testing Laboratories, Inc.¹⁰ Samples of soil used in making the proctors were taken from various locations and depths at the job site. Although appellant alleges that some of the locations were improper and in some cases not in locations where soil was actually excavated, appellant has not shown that the soils used in making the proctors and the compacted bed later tested were of differing soil types. We are aware that in some cases, soil used in making the proctors was taken from a location different than the one from which materials were later excavated. This, however, is only a scintilla of evidence, which standing alone is insufficient to prove improper test procedures. We find, too, that the number of proctors made, including the two proctors made during the course of performance, was adequate. There was no proof that the proctors made prior to the start of performance were unsuitable for use during the course of performance (*i.e.*, that a substantial change in the character of the soil occurred after May 7, 1973). Since several proctors were made which were representative of the soils en-

¹⁰ Set forth in Stipulation of Facts. (See n. 5, *supra*.)

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countered on the job, we fail to see, and appellant has failed to show, in what way the making of only two proctors during the course of performance was detrimental to appellant.

With regard to the preparation of the BIA proctors, we find that the procedure used by Mr. Fielding Myron, BIA soils and material tester,¹¹ was in accordance with the required AASHTO T-180 Method C, contained in the standard specifications for Highway Materials and Methods of Sampling and Testing, Tenth Edition, 1970 (Exh. U), except that he used several 7-pound samples rather than the commonly recommended one 12-pound sample (Tr. 1267, 1268). Note 4, referenced under the above-mentioned Method C procedure, however, allows the use of several individual or new samples for each test, in lieu of the one sample procedure, if the soil is heavy textured, clayey material. Dr. John Carney, Jr., Government's soils expert¹² testified that in this case, either the continuous use of one sample or the use of several individual samples was appropriate (Tr. 1572).

Mr. Myron stated at Tr. 1268 that he followed the procedure set forth in Exh. U, Sec. 8.2, which specified a procedure using "three" approximately equal layers, and that he was unaware of the interim specification adopted by the AASHTO dated 1972

(Exh. V) which specified in sec. 8.2 the use of "five" approximately equal layers (Tr. 1269).

It appears from the record, and we so find, that the printing of the procedure using "three" approximately equal layers (Exh. U) resulted from a typographical error, and that "five" layers should have been specified and used by BIA in making the modified proctors.¹³ Exh. WW and XX, both soils manuals for Design of Asphalt Pavement Structures, which were in use in 1964 and 1969, respectively, called for the same Method C for the modified proctor as was set forth in Exhibit U, except the "five" layer procedure rather than the "three" was specified. Referencing page five of Exhibit VV, Dr. John Carney, Jr., noted that the applied energy per cubic foot for the BIA tests was more than that of the standard proctor and less than that of the modified proctor. This worked to appellant's advantage inasmuch as the compaction of only three layers resulted in laboratory control tests with a lower maximum dry density, than would have existed with use of five layers (modified proctor). Appellant's witness, Dr. Robert Lytton,¹⁴ soils expert, testified that compacting at optimum moisture, a lab control test having a lower maximum dry density than it should have, would require the contractor to apply less

¹¹ Mr. Myron had, at the time of hearing, 18 years' experience as a soils and material tester.

¹² See Exh. UU for expert's qualifications.

¹³ Comparison of Method C in Exh. U to Method C in Exhs. WW and X.X.

¹⁴ Stipuation at Tr. 404 as to Dr. Lytton's qualifications as an expert.

compactive effort to meet the specifications (Tr. 516, 517). Applying that hypothesis to this case, in conjunction with the fact that the compaction effort in the majority of the tests was less than that required by a modified proctor, we find that appellant could compact at optimum moisture¹⁵ with less compactive effort than required by the contract.¹⁶

Appellant has claimed that the Government's improper use of the nuclear moisture density gauge in making the field density tests caused unnecessary reworking of the soil by appellant in order to meet specifications. In place field tests were performed by BIA and compared to the laboratory standard or control tests in order to determine whether compacted materials met contract requirements for moisture content and density. The contract terms allowed the use of "properly calibrated nuclear testing devices" (AF I-2, p. 89). The nuclear gauges used on the subject project were manufactured by Troxler Electronic Laboratories, Inc., Mr. Myron, who performed the field tests had received training on use of the nuclear gauge prior to working on the project as well as onsite at the start of the project (Tr. 1270). Although Mr. Myron testified that he calibrated the gauge every morning, he was mistaken as to the name of the procedure, and was, in fact, performing a standardization of the

equipment which was required prior to each day's use.¹⁷ Standardization determines whether or not the equipment is functioning properly (Exh. L, pp. 5, 6). Mr. Richard Berry, vice president of Troxler Laboratories prepared a report dated Feb. 28, 1977 (Exh. M), at the request of BIA, with regard to the possibility of composition errors on the project which would affect the field test results. Nine samples of soil from the project were sent to Troxler Laboratories for a chemical analysis (Tr. 899). Exh. M reflects the findings of that analysis, wherein it was concluded that the composition of the soils on the project were normal (Tr. 902). The Lab found that the scattering coefficients fell between those of poor limestone and the averages of limestone and granite, which was the point for which the gauges were calibrated (Tr. 902; Exh. M).

The manufacturer did not recommend or require that the gauge be recalibrated for every soil type as far as density measurement was concerned, except under extreme conditions (Tr. 908). For moisture content, it was recommended that the calibration be confirmed in the field by comparison to data on other soil samples (Tr. 909). Mr. Berry of Troxler Labs testified that in soils containing materials of or similar to limestone and granite wherein the only variation in the moisture content for air content involved water hydration, errors

¹⁵ Contract specified optimum moisture to optimum moisture minus 5 percent.

¹⁶ This was also supported in Dr. Carney's analysis on p. 21 of Exh. VV.

¹⁷ See Mr. Myron's testimony at Tr. 1291, Tr. 1294 and compare to standardization procedure in Exh. L, p. 5 and Exh. 61, p. 3.

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would be in the neighborhood of ± 5 percent. Rare chemical elements in the soil could cause errors as large as 5 or 6 pounds per cubic foot (Tr. 911). Appellant, although hypothesizing at times with regard to soil compositions, did not refute Mr. Berry's analysis of the soil at the project site, which was the same as that on which the gauge's calibrations were based. Appellant did not establish that rare chemicals were present in the soil indicating a need to recalibrate the gauges for moisture content. We find that the nuclear gauges were properly calibrated for the soils encountered on the project; that the gauges were working properly; and that they were properly used by the Government.

[2] With regard to compaction requirements, appellant argues that "subgrade" material was the only material required by the specifications to be compacted at a moisture content between optimum and optimum minus 5 percent (AF 1-3-Sheet 2) and that contrary to the specifications, the Government required appellant to compact the existing ground and embankment at that same moisture level. Appellant contends that it interpreted "subgrade" materials as those materials comprising the top 6 inches of embankment (*i.e.*, that portion directly under the pavement) (Tr. 190). The Government's definition of "subgrade" was all embankment materials between the natural ground and the bituminous base including the top 6 inches below the

bituminous base (AF III-2-memo dated Aug. 2, 1973). Both definitions appear to be commonly used and accepted in the industry or trade. The fact, however, that two commonly accepted definitions of a word exists does not in itself show that the use of that word in a particular specification created an ambiguity. All contract specifications should be read as a whole and harmonized if at all possible. We find that "subgrade" as used in the subject contract calls for an interpretation in line with that advanced by the Government. Our examination of the record deters the Board from accepting appellant's claim as to its interpretation being reasonable. A reading of the specifications shows that use of appellant's definition would have created an illogical requirement. The following is a portion of the language used in the contract requirements dealing with the construction of embankments, at p. 6 of the Special Provisions (SP-6), Sec. 203.10: "The top six inches of subgrade shall be compacted to not less than 95% of maximum density, except high volume change soils shall be compacted to 90% of maximum density." Appellant's definition of "subgrade" as the "top 6 inches of embankment" is not compatible with the above requirement since the language used therein indicates that the subgrade in total is greater than 6 inches. This incongruity should have alerted appellant to the unreasonableness of its interpretation and from that, its duty to inquire. If a

word lends itself to two definitions, the interpretation adopted by the contractor should be the one which is reasonable when read in the context of the contract in its entirety. *Frank Farner*, ASBCA No. 18662 (Feb. 11, 1975), 75-1 BCA par. 11,115.

The "contra proferentem" rule does not apply in this instance since we find that the language was not ambiguous, the appellant's interpretation was not reasonable, and no evidence was submitted to show that appellant's alleged interpretation was relied upon by it at the time of bidding. In addition, appellant was verbally advised on July 16, 1973 (Tr. 181, 1504), of the Government's interpretation and accepted the meaning at that time with no sign of disagreement, dissatisfaction, or dissension.

In support of its contention that the Government informed and assured it that the project soil was not high-volume change soil, appellant has provided only self-serving statements. The evidence of record shows that the soil was high-volume change soil; that Government test results show it as such; and that no representations were made by the Government to the contrary. The definition of high volume change soil on this project was set forth in the contract specifications at p. SP-6, sec. 203.10. Appellant had the resources and capability to make an independent determination as to whether the soil, under the definition given, was or was not high-volume change soil. This should have been determined prior to bidding and could have easily been

done during appellant's prebid site investigation. The Government had no contractual obligation to supply the contractor with information on soil composition, absent a showing that the Government possessed superior knowledge in this area. There is no evidence to show that the Government volunteered and misrepresented any such information.

[3] Appellant has alleged that the Government required the top 6 inches of subgrade to be compacted at 95 percent density due to the Government's failure to recognize high-volume change soils, thus, imposing greater compaction requirements than those specified. The requirements, as set forth on p. SP-6, sec. 203.10 of the contract (AF I-1) specify compaction at 95 percent density, except for high-volume change soils for which 90 percent compaction is specified. The contract gave the engineer the discretion to require compaction at a moisture content at any level he deemed to be suitable for the required densities (AF I-1-SP-6, sec. 203.10). All of the compaction tests for the top 6 inches of subgrade passed the initial testing (AF II-4). Out of the 11 tests run, 10 were 95 percent or above density and 1 was below 95 percent density. These records do not prove appellant's contention. We find no other evidence of record which proves that the Government required compaction of the top 6 inches of subgrade at 95 percent density. It is conceivable that appellant itself failed to ascertain whether or not the soil was high-volume change soil and proceeded on its own initiative to com-

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compact the soil at a higher density than required by the contract. (See Mr. Lee's testimony at Tr. 1066 as to appellant's superintendent proceeding without guidance or direction from the Government.)

Even though under the contract definition the project soil was classified as high-volume change soil, the parties agree that the soil was only low to mildly expansive. This being the case, we find that the Government, having discretion in requiring suitable moisture contents, did not abuse its discretion in requiring the compaction of embankment and existing ground at a moisture content between optimum and optimum minus 5 percent.

Decision on Earthwork Claims

[4] The appellant has failed to sustain its burden of proof on all of the earthwork claims discussed above. The claims are therefore denied.

Issue of Timely Notice of the Earthwork Claims

[5] The remaining issue relevant to the earthwork claims is that of timely notice under the "Changes" clause of the contract.

The "Changes" clause is contained in the contract's Standard Form 23A (Oct. 1969 ed.). Paragraph (b) of the "Changes" clause provides that any written order¹⁸ (other than a formal change order), or any oral order, from the contract-

¹⁸ An order, within the meaning of the Changes, clause, includes those of direction, instruction, interpretation, or determination. This is noted in par. (b) of the clause.

ing officer, which causes any change in the work within the general scope of the contract shall be treated as a change order under this clause, provided that the contractor gives the contracting officer written notice stating the date, circumstances, and source of the order and that the contractor regards the order as a change order. Par. (d) of the "Changes" clause provides that except for claims based on defective specifications, no claim for any change under (b) above shall be allowed for any costs incurred more than 20 days before the contractor gives written notice as therein required. The Government contends that appellant's earthwork claims should be denied for its failure to comply with the above-referenced notice provision of the "Changes" clause.

The "Changes" clause as presently written was prescribed for use in 1968. The notice provision of the clause was strictly interpreted by the Boards following the 1968 revision of the clause.¹⁹ This trend continued until 1972 when the Court of Claims reversed a decision of this Board based on a strict interpretation of the notice provision in the Suspension of Work clause,²⁰ stating that the "inquiry is simply whether the contractor put the Government on notice of the govern-

¹⁹ For an analysis of the interpretations given the Changes clause prescribed for use in 1968, see *Hartford Accident and Indemnity Co.*, IBCA 1139-1-77 (June 23, 1977), 84 I.D. 296, 77-2 BCA par. 12,604.

²⁰ The Suspension of Work clause contains a notice provision similar to that in the Changes clause.

ment conduct complained about, so that the procurement officials could begin to collect data on the asserted increase in cost, and could also evaluate the desirability of continuing the delay-causing conduct."²¹

In the instant case, the appellant has argued that verbal complaints were constantly being made to the Government by a representative of the company about earthwork problems (Tr. 159). Appellant has failed to produce evidence, however, in support of its argument. Appellant did not file a written complaint regarding alleged earthwork changes until Feb. 5, 1974, when it presented six earthwork claims to the contracting officer.

There is documented evidence, however, that appellant's engineer, Mr. Soards, did complain to the government's engineer, Mr. Lee, on Aug. 6, 1973, about difficulties with embankment compaction allegedly due to inaccurate proctor information. This incident was recorded by Mr. Lee in his diary entry of that day.²² Although the Government's engineer did not have authority to make contract changes, he was charged with responsibility for administering the contract and we find that his knowledge is imputable to the contracting officer. The Government appears not to have been prejudiced in its defense of the claim regarding inaccurate proctor information since the Government had

notice of the operative facts giving rise to the claim.²³ In fact, the Government's engineer, Mr. Lee, reacted immediately to appellant's complaint by asking the materials technician to continually update proctor information. If a written component of the 20-day notice requirement of the "Changes" clause is necessary, it was supplied by the engineer's diary entry of Aug. 6, 1973.

It is doubtful, however, that the aforementioned notice is sufficient notice for *all* of the earthwork claims (*e.g.*, there is no evidence that complaints were made to the Government on its use of the nuclear gauges during the contract period). We also find perplexing the fact that when the appellant filed a written notice of intent to file a claim under the superspan change by letter dated Sept. 25, 1973, no mention was made of any irregularities regarding earthwork performance under the contract. Although some of appellant's earthwork claim could well be barred by appellant's failure to comply with the 20-day notice provision of the "Changes" clause, it is unnecessary to decide the claim on this ground, since, as we have previously found, the earthwork claims considered above are without merit in any event.²⁴

²³ *Davis Decorating Service*, ASBCA No. 17342 (June 13, 1973), 73-2 BCA par. 10,107 at 47,475.

²⁴ *Electrical Enterprises, Inc.*, IBCA 971-8-72 (Mar. 19, 1974), 81 I.D. 114, 74-1 BCA par. 10,528.

²¹ *Hoel-Steffen Construction Co. v. United States*, 197 Ct. Cl. 561, 570-71 (1972).

²² AF IV-4—p. 37.

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Superspan Claim—932G

During the initial stages of contract performance, appellant was verbally advised by the Government that a contract change was forthcoming which would require excavation of earth and placement of bedding material under the superspan. The contract had originally called for the superspan to be placed directly on the roadbed surface.

Following the informal advice, a letter from the contracting officer's representative dated June 1, 1973, was hand carried to appellant's superintendent, Mr. Bruner, at the project site. In that letter it was specified that the sand and gravel materials for the superspan bedding shall meet "requirements for bituminous base materials, Item 301 (1)." A sketch of the additional requirement was attached thereto and contained the following notation: "Compacted Sand & Gravel (1" Max. well graded)." (AF III-1, p. 35.)

By letter dated June 13, 1973, appellant responded to the Government's June 1 letter with a submittal of \$8,115.80 for the compacted sand and gravel, based on an estimate of 1,159.4 cubic yards at \$7/cubic yard. (AF III-1, p. 37.)

Appellant contends that it was authorized to crush 2-inch minus by Mr. Lee and Mr. Holmes (contracting officer's representative and area construction engineer, respectively), and that its cost proposal was

based on 2-inch minus material. Appellant also contends that 2-inch minus was being crushed pursuant to Government authorization from June 11 through June 16, 1973 (Tr. 172-3) (Tr. 346-7).

The Government contends that the letter of June 1 clearly set forth the requirement for the "bathtub" materials as being the same gradations as those specified for bituminous base course and that the Government did not authorize the appellant, either verbally or in writing, to produce 2-inch minus material.

There is no evidence of record which substantiates appellant's claim that it was authorized by the Government to produce 2-inch minus material. The evidence does show that conversations were had between Government and appellant representatives on June 1, 1973, and June 5, 1973, regarding the *possible* use of 2-inch minus material rather than that meeting bituminous base gradations. (See AF IV-4, p. 28 and AF III-2, Report of June 4 and 5 field trip dated July 20, 1973.) It appears that Mr. Bruner was cognizant of the fact that bituminous base gradations were being required although he was advised that an additional proposal for 2-inch minus could be submitted to the Government for its consideration. (Tr. 1071-2, 1393). Appellant submitted a price proposal via the June 13 letter specifically stating that it was in response to the Government's undated letter, hand car-

ried to appellant on June 1, 1973 (AF III-1, p. 37, Tr. 1072). The Board interprets that undated letter from the Government as requiring 1-inch maximum material meeting the specifications for bituminous base materials. Appellant did not advise in its reply proposal that the price submitted was for 2-inch minus rather than the specified 1-inch maximum. There is evidence that 2-inch minus (material passing the 1½-inch screen) was produced during the period of June 13 through June 16, 1973 (Exhs. 6, 7), but it was not produced pursuant to Government authorization. Appellant assumed the risk that the materials would be rejected for failure to meet specifications. We find no liability on the part of the Government for the time, materials, and labor which may have been expended on the production of 2-inch minus.

On June 22, 1973, appellant offered material for the "bathtub" fill to the Government for testing. Appellant was notified in writing on June 27 that the material failed and set forth in that writing the gradations required for the bathtub material (Exh. 4). The requirement calling for 100 percent to pass the ¾-inch screen, instead of the 1-inch screen originally specified, was an "error" made by the contracting officer's representative (Tr. 1076-7). We find no evidence, however, showing that appellant relied on this "error" in subsequent runs of material or that it was damaged in any other way by this "error." In addition, on the next day, June 28,

a letter was sent to appellant from the Government instructing it to proceed with placement of material meeting the aggregate gradations for bituminous base course. The Government advised therein that the price for the material was subject to further discussion prior to execution of a written change order (AF III-1, p. 4). On July 16, 1973, a meeting was held between appellant and Government representatives at the request of appellant. Appellant's primary complaint was the manner in which material testing was being performed by the Government. The tests complained of were those performed on June 22, 28, and 29, 1973, a total of five tests.²⁵ Appellant contends that materials were offered to the Government for acceptance for the "bathtub" fill and that the government performed compliance tests contrary to the specifications producing invalid test results and causing appellant extra work (Exh. 5). The Government contends that the tests complained of were merely "courtesy" tests, performed for appellant's information only. The evidence shows that appellant took its own samples; that Government technicians made "dry" runs of the materials; and, that the materials tested failed to meet specified gradations (Tr. 354, 380, 1097-8, Exhs. 4 and 5). The test procedure used by the Government prior to the July 16 meeting appears to have been contrary to that specified in

²⁵ Exhibit 27, those tests prior to July 16, 1973.

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the contract.²⁶ Although the Government contends that the tests were only "courtesy" tests, the Government was keeping official records of the tests and notifying the appellant whether materials passed or failed (Exh. 28).

Any testing performed by the Government should have been compliance testing, unless the parties had agreed otherwise. There is no indication that appellant agreed to test standards other than those specified by contract; nor was it aware that the Government was performing so-called "courtesy" testing in a manner contrary to specifications (Tr. 255-6). Test results from Government testing in June indicated too few fines when dry run (Exh. 29), while appellant's testing was indicating excessive fines (Tr. 351). After the July 16 meeting, the Government began to wash the samples and perform tests as specified in the contract. At this time, results were indicating that material had excessive fines (Exh. 29). It appears from the record that improper testing by the Government caused appellant to add more fines than it actually needed to bring the material into compliance

(Tr. 381). Appellant was later unable to reduce the fines, mainly on the No. 200 sieve which required 4-10 percent passing. Appellant on July 20, 1973, placed about 400 yards of material in the superspan "bathtub." Although Government testing found that too many fines were passing the No. 200 sieve, the Government did not require its removal (AF IV-1, 7/20/73 and AF IV-3, 7/20/73). Appellant in late July 1973, stopped crushing material for the "bathtub" and ordered the hot plant to be set up in a last effort to reduce fines. The moving in of the hot plant took approximately 2 weeks. Mr. Dinsmore, appellant's foreman over the hot plant operation, took 3 weeks to set up the hot plant, beginning the latter part of July and completing the setup on or about Aug. 15, 1973 (Tr. 530-32). Mr. Dinsmore testified that normally setting up the hot plant takes a week to 10 days, and if he had been directed to do so, he could have had the hot plant in operation before the end of July (Tr. 580). Mr. Dinsmore testified that his primary effort was directed toward the subject job (Job 932). From the middle of July through the middle of August, however, he was also working on the two other jobs that appellant had in the area (Tr. 532). After calibrating the hot plant, appellant began its production run of the "bathtub" material (middle to end of Aug.). Even with the use of the hot plant, appellant failed to produce materials meeting the specified gradations, again

²⁶ The test Standard required is set forth in FP-69, Table 703-2.

It was not disputed by the Government that prior to July 16 it was taking smaller samples of materials than required and was not washing the samples, and that this procedure changed subsequent to the July 16 meeting with appellant. The Government contends, however, that prior to July 16, the manner of testing was dictated by appellant; that the tests were performed merely as a "courtesy" to the appellant; and that the five tests complained of were not compliance tests.

troubled with the No. 200 sieve, according to Government testing. Laboratory tests made by the appellant showed No. 200 sieve material to be out of specification. After the No. 200 materials were decanted, however, one lab test result showed materials within the range specified (Exh. 10). A field change was made on Aug. 28, 1973, by the Government for the top 9 inches of the "bathtub" to avoid possible drainage problems (AF IV-4, pp. 44-45). Bituminous base aggregate was again placed in the "bathtub" on Aug. 29, Sept. 4 and 5, 1973. Although Government testing showed material to be out of specification, the Government again did not require its removal. The top 9 inches of coarser material was placed shortly thereafter with no problems (AF IV-4, pp. 49-51). The final work on the superspan progressed in an orderly fashion.

Decision on Superspan Claim

We find that appellant is entitled to the reasonable cost of performing extra work caused by the Government's improper test procedures, inappropriately labeled by the Government as "courtesy testing." Appellant is also entitled to damages for any delays in the general work progress caused by the superspan change, and for the time reasonably needed to erect the hot plant, the use of which we find to have been justified under the circumstances. As previously stated, the Government is not liable for time and labor

expended in producing 2-inch minus material.

Equitable Adjustment

[6] Appellant is seeking an equitable adjustment of the contract based on the difference between its original bid and the total cost of performing the contract as changed. This method is known as the total cost approach and is not favored unless all other methods are shown to be unfeasible. The total cost approach is disfavored because it is based on three questionable premises: (1) that the actual cost incurred is the proper cost, (2) that the original bid is a fair approximation of what it would have cost to perform the work had no change occurred, and (3) that the change was the sole cause of the increased costs.²⁷ Factors such as contractor inefficiency, equipment breakdown, third-party interference, bad weather, and other variables for which the Government would not be liable could have caused all or some of the increase in costs.

Here, we are only concerned with the equitable adjustment for delays and extra work under the superspan claim. Appellant's original claim for superspan related damages was \$113,607.23 as set forth in appellant's amended complaint dated June 16, 1976. Appellant's final claim as set forth in its posthearing brief is \$74,351.05. Ac-

²⁷ *Steenberg Construction Co., IBCA 520-10-65 (May 8, 1972)*, 79 I.D. 158, 363, 72-1 BCA par. 9459 at 44,038.

August 30, 1978

According to the record, various other amounts have been asserted as damages under this claim. It is quite obvious that appellant itself is unable to accurately ascertain from its financial records the extent of damages resulting from the superspan change. The Government audited appellant's claims as originally submitted and in the resulting audit report dated Aug. 5, 1976, the following findings were made:

We are unable to verify or substantiate the contractor's claimed amounts. The claims were not based on recorded costs by claim item, except for Claim II which was not audited. Furthermore, the claim data submitted was inaccurate and grossly overstated the costs of some of the equipment and employees identified. For example, the basis for the proration of equipment and labor hours was not mentioned in the claims, and contractor officials were unable to provide a satisfactory explanation of these prorations.

(Exh. 100, p. 3.) The report was made after reviewing appellant's cost and pricing data as well as accounting data. Appellant subsequently furnished supplemental data to the Government and upon further review the Regional Audit Manager reported that the data submitted did not affect their earlier findings (Exh. PP).

Appellant in its final estimate of damages under the superspan claim purports to have adjusted the costs "to remove those costs not attributable to changes, *i.e.*, underbidding, inefficiency, loss on subcontracts, etc." (Appellant's posthearing brief, p. 120.) Appellant also

contends that it has properly allocated costs to the respective jobs being performed currently in the area. There is no way the Board can verify that appellant's allocation was proper and correct since appellant's records do not separate costs along those lines. The appellant has admitted that equipment, materials, and labor were common to all three jobs.

The reliability of the supporting evidence for the claimed adjustment in cost has not been established. In addition, imponderables and unknown factors make it impossible to determine with mathematical exactness the amount of adjustment to which appellant is entitled.

In light of the above, we find the total cost methods inappropriate in this case and hold that a "jury verdict" is the best means of determining the cost adjustment since some evidence exists which we deem sufficient for this purpose. *WRB Corp. v. United States*, 183 Ct. Cl. 409 (1968). Even though this may involve some degree of subjective judgment, it is more appropriate in this case for pricing extra work than is the total cost method. Under the jury verdict method, neither mathematical exactness nor computations are necessary.²⁸

²⁸ *Warren Painting Co., Inc.*, ASBCA No. 13037 (July 22, 1971), 71-2 BCA par. 8993 at 41,796; *Ford Construction Co., Inc.*, AGBCA No. 252 (July 9, 1971), 71-2 BCA par. 8966 at 41,687; *Lincoln Construction Co.*, IBCA 438-5-64 (Nov. 26, 1965), 72 I.D. 492, 504, 65-2 BCA par. 5234 at 24,588, *aff'd on reconsideration*, 73 I.D. 49, 66-1 BCA par. 5343 (1966).

Having taken into consideration the testimony adduced at the hearing and the documentary evidence before us regarding materials, labor, and equipment utilized in performance of the superspan change, we hold that appellant is entitled to an equitable adjustment in the amount of \$20,000.

For delays in the superspan work due to extra crushing, disruption of the original work sequence, and setting up the hot plant, the Board finds that the appellant was excusably delayed by the Government a total of 42 days,²⁹ for which no liquidated damages should be assessed.

²⁹ This is in addition to the 6 days previously allowed by the contracting officer.

Decision

The appeal for the superspan change is sustained for extra costs caused by the Government in the amount of \$20,000, and the time for performance of the contract is extended by 42 days. All other claims are denied.

RUSSELL C. LYNCH,
Administrative Judge.

WE CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

G. HERBERT PACKWOOD,
Administrative Judge.

G.T.S. COMPANY, INC.

INTERIOR BOARD OF
CONTRACT APPEALS

IBCA-1077-9-75

*Background and Procedural
Setting*

Decided September 15, 1978

Contract No. NOO C 1420 4809, Bu-
reau of Indian Affairs.**Sustained in Part.****1. Contracts: Construction and Opera-
tion: Drawings and Specifications**

The Board finds contract specifications to be defective where an elevation shown on the drawings fails to coincide with the actual elevation at the site causing extra work and additional costs with respect to the installation of riprap.

**2. Contracts: Disputes and Remedies:
Equitable Adjustment**

Where the contractor alleged extra costs but failed to establish that all such costs were due to the defective specifications, and where a Government audit shows that a substantial portion of such costs were in fact incurred but could not attribute such costs to that portion of the project relating to the defective specification, the Board will determine the amount of the equitable adjustment by utilizing the jury verdict approach.

APPEARANCES: Mr. Carl W. Divelbiss, Attorney at Law, Divelbiss & Gage, Phoenix, Arizona, for the appellant; Mr. Dale Itschner, Department Counsel, Window Rock, Arizona, for the Government.

**OPINION BY ADMINISTRATIVE
JUDGE DOANE**

The G.T.S. Company, Inc., of Phoenix, Arizona (appellant), entered into a construction contract, No. NOO C 1420 4809, on June 9, 1972, with the Bureau of Indian Affairs (BIA) of the Department of the Interior (Government). The contract price was \$339,775.94. The work to be performed included demolition of the existing bridge and the construction of a new 442.5 foot, 11 span, cast in place bridge across Chinle Wash, together with the approach road beds, at Many Farms, Apache County, Arizona, on the Navajo Reservation. The work commenced in June 1972 and was completed in Dec. 1972 with the exception of laying the riprap,¹ painting the pilings, installing concrete collars around the pilings, and clean up. The project was shutdown until Aug. of 1973 because of rain, muddy conditions, and a high water table. The job was complete and finally inspected in Dec. 1973 (Tr. 8-10).

There were five formal Change Orders issued by the contracting officer during the period Nov. 15, 1972-Mar. 1, 1974, resulting in a net

¹"Riprap" is a term common in highway and bridge construction which pertains to rocks or stones often required to be placed, in conformance with certain lines, grades, and dimensions set forth in the plans and specifications, in order to protect embankments. See Sec. 619 of *Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects*, published in 1969 by the U.S. Department of Transportation.

decrease of the contract price to \$324,740.48.

On Apr. 19, 1974, counsel for the contractor notified BIA of its pending claim growing out of a change in slope and pertaining to the installation of riprap at a greater depth with attendant problems resulting from subsurface water (Ex. 6-AF).² By letter dated Aug. 20, 1974, the claim was made by appellant for the amount of \$103,293.41 (Ex. 7-AF). By letter dated June 12, 1975, after considerable exchange of correspondence between the Government and the appellant, the appellant, through counsel, furnished to BIA executed copies of "Contract Pricing Proposal (Change Orders)" on forms provided by BIA, supplemented by an explanatory statement, a breakdown of bridge riprap estimated costs, a breakdown of purported actual costs of bridge riprap, a certificate of current costs or pricing data signed by Gerald T. Sullivan, President of appellant, and finally a schematic drawing purporting to show the effect of changes in the specifications and the water problems resulting therefrom (Ex. 10-AF). By letter dated July 15, 1975, counsel for the appellant notified the Government that the appellant's claim was predicated upon the General Provisions of the contract, pars. 3(d) and (e) and 4, as well as upon sec. 100—General Provisions, par. 105.04 and 105.08 (Ex. 16-AF).

²For purposes of this opinion, "Ex." means Exhibit, and "AF" means Appeal File. The Government's Exhibits are numbered, while appellant's exhibits are designated by letters of the alphabet.

By an undated letter, apparently executed on or about Aug. 5, 1975, the contracting officer made findings of fact in substance as follows:

(1) that there was no substantial defect in the specifications with regard to the slopes of the embankments as contended by the contractor;

(2) that no differing site conditions existed with respect to the elevation of the bottom of the wash as contemplated by the "Differing Site Conditions," clause 4, of the contract;

(3) that the contractor could have avoided the ground water problems encountered by utilizing sheeting and bracing together with pumping equipment to provide for a workable area in which to place the riprap and is therefore not entitled to extra costs incurred as a result of the caveins caused by the ground water.

In its Notice of Appeal, dated Sept. 5, 1975, appellant alleged that the contracting officer's decision was erroneous because: it ignored the fact that the problem of installing the riprap resulting from changes made to the slopes by the BIA was made known to the BIA long before the work of installing the riprap was commenced; and while appearing to be statistically correct, ignored the conditions which existed at the jobsite and during the installation of the riprap.

By its complaint dated Oct. 30, 1975, appellant alleged substantially that additional costs of \$103,293.41 were incurred with respect to Item 619(3), WIRE ENCLOSED RIPRAP, because:

(1) changes from the original plans were made to the slopes by the BIA where the riprap was to be laid;

(2) elevations of the existing wash, as indicated in the plans, were altered sometime prior to bid time by the washing in of material from the waters going downstream;

(3) elevations indicated on one drawing showing the bottom of the riprap to be situated at a certain elevation were in conflict with the larger and more specific detail showing the riprap to be placed at a depth of 5 feet below the existing bottom of the wash elevation; and

(4) the riprap was installed at an average of approximately 9-foot deep which was 4 feet greater in depth than called for by the plans and this depth made it impossible to maintain the 2-foot width of riprap due to the load factor and the proximity of the water table which was about 3 feet below ground level, so that the riprap area spread to a width of up to 6 feet and averaged 4 feet in width.

In its answer, the Government admitted that minor changes were made to design slopes to meet the conditions as found, but denied this resulted in unpaid costs to the appellant; denied any material change to the elevation on the bottom of the wash as shown on the plans prior to bid time; and on the basis of having no information, denied that the riprap in the bottom of the trench spread to a width of 6 feet and that the average width was 4 feet. By way of affirmative defenses, the Government in its answer alleged substantially the same facts as contained in the contracting officer's findings of fact.

The ultimate issues presented by this appeal may be reduced to: whether the evidence supports en-

titlement of the appellant to an equitable adjustment for extra costs incurred as a result of changes in the contract and/or differing site conditions; and whether, if appellant has established entitlement, the evidentiary record supports the amount of equitable adjustment claimed, or some other amount.

Entitlement Issue

[1] In resolving the entitlement issue, we are basically concerned with whether additional costs were incurred by appellant in the course of installing the riprap as a result of Government-caused changes in the contract work.

The Government in its answer admitted that minor changes were made to the design slopes to meet the conditions as found, but simply denied that this resulted in unpaid costs to the appellant. Therefore, we need to examine the record to see what effect the "minor" or "major" changes, as the case may be, had on the work of the contractor in installing the riprap.

Sheets 3, 7, and 9 of the Project Construction Plans (Ex. G) clearly show that the riprap was to be placed on a 3:1 slope with the toe (bottom) of the slope level with the bed of the channel at an elevation of 5,276 feet. From the bottom or the toe of the slope, the riprap was to be extended vertically 5 feet below the channel bed so that riprap would be deep enough to protect the embankment against erosion at an

estimated scour line of 5,271 feet;³ the length of the riprap slope from the top to the toe was to be 36 feet; and the vertical riprap installed in a trench 2-foot wide and 5-foot deep with the bottom fixed at an elevation of 5,271 feet. However, evidence introduced by appellant as appellant's Exhibit A included the company job logs for Aug. 2, 1972, and Aug. 3, 1972, as well as the daily construction report of the Branch of Roads, Department of Transportation, dated Aug. 23, 1972, which established that the BIA had incorrectly staked the slopes.⁴ This was confirmed by the Contracting Officer's representative (COR) who was also the project engineer for the Government, Mr. Paul Helfenstine. He testified (at Tr. 103) as follows:

Q. Now, Mr. Helfenstine, do you recall on or about Aug. 3, 1972 some conversation with a representative of the con-

³The term, "scour line," was defined by Mr. Bernard C. Oldenburg, Government Civil Engineer, at p. 80 of the transcript, as, "that anticipated elevation at which the stream bed would erode during periods of hydraulic turbulence such as flash floods."

⁴The company log sheet for Aug. 2, 1972, contains the following pertinent language: "Wayne Barrow visited job site * * *. He also mentioned that the BIA had staked the slopes wrong. I will discuss this with Helfenstine." The company log sheet for Aug. 3, 1972, shows the following notation: "Concerning our discussion this morning having to do with slope stakes being marked wrong, I discussed this with Paul Helfenstine. Paul told me that they had taken cross sections and we would be paid at our regular yardage rate." The daily construction report of Aug. 23, 1972, for the Branch of Roads, Department of Transportation, among other things, shows: "1. Restake slope for riprap on both sides. * * * 9. Paul Helfenstine & Bob Smith discussed the change of slope & bottom elevation on riprap."

tractor relative to an error in staking the slopes?

A. I believe there was something on that, but I don't remember the time.

Q. Was there an error in staking the slopes?

A. Yes, sir.

Mr. Helfenstine also testified that the plans called for a 3:1 slope but that it was changed at both ends of the bridge to a ratio of approximately 4:1 (Tr. 104, 105, 107). Further significant testimony by Mr. Helfenstine is found on p. 108 of the transcript as follows:

Q. Now where was the toe of the slope? You testified you set the stakes to the toe of the slope at the then-existing level of the channel.

A. Yes, sir.

Q. And where were those stakes with reference to elevation 5276?

A. I don't have exact knowledge of that. They were higher than 5276.

Q. They were probably at 5281, were they not?

A. If we have a nine-foot-trench, it'd be probably about 5280, but that'd be it, yes, about.

Q. With that then, the bottom of the rip-rap in the trench had to go down nine feet to meet the 5271 elevation, didn't it?

A. Right.

Q. Sir.

A. Yes, sir.

Q. And you did, in fact, direct GTS to place the rip-rap where it came to the 5271 elevation?

A. Yes, sir.

Q. And, in reaching the 5271 elevation, that is when they hit the water?

A. Yes, sir.

The foregoing evidence establishes without question that not only did the Government err with respect to either the drawings, the staking,

or both, but also that the elevation of the bed of the channel was incorrectly shown on the drawings to be 5,276 feet. The slope was changed from a ratio of 3:1 with the toe of the slope level with the bed of the channel at an elevation of 5,276 feet, according to the drawings, to a ratio of 4:1 with the toe of the slope level with the bed of the channel at an approximate elevation of 5,280 feet, as finally built.

As a result of these changes and the directive by the COR to the appellant to construct the vertical riprap wall to a depth of 9 feet below the bed of the channel in lieu of a depth of only 5 feet, as originally contemplated by the construction plans, the appellant obviously incurred some additional costs over and above the estimates which formed the basis for the original bid.

The extra work and construction problems encountered by the appellant were unrefuted by the Government and generally described by Mr. Gerald T. Sullivan, President of appellant. He testified that, prior to construction, appellant dug a hole upstream from the project and found water at 4½ feet (Tr. 13); that installing riprap in 6 inches to a foot of water was not a problem, but installing it 9 feet deep in 5 feet of water was a problem (Tr. 13); that it was suggested that gunite be used as a solution to the problem but this was rejected by the Government, so appellant, under protest, attempted to construct the riprap as directed (Tr. 14). Mr.

Sullivan further explained that in trying to dig the riprap trenches 2-foot wide and 9-foot deep in 5 feet of water, the trenches were caving in and sloughing off to a width of up to 6 and 7 feet, averaging about 4 feet.

On the basis of the foregoing evidence, as well as our review of the entire record, we find that some additional costs were incurred by appellant, not because of changed conditions or differing site conditions as alleged by appellant, but because of defective specifications indicating the elevation of the channel bed to be 5,276 feet instead of 5,280 feet.⁵

There is an implied warranty by the Government that its specifications, if followed, will achieve the desired result without undue expense, and consequently, the additional costs incurred by a contractor resulting from faulty specifications are recoverable.⁶ It follows that the appellant here is entitled to an equitable adjustment.

Quantum Issues

[2] Having determined that appellant is entitled to an equitable adjustment because of additional costs resulting from the Government's defective specifications, the Board must next make a dollars and

⁵ One explanation for the defective specifications in this regard may be found in the testimony of Mr. Bernard C. Oldenburg at pp. 143 and 144 of the transcript where he reports that he found a letter dated Dec. 11, 1967, indicating that the survey from which the elevations were determined might have been made as early as 1961.

⁶ *U.S. v. Spearin*, 248 U.S. 132 (1918).

cents determination with respect to the amount of the entitlement.

The principal evidence adduced by the appellant on this issue consists of three attached sheets to appellant's letter of June 12, 1975 (Ex. 10-AF) entitled, Contract Pricing Proposal (Change Order), Bridge Rip-Rap Estimated Costs, and Bridge Rip-Rap Actual Costs.⁷ The last two documents purport to explain the ultimate figure on the first document, a form supplied by the Government, which is \$103,293.41. But the sheet on estimated costs simply shows that the estimated cost per cubic yard unit for bridge riprap is \$15.531, derived by adding the component breakdown per unit cost of equipment rentals, materials, and labor. These computations are based on the Government's estimate of 1,962 total cubic yards of riprap required for the project. The total dollars and cents or the figure \$15.531 multiplied by 1,962 is \$30,471.82, although the total shown on the Estimated Costs Sheet is shown to be \$30,472.77.

Based again on the 1,962 total cubic yards, the Actual Cost Sheet shows a total figure after the addition of eight components, as compared to only three components on the Estimated Costs Sheet, of \$133,766.18. The Actual Costs Sheet for Bridge Rip-Rap also shows a cost per unit of \$68.178. To arrive at the claim of \$103,293.41, the calculation as shown on the Actual Costs Sheet is made by subtracting the

estimated cost of \$30,472.77 from the actual cost of \$133,766.18.

At pages 26 and 27 of its brief, appellant argues in substance that its claim was verified by a Government Audit Report (Ex. 27), except for \$3,473, which was a total of unsupported items, and the sum of \$7,085, which was classified as the total of unallowable items; that the appellant is willing to accept the reduction and a final claim of \$92,735; that such claim is in detail (Ex. 10) and demonstrates a concerted effort to eliminate all costs not associated with the installation of the riprap; and that it is otherwise unrefuted by the Government and should be allowed. The Government, on the other hand, argues that its inspector, who was regularly on the project and took actual measurements of the riprap installed by appellant, came up with the figure of 296.54 excess cubic yards; and that if the Board determines that appellant is entitled to an equitable adjustment, the amount should not exceed 296.54 multiplied by the contract unit price of \$17.86 or a total quantum figure of \$5,294.24 (Gov't. Br. p. 18).

(The method employed by appellant in computing its claim is known as the "total cost" approach. Since the early days of its existence, this Board has not looked too favorably upon the "total cost" method of computing quantum if some other method is reasonably available.⁸

⁷ The estimated costs sheet and the actual costs sheet were both attached also to the complaint.

⁸ See *Henly Construction Co.*, IBCA-249 (Dec. 7, 1961), 68 I.D. 348, 61-2 BCA par. 3240 and *Lincoln Construction Co.*, IBCA-438-5-64 (Nov. 26, 1965), 72 I.D. 492, 65-2 BCA par. 5234, affirmed on reconsideration, 73 I.D. 49, 66-1 BCA par. 5343.

September 15, 1978

The principle shortcoming of appellant's proof of quantum is that neither the documents nor the testimony involved establish that all or any particular part of the extra expenditures directly relate to the extra work caused by the Government's defective specifications. Furthermore, there is nothing in appellant's evidence except the self-serving declaration in the titles of the cost sheets that the expenditures shown are confined to the riprap installation part of the project. The mere fact that the Government audit report verifies that certain expenditures were made does not, in and of itself, establish the necessary attribution of the excess expenditures. The audit report does not attribute the verified costs to *any* particular part of the total project.⁹ The cost sheets referred to amount to little more than a schedule of costs expended. We also believe that the evidence of quantum presented by appellant is ambiguous. For example, in arriving at the unit cost figure of \$68.178 the actual costs sheet indicates that this figure was reached by using 1,962 cubic yards as the total amount of riprap used

on the job, while Mr. Sullivan testified that 721 cubic yards was an overrun over and above the Government estimate of 2,024 cubic yards (Tr. 17). The sheet entitled, "Bridge Rip-Rap Estimated Costs," also used the estimated total cubic yardage figure of 1,962.

Our problem with the Government figures on quantum is that its computations, as reflected in Exhibit 30, show that the variations in width of the 9-foot trench due to caving and sloughing were not taken into account. Also, as stated in appellant's reply brief, it is unfair, considering the extra difficulties encountered by appellant because of the Government errors, to use the contract unit price of \$17.86.

The Board is thus in the situation where it is not convinced of the accuracy of the figures presented by either party but is convinced that in the circumstances of this case, a jury verdict approach to the quantum issue is both reasonable and appropriate. We are satisfied that the appellant is entitled to much more than the Government computation would allow. However, the claim of \$92,735 arrived at by utilizing a cost per unit price nearly four times greater than the contract unit price seems excessive.

Accordingly, upon our review of the entire record and analysis of the evidence, the Board finds that appellant incurred additional costs in excess of the contract price due to defective Government specifications and concludes that appellant is en-

⁹ The audit report itself (Exh. 27) explains the limited basis upon which the verifications are made. On p. 2 thereof is the following language: "However, the documentation provided for audit for materials, equipment or labor costs was not sufficiently detailed to determine quantities of rip rap placed or to isolate rip rap costs specifically from the other work items. Accordingly, our opinion on the claimed amount is based only on our analysis of the adequacy of supporting documentation that costs were incurred relative to work at the contract location rather than specifically for rip rap work."

titled to an equitable adjustment in the sum of \$45,000.

DAVID DOANE,
Administrative Judge.

WE CONCUR:

G. HERBERT PACKWOOD,
Administrative Judge.

RUSSELL C. LYNCH,
Administrative Judge.

MILTON D. FEINBERG
BENSON J. LAMP

37 IBLA 39

Decided September 18, 1978

Appeals from separate decisions of the New Mexico State Office, Bureau of Land Management, dismissing protest against the award of any priority rights to the successful drawees of one simultaneous oil and gas lease drawing, and rejecting an oil and gas lease offer for failure to accompany the drawing entry card with the agency statement required by 43 CFR 3102.6-1. NM 29826.

Reversed in part, and dismissed in part.

1. Administrative Authority: Generally—Administrative Practice—Bureau of Land Management—Oil and Gas Leases: Applications: Drawings

Established and long-standing Departmental policy relating to the administration of the simultaneous oil and gas leasing system is binding on all employees of the Bureau of Land Manage-

ment, until such time as it is properly changed.

2. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Applications: Drawings

The simultaneous drawing system presupposes that each properly filed offer be afforded the same opportunity for priority consideration. This requires that when drawing entry cards are improperly omitted from a drawing, the first drawing be considered as void, and priorities established at a second drawing, in which all entry cards are included, shall control consideration for the oil and gas lease.

APPEARANCES: James W. McDade, Esq., McDade and Lee, Washington, D.C., for appellant Lamp; David H. Wiggs, Jr., Esq., Kemp, Smith, White, Duncan & Hammond, El Paso, Texas, for appellant Feinberg.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

On Feb. 8, 1977, a drawing entry card for one Benson J. Lamp was drawn with first priority for Parcel No. NM 396 in the Bureau of Land Management (BLM) simultaneous oil and gas lease drawing in New Mexico. The offer was assigned serial number NM 29826. On Mar. 9, 1977, the New Mexico State Office, BLM, issued a decision requiring additional information as a prerequisite to the issuance of the oil and gas lease. On Mar. 4, 1977, one Kelly Everette filed a protest against the issuance of the lease to

appellant Lamp, arguing that Lamp had not used his "true address" and, therefore, Everette questioned the existence of the offeror. This protest was dismissed on Mar. 10, 1977. No appeal was taken from that dismissal.

Certain entry cards, however, had been excluded from the original drawing, and another drawing had been held on Feb. 15, 1977, which included all of the entry cards. The offer of appellant Milton D. Feinberg was drawn with first priority at this new drawing. However, under instructions from the BLM Director's Office, appellant Feinberg was given no priority inasmuch as his card had not been one of those originally excluded from the drawing. On Mar. 2, 1977, appellant Feinberg protested the issuance of the oil and gas lease to appellant Lamp, arguing that the results of the second drawing should control lease priorities. On Apr. 6, 1977, the State Office dismissed Feinberg's protest.

On that same date, appellant Lamp submitted evidence in response to the State Office decision of Mar. 9, 1977. By decision of Apr. 27, 1977, the State Office rejected Lamp's lease offer because the offer had not been accompanied by the statement required by 43 CFR 3102.6-1.

On May 7, 1977, appellant Feinberg filed a notice of appeal from the Apr. 6 decision dismissing his protest. On May 12, appellant Lamp filed a notice of appeal from the Apr. 27 decision of the State Office.

Thus, both appeals are presently pending before the Board, though they involve totally different questions of law. Inasmuch as appellant Lamp's appeal would be mooted were we to rule in favor of appellant Feinberg, we will first examine the correctness of the State Office's decision rejecting his protest.

The action of the State Office in rejecting appellant Feinberg's protest was premised on instructions it received from the BLM Director's Office.¹ The procedure which they were instructed to follow is contained in the State Office decision dismissing the protest:

1. The omitted entry card will be added to the batch of entry cards contained in the original drawing.

2. Three cards will be drawn from the new batch to determine the priority of the drawees with respect to being considered as the lessee.

3. If the entry card which was omitted in the original drawing is drawn as priority 1, 2 or 3, it will hold this priority as the final result of drawing replacing the same priority card from the original drawing.

4. If the entry card which was omitted in the original drawing is not drawn as priority 1, 2 or 3, the priorities established in the original drawing will remain unchanged and will be the final results of the drawing. [Italics in original.]

[1] We note initially that this revised procedure is *not* in accord with the former Departmental practice. The Department has consist-

¹ While this procedure was apparently utilized in another case, *W. J. Langley*, 34 IBLA 213 (1978), that case was remanded to compile a complete record, and the substantive correctness of the new procedure was not then examined.

ently held that the omission of a drawing entry card *voids* the drawing and requires a new drawing, with *all* entry cards included, for the purposes of establishing leasing priorities. See, e.g., *Marshall & Winston, Inc.*, 25 IBLA 169 (1976); *Herman A. Keller*, 14 IBLA 188, 81 I.D. 26 (1974); *R. E. Puckett*, A-30419 (Oct. 29, 1965). It is interesting to note that this rule actually predates the establishment of the simultaneous filing system. See *John H. Anderson*, 67 I.D. 209 (1960).²

The animating principle of these decisions has been expressed numerous times. Thus, this Board has stated "[i]t is clear that a drawing is considered fair only if each applicant has had an equal chance of winning. For that reason, drawings have been canceled where a drawing card has been omitted." (Citations omitted.) *Verna C. Bucy*, 21 IBLA 155 (1975).

We have closely examined this appeal and feel that for two separate reasons the decision of the State Office rejecting the Feinberg protest must be reversed.

In the first place, there is no question that the procedure herein utilized is directly contrary to prior *Departmental* policy. Indeed, the procedures adopted were *expressly* rejected in two prior *Departmental* decisions. See *R. E. Puckett*, *supra*;

Leonard H. Treiman, A-29579 (Oct. 4, 1963). Moreover, the binding nature of this policy was directly noted in *John Halagan*, A-29027 (Oct. 4, 1962), wherein the Assistant Solicitor for Public Lands declared:

The land office action which reflects an assumption that, in the absence of a correct drawing affording the same opportunity to all offerors, anything done toward a determination of priorities is a nullity has received the express sanction of the Department.

See *John H. Anderson et al.*, 67 I. D. 209 (1960). It was binding upon the Denver land office at the time of the action complained of.

In three recent cases this Board reversed actions by a BLM State Office for being in contravention of a BLM Instruction Memorandum. *Raymond A. Berry*, 35 IBLA 386 (1978); *W. C. Yahmel*, 34 IBLA 377 (1978); *Margaret A. Ruggiero*, 34 IBLA 171 (1978). See also, *Tenneco Oil Co.*, 36 IBLA 1 (1978), *Western Slope Gas Co.*, 10 IBLA 345 (1973). Implicit in our decisions in those cases was the recognition that subordinate employees of the Bureau of Land Management are bound by instructions issued by the Director, BLM. However, it is equally obvious that the Director, BLM, is similarly bound by established *Departmental* policies until such time as those policies are properly changed. The instructions at issue, being clearly contrary to established and long-standing policies of the Department, must be treated as a nullity.

[2] Moreover, even were we to assume that the Director, BLM,

² While there was no formalized simultaneous filing procedure at that time, when non-competitive over-the-counter offers to lease were received simultaneously a drawing was conducted to establish priorities. *John H. Anderson*, *supra*, dealt with a situation in which one such offer was not included in the drawing.

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was authorized to promulgate the change effectuated herein, we would find the new procedures to be both arbitrary and capricious. The basis for this conclusion can readily be demonstrated by an illustration. Let us assume that in a first drawing the following priorities were established: 1—Smith; 2—Jones; 3—Doe. Subsequent to this first drawing, the State Office discovered that through inadvertence the drawing entry card of Harris has been omitted. A second drawing is held in which the following priorities occurred: 1—Jones; 2—Harris; 3—Doe. Under the procedures advocated in the instruction memorandum the final priorities would be: 1—Smith; 2—Harris; 3—Doe. Despite the fact that Jones had been drawn alternatively second and first, he would have *no* priority whatsoever. The effect of the procedure is to nullify Jones' filing. It has virtually ceased to exist, and his offer is as effectively excluded from consideration as if it had never been filed.

The benchmark of the simultaneous filing system is that all properly filed offers receive an equal opportunity to be selected for priority consideration. It is true that an offeror who has had an entry card drawn with first priority in a defective drawing feels that it is less than likely that he will be drawn first in a subsequent drawing. The short answer to this is that the first drawing *was* defective. All that an offeror has a right to expect is that he be given an equal opportunity to

participate with all of the other offerors. This is afforded him in the second drawing. The proposed system vitiates this right for those offerors whose priority is displaced by a formerly excluded card. The procedure thus runs afoul of the basic purposes and principles of the simultaneous filing system. For this reason alone, we would reverse the decision of the State Office on appellant Feinberg's protest.

Inasmuch as we have determined that the results of the second drawing established the priorities for the subject lease, it is unnecessary to examine the question whether the State Office properly rejected appellant Lamp's lease offer. His appeal is moot and is accordingly dismissed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Apr. 6, 1977, decision of the State Office dismissing the protest of Milton D. Feinberg is reversed, and the appeal of Benson J. Lamp is dismissed as moot. The case files are remanded to the State Office for adjudication of the offers drawn with priority in the second drawing.

JAMES L. BURSKI,
Administrative Judge.

WE CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

EDWARD W. STUEBBING,
Administrative Judge.

**PENNSYLVANIA DRILLING
COMPANY**

IBCA-1187-4-78

Decided *September 26, 1978*

**Contract No. 14-16-0005-77-038,
Fish & Wildlife Service.**

Sustained.

**1. Contracts: Construction and Op-
eration: Differing Site Conditions
(Changed Conditions)**

A first category differing site condition under a well drilling contract is found where the contract indications of subsurface conditions did not reveal an extensive alluvial deposit strewn with boulders, and the subsurface conditions could not be determined by a prebid site investigation.

**2. Contracts: Performance or Default:
Impossibility of Performance**

A claim that performance of a well drilling contract is impossible is denied where the evidence shows only that the contractor has been unable to penetrate beyond 38 feet using two different drilling rigs and there is no evidence to show that no known drilling methods or equipment could enable the construction of a vertically aligned well at the required depth.

APPEARANCES: Mr. Samuel P. Gerace, Attorney at Law, Jones, Gregg, Creehan & Gerace, Pittsburgh, Pennsylvania, for appellant; Mr. Robert J. Araujo, Department Counsel, Newton Corner, Massachusetts, for the Government.

**OPINION BY ADMINISTRATIVE
JUDGE LYNCH**

**INTERIOR BOARD OF
CONTRACT APPEALS**

Appellant was awarded a fixed price contract for \$24,400 requiring

the drilling of a 10-inch diameter water well 200 feet deep at the Fish Hatchery, White Sulphur Springs, West Virginia. The notice to proceed was issued on Oct. 26, 1977, requiring work to commence within 10 days of receipt (Oct. 29, 1977), and be completed within 90 days thereafter. Appellant began work at the contract site on Nov. 16, 1977. The following day, drilling with a 6-inch air rotary drill, a depth of 20 feet was reached. However, the casing could not be set plumb (AX-2).¹ Subsequently, the appellant's efforts continued to be hampered by boulders encountered in drilling operations. By letter dated Feb. 22, 1978, appellant advised that 17 days of drilling with two different drilling rigs had not permitted penetration beyond 30 feet in any of the six holes attempted (AF7). This letter advised that appellant had become aware of additional geological data available to the Government, but not disclosed to it which revealed "conditions totally outside the scope of this contract." Appellant requested termination of the contract and return of its bond.

The Government responded by letter on Mar. 9, 1978, advising of the continued need for the well, the expiration of the contract time on Jan. 26, 1978, granting permission to relocate the well within a 10-foot radius of the contract location, and directing the completion of performance which, if not recommenced within 10 days, would result

¹ Appellant's progress reports. All references to the record use the following abbreviations: Tr.—transcript, AX—appellant exhibit, GX—Government exhibit, and AF—appeal file document.

in the Government proceeding to terminate the contract for default (AF8). By letter dated Mar. 16, 1978, appellant advised of its intent to appeal this decision (AF9).

On May 12, 1978, a prehearing conference was held at the Board's offices in Arlington, at which the Government filed a motion to dismiss the appeal. The Government asserts that the Board is without jurisdiction, there having been no claim for a contract price adjustment due to the alleged differing site condition, and no denial of such claim, but only appellant's request for termination of its contract which had been denied by the contracting officer. The conference also determined the issues to be (1) whether there existed a differing site condition which would not have been discoverable during a prebid site investigation and (2) whether the actual site conditions rendered contract performance impossible at the selected well-site location.

Government Motion to Dismiss

The Government contends that the Board lacks jurisdiction because appellant's complaint requests additional costs beyond that called for in the contract and since such a request has not been presented and denied by the contracting officer, no factual dispute exists under the disputes clause.

The complaint does request that appellant be remunerated for costs to date and relieved of any further obligations under the contract.

Whether these costs exceed the contract amount or not cannot be determined since appellant has not presented any cost information respecting costs to date or projected costs to complete. Instead, appellant argues that a subsurface differing site condition exists which makes completion of the contract impossible.

It is clear that a factual dispute exists between the parties over which the Board has jurisdiction, *i.e.*, whether the appellant has encountered a subsurface differing site condition. Appellant advised the contracting officer that it was encountering "conditions totally outside the scope of the contract" and the contracting officer responded with the Mar. 9, 1978 "cure notice" threatening termination if appellant did not recommence performance of the needed well within 10 days. This response did not directly address the question of differing conditions claimed by appellant, but the failure to do so was as much of a denial of appellant's claim as a direct denial would have been.

The Differing Site Conditions clause (AF5, General Provision 4), makes it mandatory for the contracting officer to promptly investigate the conditions and to make a determination as to whether materially differing conditions were, in fact, being encountered. The fact that appellant requested termination (presumably for convenience of the Government) does not relieve the Government of its obligation to investigate and determine whether

the actual conditions are materially different. Nor does the contract provision give the Government the right to insist upon completion of performance before appellant submits its claim, as stated in the contracting officer's letter of May 4, 1978, transmitting the appeal file to the Board.

At the prehearing conference, the Government denied the existence of differing site conditions, which suffices to join the parties in a factual dispute under the contract and confirms the intent of the Mar. 9 "cure notice" to be such a denial. Certainly, the Government's directive to proceed with performance or be terminated for default was a direct response to the question raised by appellant in its Feb. 22, 1978, letter as to whether performance was even possible.

Appellant's concern over the question of whether performance was possible in view of the conditions encountered provides one reason that no revised cost to complete the contract was provided. In the face of a belief that the task may not be possible, the generation of cost estimates to achieve performance becomes meaningless because cost estimates cannot be related to unknown methods to achieve an objective that has become illusory.

Confronted with the factual issues of whether a differing site condition existed and whether performance was possible, the Board

secured the agreement of the parties to hold a hearing on the entitlement questions only, reserving quantum issues to be resolved by the parties, if determined to be appropriate. Having found that factual issues are present, the Government's Motion to Dismiss is denied.

Background

The Government submitted a request for quotation to several prospective offerors, including appellant, seeking quotations for the drilling of a 10-inch diameter open hole water well at the Fish Hatchery. None of the well drillers responded to the request. Subsequently, during August of 1977, Mr. Louis Wise, the Government engineer who prepared the specifications sought out several well-drillers, including appellant, to secure a contractor for the water well. Appellant submitted a quotation on Aug. 25, 1977, in response to a verbal request from Mr. Wise. This quotation was accepted and resulted in the contract between the parties on Oct. 7, 1977. Prior to preparing the quotation, appellant did not make a site inspection (Tr. 74, 89, 90).

The contract (AF5) contained a drawing of the Fish Hatchery property and adjacent areas. This drawing No. 5F-W.Va-22-26.0, was introduced at the hearing by appellant as Exhibit 1A with test holes 1 through 5 marked in red and test holes A, B, and C marked in

green. The red and green designations of test well locations had been placed on the drawing by appellant to illustrate (except for test hole C) the subsurface data that existed prior to bidding and which had not been made available to appellant. The blue line drawing had been prepared by Mr. Louis Wise while employed by the Government, as an engineer. The original drawing located the site of the desired well approximately 30 feet south of Wade Creek, a narrow rock-strewn stream flowing generally in a northwesterly direction at the base of higher terrain to the north known as Bob's Ridge. A 6-inch test well (test hole C) is shown about 460 feet south of the contract well site. A log of the 6-inch test well is shown at the top of the drawing as follows:

LOG OF 6" TEST WELL

Alluvial	0' to 5'
Sand & Gravel.....	5' to 11'
Hard Black Lime.....	11' to 16'
Sandy Lime.....	16' to 38'
Hard Gray Lime.....	38' to 110'
Crevice	110' to 112'
Hard Rock.....	112' to 145'
Crevice	145' to 150'
Broken Lime.....	150' to 160'
Solid Lime.....	160' to 184'
Seam	184' to 187'
Solid Lime.....	187' to 205'

To the right of the test well log is a drawing of the well to be constructed under the contract. Depicted is a 10-inch diameter hole to

a depth of 200 feet. Casing 14 inches in diameter is shown extending above the surface about 3 feet. Inside the 14-inch casing, casing with a 10-inch diameter is shown to extend from 1 foot 6 inches above the surface to a depth of 160 feet, with the first 30 feet from the surface grouted in place. The bottom 40 feet of the planned well is shown as an open hole. At 18 feet, the words "water level 18'±" appear. At about the 150-foot level, the word "limestone" appears, and at about 185-foot depth, the words "seam or cavern" appear. It is noted that the last two designations coincide with the log of the 6-inch test well at similar depths.

In addition to the information on the contract drawing, the contract provided in the technical specifications the following additional data respecting the conditions to be encountered:

Section 2—Local Conditions

2.01 Existing test wells drilled in the area penetrated alluvium, sandstone, chert, shales and limestone. Some of the wells terminated in chert and some in sand filled caverns in limestone. Log of 6-inch test well is shown on the drawing. The well penetrated a water bearing seam between 184 and 187 feet below ground.

The need for additional water supply for the Fish Hatchery had been recognized for many years. Under date of January 1952, Mr. Robert E. Smith, a geologist with the U.S. Geological Survey, issued

an 18-page report dealing with the potential water sources for the Hatchery (AX-4). The report dealt with an investigation of the area in June 1950, and the observation of the drilling of test wells 1 through 5 during June, July, and August of 1950. Mr. Smith states that "[a]t the hatchery, the consolidated rocks are covered by a layer of recent alluvium" (p. 6, AX-4). The five test wells were drilled by the cable tool method and were 6 inches in diameter. Test hole 1 was located about 1,060 feet east of the contract well site and 80 feet away from Wade Creek on the side opposite the contract site. Test hole 1 penetrated chert and sandstone to a depth of 35 feet, where a cavern of fine sand and blocks of limestone were encountered. The well was cased to a depth of 67 feet to block off the fine sand, but upon encountering a limestone block that could not be penetrated and with the sand continuing to enter the well, test hole 1 was abandoned.

Test hole 2 was located about 200 feet further to the east and north of test hole 1 and about 1,220 feet from the contract site. This well was abandoned at a depth of about 37 feet when the same conditions were encountered as existed in test hole 1.

Hole 3 was located southwest of holes 1 and 2 about 420 feet from the contract site. Again the quicksand filled cavern was encountered at 37 feet and the well abandoned.

Wells 4 and 5 were drilled in the vicinity of 1 and 2 with well 4 close to the bank of Wade Creek. Well 4 penetrated marcellus shale to 34 feet and then 27 feet of Huntersville chert. Well 5 penetrated only the Huntersville chert to depth of 45 feet. The chert was so hard that wells 4 and 5 could not be drilled to a greater depth.

Mr. Smith concludes that there is no way of predetermining the most likely place where a sand-free channel would exist; and while the quicksand contains a great deal of water, there is no known means of securing an appreciable flow of water without the sand passing through any filter. Further, he indicated that water may exist in the deeper rock beneath the chert using rotary drilling equipment, but that a test well "would, most likely, be difficult and costly to drill" (AX-4, p. 14).

In 1963 and 1964, Mr. Wise participated in a second test well program at the fish hatchery (Tr. 11). He selected the sites for test wells A and B (Tr. 13), which proved to be unfeasible as water wells.

Test well A was drilled as a 6-inch diameter test hole from Dec. 30, 1963, to Jan. 27, 1964, to a depth of 102.5 feet. The Inspector's daily logs show that boulders were encountered below 52 feet (AX-19). The Inspector's daily logs of test well B indicate drilling began on Jan. 28, 1964 (AX-20). Boulders

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were encountered at 42 feet and below, causing considerable difficulty in maintaining the casing straight. The driller lost his drill tools in the casing well twice and failed to recover them at a depth of 165 feet. The Inspector's entry for Apr. 6, 1964, indicates a suspension of work while the advice of Mr. Ken Ellis was sought relative to possible water well locations.

Mr. Wise testified that Mr. Ellis was known as a water witch who surveyed the area and marked a drawing to show the best locations for water wells (Tr. 13-15). Mr. Wise had already selected a site to attempt test well C. However, Mr. Ellis chose a site about 260 feet to the northeast, where he indicated a 350 GPM subsurface water was available. Mr. Ellis also indicated the same amount of water to be located at the contract site about 460 feet to the north and at a point approximately midway between the contract site and his choice for test well C. The method used by Mr. Ellis to predict the available subsurface water remains unclear. However, test well C was drilled at the site selected by him to a depth of 205 feet from Apr. 14, 1964, to May 1, 1964. The Inspector's daily log shows subsequent testing of the pumping capacity (AX-21). In 1967, a 10-inch diameter production well was drilled within 5 feet of test well C, and a 350 GPM well resulted (Tr. 18, 429).

After the 1964 test well program, Mr. Joseph E. Settle, a consulting engineer for respondent prepared a report on the test wells (AX-5). The Settle report was not encouraging respecting a high flow of usable water resulting from any production well at the site of test well C, but suggested a larger and deeper well to the north and west might be more productive. This points to an area nearer the contract site previously selected by Mr. Ellis.

Discussion and Findings of Fact

Mr. Wise who prepared the contract drawing, appears to have been the most knowledgeable Government employee respecting the earlier efforts to find a supply of subsurface water for the hatchery. He supervised the test well program of 1963-1964 resulting in test wells A, B, and C. In addition, he was aware of the five test wells drilled in 1950 (Tr. 59). In locating the contract well site on the drawing, Mr. Wise consulted the test well program of 1964 (A, B, and C), and the Settle report (Tr. 20). The actual selection was recommended by Mr. Peter Stine manager of the fish hatchery. The hatchery personnel had placed iron rods in the ground at the points indicated by Mr. Ellis to have the greatest water potential. These iron markers had been carefully preserved, and, considering the successful well brought

in at location C selected by Mr. Ellis, Mr. Stine wanted the new well to be drilled at the site indicated by Mr. Ellis to have a 350-GPM potential (Tr. 430-431). Mr. Wise placed the log of test well C on the contract drawing and testified that this indicated that similar substrata would be encountered at the contract site (Tr. 30). No evidence was produced to indicate that Mr. Wise or anyone else in the Government made any specific analysis of the subsurface conditions expected to be encountered at the contract site. The prime consideration in selecting the site for the well was the greatest potential for the needed water supply. The one success out of eight attempts had occurred at test well C based on the advice of Mr. Ellis (Tr. 432). There is agreement that there is no way of knowing the subsurface conditions without actually drilling (Tr. 46, 396).

Appellant's drillers, Messrs. Triplett and Horsman, testified at length concerning the difficulties encountered in achieving a maximum depth of 38 feet in at least six holes attempted (AX-6). In each instance, boulders were encountered which prevented the vertical alignment of the casing or which shifted during drilling or movement of casing so that the casing could not be placed or was crushed after placement (Tr. 172-200). Although reluctant to permit the well to be drilled at any point other than the spot selected by the water witch,

Mr. Ellis, the Government did agree to relocation of the well within a 10-foot radius, and later extended this permitted deviation to a 25-foot radius of the contract site (Tr. 575-6). Despite this latitude, none of appellant's drilling attempts were able to penetrate beyond 38 feet because of the boulder material encountered. It is undisputed that the drilling operation could proceed normally once bedrock or solid strata is reached and that the unstable boulder condition is characteristic of drilling in the surface alluvial deposits (Tr. 296). Such alluvial deposits result from the movement of material by the action of surface water (Government brief, p. 15).

Appellant claims that the depth of the alluvial deposits containing boulders constitutes a category 1 changed condition in that the contract indications did not indicate the alluvial deposits would extend to depths of 38 feet or more. Appellant also contends that the unknown depths of alluvial and the demonstrated inability to penetrate the alluvial and construct a vertically aligned well renders performance impossible. The Government contends that the contract information concerning subsurface conditions when combined with a prebid site inspection would have given appellant appropriate information about subsurface conditions. The Government denies that a differing site con-

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dition exists or that the contract is impossible to perform.

The Government does not dispute that neither party knew with specificity the composition of the contract site substrata and that the only way to determine the substrata is to drill at that location (Government brief, p. 15). Contending that the Government did not have specific information about the contract site which it failed to disclose, the Government argues that there was no representation made about the size and quantity of boulders to be found in the alluvial, and, therefore, the boulders do not constitute a changed condition. It is true that in a number of cases alleging a differing site condition, the Board has found liability when the Government had specific knowledge that was withheld from the bidders. The withheld information must be of such a nature that it would have alerted the contractor to a condition not disclosed by the contract indications.

However, the Differing Site Condition clause does not require that the Government have specific or superior knowledge of the site conditions in order for a differing condition to be found to exist.² It is

² *Southern Paving Corp.*, AGBCA 74-103 (Oct. 18, 1977), 77-2 BCA par. 12,812 at 62,367. A category 1 differing site condition was found to exist even though it was obvious that neither party had known of or anticipated the unstable and unworkable conditions of the soil.

necessary only that the actual conditions encountered be materially different than the conditions indicated in the contract. Here, the contract indications relied on by appellant were the log of test well C on the contract drawing and the specification paragraph describing local conditions. There is nothing in the contract to caution the contractor that conditions at the contract site may not be similar to the log of test well C. The specification paragraph describing local conditions does not refer to boulders encountered in the other test wells.³ The reference to wells terminating in chert or in sand-filled caverns appears to stem from the earlier history that caused these test wells to be abandoned for failure to reach a potential water supply. Chert is not an aquifer (Tr. 308), but it is a solid material that can be penetrated by certain drilling methods (AX-4, p. 14).

Appellant urges that the reports and logs of all the previous test wells should have been furnished as prebid information in order that appellant would have been better informed of the difficult subsurface conditions. Appellant contends that such knowledge of the other test wells would have caused it to refuse to bid for the contract. Whether this would have occurred is obviously

³ See *Foster Construction Co. v. United States*, 193 Ct. Cl. 587 (1970).

not relevant to the issue, but whether the information to be derived from the other test well reports and logs constituted superior knowledge in the Government which was withheld to the detriment of appellant could be significant. An examination of the reports and logs of all eight test wells does not disclose that there were drilling problems due to boulders in drilling through the surface alluvial layer, unless the alluvial was much deeper than indicated on the test well C log, *i.e.*, boulders were encountered below 52 feet in test well A and 42 feet and below in test well B. There appears to be little similarity between appellant's experience in the first 38 feet of drilling and the first 38 feet in any of the other test wells. Actually test wells A and B, which were located near Wade Creek, reached depths of 102.5 feet and 165 feet, respectively, in relatively short periods of time despite a few boulders and caving difficulties. Consequently, a comparison of all eight test holes appears only to show that drilling conditions varied significantly on different areas of the hatchery property. It is reasonable that such diverse subsurface conditions at the various sites of test wells may not have appeared material to the Government engineers as indicative of the conditions at the contract site. However, the selection

of the log of test well C to place on the contract drawing does not appear to have resulted from any comparative analysis of the test well program to determine the probable subsurface conditions at the contract site. Instead, there appears to have been an assumption made by Mr. Wise that subsurface conditions at the only test well resulting in a successful well (test well C) would be the same or similar at the other potential sites selected by Mr. Ellis. Mr. Wise's testimony confirms that he expected conditions to be similar to test well C. Although the Government did not know with specificity the subsurface conditions at the contract site, its assumption that conditions would be similar to test well C led to the placement of this log on the contract drawing.

[1] The log data indicates the alluvial deposits to extend only to 5 feet. Neither the log nor the local conditions description indicate even a possibility that the alluvial would extend to the appellant's achieved depth of 38 feet. Appellant relied on the unrepresentative log data to its detriment in bidding for the contract. The fact that the Government also mistakenly relied on the log data to indicate expected subsurface conditions does not lessen the impact of its mistaken assumption on appellant. The credence given

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the log data by the Government is shown by the placement on the contract drawing of the well to be constructed the legends "limestone" and "seam or cavern" at the same depths shown on the log of test well C.

Further, the Government's contention that appellant did not make a site visit which would have alerted him to the actual conditions is refuted by the Government's admission that the subsurface conditions could only be determined by drilling a test well. The Government engineer, Mr. Wise, was familiar with the contract site by reason of his participation in the test well program of 1963-64. His intimate knowledge of the site did not alert him to the extensive alluvial deposits containing numerous boulders at the contract site. It is not reasonable to expect that a prospective bidder would become better informed from a site inspection than the engineer drafting the specifications who had considerable knowledge and experience in drilling accomplished in the area.

We find that the contract indications of subsurface conditions relied on by the appellant differed materially from the actual conditions encountered by appellant in repeated attempts to construct the well.

Impossibility of Performance

[2] The appellant alleges that the differing site conditions encountered renders performance impossible. Appellant had achieved a maximum depth of 38 feet in his performance efforts at the time of the hearing. Although there is agreement between the parties that there is no way of determining the conditions below that depth without drilling further, the record does not support a finding that drilling to a greater depth is impossible. The record shows that various attempts by appellant using different drilling rigs have not been successful. However, there is no evidence to show that no existing drilling equipment or methods could reasonably be expected to penetrate the boulder strewn alluvial deposits. Absent such evidence, the record shows only that the equipment and drilling methods used by appellant have not proved successful.

We have found that appellant has encountered a category 1 differing site condition rendering contract performance more difficult than expected. The contracting officer must now determine the appropriate equitable adjustment in the contract performance time and costs. By agreement of the parties, we limit our findings to entitlement and leave the equitable adjustment for resolution between the parties. Should the parties be unable to agree on the equitable adjustment, another ap-

peal to the Board may be initiated by appellant.

Decision

We find that the subsurface conditions encountered by appellant differed materially from the conditions indicated in the contract and remand the appeal to the contracting officer for a determination of

the equitable adjustment of contract time and price resulting from the differing site condition.

RUSSELL C. LYNCH,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

July 13, 1978

APACHE MINING COMPANY*

1 IBSMA 14

Decided July 13, 1978

Appeal from the Office of Surface Mining Reclamation and Enforcement denying an application for a small operator exemption.

Reversed and remanded.

1. Appeals—Rules of Practice: Appeals: Effect of

When an appeal is filed with the Board of Surface Mining and Reclamation Appeals from a decision made by the Office of Surface Mining Reclamation and Enforcement, that office loses jurisdiction and has no authority to take any action concerning it until that jurisdiction is restored by action of the Board that is dispositive of the appeal.

APPEARANCES: Mr. Jack Robertson, President, Apache Mining Co.

MEMORANDUM OPINION
AND ORDER BY ADMINISTRATIVE JUDGE MIRKIN
INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

On Feb. 10, 1978, Apache Mining Co. (Apache) filed with the Office of Surface Mining Reclamation and Enforcement (OSM) an application for small operator exemption under sec. 502(c) of the Surface Mining Control and Reclamation Act of 1977 (Act). (91 Stat. 445 (1977)).

* Not in Chronological Order.

In a letter dated Apr. 12, 1978, OSM rejected Apache's application on the grounds that Apache's state-issued mining permit expired prior to May 3, 1978. On Apr. 25, 1978, Apache appealed that rejection and on May 15, filed a statement of reasons in support of that appeal.

Thereafter, on May 23, 1978, OSM mailed two letters to Apache. In the first, OSM admitted that it had erred in rejecting the application and essentially rescinded that rejection. In the second, however, OSM indicated that it had determined that Apache was ineligible under the Act for the exemption for a distinct reason, namely, annual production in excess of 100,000 tons. Apache never responded to this action.

For a considerable period of time it has been the declared policy of the Department that when an appeal is taken from the decision of one of its offices, that office loses jurisdiction of the matter until that jurisdiction is restored by disposition of the appeal by the appellate body. *Audrey I. Cutting*, 66 I.D. 348 (1959); *Utah Power & Light Co.*, 14 IBLA 372 (1974).

Considering the obvious chaos that would result if two different offices of the Department were to exercise simultaneous jurisdiction over the same persons and subject matter, this Board sees no reason to deviate from the departmental policy. Consequently, the Board holds that OSM was without jurisdiction to act on the matter after the appeal was taken except to advise the

Board of why the Board should or should not grant or deny the relief requested. Under this rule the letter of May 23, 1978, denying the application for excess tonnage was a nullity. The other letter of the same date in which OSM admitted error in regard to the denial which is the basis of the appeal herein, will be treated as a confession of error and a motion to grant the appellant relief.

ORDER

WHEREFORE, it is hereby ordered that the decision of OSM rejecting the application on the basis of the date of Apache's state-issued permit is reversed. The case is remanded to the Office of Surface Mining Reclamation and Enforcement for further action consistent herewith.

MELVIN J. MIRKIN,
Administrative Judge.

WE CONCUR:

WILL A. IRWIN,
Chief Administrative Judge.

IRALINE G. BARNES,
Administrative Judge.

ROSEBUD COAL SALES COMPANY

37 IBLA 251

Decided *October 18, 1978*

Appeal from a decision of the Wyoming State Office, Bureau of Land Management rejecting applications for extensions of prospecting permits and preference-right leases W-23411 and W-23412.

Affirmed.

1. Administrative Procedure: Administrative Procedure Act—Administrative Procedure: Hearings—Applications and Entries: Valid Existing Rights—Coal Leases and Permits: Applications—Coal Leases and Permits: Permits: Generally

A delay in taking action on an application for extension of a coal prospecting permit while the Secretary formulates a new leasing policy does not violate the Administrative Procedure Act, 5 U.S.C. § 555(b) (1976), nor does it constitute an abuse of discretion which would create any rights not authorized by law. No hearing is required when the facts of a case are not in dispute and the only issues are questions of law.

2. Administrative Procedure: Administrative Procedure Act—Administrative Procedure: Licensing—Applications: Generally—Coal Leases and Permits: Applications—Coal Leases and Permits: Permits: Generally—Mineral Leasing Act: Generally

Sec. 9(b) of the Administrative Procedure Act, *as amended*, 5 U.S.C. § 558(c) (1976), does not apply to coal prospecting permit extension applications because the prospecting is not an "activity of a continuing nature" within the meaning of the statute. As the Federal Coal Leasing Amendments Act of 1975, 90 Stat. 1083, 30 U.S.C. § 201 (West Supp. 1977), removed the Secretary of the Interior's discretion to grant extensions, applications for preference-right leases filed after expiration of the initial 2-year permit term, and during pendency of extension applications, cannot be issued.

APPEARANCES: Michael W. Coriden, Esq., Rosebud Coal Sales Co.; Lawrence G. McBride, Esq., Office of the Solicitor, Bureau of Land Management.

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OPINION BY ADMINISTRATIVE JUDGE THOMPSON
INTERIOR BOARD OF LAND APPEALS

Rosebud Coal Sales Co. appeals from the Oct. 7, 1974, decisions of the Wyoming State Office, Bureau of Land Management (BLM), rejecting its applications for extensions of coal prospecting permits and preference-right leases W-23411 and W-23412.

Prospecting permits W-23411 and W-23412 were issued to appellant by BLM on Sept. 1, 1970, and Nov. 1, 1970, respectively, for the statutory terms of 2 years each pursuant to sec. 2 of the Mineral Leasing Act of 1920 (MLA), *as amended*, 30 U.S.C. § 201 (b) (1970). The applications for 2-year extensions were timely filed in 1972 in the State Office. On Aug. 30, 1974, appellant filed applications for preference-right coal leases.

In Feb. 1973, the Secretary of the Interior announced a moratorium on coal leasing and the issuance of coal prospecting permits. Secretarial Order No. 2952 (Feb. 13, 1973). Under this order no coal leases were to be issued unless certain "short-term criteria" were met, while long-term coal leasing policies were being developed.

On June 14, 1974, the Wyoming State Director, in a Referral for Review of Proposed Coal Permit Extension to the BLM Director, concluded that appellant met the short-term leasing criteria. From the record it appears that no fur-

ther action was taken concerning W-23411 and W-23412 until Oct. 7, 1977, when the decision appealed from was rendered.¹

The Federal Coal Leasing Amendments Act of 1975 (FCLAA), 90 Stat. 1083, 30 U.S.C. § 201 (1977), effective Aug. 4, 1976, altered the coal leasing provisions, repealed the Secretary's authority to grant extensions of coal prospecting permits, required all leases to be awarded by competitive bidding, and eliminated the preference-right leasing provision. Sec. 4 of the Act provides that these amendments are subject to valid existing rights. On July 21, 1977, the Solicitor issued an opinion, M-36894, 84 I.D. 415 (1977), that an applicant for a coal prospecting permit extension does not have a "valid existing right" protected by the savings clause in sec. 4 of FCLAA because the grant of an extension under the pre-FCLAA provision was discretionary.

The State Office decisions of Oct. 7, 1977, rejecting appellant's applications for coal prospecting permit extensions and preference-right leases, were based on the grounds that (1) "the holder of a coal prospecting permit has no *right* to an extension," (2) "the authority to grant such extensions terminated with the enactment of the 1975 Coal

¹ On Oct. 1, 1975, the Director issued a memorandum to the Wyoming State Director requesting further examination of five applications from appellant for preference-right leases and prospecting permit extensions in the environmental analysis record. None of these five applications are subjects of this appeal.

Leasing Amendments Act," and (3) "the preference right lease application[s] [were] not filed within 30 days after the expiration of the initial two-year permit[s]."

Appellant asserts five basic reasons why the decision is erroneous. Briefly, they are: (1) BLM's 5-year delay on the extension applications violated the Administrative Procedure Act (APA), 5 U.S.C. § 555(b) (1976), which provides for prompt disposition of agency proceedings, (2) the delay was an abuse of discretion, (3) failure to provide appellant with a hearing prior to a final decision on the lease applications violated appellant's right to due process of law; (4) under sec. 9(b) of the APA, *as amended*, 5 U.S.C. § 558(c) (1976), the permits did not expire until Oct. 12, 1977, the date appellant received notice of BLM's final decision; therefore, the basis for rejecting the lease application was a misinterpretation of the law and arbitrary and capricious; and (5) appellant timely filed its lease application and thus obtained "valid existing rights" to such leases.

[1] Appellant's first three reasons are without merit and have been answered by prior decisions in other cases. The delay in taking action on the applications was due to a change in Federal coal leasing policy and as such did not violate the Administrative Procedure Act, nor did it constitute an abuse of discretion. See *Duessing v. Udall*, 350 F.2d 748 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 912 (1966). The moratorium on coal leasing and prospecting per-

mits has been upheld as a proper exercise of the Secretary's discretion. *Albrechtsen v. Andrus*, 570 F.2d 906 (10th Cir. 1978); *Krueger v. Morton*, 539 F.2d 235 (D.C. Cir. 1976); *Hunter v. Morton*, 529 F.2d 645 (10th Cir. 1976); *Peabody Coal Co.*, 34 IBLA 139 (1978). Furthermore, any delay in taking action on the applications cannot vest in appellant any rights which would not otherwise be authorized by law. 43 CFR 1810.3. Also, the fact that the Department did not approve the extension applications prior to the end of the 2-year period authorized by the MLA arguably can be considered as showing sub-silentio that the applications would be rejected. Appellant has not pointed to any actions on its part to compel action by BLM before that time. In any event, the mere filing of an application for an extension is not a valid existing right so as to be excepted from the effects of FCLAA. *Thomas C. Woodward*, 35 IBLA 262 (1978).

The issues of this case may be decided on the facts of record and assumed facts. Therefore, assuming *arguendo* the facts as asserted by appellant, the questions raised are issues of law. Hearings are not required where facts are not in issue and there are only issues of law to be decided. *United States v. Consolidated Mines & Smelting Co., Ltd.*, 455 F.2d 432 (9th Cir. 1971). Thus, no hearing is required on the preference-right lease applications.

[2] Appellant's fourth and fifth arguments are dependent upon each other for support and will be discussed together. It is well settled,

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and appellant does not dispute the fact, that the granting of extensions under former 30 U.S.C. § 201(b) (1970), was not automatic but entailed an exercise of the Secretary's discretion. *Thomas C. Woodward, supra*; *Island Creek Coal Co., 35 IBLA 247 (1978)*; *Peabody Coal Co., supra*; *Solicitor's Opinion, M-36894, 84 I.D. 415 (1977)*; see also, *Schraier v. Hickel, 419 F. 2d 663 (D.C. Cir. 1969)*; *United States v. Consolidated Mines & Smelting Co., supra*. Appellant argues that under sec. 9(b) of the APA, as amended, 5 U.S.C. § 558(c) (1976), its permits did not expire until receipt of the final decision rejecting the extension applications (Oct. 12, 1977), and as the permits were still *in esse* when the lease applications were filed, it had a valid existing right to the leases.

Sec. 9(b) of the APA, *supra*, provides in part: "* * * when the licensee has made timely and sufficient application for a renewal of a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency." This case raises squarely the issue of whether sec. 9(b) of the APA applies to prospecting permits issued for coal under the MLA before the effective date of FCLAA. We find that it does not.

Sec. 9(b) applies only to licenses for an "activity of a continuing nature." Cases cited by appellant in support of his position deal with

such activities as broadcasting, and air and sea transportation lines, on-going, day-to-day, commercial ventures for which a license is required to operate. See *Pan Atlantic Steamship Corp. v. Atlantic Coast Line R. Co., 353 U.S. 436 (1957)*; *Committee for Open Media v. F.C.C., 543 F. 2d 861 (D.C. Cir. 1976)*; *County of Sullivan, N.Y. v. C.A.B., 436 F. 2d 1096 (2d Cir. 1971)*. In *Pan Atlantic, supra*, as appellant himself points out, the Supreme Court invokes sec. 9(b), "to protect a person with a license from the damage he would suffer by being compelled to discontinue a business of a continuing nature, only to start it anew after the administrative hearing is concluded." (353 U.S. at 439.)

In these and similar situations, the application of sec. 9(b) serves to preserve the status quo, allowing the applicant no greater or lesser rights during the pendency of his application than he had during the stated term of the license. Coal prospecting permits differ in several important aspects. First, the permit is not granted for an on-going activity of a commercial nature. See *Bankers Life and Casualty Co. v. Callaway, 530 F. 2d 625, 634 (5th Cir. 1976)*. It is limited to the minimum discovery activity possible to determine the existence and location of coal deposits. 43 CFR 3510.1-2. Second, 43 CFR 3511.4-4(a) provides for cancellation of such permits if cancellation is in the public interest. Third, the regulation provides for automatic expiration of a

permit, without notice to the permittee, if an application for extension is not timely filed, and makes the lands available for new applicants. 43 CFR 3511.3-4(b), 3511.4-2(a). This regulation indicates that if the application for extension is timely filed the notation that the lands are unavailable to new applicants will remain in effect. It, in effect, applies the notation rule to segregate the land from other applications until action is taken on the extension application.² It does not protect the permittee from the Secretary's exercise of discretion and denial of the extension. Fourth, there are specific statutory and regulatory time strictures imposed for the term of the permit. It is unlike those situations where regulatory bodies impose the only time stricture by the original grant itself.

² *Carl Nyman*, 59 I.D. 238 (1946), held that a prospecting permit is not automatically canceled by expiration of the 2-year term and no other person can gain rights by filing an application for the land prior to the end of 4 years from date of issue of the permit unless the permit is canceled. The regulations in effect then, as quoted at 59 I.D. 240, 43 CFR 193.26 (1939), provided that "a coal permit cannot be considered as expired until the full period for which granted and for which it may be extended has elapsed. Where application for lease has not been filed, a coal permit will, at the end of 4 years from date of lease, be considered no longer in force and no bar to other applications for the lands described therein." The decision in *Nyman* merely applied the regulations and held the land was segregated for the full 4-year period, even though an extension application was not filed. A different result would be reached today because of changes in the regulations. They now provide for automatic expiration of the permit if an application for extension is not filed, 43 CFR 3511.3-4(b), 3511.4-2(a), and the land is subject to the filing of new applications. However, where an extension application was timely filed and was allowed in the past, the extension related back to the time of filing the application.

Were we to hold that sec. 9(b) of the APA is applicable and has the effect here which appellant seeks, permittees would be receiving something more than a continuation of the permit pending action on the application. They would receive additional time in which to file an application for a preference-right lease regardless of any ultimate determination on the extension application. This would completely abrogate the Secretary's discretionary authority to deny an extension of a prospecting permit and to prevent the inception of rights which could only be attained for a preference-right lease if an extension were granted. We cannot read the general provision in the APA as overruling, in effect, the more specific provisions of the Mineral Leasing Act. To do so would greatly hinder the Department's ability to manage the resources over which it has jurisdiction for the benefit of the nation as a whole.

Former sec. 201(b) of the MLA required the permittee "within said period of two years thereafter" of issuance of the permit to show the Secretary that the land contains coal in commercial quantities to be entitled to a lease. The regulations in effect at the time appellant's lease application was filed provided that an application for a coal preference right lease "must be filed in duplicate promptly after commencement of commercial operations, but in no event later than the expiration of the period to which the permit is limited." 43 CFR 3521.1-1(a) (1972). Appellant's argument con-

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cerning the applicability of the Administrative Procedure Act provision, would not only have the period of the permit extend to the statutorily authorized additional 2 years, beyond the initial 2-year period, but to Oct. 12, 1977, the date appellant was served with the decision rejecting the extension application and preference-right lease. This logical extension of its argument concerning the APA provision further demonstrates its incompatibility and inapplicability to the situation here. Not only would the extension period go beyond that originally authorized by the Mineral Leasing Act, but also would extend well beyond the time the authority to grant prospecting permits and their extensions had been repealed. This would certainly be an unprecedented and unwarranted effect. It is contrary to usual rules of statutory construction that specific statutory provisions prevail over those of more general applicability. 2A *Sutherland, Statutory Construction* § 51.05 (4th ed. 1973).

We conclude that filing the application after the initial 2-year period and prior to the granting of an extension did not give rise to a valid existing right to a preference-right lease under the statute so as to be excepted from the FCLAA. During the period between the end of the original 2-year term and a decision on the applications for extension the permittee has been protected from top-filers under the notation rule as specifically applicable to extension applications by 43 CFR 3511.3-4

(b), and 3511.4-2(a), but the mere filing of the extension applications gave no further rights which would preclude their rejection and the rejection of the preference-right lease applications. Because the lease applications were not filed within the authorized permit time, they were properly rejected.³

Therefore, pursuant to the authority delegated to the Board of Lands Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JOAN B. THOMPSON,
Administrative Judge.

I CONCUR:

JAMES L. BURSKI,
Administrative Judge.

ADMINISTRATIVE JUDGE
STUEBLING, CONCURRING:

While in essential agreement with the majority opinion, I respectfully offer these additional comments.

³ The author of this decision in a dissenting opinion in *Utah Power & Light Co.*, 14 IBLA 372, 377 (1974), at 378, in a footnote discussing a hypothetical situation where an assignment of an application for a coal lease and request for approval was filed before the expiration of a coal prospecting permit and an application for extension of the permit, noted the *Nyman* case, *supra*, and gave a comparison reference to 5 U.S.C. § 558(c) (1976). Upon reflection as to the effect of the regulations and the law discussed above, I wish to correct any implication arising from that footnote concerning the effect of an application for extension of a permit. It only has the effect afforded by the regulations of segregating the land from subsequent filings and, of course, if the application had been granted, it would relate back to the time of the expiration of the original term of the permit. There can be no relation back, however, if the application cannot be granted.

To add emphasis to the holding that sec. 9(b) of the Administrative Procedure Act (5 U.S.C. § 558(c) (1976)) has no applicability in this instance, we might consider *Bankers Life and Casualty Co. v. Callaway*, 530 F.2d 625 (5th Cir. 1976). In *Bankers Life*, *supra*, the Corps of Engineers had issued the company a permit to conduct dredging and land-filling operations. One extension was granted, and about 2 weeks prior to the expiration of the extended term the company applied for a second extension. Years of delay and controversy then ensued, during which no final agency action was taken on the pending application. Eventually the company sued for relief, asking the court for declarations *inter alia*, that because of the provisions of 5 U.S.C. § 558 (1976), the company's rights under the original permit never expired, and that because a refusal to renew is the equivalent of "withdrawal, suspension, revocation, or annulment," the company was entitled to a hearing pursuant to sec. 558 on its application for renewal. The company also relied on a letter which it had received from the Corps' district engineer, which stated "[t]he lapse in the permit will have no effect insofar as the Corps of Engineers is concerned." The court, however, stated, "* * * we believe that sec. 558(c) was not designed to cover this kind of situation." *Id.* at 633. The court went on to say, "The Corps' conscious decision not to renew activated the expiration provisions of the permit. Thus, after the period specified in the 1960 permit

expired, all rights under the permit expired with it." In concluding that filling land is not an activity of a continuing nature, but is instead a project that will end as soon as all the land is filled in, the Court compared it with radio broadcasting or shipping services, which *would be* regarded as of a continuing nature, and which would involve great hardship if interrupted during the pendency of an application for license renewal. *Id.* at 634.

By analogy, I think that prospecting operations are no more an "activity of a continuing nature" than are land-fill operations, and that the interruption of prospecting at the expiration of the term of the prospecting permit does not involve undue hardship. It is obvious that one cannot go on infinitely prospecting for coal on the same tract of land. Such an undertaking is in the nature of a definite job or project, intended to be concluded as quickly as its objective is realized; the objective, of course being the acquisition of knowledge concerning the possible occurrence of coal within the boundaries of the designated tract. Once the prospecting effort establishes that mineable coal either is or is not present, the job of prospecting that tract is completed. Thus, it is not an "activity of a continuing nature" within the purpose and spirit of 5 U.S.C. § 558(c) (1976).

We must also consider the effect of this Board's most recent decision in a case of this nature, *Thermal Energy Co.*, 36 IBLA 334 (1978). There we set aside BLM's rejection

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of appellant's application for a preference right coal lease, and restored the application to pending status. However, that case is distinguishable from the instant appeal in one very significant particular. In *Thermal Energy* the prospecting permittee actually discovered valuable deposits of coal on the land during the initial 2-year term of the permits. Before the permits expired the permittee filed timely applications for an extension. But when the initial 2-year term lapsed, the permittee ceased its prospecting operations on the land altogether and, in reliance on the discoveries which it had already made (which were confirmed by the Geological Survey), it then applied for a preference right lease. The Board (Henriques, Administrative Judge, dissenting) held that although the lease application was filed 26 days after the 2-year term of the permit had expired, the application could be reviewed and adjudicated on its merits, citing *William R. White*, 1 IBLA 273, 78 I.D. 49 (1971), among other authorities.

By distinction, the appellant in the case now before us freely declares that no discovery of commercial coal was made during the initial 2-year term of the permit, and when that term lapsed it went right on with its prospecting activities as though that event had no significance whatever, although no extension had been granted. Appellant states at p. 9 of its statement of reasons for appeal:

In the instant case, Rosebud Coal Sales Co. filed applications to extend coal exploration permits W-23411 and W-23412 for a period of two years because Rosebud had been unable, with the exercise of reasonable diligence, to determine the existence and workability of coal deposits and desired further exploration. Since Rosebud received no immediate determination from the Bureau of Land Management on its permit extension applications and any indefinite delay in exploration activities would have severely disrupted Rosebud's operational plans, Rosebud Coal Sales Co. proceeded to conduct further exploration with the result that Rosebud was able to make a final determination of the existence and workability of coal deposits in the area of land covered by permits W-23411 and W-23412. Based upon the results of its exploration activities, Rosebud Coal Sales Co. filed applications on Aug. 30, 1974 for preference right coal leases W-23411 and W-23412.

For the foregoing reasons, as well as for those stated in the majority opinion, I agree that the decision of the Bureau of Land Management in this case must be affirmed.

EDWARD W. STUEBING,
Administrative Judge.

ESTATE OF CHARLES D. ASHLEY

37 IBLA 367

Decided November 2, 1978

Appeal from decision of the Montana State Office, Bureau of Land Management, rejecting oil and gas lease offer M 40561 (ND) Acquired.

Affirmed.

1. Administrative Procedure: Hearings—Hearings

A request for a hearing will be denied when the facts are not in dispute and the determination rests on questions of law.

2. Rules of Practice: Appeals: Generally

A request for an oral argument before the Board of Land Appeals may be denied when legal issues are well briefed and no useful purpose would be served.

3. Applications and Entries: Generally—Oil and Gas Leases: Generally—Oil and Gas Leases: First Qualified Applicant

An application for an oil and gas lease filed in the name of a person deceased at the time of filing is properly rejected as there then was no offeror qualified to hold a lease.

4. Agency—Oil and Gas Leases: Applications: Attorneys-in-Fact or Agents—Oil and Gas Leases: Applications: Sole Party in Interest

Where a contract between an oil and gas lease offeror and a leasing service created an agency relationship, in the absence of circumstances giving the agent an authority coupled with an interest, the agent's authority ordinarily terminated upon the death of the principal. If the leasing service had an interest, a lease could not issue to the estate of the deceased if no statement was filed delineating the nature and extent of that interest as required by 43 CFR 3102.7.

5. Oil and Gas Leases: Applications: Generally

While the Department of the Interior does not require oil and gas lease drawing entry cards to be signed and dated at the same time, the signer does attest to the truth of the statements on the card as of the date of the card and is bound by and to its terms.

APPEARANCES: Scott W. Hansen, Esq., Reinhart, Boerner, Van Deuren,

Norris & Rieselbach, Milwaukee, Wisconsin, for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON INTERIOR BOARD OF LAND APPEALS

Elenore P. Ashley is the widow and personal representative of the Estate of Charles D. Ashley. This appeal is taken in behalf of the estate, from the decision dated June 2, 1978, of the Montana State Office, Bureau of Land Management (BLM), rejecting oil and gas lease offer M 40561 (ND) Acquired, for Parcel MT 789 for the reason that the applicant, Mr. Ashley, was deceased at the time of filing.

Information submitted on appeal shows that Mr. Ashley executed a service agreement with Resource Service Company (RSC) on Nov. 18, 1977, authorizing RSC to complete and file all forms required for his participation in 240 simultaneous drawings for oil and gas leases. Mr. Ashley signed and returned all 240 cards to RSC prior to Nov. 25, 1977. Thereafter, RSC filed cards on a monthly basis in Mr. Ashley's behalf. The agreement was for 1 year. Under the original agreement Mr. Ashley paid RSC a fee for its services in advance, in addition to agreeing to share an interest in any leases obtained by the filings.

A recent decision of this Board¹ found standard service agreements

¹ Alfred L. Easterday, 34 IBLA 195 (1978).

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of this type to be in violation of the regulations concerning interested parties and multiple filings. Accordingly, in Apr. 1978, RSC sent Mr. Ashley a modification of the agreement designed to conform the agreement to the requirements of the regulations. Mr. Ashley died Feb. 8, 1978, and the modification was directed to his widow, the personal representative, of his estate. On Apr. 14, 1978, Mrs. Ashley signed and returned the modification to RSC. On Apr. 21, 1978, RSC dated, addressed, and placed the parcel number on one of the cards previously signed by Mr. Ashley and filed it in the Montana State Office. The card was drawn No. 1 in the May 4, 1978, drawing.

BLM, in rejecting the offer, indicated that the regulations, 43 CFR Part 3100, do not provide for filing applications in the name of deceased individuals. BLM also expressed incredulity over how Mr. Ashley could sign and date the drawing card on Apr. 21, 1978, which was 2 months after his death.

In the statement of reasons appellant makes several arguments. She asserts that the card was properly completed and "statutory, judicial and board authority do impliedly, if not expressly, authorize issuance of a lease to Mr. Ashley's estate." She points out that nothing in the regulations requires an applicant to sign the card during the 5-day filing period. Appellant states her belief that she followed "the only procedure recognized by the Department of the Interior with re-

gard to such a filing," citing several cases as authority for granting rights pursuant to applications filed in the name of a deceased individual. As executor of the estate, appellant argues that she steps into the shoes of the decedent and is bound by and authorized to enforce his contracts. Under the modified contract with the filing service, she asserts that use of such a service is permissible. Finally, she states that she and the heirs have submitted the necessary statements of citizenship and qualifications to hold a lease. Appellant has also requested an administrative hearing and an opportunity for oral argument.

[1] A request for a hearing will be denied when the facts are not in dispute and the determination rests on questions of law. *Concho Petroleum Co.*, 22 IBLA 139 (1975). There is no disagreement concerning the facts of this appeal. The issue is legal: whether an oil and gas lease can be issued when the application was filed in the name of one who was deceased at the time of filing. A hearing would be of little help in resolving this matter and, therefore, will not be granted.

[2] A request for an oral argument before the Board of Land Appeals may be denied when legal issues are well briefed and no useful purpose would be served. *Cf. Silver Monument Minerals, Inc.*, 14 IBLA 137 (1974). Accordingly, the request for an oral argument is also denied.

[3] An application for an oil and gas lease filed in the name of a per-

son deceased at the time of filing is properly rejected as there was then no offeror qualified to hold a lease. Had the applicant died after filing the application but prior to issuance of the lease, his personal representative, heirs or devisees would be entitled to the lease if there was a proper offer to lease "which will be effective as of the effective date of the original application or lease offer filed by the deceased." 43 CFR 3102.8. Appellant's assertion that the card was properly completed avoids the real issue of whether or not there was a qualified applicant for this parcel. Under 30 U.S.C. § 181 (1976) and 43 CFR 3102.1-1, only citizens of the United States, associations, corporations, or municipalities may hold interests in oil and gas leases. Only such entities are proper offerors. 43 CFR 3112.2-1. The fact that Mr. Ashley died before the offer was filed precludes a finding that there was a qualified applicant. Merely because there is no requirement that the card be signed within the 5-day filing period, does not give license to file cards in the name of nonexistent or deceased persons.

Appellant cites several decisions in support of her argument, mistakenly assuming a similar factual situation exists. Appellant asserts that *Drake v. Simmons*, 54 I.D. 150 (1933) is closely on point. There is one major difference between the facts of *Drake* and those involved here. In *Drake*, the applicant was living at the time the application was filed, but died prior to issuance of the permit. The same is true in

Walter Kearin & Legatees of Peter Fern, 53 I.D. 699 (1932), also cited by appellant. Appellant cites no cases, nor have we discovered any, where an application filed in the name of a decedent has conferred rights upon the estate.

In *Fox Film Corp. v. Knowles*, 261 U.S. 326 (1923), the Supreme Court approved allowing an author's executor to renew a copyright even though the author died prior to the period in which the renewal application could be filed. Appellant's reliance on this case is misplaced; there the statute itself allowed renewal by the widow or executor. Here, the requirement of a qualified applicant, 30 U.S.C. § 226 (c) (1970) 43 CFR 3102.1-1, read in conjunction with the provision for issuing the lease to the estate or heirs, 43 CFR 3102.8, forecloses the applicability of the *Fox* rationale to the facts and law of this case.

The regulation, 43 CFR 3102.8,² while not specifically addressing the applicant's status as living or deceased in conferring the right to a lease upon his heirs, when read with the general regulation governing who is qualified to file an application for a lease, 43 CFR 3102.1-1, is not ambiguous. The general rule is that the death of the offeror prior to acceptance of the offer, terminates it. *Williston on Contracts*,

² 43 CFR 3102.8 provides in pertinent part: "If an offeror dies before the lease is issued, the lease will be issued to the executor or administrator of the estate if probate of the estate has not been completed, and if probate has been completed, or is not required, to the heirs or devisees * * *" (Italics supplied.) This language assumes the offer (application) is made prior to the death of the applicant.

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§ 62 (3d Ed. 1957). The regulation creates a narrow exception to the general rule but cannot be read to imply that a deceased individual can be an offeror. The policy of the Department relied on by appellant in interpreting its regulations "to resolve latent ambiguities in favor of public land applicants," *Georgette B. Lee*, 3 IBLA 272, 276 (1971), has no place where the regulation, applied with common sense, is not ambiguous.

Appellant also relies on a general principle of the law that the executor "steps into the shoes of his decedent," and may enforce the decedent's contracts (Statement of Reasons at 11). However, generally the personal representative is bound by the *outstanding* contract obligations of the decedent *except* where the obligation is personal, or terminated by death or otherwise discharged. 33 C.J.S. *Executors and Administrators* § 189 (1972). The personal representative is not empowered to make anew or enlarge a contract for the decedent, nor to ratify his void transactions. *Id.* The personal representative of Mr. Ashley, appellant, had no authority to sign the modification of the service agreement with RSC. The old agreement violated the regulations. The new agreement, if of any force whatsoever, was a new and separate contract between Mrs. Ashley and RSC. It is separate and distinct from the right or eligibility of a decedent to apply for an oil and gas lease. The contract is an agreement between private parties and cannot

confer upon them rights in public lands not authorized by law.

[4] The contract between Mr. Ashley and the leasing service created an agency relationship. In the absence of circumstances giving the agent an authority coupled with an interest, the agent's authority ordinarily terminates upon the death of the principal. 2A C.J.S. *Agency* § 135 (1972). Generally the agency is terminated immediately upon the principal's death, regardless of whether or not all the acts contemplated by the principal and agent as being authorized have been completed. 2A C.J.S. *Agency* § 137 (1972). Where the agent has an interest in the subject matter, death does not automatically terminate the agency. 2A C.J.S. *Agency* § 136 (1972).

If the leasing service here held an interest in the lease, the lease could not issue to the deceased or his estate because no statement was filed delineating the nature and extent of that interest as required by 43 CFR 3102.7. *Lola I. Doe*, 31 IBLA 394 (1977). Appellant herself signed, for the decedent, a new contract with the leasing service in an attempt to avoid the problems created when such a service holds an interest in the leases it aids its clients in obtaining. Whether we view the agency as terminated upon the death of Mr. Ashley or not, the filing of the card gained the estate no right to an oil and gas lease because if RSC had no interest in the lease, their authority to file applications in his name terminated; if

there was still an interest, and the agency continued, the filing violated regulations 43 CFR 3102.7 and possibly 3112.5-2.

[5] While this Board has never required the drawing entry cards to be signed and dated at the same time, the signer does attest to the truth of the statements on the card as of the date of the card and is bound by and to its terms. *Evelyn Chamber*, 31 IBLA 381 (1977). Where the signer is dead as of the date on the card it cannot be said there was a person who attested to the veracity of the statements on the card, nor one who would be bound to a lease. Noncompetitive oil and gas leases must be issued to the first-qualified applicant. *Walter M. Sorensen*, 32 IBLA 345 (1977). As there was no qualified applicant, the lease offer must be rejected. The fact that the heirs of Mr. Ashley have now submitted statements of citizenship and qualifications to hold a lease can gain them no priority under the simultaneous leasing provisions.

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

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

EDWARD W. STEUBING,
Administrative Judge.

**D. E. PACK (ON RE-
CONSIDERATION)**

38 IBLA 23

Decided *November 9, 1978*

Reconsideration of the Board's decision styled *D. E. Pack*, 30 IBLA 166, 84 I.D. 192 (1977), at the direction of the Secretary of the Interior.

Sustained.

1. Oil and Gas Leases: Applications: Attorneys-in-Fact or Agents—Oil and Gas Leases: Applications: Drawings

Where a drawing entry card form of offer to lease a parcel of land for oil and gas is prepared by a person or corporation having discretionary authority to act on behalf of the named offeror, and the offer is signed by such agent or attorney-in-fact on behalf of the offeror, the requirements of 43 CFR 3102.6-1 apply, so that separate statements of interest by both the offeror and the agent must be filed, regardless of whether he signed his principal's name or his own name as his principal's agent or attorney-in-fact, and regardless of whether the signature was applied manually or mechanically.

2. Administrative Practice—Appeals—Oil and Gas Leases: Applications: Generally—Regulations: Applicability

A final Departmental appellate decision construing a regulation will be given immediate effect, and will not be applied with prospective effect only, unless the decision alters materially the interpretation given the regulation by earlier Departmental decisions or official published opinions, and unless the equitable benefit of the decision is not outweighed by ill effects of allowing a benefit in derogation of the regulation.

APPEARANCES: *D. E. Pack*, pro se.; *Philip W. Buchen*, Esq., *James W. McDade*, Esq., *Craig R. Carver*, Esq.,

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for Stewart Capital Corp., and John S. Runnells; John W. Carver, Esq., for J. G. Fritzinger, Jr.; Lawrence G. McBride, Esq., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD OF LAND APPEALS

This Board, in *D. E. Pack*, 30 IBLA 166, 84 I. D. 192 (1977), held essentially that the signature of an offeror on a drawing entry card (DEC) in the simultaneous oil and gas leasing procedures of the Bureau of Land Management (BLM) may be affixed by a rubber stamp if it is the intention of the offeror that the impressed facsimile be his or her signature, but if the signature was impressed by an agent of the offeror, the requirements of 43 CFR 3102.6-1(a)(2) apply, and if the separate statements of authority and disclosure of interest by both the offeror and the agent have not been filed, the DEC will be rejected.

Pack arose from a drawing in the BLM Utah State Office for Parcel UT 1408 in the Aug. 1976 notice of lands available for simultaneous filing for oil and gas lease offers. The DEC of John S. Runnells was drawn with first priority for this parcel. D. E. Pack, alleging that he had filed a DEC for this parcel, but not one drawn among the three cards given priority of consideration, protested the bona fides of the Runnells' DEC. Inquiry by BLM disclosed that Stewart Capital

Corp. (Stewart), acting on authority granted to it by John S. Runnells, and on Runnells' behalf, did select the land for which the DEC lease offer was made; did apply Runnells' facsimile signature to the DEC, did file the DEC with BLM, and did advance payment of the first year's rental for the lease to be issued in response to the winning priority given to Runnells' DEC. The explanation by Runnells satisfied BLM and it dismissed Pack's protest. Pack appealed to this Board. The Board reversed, holding, as pointed out above, that the absence of separate statements by Stewart and Runnells required rejection of Runnells' DEC.

On or about June 19, 1977, Stewart petitioned the Secretary of the Interior to exercise his supervisory powers and take original jurisdiction over a number of appeals pending before this board. Petitioner alleged that *Pack* sets new policy contrary to prior Departmental practice, court decisions and government interests, and has applied such policy retroactively in violation of the due process rights of oil and gas lease offerors who have utilized the services of Stewart in participating in the BLM simultaneous oil and gas leasing program.

A similar petition to the Secretary was filed July 19, 1977, on behalf of J. G. Fritzinger, Jr., a client of Stewart.

A brief in opposition to the petition of Stewart was filed with the Secretary on behalf of Collins C. Diboll. Diboll had filed several

DECs in the BLM Wyoming State Office, two of which had been drawn with second priority to DECs filed by Stewart in behalf of certain of its clients named in the petition to the Secretary.

The Secretary, by memorandum of Oct. 5, 1977, advised the Chief Administrative Judge, Board of Land Appeals, that he had declined to exercise his jurisdiction over the petitions of Stewart and of Fritzing, but he directed the Board to reconsider *Pack*, affording affected parties in this matter an opportunity to be heard. The Secretary stated that the Office of the Solicitor would appear on behalf of BLM, presenting a brief in support (of the position) of BLM's position in this matter.

On Aug. 16, 1977, Civil Action C-77-0268, *Runnells v. Andrus*, was filed in the United States District Court for the District of Utah, seeking judicial review of *Pack*. The action was filed pursuant to sec. 42, Mineral Leasing Act, 30 U.S.C. § 226-2 (1976), which provides that no action contesting a decision of the Secretary involving an oil and gas lease shall be maintained unless the action is commenced within 90 days after the final decision of the Secretary relating to such matter. *Pack* was issued May 19, 1977.

A similar suit, *McDonald v. Andrus*, Civil No. S 77-0333(C), was brought Sept. 30, 1977, in the United States District Court for the Southern District of Mississippi. This case sought review of the Board's decision, *Ray H. Thames*, 31 IBLA 167 (July 5, 1977), in

which Thames, whose DEC was drawn with second priority protested the number one DEC filed by Stewart for its clients, Maude E. McDonald and Harriet H. Walsh. BLM dismissed the protest, but on appeal, this Board reversed BLM, and otherwise held in accord with *Pack*.

Following the Secretary's directive to reconsider *Pack*, the Department of Justice was requested to seek Consent Orders in the pending litigations to permit reconsideration of *Pack* by this Board. Such Consent Orders were obtained, *McDonald* on Dec. 19, 1977, and *Runnells* on Mar. 8, 1978.

Thereafter the Board ordered Oral Argument on *Pack*, to be heard June 14, 1978, with the argument limited to this issue:

Whether the formulator/amanuensis test applied by the Board in *Pack* is appropriate to determine the applicability of 43 CFR 3102.6-1(a)(2) (1976), when someone other than the offeror both completes the drawing entry card and, with the consent of the offeror affixes the offeror's signature to the card.

Prior to the time for the oral argument, briefs were submitted to this Board from Counsel for Stewart and Runnells, and for BLM. An amicus brief was received from counsel for Diboll.

On June 14, 1978, the Board, sitting en banc (but excepting Judges Lewis and Burski, who had recused themselves), heard the oral argument from Philip W. Buchen, Esq., on behalf of Stewart and Runnells; from John W. Carver, Esq., on behalf of J. G. Fritzing, Jr.; from

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Lawrence G. McBride, Esq., on behalf of BLM; and from D. E. Pack, on behalf of himself.

[1] There is no dispute as to the facts. Stewart acts as a service agency to assist clients in participating in the BLM simultaneous oil and gas leasing programs. Under contract, each client pays Stewart a stipulated fee, for which Stewart selects parcels which in Stewart's opinion have superior value from the monthly lists of available lands issued by BLM; prepares appropriate DEC's by inserting the name of the offeror, Stewart's address, the parcel number, the facsimile signature of the offeror, and the date; and then files the DEC's in the proper BLM office. For any DEC of its clients, Stewart advances the first year's rental if the DEC is drawn with first priority; the client repays the advanced rental when billed. Stewart does not deny that it acts as the agent of its clients, with full authorization of each such client.

Stewart's argument is predicated, in part, on the holding by this Board in *Mary I. Arata*, 4 IBLA 201, 78 I.D. 397 (1971), that under the present regulation, a printed or stamped facsimile signature of an oil and gas lease offeror is just as efficacious as a signature which is written manually, provided that the offeror intends the facsimile to constitute his/her signature and to be bound thereby. Stewart maintains that under the Board's holding in *Arata*, then, when the authorized agent of the offeror applies a facsimile signature of the offeror, that

signature should be effective, and nothing further should be required.

That argument is fallacious. *Arata* is distinguishable from *Pack* in several respects. First, there was no question of agency presented in *Arata*, as the offeror in that case gave her affidavit that she herself had applied her own facsimile signature to her DEC, and that the facsimile stamp had never left her possession for use by any other person. Second, the issue in *Pack* is not whether the stamped or printed facsimile signature of Runnells is effective if applied by his agent, Stewart. We have assumed that, under the rule in *Arata*, Runnells' facsimile signature can be just as valid as the one in *Arata*. This satisfies the requirement in 43 CFR 3112.2-1(a) that the DEC be "signed * * * by the applicant or his duly authorized agent in his behalf." See *Robert C. Leary*, 27 IBLA 296, 301 (1976). But that is not the issue here. We are here concerned with the question of whether separate statements of the offeror and the agent must be filed in accordance with 43 CFR 3102.6-1(a) (2) when the agent, on behalf of the offeror, writes, stamps, prints or otherwise applies the offeror's signature to the DEC.

We have previously held that where the offeror's signature was affixed by another person acting (for that purpose) purely as an amanuensis (scribe or scrivener), there was no agency, and thus no requirement under the regulation for the filing of separate state-

ments. *Rebecca J. Waters*, 28 IBLA 381 (1977). As noted in the *Pack* decision now being reconsidered, there is a line of Departmental decisions holding that where a leasing service holds and exercises discretionary authority to act for its client in the selection of lands, the preparation and filing of offers, the advancement of funds, etc., the leasing service is the agent of the client/offerrer.

Thus, where an offeror's signature has been "signed" by another on behalf of the offeror, the test to determine whether compliance with 43 CFR 3102.6-1(a)(2) was required has been to ascertain whether the person who actually applied the signature was the offeror's agent or attorney-in-fact, or merely an amanuensis. This was the test in *Pack*, and it is the propriety of this test which is now at issue upon reconsideration.

The Bureau of Land Management, by counsel from the Office of the Solicitor, maintained at oral argument that *anyone* who signs an offer for another is exercising some degree of agency, and that therefore separate statements in compliance with 43 CFR 3102.6-1(a)(2) are *always* required in such cases. BLM, then, maintains that the formulator/amanuensis test is improper because it allows those who utilize the service of an amanuensis to sign their names for them to avoid compliance with the regulation, on the theory that even an amanuensis is a species of agent. On this premise it was the hypothetical position of BLM that where the

offeror was a double amputee who had no hands and requested a friend to sign the offeror's name to a DEC in his presence and at his direction, both the offeror and the friend would be obliged to file the statements. Or, again hypothetically, where an offeror who planned to file 1000 DEC's in the coming year took a block of 1000 cards to an independent printer with a signature "cut" and had his signature printed on all the cards, BLM would require the offeror and the printer to file their own separate statements with each of the 1000 cards. Thus, BLM apparently would have this Board overrule its decision in *Rebecca J. Waters*, *supra*, wherein, due to advanced age (85 years) and infirmity, the offeror sometimes found it impossible to write her name, and had her son write it for her. In that case we held that the son was merely an amanuensis, and not the agent of his mother, and that the failure to file separate statements was not cause for rejection. The distinction between an "agent" and an "amanuensis" is explored in *Evelyn Chambers*, 27 IBLA 317, 83 I.D. 533 (1976), *inter alia*. While acknowledging that an employee or servant is "an agent in the broadest sense of that term," the opinion cites authority for distinguishing between an employee who is authorized to exercise discretion and one who is not.

Stewart, on the other hand, opposes the formulator/amanuensis test on the ground that it results in too broad an invocation of the regulation, in that agents who write,

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stamp or print the names of their principals should not be obliged to file separate statements together with those of the offerors on whose behalf they are acting.

The six participating administrative judges of this Board are in unanimous agreement that the formulator/amanuensis test applied by the Board in *Pack* is appropriate to determine the applicability of 43 CFR 3102.6-1(a)(2) when someone other than the offeror affixes the offeror's signature to the oil and gas lease offer (including a drawing entry card), with the consent of the offeror.

Moreover, we are in full agreement that if the formulator/amanuensis test shows that the person who affixes the offeror's signature is the agent or attorney-in-fact of the offeror, the requirements of 43 CFR 3102.6-1 apply, so that separate statements by both the offeror and the agent must be filed regardless of whether he signs his principal's name or his own name as his principal's agent or attorney-in-fact, and regardless of whether the signature was applied manually or mechanically.

Petitioners exhibited a letter on White House stationery which bore the signature of the President of the United States. The letter was a courteous acknowledgement, with appreciation, of a service performed by one of the lawyers present. The recipient opined that his letter probably was not personally signed by the President's own hand but, rather, by the operator of a signa-

ture machine at the direction of someone who had been delegated with the discretionary authority to affix the President's signature to appropriate documents. If this assumption were correct, it was argued, the signature was nonetheless that of the President, and the documents on which such signatures are inscribed are just as valid as those which the President signed with his own hand.

This Board does not disagree. However, to our knowledge, there is no requirement that where an agent of the President inscribes the President's signature on a White House document, there be separate disclosures by the President and his agent in order to validate the instrument. Carrying the analogy a bit further, if the President's agent, fully authorized, and acting at his own discretion, filed an oil and gas lease offer in the President's name with the BLM, and inscribed the President's signature on the offer, that would trigger the need to accompany the offer with the separate statements of the President and his agent.

Petitioners further noted that there is a requirement under 43 CFR 3102.7 that every offeror declare whether he is the sole party in interest in that offer, and to disclose the identities of any other interested parties, in which event the offeror and each of the other interested parties and the offeror must file separate statements declaring the nature and extent of their respective interests. It was argued, in effect, that

since Runnells (acting through Stewart's agency) had made a declaration that he was the sole party in interest, the requirements of 43 CFR 3102.6-1(a)(2) are unnecessary, duplicative, redundant, or superfluous. That argument was presented and disposed in 1964 in the case of *Union Oil of California*, 71 I.D. 287 (1964), where the Department, construing the regulation (since recodified and amended), said at 292:

* * * 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.

* * * 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 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 [the regulation].

The minority opinion implies that because the foregoing from *Union Oil* was written prior to the amend-

ment of the regulation, it is no longer appropos. To the contrary, if the regulation was not duplicative in its more onerous original form, it certainly is not duplicative in its modified, less comprehensive, present form, and the holding in *Union Oil* on this point was strengthened—not vitiated—by the amendment.

The minority opinion quotes from *A. M. Shaffer*, 73 I.D. 293, 300 (1966). The final sentence of that quotation addresses a circumstance which was not at issue in that case and therefore was not briefed or argued by any party. Thus, as acknowledged by the minority, it is pure *obiter dictum*, and represents little more than the conjectural musing of the author of that opinion.

The minority opinion also declares that there is no material difference between the case of *Evelyn Chambers*, 31 IBLA 381 (1977) (where the offerors personally affixed their signatures), and this case (where the agent affixed the signature of the offeror). This is best answered by the regulation itself, which was deliberately amended so as to draw the crucial distinction between those circumstances, and to trigger the requirement only when the agent or attorney-in-fact signs the offer. To contend that there are no material differences in the two situations, or to assert that the regulation is redundant, is to deny that when the regulation was amended, it was done purposefully with a definite object in view. That argument assumes that those involved in the amendment of the regulation,

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acting in ignorance of 43 CFR 3102.7 (as recodified), did a vain and useless thing. But the minority opinion also says that the *original* regulation "was redundant and, thus, simply not necessary." Of course, that statement contradicts *Union of California, supra*, which held that the original regulation was *not* duplicative. Nevertheless, even if that were the reason for amendment of the regulation, would the Department have replaced one redundant requirement with another? And even if one thought so, would that excuse him from compliance?

It is obvious that in amending the regulation in 1964, the Department desired to modify it so as to obviate the need for separate statements in every case where there was *any* agency involvement, and to make such filings mandatory only where the agent actually signed the offer on behalf of the offeror.

Thus, the Board adheres to its decision in *Pack*.

[2] Counsel for petitioners argued that if the Board adhered to its holding in *Pack* that separate statements must be filed where an agent affixes the facsimile signature of the offeror to the DEC, such holding should be applied only prospectively. This argument is based on the contention that Runnells' and many other lease offers were filed by DECs with the offerors' facsimile signatures affixed by Stewart. Stewart, it is said, relied in good faith on the BLM practice of accepting such offers without requiring that they be accompanied by the separate

statements of the agent and the offeror. Counsel for BLM did not oppose this request, finding support for such prospective application of the ruling in the case of *Safarik v. Udall*, 304 F. 2d 944 (D.C. Cir. 1962).

A minority of the members of this Board would apply the *Pack* decision with prospective effect only, thereby allowing Runnells and others to receive the oil and gas leases notwithstanding their acknowledged failure to comply with 43 CFR 3102.6-1(a)(2). The minority would hold that the provisions of 43 CFR 3102.6-1(a)(2) should not be applied to Runnells' offer because it was filed in good faith and in reliance on BLM's practice of verifying only that the offeror intended the facsimile to be his own, and on BLM's failure to raise the question of whether agency statements were required. It is an effort to reach an equitable result, and is apparently premised on the minority's *sub silentio* assumption that the Government should be estopped from enforcing the rule with immediate effect. However, the elements of equitable estoppel are not present.

The minority apparently bases its opinion that Runnells' lack of compliance should be waived on BLM's failure to point out the existence of this requirement prior to the filing of Runnells' offer. But the regulations provide that the authority of the United States to enforce a public right, including the right to enforce the regulations by which it is

bound (*McKay v. Wahlenmaier*, 226 F. 2d 35, 43 (D.C. Cir. 1955)), is not vitiated or lost by the failure of its officers or agents to notify a party of the existence of regulatory requirements. 43 CFR 1810.3(a). BLM should not be faulted for a failure to anticipate and warn prospective offerors against every pitfall in the regulations which might affect them, and its failure to warn of the existence of regulatory requirements does not excuse the party's failure to comply with these requirements. *Moss v. Andrus*, Civ. No. 78-1050 (10th Cir., filed Sept. 20, 1978); *Burglin v. Morton*, 527 F. 2d 486, 490 (9th Cir. 1976); *Belton E. Hall*, 33 IBLA 349, 352 (1978); *Charles House*, 33 IBLA 308, 310 (1978); *Mary Nan Spear*, 25 IBLA 34, 35 (1976); *James H. Scott*, 18 IBLA 55, 57 (1974); see *Mark W. Boone*, 33 IBLA 32, 34 (1977); *Arthur W. Boone*, 32 IBLA 305, 308 (1977); *Foster Mining and Engineering Co.*, 7 IBLA 299, 312, 79 I.D. 599, 605 (1972). In particular, the failure of BLM to give notice of the requirement for filing separate interest statements provides no basis for granting a lease in contravention of the oil and gas regulations. *Mary Nan Spear*, *supra* at 35 (1976); *James H. Scott*, *supra* at 57 (1974). Moreover, it is simply not true that Stewart received no notice of the existence of the agency-statement requirement. The drawing entry card itself contains a caveat expressly reminding all offerors that the terms of 43 CFR 3102 must be complied with. As the 10th Circuit observed in *Ballard E.*

Spencer Trust, Inc. v. Morton, 544 F. 2d 1067, 1069 (10th Cir. 1976), "[t]his is sufficient notification of the need to comply." See *Verner A. Sorenson*, 32 IBLA 341, 343 (1977); *Leon M. Flanagan*, 25 IBLA 269, 270 (1976); *Ross I. Gallen*, 15 IBLA 86, 87 (1974). In any event, all persons dealing with the Government are presumed to have knowledge of duly promulgated regulations. 44 U.S.C. §§ 1507, 1510 (1970); *Moss v. Andrus*, *supra*; *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384-5 (1947).

Nor may Runnells' lack of compliance be waived because BLM allegedly failed to enforce the provisions of 43 CFR 3102.6-1(a)(2) in the past. The Department remains obligated to enforce its regulations even where, in the past, its officers may have acquiesced in forbidden conduct by erroneously failing to apply a regulation. 43 CFR 1810.3(a); *Energy Reserves Group, Inc.*, 36 IBLA 57, 58 (1978); *Tina A. Regan*, 33 IBLA 213, 215 (1977); *Verner A. Sorenson*, *supra* at 343-4; *Leon M. Flanagan*, *supra* at 271; *Mary Nan Spear*, *supra* at 35-36; *Tenneco Oil Co.*, 8 IBLA 282, 284 (1972). The requirements of 43 CFR 3102.6-1(a) "are mandatory and where they are not followed an offer must be rejected, regardless of any contrary action alleged to have occurred on previous occasions." *Energy Reserves Group, Inc.*, *supra* at 57.

In *Mary Nan Spear*, *supra*, this Board considered a case closely analogous to the present dispute. In that case, a noncompetitive acquired

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lands oil and gas lease offer had been rejected because the offeror had failed to file with the offer a statement showing the extent of her ownership of the operating rights to a fractional mineral interest in the lands applied for which was not owned by the United States, as then required by 43 CFR 3130.4-4. This Board held that appellant's offer was properly rejected because she had failed to file this statement with her offer, as required, even though BLM had not enforced this requirement previously, saying: "Nor is the requirement for a statement vitiated by appellant's assertion that the Eastern States Office [of BLM] had disregarded the regulation in the past. Such assertion, even if established by irrefragable evidence, would not serve as a valid predicate for further disregard of the regulation." *Id.* at 35-36.

In *Tenneco Oil Co., supra*, in rejecting a similar argument where the Department had admittedly erroneously issued oil and gas leases and permits in the past, the Board held as follows: "[The Department's former action] we believe to have been error. But we cannot let a desire for consistency in action blind us to the errors of past practice. It is enough that at this point in time we recognize former mistakes in the treatment of the subject land and act accordingly." *Id.* at 284.

In *Tina A. Regan, supra*, we held, "The failure of * * * [an] offeror * * * is not excused, and the Department is not estopped to reject

such an offer, by his reliance on the Department's prior erroneous issuance of a lease in acceptance of an offer which was deficient for the same reason." (Syllabus.)

"Strict compliance with the Department's regulations may not be waived to favor an applicant who pleads good faith, ignorance of the law, or inexperience in oil and gas leasing." *W. D. Girard*, 13 IBLA 112 (1973).

This has been the stated policy of the Department from the inception of this Board. "Even if appellant was able to demonstrate conclusively that prospecting permits were wrongly issued in the past, this would not militate in favor of re-enacting the wrong in this case." *George Brennan, Jr.*, 1 ILBA 4, 6 (1970).

As Justice Jackson stated in *United States v. Bryan*, 339 U.S. 323, 346 (1950), "Of course, it is embarrassing to confess a blunder; it may prove more embarrassing to adhere to it."

On reconsideration, Stewart Capital Corp. and Runnells (petitioners) assert that 43 CFR 3102.6-1(a) (2) requires agency statements only where an offeror's agent signs the card in his own name. The minority opinion, while rejecting this interpretation, would waive their failure to comply with the agency statement requirement. Apparently, the minority feels that Runnells is entitled to be excused from the operation of this requirement because Stewart believed, in good faith, that the regulation did not apply. However, we

do not believe that Stewart's alleged good faith protects it here. Where the regulations referred to on the drawing entry card clearly prescribed the requirements for being qualified as an applicant under 43 U.S.C. § 226(c) (1970), an offer which fails to meet these requirements is properly rejected. *Moss v. Andrus, supra*; *Verner F. Sorenson, supra* at 343; *Leon M. Flanagan, supra* at 271; *Margaret Hughey Hugus*, 22 IBLA 146, 147 (1975); *Ross I. Gallen, supra* at 87. The regulation is, from any reasonable interpretation, clear on its face. The ambiguity in it alleged by Stewart and Runnells stems only from their own bizarre, unreasonable, and sophistical interpretation of its language. This Board must not grant cognizance to the subjective opinions of an effected party, particularly when unreasonable, as a basis for determining whether regulatory language is properly applied to it.

The gravamen of petitioners' entire case is rooted in their contention that 43 CFR 3102.6-1(a)(2) is ambiguous, and that therefore their reasonable interpretation of its intended meaning, even if erroneous, should not be held to have deprived them of a statutory right. The principle relied on by petitioners has long been recognized by the Department and we have applied it in appropriate circumstances. *See, e.g., Wallace S. Bingham*, 21 IBLA 266, 82 I.D. 377 (1975). But that principle has no application to this case, because the alleged ambiguity in the regulation simply does not exist. The regulation clearly and plainly

declares, "If the offer is signed by an attorney in fact or agent, it shall be accompanied by separate statements * * *." Petitioners have contrived to infuse ambiguity into this easily understood mandate by giving it an interpretation which is so bizarre and unreasonable, and so destructive of the purpose of the regulation that we simply are unable to accept it. Petitioners maintain that if an agent signs *his own name* to the offer and indicates that he is acting as agent for another, then compliance with the regulation is required; but if the agent writes or stamps *his principal's name* on the offer, compliance with the regulation is not required. This is so, petitioners contend, because when an agent writes or imprints his principal's name on the form, the agent is not "signing" the form, as it is not the agent's signature which he is writing. Therefore, runs the argument, when the signature is that of the principal, the writing of the signature by the agent is really a "signing" by the principal, not the agent, even though the principal is totally unaware of it, takes no part in it, and is not informed by his agent of its existence until after the drawing.

The purpose of the regulation is, of course, to obtain the assurance of the named offeror and the agent that the person in whose name the offer is filed is the actual offeror, and that any outstanding interest of the agent is fully disclosed. Otherwise, an unscrupulous "agent," wielding a collection of rubber-stamp facsimile signatures and list-

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ing only his own address, could file an infinite number of "dummy" offers in names taken from tombstones or telephone books, or simply invented. Alternatively, he could file offers in the name of actual principals with whom he had contracted for an interest in the lease, if issued, and the Government would have only the assurance of the agent that no such deal had been made.¹ Clearly, petitioners' completely specious interpretation of the regulation would defeat the salutary purpose of the regulation, and for that reason alone, petitioners' interpretation is unreasonable.

In the administration of the laws relating to the crime of forgery the Courts have had no reluctance to use the verb "sign" to describe the action of a person who writes the signature of another person. For example, in *Greathouse v. United States*, 170 F.2d 512 (4th Cir. 1948), the Court used the verb "to sign," or derivatives thereof, repeatedly in that context; e.g., "to sign the name of another * * * to sign a note in the name of a fictitious firm * * * signed by the defendant under a pretense that he has been authorized by an existing person to sign his name * * * signed the names of the makers * * *, etc." (Italics added.) Similarly, in *Milton v. United States*, 110 F. 2d 556, 506-61 (D.C. Cir. 1940), the Court said, "It is well settled that the signing of a

fictitious name, with fraudulent intent, is as much a forgery as if the name used was that of an existing person." (Italics added.) In *United States v. Metcalf*, 388 F.2d 440, 442 (4th Cir. 1968), the Court said "one who signs a check or other paper with a fictitious name * * *." (Italics added.) In *United States v. Bales*, 244 F. Supp. 166, 168 (D. Tenn. 1965), it was said, "[T]he Court is inclined to the view that when [defendant] signed the phony name * * *." (Italics added.) This opinion also quotes from an annotation at 49 A.L.R. 2d 852: "[T]he name signed to the instrument must purport to be the signature of some person other than the one actually signing it. Thus, under the broad definition, forgery may be committed by signing the name of a fictitious person * * *." (Italics added.)

There is a vast abundance of other cases employing the verb "sign" to describe the act of affixing a signature other than one's own. Thus, the mandate of the regulation for separate disclosures "[i]f the offer is signed by an attorney in fact or agent" cannot be avoided by the semantical contention that the offer is not "signed" by the agent if the signature he affixes thereto is that of another.

Having rejected the contention that the regulation expresses an ambiguity, we must reject the notion that petitioners' failure to comply may be waived because they allege they misunderstood it.

¹ Of course, under petitioners' theory of the case, even this limited assurance would be unverified, since the agent would not be "signing" the declaration, and his principal—if he existed—would be unaware of it.

In support of its contention that the agency-statement requirement should not apply to Runnells' offer petitioners cite *Safarik v. Udall*, 304 F.2d 944 (D.C. Cir. 1962), *aff'g Franco Western Oil Co. (Supplemental)*, 65 I.D. 427 (1958). The present situation is entirely different. In the first *Franco Western Oil Co.*, 65 I.D. 316 (1958), a statutory interpretation announced in *Associate Solicitor's Opinion*, M-36443 (June 4, 1957), was expressly overruled in favor of the opposite interpretation. Between June 4, 1957, and Aug. 11, 1958, leases were issued based on the policy formally announced and published in M-36443. After Aug. 11, 1958, these leaseholders, and others, became concerned about the status of these leases, in view of the different policy set out in the *Franco Western* decision of Aug. 11, 1958. In response to challenges against the continued validity of these leases, the Department held in *Franco Western (Supplemental)*, *supra*, that it is not "the practice of the Department to give its decisions retroactive effect so as to disturb actions taken in other cases based on an overruled interpretation of the law." *Id.* at 428. In the first *Franco Western*, *supra*, the Department had reversed a formal, written Solicitor's opinion (M-36443) announcing its holding on a point of law, which it then applied to several cases. In *Franco Western (Supplemental)*, *supra*, the Department simply recognized that parties who were granted rights by BLM pursuant to a poli-

cy, set out in a formal, written decision by the Department's official decisionmaker at the time, were entitled not to have these rights disturbed. On appeal before the D.C. Circuit, the court approved the rule set out in *Franco Western (Supplemental)*, *supra*, saying:

Where the Department of the Interior has decided that a statute should be given a different interpretation than that reflected by its earlier decisions and that such decisions should be overruled, it has been a rule in the Department since at least as far back as 1917 not to give its later decisions retroactive effect, especially when to do so would adversely affect actions taken and rights and interests acquired by private persons on the faith of the earlier decisions and would come inure to the benefit of other private persons. [Italics supplied.]

Safarik v. Udall, *supra* at 949. The court held that the revised interpretation would be given prospective application only, and that rights given to persons by BLM in following the previous official statement of the interpretation would not be disturbed. However, the prospective-operation rule is expressly limited to situations in which the Department "hands down a decision placing a different construction on a statute or regulation from that laid down in an earlier decision or regulation." *Id.* at 950 (Italics supplied); see also *Brandt v. Hichel*, 427 F.2d 53, 57 (9th Cir. 1970), allowing relief only "where the erroneous advice was in the form of a crucial misstatement in an official decision." (Italics supplied.)

The instant case is quite different. Here, we have overruled no previous

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holding concerning the agency-statement requirement on which Stewart and Runnells relied or on which parties had previously received oil and gas lease rights. There had been no official decision announcing the Department's position on this question published prior to Stewart's filing of the Runnells' offer. In such circumstances, the doctrines set out in *Safarik v. Udall*, *supra*, and *Brandt v. Hickel*, *supra*, do not apply, and we are not prevented from applying the effect of the regulation in the present case. See *Leon M. Flanagan*, *supra* at 271.

To the contrary, it is clear that we may, and should, apply this decision to the case before us, and not just prospectively. In *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947),² a landmark in judicial review of administrative procedures, the Supreme Court held as follows:

² In *Chenery*, *supra*, the Supreme Court allowed the retroactive application of a rule even though the ill effects of doing so were much greater than in the instant case. There, the SEC had ordered the parties to surrender stock purchased by them, at original cost, plus interest, despite the total absence of any previous decision by SEC by which they could have known that they were violating SEC restrictions on securities trading by purchasing the stock. Thus, the SEC's order barred the shareholders from realizing a profit on the shares in question. This totally unexpected and unforeseeable financial loss was clearly a severe "ill effect." Nevertheless, the Supreme Court did not disturb SEC's conclusion that the ill effect of voiding the purchases was outweighed by the adverse effect on securities regulation which might result from allowing the sales to stand. In the instant case, the rejection of Runnells' offer was reasonably foreseeable, had Stewart heeded the requirements of the regulations, and, therefore, the ill effect is much less onerous than that recognized as acceptable by the Supreme Court in *Chenery*.

... That [agency] action might have a retroactive effect [is] not necessarily fatal to its validity. Every case of first impression has a retroactive effect, whether the new principle is announced by the court or by an administrative agency. But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal or equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.

The instant case is, effectively, a case of first impression before the Department. The Board had previously announced in *Robert C. Leary*, *supra*; *Evelyn Chambers*, 27 IBLA 317 (1976); *William J. Sparks*, 27 IBLA 330, 83 I.D. 538 (1976); and *Rebecca J. Waters*, 28 IBLA 381 (1977), that the plain meaning of 43 CFR 3102.6-1(a)(2) applied and that, accordingly, agency statements were due where agents, such as Stewart, affixed facsimiles of offerors' signatures on the drawing entry cards on their behalf. However, Stewart had not received notice of these decisions at the time it filed Runnells' offer.

Applying the Supreme Court's analysis here, it is clear that the "ill effect" of applying the agency-statement rule to Runnells' offer is far less than the "mischief" to the oil and gas simultaneous offer system, especially the "mischief" to other qualified oil and gas offerors who would otherwise be entitled to obtain the leases affected.

The only "ill effect" of applying the rule in this case would be that

Runnells (and others who would benefit from its prospective application) will not receive a lease. On the other hand, prospective application would allow each such unqualified offeror to receive an oil and gas lease in place of another offeror who has complied with all the regulations applicable to oil and gas lease offers, and thus has statutory priority.

Such a result would be "contrary to a statutory design," in that, under 30 U.S.C. § 226 (c) (1970), only "the person first making application for the lease who is qualified to hold a lease" is entitled to receive it. This section "is *mandatory* in directing that a lease be issued to the person (a) who first makes application and (b) who is qualified under certain other sections of the Act to hold a lease." *McKay v. Wahlenmaier*, *supra* at 39 (Italics supplied). The instant case concerns the former requirement, *i.e.*, whether Runnells' application "was in such form and was filed in such circumstances that he was entitled to have it entered in the drawing. In other words, was he properly qualified as an applicant?" *Ibid*. The standards for determining whether one is "qualified as an applicant" are set by the Secretary through rules and regulations adopted for this purpose. 30 U.S.C. § 189 (1970); *Thor-Westcliffe Development v. Udall*, 314 F.2d 257, 259-60 (D.C. Cir. 1963), *cert. denied* 373 U.S. 951 (1963); *McKay v. Wahlenmaier*, *supra* at 42-43; *Ballard E. Spencer Trust, Inc.*, 18 IBLA 25, 27 (1974), *aff'd Ballard*

E. Spencer Trust v. Morton, *supra*. Unless arbitrary or capricious, each of these regulations has "the force of law" and must be met in order for an offeror to be considered to have filed a valid application. *Chapman v. Sheridan-Wyoming Coal Co.*, 338 U.S. 621, 629 (1950); *Thor-Westcliffe Development Co. v. Udall*, *supra* at 259-60; *McKay v. Wahlenmaier*, *supra* at 43.

The Board has held that Runnells did not meet one of these regulatory requirements. He did not submit a valid application, and, therefore, was not qualified as an applicant. A holding to the contrary would work the mischief of ignoring this statutory mandate at the expense of another offeror for parcel UT 1408 in the Aug. 1976 drawing in the Utah State Office, BLM, who met all the qualifications of the regulations, and who is therefore the person to whom this lease must be awarded. Allowing an unqualified first-drawn entrant to receive a lease would infringe on the rights of the second-drawn qualified offeror. *See Ballard E. Spencer Trust, Inc. v. Morton*, *supra* at 1070. *See also Boesche v. Udall*, 373 U.S. 472, 485 (1963); *Moss v. Andrus*, *supra*; *Southwestern Petroleum Corp. v. Udall*, 361 F. 2d 650, 654 (10th Cir. 1966). Moreover, to do so would be irreconcilably at odds with the Department's obligation to follow its own regulations. *McKay v. Wahlenmaier*, *supra*. This statutory mandate and the judicially directed obligation of the Department to recognize only interests of the true

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qualified offeror require that Runnells' offer be rejected.³

The closely correlative case of *Robertson v. Udall*, 349 F.2d 195 (D.C. Cir. 1965), dealt with an oil and gas applicant's failure to comply with the requirements of this same regulation (since somewhat amended) to disclose an agency interest and an agency relationship. The Court held that the discovery of this defect, upon subsequent investigation, rendered the mineral lease offers ineffective, saying, at 198:

[3] Appellants contend that there is some evidence of a departmental practice in the past to apply the agency regulation only in those cases where the lease offer purports on its face to be signed by an agent and where the agent is shown to have made the selection of the lands. In this latter respect, it is claimed that there has been no opportunity to show that appellants did in fact select their own lands. But the regulation does not, in our reading of it, say or fairly imply that these conditions attach; and, whatever may

³ As the D.C. Circuit observed in *Thor-Westcliffe Development v. Udall*, *supra*, although the Department is given permission by the Act to take certain discretionary acts, "it is [not] permitted to grant a lease to one other than 'the person first making application.'" *Id.* at 259. It is *only* by compliance with the Department's implementing regulations that one may qualify as an applicant. *Id.* at 259-60. As we observed in *Ballard E. Spencer Trust, Inc.*, *supra* at 27, *aff'd Ballard E. Spencer Trust, Inc. v. Morton*, *supra*:

"[I]f the first drawn offer is not acceptable by reason of some failure to comply with the regulation it cannot be afforded a priority as of the time it was officially filed. The next drawn offer in acceptable form earns priority as of the date and time of the simultaneous filing, and that offeror is first qualified as a matter of law to receive the lease. See 43 CFR 3112.2-1(a) (3); 43 CFR 3112.4-1; *McKay v. Wahlenmaier*, [*supra*]; *Duncan Miller*, 17 IBLA 267, 268 (1974)."

have been their recognition within the Department on other occasions, we do not think that the Secretary was disabled from applying the regulation in this instance in what clearly appears to have been not only its letter but its spirit.* * * [Italics in original.]

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision styled *D. E. Pack*, 30 IBLA 166, 84 I.D. 192 (1977), on reconsideration, is hereby affirmed and sustained.

EDWARD W. STUEBING,
Administrative Judge.

I CONCUR:

FREDERICK FISHMAN,
Administrative Judge.

I CONCUR IN THE RESULT:

JOAN B. THOMPSON,
Administrative Judge.

JOSEPH W. GOSS (Concurring separately),
Administrative Judge.

ADMINISTRATIVE JUDGE
GOSS CONCURRING:

While the case has been well argued and briefed, I feel that 43 CFR 3102.6-1(a)(2) is sufficiently clear. *Robertson v. Udall*, 349 F.2d 195, 198 (D.C. Cir. 1965), *cert. denied sub nom.*, *Miller v. Udall*, 385 U.S. 929 (1966). Accordingly, the Department must focus its concern not only on John S. Runnells, the No. 1 drawee, but also on the interests of Scott A. Harris and

Judith S. Bolander, whose cards were drawn second and third. Further, the Department must also keep in mind the interests of the second and third drawees in such cases as *Robert C. Leary*, 27 IBLA 296 (1976), decided prior to *Pack*.¹ Priority is earned not only by an offeror's card being first drawn but also by his timely filing of the required documents. 43 CFR 3112.4-1.

The dictum in *A. M. Shaffer*, 73 I.D. 293 at 300 (1966), is contrary to the view of the Circuit Court in *Robertson*, *supra*. In *Pack*, the second and third drawees Harris and Bolander had of course no opportunity to present their views during the *Shaffer* deliberations in 1966. Their interests should not now be prejudiced by application of an incorrect statement in 1966 dictum.

The penalty for noncompliance with the regulation is also sufficiently clear, despite the recodification of 1970. The penalty was previously expressly set out in the various codes. *E.g.*, 43 CFR 192.42(g) (1964); 43 CFR 3123.3(b) (1965), (1969), (1970); *Union Oil Co. of California*, 71 I.D. 287, 292 (1964), *sustained* in *Union Oil Co. of California v. Udall*, Civ. No. 2595-64 (D.D.C. filed December 27, 1965). In the revisions of May 12, 1970, sec. 3123.3(b) was transferred to sec. 3111.1-2(a) (4), which pertains to regular offers rather than simultaneous filings. It now appears as sec. 3111.1-2(d). The 1970 recodification, however, contains the fol-

lowing statement: "It is the Department's intent in this revision to make no substantive changes in the regulations." 35 FR 9502 (1970).

In *Ballard E. Spencer Trust, Inc. v. Morton*, 544 F.2d 1067 (10th Cir. 1976), the Tenth Circuit ruled in effect that the former consequences continued to obtain for failure to file the corporate information required by 43 CFR 3102.4-1, although the 1970 recodification was not discussed. The same approach has been followed by the Department in the numerous decisions cited by majority, *supra*. It is of course most logical for a similar approach to be applied for the determination of priority in all noncompetitive leasing, whether the offer be "regular" or "simultaneous."

Here the regulation does afford a corroboration as to the matters required. In *McKay v. Wahlenmaier*, 226 F.2d 35, 43 (D.C. Cir. 1955), the Circuit Court held that in the determination of priority the Secretary must give effect even to those regulations of lesser significance:

It is argued that, since the Secretary devised the regulation, he alone has the right to say what the consequences of violating it shall be. Whether that is so, we need not decide. The Secretary is bound by his own regulation so long as it remains in effect. * * * He is also bound, we think, to treat alike all violators of his regulation. He may not justify, simply by saying the violation is unimportant, his departure in a single case from an otherwise consistent policy of rejecting applications which do not conform to the regulation. [Footnote omitted.]

JOSEPH W. GOSS,
Administrative Judge.

¹ The several appeals consolidated in *Leary* are again before the Board as IBLA 77-245 *et al.*

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CHIEF ADMINISTRATIVE
JUDGE FRISHBERG DIS-
SENTING IN PART:

The specific issue that confronts us is whether Stewart knew, or should have known when it affixed Runnells' signature that the "offer [was being] signed by an attorney in fact or agent." If it knew or should have known, as the majority holds, then its (and Runnells') failure to file the statements required by 43 CFR 3102.6-1(a)(2) compels rejection of the offer. If not, Runnells should not be deprived of his statutory preference right to a lease. *A. M. Shaffer*, 73 I.D. 293 (1966).

Whether Stewart knew or should have known depends upon the applicable statutes, regulations and case precedents, if any, at the time it affixed the stamp. There is nothing helpful in the statutes. Since this offer was submitted in Aug. 1976, and since *Robert C. Leary*, 27 IBLA 296 (1976), the first case in which this Board announced its interpretation of 43 CFR 3102.6-1(a)(2) as applicable to those, such as Stewart, who affixed offerors' signature stamps, was not decided until Oct. 26, 1976, there were no prior holdings in point. Thus, Stewart and Runnells were left with the regulation itself and whatever prior decisions which shed some light on the subject, however indirectly.

I am persuaded that the language of 43 CFR 3102.6-1(a)(2), its history, its purpose, and its prior application, coupled with a reasonable

interpretation of *A. M. Shaffer*, *supra*, and *Mary I. Arata*, 4 IBLA 201, 78 I.D. 397 (1971), result as reasonably in petitioners' interpretation as in the majority's. Indeed, BLM, the Secretary's delegate in administering the Mineral Leasing Act, interpreted it as did petitioners.¹

Prior to Apr. 1964, 43 CFR 3102.6-1(a)(2), then 43 CFR 192.42(e)(4)(i), provided in pertinent part:

(e) Each offer, when first filed, shall be accompanied by:

* * * * *

(4)(i) 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 * * * by which the attorney in fact or agent or such other person is to receive any interest in the lease when issued, * * * 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, applica-

¹ This case arose from approval by BLM of the Runnells offer. As stated in the Bureau's brief and by Mr. McBride of the Office of the Solicitor in oral argument (Tr. pp. 40, 52-3, 55-6, 85, 88-9), it was the position of BLM since *Arata* that Stewart's practice of affixing offerors' signatures without filing an initial statement did not violate the agency regulation.

tions, and offers including options for such leases or interests therein exceed 246,080 acres in any one State * * *. The statement by the principal (offeror) may be filed within 15 days after the filing of the offer. [Italics added.]

On Apr. 1, 1964, the regulation was amended (and renumbered as 43 CFR 3123.2(d)(1)) by deleting the underlined portion, thus beginning as follows:

(d) (1) If the offer is signed by an attorney in fact or agent, it shall be accompanied by separate statements over the signatures of the attorney in fact or agent and the offeror * * *.

The remaining language of the regulation is essentially identical to that of its predecessor, as is the present regulation, 43 CFR 3102.6-1(a)(2). The citizenship and acreage limitation requirements remain, as does the 15-day allowance for filing a statement by the offeror.

The judicial precedents interpreting the pre-1964 regulation were discussed in *A. M. Shaffer, supra* at 299:

The regulation requiring the showing as to evidence of authority of the agent and the statement of interest by the agent formerly required the statement not only where the offer was signed by an attorney in fact or agent (as the regulation now provides) but also where the attorney in fact or agent had been authorized to act on behalf of the offeror with respect to the offer or lease, 43 CFR 192.42(3)(4) (1954 ed.). In applying this regulation, the United States Court of Appeals for the 10th Circuit found that where an offer in the name of a principal had been signed by the principal himself, but an agent had authority to act in his behalf as to the lease both before and after the offer to lease was filed, the agent was properly required to furnish the statement and the offer was defective in the absence of such a statement. Pan

American Petroleum Corp. v. Udall, 352 F.2d 32 (10th Cir. 1965), upholding *Charles B. Gonsales et al.*, 69 I.D. 236 (1962), and distinguishing, upon the basis of a difference in showing as to the agent's continuing authority, *Foster v. Udall*, 335 F.2d 828 (10th Cir. 1964), which reversed *Eugenia Bate*, 69 I.D. 230 (1962). The Court in *Pan American* and also a Court in another case applying the same regulation, *Robertson v. Udall*, 349 F.2d 195 (D.C. Cir. 1965), emphasized that the type of work performed by the undisclosed agent in preparing the forms, in some instances selecting the lands, and negotiating for the sale of the leases was the very type of agency relationship contemplated by the regulations. In the *Robertson* case, *supra*, indeed, some of those actions were not performed by the agents, yet the agency relationship and the applicability of the regulation as determined in the Departmental decision, *Evelyn R. Robertson et al.*, A-29251 (Mar. 21, 1963), was upheld.

In those cases, the name of the agent and his relationship to the principal and interest in the offer were not disclosed when the offer was filed. * * * [Italics added.]

Not only did the filing in *Robertson* offend the pre-1964 requirement to provide a statement by an undisclosed agent, but it was also found that the agent held a major interest in every filing made by each principal. In *Pan American* the only defect was failure to disclose the agency relationship.

In light of the elimination of the regulatory requirement to submit a statement by an undisclosed agent, neither case remains authority on that issue. Indeed, contrary to the holdings in both cases, we have recently held that where an entry card is signed by the offeror but completed by an agent, the separate statement by the agent required by 43 CFR 3102.6-1(a)(2) need not be

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filed. *Virginia A. Rapozo*, 33 IBLA 344 (1978); *D. E. Pack*, 31 IBLA 283 (1977).

What, then, does 43 CFR 3102.6-1(a)(2) require? The majority bases its interpretation of the regulation on its purpose, *i.e.*, in order to insure fairness to all offerors in a drawing, it is necessary to obtain the assurance of the named offeror and the agent that the person in whose name the offer is filed is the actual offeror, and that any outstanding interest of the agent is fully disclosed. But, if this is so, why did the Department eliminate the requirement of a statement by an undisclosed agent?

The answer is contained in the regulations and their interpretation by the Court in *Pan American*, *supra*, and by the Department in *Shaffer*, *supra*. The requirement was redundant and, thus, simply not necessary.² To insure against one person having an interest in more than one offer in a drawing, 43 CFR 3102.7 (formerly 3123.2(c)(3), formerly 192.42(e)(3)(iii)) provides:

§ 3102.7 Showing as to sole party in interest.

A signed statement by the offeror that he is the sole party in interest in the offer and the lease, if issued; if not he shall set forth the names of the other interested parties. If there are other parties interested in the offer a separate statement must be signed by them and by the offeror, setting forth the nature and extent

of the interest of each in the offer, the nature of the agreement between them if oral, and a copy of such agreement if written. All interested parties must furnish evidence of their qualifications to hold such lease interest. Such separate statement and written agreement, if any, must be filed not later than 15 days after the filing of the lease offer. Failure to file the statement and written agreement within the time allowed will result in the cancellation of any lease that may have been issued pursuant to the offer. Upon execution of the lease the first year's rental will be earned and deposited in the U.S. Treasury and will not be returnable even though the lease is canceled.

The requirements and limitations of each regulation, 43 CFR 3102.6-1(a)(2) and 3102.7, are clearly delineated in *Shaffer*, *supra* at 300:

The agency provisions make a clear distinction between the agent and the offeror. They also clearly refer to signing of the offer by the agent in behalf of the offeror. They should be read then to apply only to those offers where the principal is named as the offeror and the agent signs in his behalf as his agent. [Footnote omitted.] As previously pointed out, under the former wording of the regulation a statement was required even though the agent did not actually sign the offer in behalf of the offeror. The Court in the *Pan American* case, *supra*, noted (at 35) that the regulation had been replaced "by an apparently more sensible one requiring directly the disclosure of all outstanding interests in offers to lease."³ From the discussion in that case it would appear that the situation it involved would be considered covered now by 43 CFR 3123.2(c)(3), the sole party in interest regulation [now 43 CFR 3102.7]

² The majority invokes *Union Oil of Calif.*, 71 I.D. 287 (1964), to answer this argument. But that case was governed by the pre-1964 regulation. More important, its rationale was implicitly modified by the distinction subsequently made in *Shaffer* between the purpose of 3102.6 and that of 3102.7.

³ The Court was inaccurate in stating that the agency regulation had been replaced by one requiring direct disclosure. As pointed out above, both regulations were in existence in 1964, when the undisclosed agent statement requirement was deleted from the agency regulation.

and that *the agency regulation [now 43 CFR 3102.6-1(a)(2)] could, not unreasonably, be interpreted by offerors as covering only situations where the principal is named as the offeror and the agent signs the offer expressly as his agent.* [Italics added.]

While the discussion quoted is dictum, it is, to my knowledge, the only interpretation of the amended regulation published by the Department before Stewart submitted the Runnells offer.

The above-quoted distinction between the agency regulation, 3102.6-1(a)(2), and the interest regulation, 3102.7, is supported by subsec. (b) of 43 CFR 3100.0-5, "Definitions":

(b) *Sole party in interest.* A sole party in interest in a lease or offer to lease is a party who is and will be vested with all legal and equitable rights under the lease. No one is, or shall be deemed to be, a sole party in interest with respect to a lease in which any other party has any of the interests described in this section. *The requirement of disclosure in an offer to lease of an offeror's or other parties interest in a lease, if issued, is predicated on the departmental policy that all offerors and other parties having an interest in simultaneously filed offers to lease shall have an equal opportunity for success in the drawings to determine priorities.* Additionally, such disclosures provide the means for maintaining adequate records of acreage holdings of all such parties where such interests constitute chargeable acreage holdings. * * * [Italics added.]

The "sole party in interest" definition and its purposes are keyed to sec. 3102.7, entitled "Showing as to sole party in interest," rather than to the subsecs. of 3102.6, which section is entitled "Attorney-in-fact." As summarized in *Shaffer, supra* at

300: "In short, the purpose of disclosure underlying the agency provisions is satisfied by compliance with the real party in interest provision."

Thus, the purpose ascribed to 3102.6-1(a)(2) by the majority, *i.e.*, assurance of fairness to all offerors by disclosure of all interests in each offer, is, rather, the express purpose of 3102.7. This comports with the interpretation of 3102.7 by the court in *Pan American* and the Department in *Shaffer*.

True, 3102.6-1(a)(2) requires a statement by an agent as to whether or not there is an agreement between him and the offeror by which the agent has or is to receive any interest in the lease and, if so, the citizenship and acreage interests of the agent. Since the statement of interest is also required by 43 CFR 3102.7, and since an undisclosed agent need not file a statement pursuant to *Rapozo, supra*, and *Pack, supra*, 3102.6 can only be read as a complement to 3102.7, a safety device. That is, when the offer is signed by an agent as an agent, the Department is put on notice that a person other than the named offeror is not only involved in preparing or submitting the offer, but may have an interest in the offer. Accordingly, when that person signs as an agent he must divulge evidence of his authority to bind the offeror (3102.6-1(a)(1)) and of any agreement giving him an interest in the offer. 3102.6-1(a)(2). But, since 3102.7 always requires all interests in the lease offer to be divulged, the 3102.6 requirement is only triggered where "the principal is named as the offeror and the agent

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signs the offer expressly as his agent." *Shaffer, supra*.

In this case Stewart affixed the signature stamp of Runnells with the latter's consent. The stamp was a reproduction of Runnells' written signature. In *Mary I. Arata, supra*, we held that a stamped signature on a simultaneous oil and gas lease offer was acceptable, "provided it was the applicant's intention that the stamp be his signature." *Id.* at 4 IBLA 203-4.⁴ And, as held by at least one case cited in *Arata* and others, the stamp need not be affixed by or in the presence of the person whose signature it purports to be. *Joseph Denunzio Fruit Co. v. Crane*, 79 F. Supp. 117 (S. D. Cal. 1948), *vacated on other grounds*, 89 F. Supp. 962 (S. D. Cal. 1950), *rev'd*, 188 F.2d 569 (9th Cir. 1951), *cert. denied*; 342 U.S. 820 (1951); *Kadota Fig Ass'n of Producers v. Case-Swayne Co.*, 73 C.A. 2d 815, 167 P.2d 523 (1946). In *State v. Liberty National Bank and Trust Co.*, 414 P.2d 281, 286-7 (Okla. 1966), the Supreme Court of Oklahoma held it to be:

[t]he fundamental rule that when an agent, acting within the scope of his authority, affixes the name of his principal to a writing, it is, in law, equivalent to an actual signing by the principal. *Elliott v. Mutual Life Ins. Co.*, 185 Okl. 289, 91 P.2d 746; 3 Am. Jur. 2d Agency, Section 261. In the instant case, the defendant, by its stamped endorsement, guaranteed to the plaintiff that the payee's signature upon each warrant was genuine and it is.

Even though affixed by Stewart, it

⁴ Prior to *Arata*, BLM had consistently rejected oil and gas lease offers having a stamped signature.

was obviously Runnells' intent that the stamp be his signature, and it was, as he so indicated in an affidavit dated Oct. 26, 1976. At that time the BLM State office dismissed the protest of Pack and was prepared to issue an oil and gas lease to Runnells.

If Runnells had personally affixed the stamp to a blank card and Stewart had acted identically in selecting the parcel, preparing the card, etc., the Board would have held that no statement by Stewart was required by 43 CFR 3102.6-1 (a) (2). *Evelyn Chambers*, 31 IBLA 381 (1977).⁵ There is no material difference between that case and the factual situation before us. In both Stewart is an undisclosed agent with discretion to select the parcel, submit the card, etc.⁶ In both cases Runnells intended the stamped signature to be his signature. In both cases Runnells is the sole party in interest.⁷ Moreover, in both cases this Board regards the stamped signature as that of Runnells. Finally,

⁵ Although in *Robert C. Leary, supra*, and subsequent cases we held that since a facsimile signature does not raise a presumption that it was affixed with the intent of the offeror, it is proper for BLM to require the offeror to supply a statement of the circumstances under which the stamp was imprinted and the offers formulated. If, on the other hand, the offeror's signature is holographic, then it matters not whether the card was blank when signed and an undisclosed agent designated the parcel, submitted the offer, etc. Such an offer has been held to be perfectly proper on its face. *Virginia Rapozo, supra*.

⁶ Unlike the situation in *Ballard E. Spencer Trust, Inc.*, 544 F.2d 1067 (9th Cir. 1976), where 43 CFR 3102.4-1 clearly requires a corporate offeror to submit evidence of its corporate qualifications.

⁷ Unlike the facts in *Robertson, supra*, and *McKay v. Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955), both cited by the majority in support of its position. In those cases the agent had an undisclosed interest in the lease offers.

in both situations opportunities for mischief exist.⁸

Clearly, 43 CFR 3102.6-1(a) (2) is at best ambiguous as to the need for Stewart to have filed the separate agency statements required therein. Moreover, there is ample authority that Stewart's and Runnells' interpretation of that regulation, in light of *Arata*, the other applicable regulations and case precedents, both Departmental and judicial, is the correct one. This was also BLM's interpretation and guided the practice of most of its officials administering oil and gas lease offers for 5 years, between Dec. 30, 1971 (*Arata*), and Oct. 26, 1976 (*Leary*). Under comparable circumstances the Department has stated that lease offers drawn first in a simultaneous filing would not be rejected, even though the applicants had not complied with Departmental regulations. *A. M. Shaffer, supra*. The effect of ambiguity in the regulations and the Department's holding in *Shaffer* are summarized by the following excerpts from the decision:

In considering whether regulations should be interpreted to the detriment of persons seeking oil and gas leases who would have a statutory preference to a lease, * * * the regulations should be so clear that there is no basis for the applicants' noncompliance, and if there is doubt as to their meaning and intent such doubt should be resolved favorably to the applicants. See *William S. Kitroy et al.*, 70 I.D. 520 (1963); *Donald C. Ingersoll*, 63 I.D. 397 (1956).

⁸ The possibility of the manufacture and use of fictitious signature stamps based upon voting lists, cemetery registers, etc., is not appreciably increased where only the offeror can affix the stamp. Even where the offeror must physically sign the cards, similar possibilities of forgery and chicanery exist.

73 I.D. at 298.

It is true that the Shaffer offers did not comply with the agency provisions when filed since they were not accompanied by evidence of the authority of the agent to sign in behalf of the offerors nor was there submitted with them the statement required of an agent concerning his arrangements with his principal. However, it is our conclusion that the agency provisions are not so clearly applicable that appellants should be held in compliance with them.

Id. at 299-300.

* * * The interests of both the agent and principal have been revealed so neither of them could obtain any advantage in a drawing of simultaneously filed offers. The qualifications of both to hold a lease have been set forth so there is no question in that respect. In short, the purpose of disclosure underlying the agency provisions is satisfied by compliance with the real party in interest provision [*i.e.*, now 43 CFR 3102.7].

Since neither the letter nor the spirit of the agency regulation has been clearly violated in these circumstances, we believe that any doubt as to the application and interpretation of the regulation should be resolved in the appellants' favor and that they should not be penalized for failing to comply with provisions of the regulation whose applicability is far from certain.

Id. at 300.

The majority makes much of the proposition that because Runnells is not a qualified offeror, he cannot defeat the statutory preference rights of qualified offerors drawn second and third, citing *McKay v. Wahlenmaier, supra*; *Robertson, supra*; *Ballard E. Spencer Trust, Inc., supra*, and other cases. But this begs the question. As pointed out in footnotes 5 and 6, the offerors in these cases either had interests in other leases or did not comply with the requirements of other regulations.

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Here, as in *Shaffer*, the only defect was the lack of an accompanying statement of the agent's interest. As in *Shaffer*, neither Runnells nor Stewart violated the substantive requirements of 43 CFR 3102.6 or 3102.7. And, as in *Shaffer*, the "agency provisions are not so clearly applicable that [petitioners] should be held in compliance with them."

Accordingly, although I concurred in the decision we are reconsidering, *D. E. Pack*, 30 IBLA 166, 84 I.D. 192 (1977), I would vacate that decision and affirm the decision of BLM awarding the lease to Runnells. However, because I agree with the majority that 43 CFR 3102.6-1 (a)(2) should properly be interpreted as requiring submission of the separate statements by agent and offeror where the agent affixes the signature of the offeror, I would hold that such interpretation and the requirements that flow therefrom be applied prospectively. See *Safarik v. Udall*, 304 F.2d 944 (D.C. Cir. 1962).

This leaves the question of the date from which the requirements were or should be required. The earliest date would be that of dissemination of the first decision in which we so interpreted the regulation, *Robert C. Leary, supra*; its date was Oct. 26, 1976. Since dissemination of that decision took some time, a reasonable date would be Jan. 1, 1977.

Since *Leary*, Stewart and its offeror clients have been attempting to comply with that holding and its interpretation of the requirements of 3102.6 by submitting statements

of interest by agent and offeror. The latter's signature is affixed—presumably by Stewart—by the same signature stamp as that on the offer. This practice has been condoned by many officials of BLM. When the problem reaches us, as it inevitably must, application of the majority rationale would compel the conclusion that the offerors' statements must be signed by the offeror personally. The question that follows is whether the offeror may affix his signature by stamp or must sign by hand. In fairness to BLM, petitioners and the public, and since the practice germinated from our decision in *Leary*, I feel that we can and should rule on that question now, for it flows directly from the issue before us, coupling that ruling with our holding in this case.

Therefore, I would hold that this decision, requiring the submission of the statements required by 43 CFR 3102.6, be prospective and take effect Jan. 1, 1979. This would provide sufficient time for its dissemination. In addition, it is my opinion that the past practice of signing such statements by affixing the stamp of the offeror was not clearly in violation of 3102.6, regardless of by whom affixed. Thus, those offerors whose signatures were so affixed "should not be penalized for failing to comply with provisions of the regulations whose applicability is far from certain." *Shaffer, supra*. However, I would hold that from Jan. 1, 1979, such statements must be signed by the offeror in ink and by hand.

Unfortunately, 43 CFR 3102.6-1

(a) (2) remains ambiguous, as does 43 CFR 3112.2-1(a), requiring offers to lease to be "signed and fully executed by the applicant or his duly authorized agent in his behalf," which led to our holding in *Arata*. Nor has this Board been a model of clarity. While Mary Arata submitted an affidavit that she stamped the card with the intention of it being her signature, the Board never stated that the stamp need be affixed by the offeror. On the contrary, our language was quite broad, and, in conjunction with the cases cited, implied that the offeror's intent should govern, not who stamped the card.

I feel the Board was correct in its holding on the narrow issue confronting it in *Arata*. However, it was obvious to us and should have been obvious to the Department that in order to resolve one ambiguity we raised others. I seriously question whether the Department intended to provide in 43 CFR 3112.2-1(a) that simultaneous offers could be signed with a stamp—by the offeror, agent, attorney-in-fact, or anyone else. I doubt that the Department contemplated use of a stamp when it decided *Shaffer*. But our function is the interpretation and application of existing law and policy, not their formulation. Granted, interpretation and formulation are not always capable of separation. Nevertheless, judicial restraint is imposed upon us in a very real sense and we must be wary of rulemaking by adjudication. Thus, we hoped the Department would resolve the regulatory ambiguities that lead to and flowed from *Arata* by rulemaking. Unfor-

tunately, it never did. The public, BLM, and the Board were left to grapple with the ensuing problems on an *ad hoc* basis.

In his memorandum of Dec. 19, 1977, directing the Board to reconsider its earlier decision herein, the Secretary stated as follows:

The issue intended to be covered * * * [is]

Whether the formulator/amanuensis test applied by the Board in *Pack* is appropriate to determine the applicability of 43 CFR 3102.6-1(a) (2) (1976) when someone other than the offeror both completes the drawing entry card and, with the consent of the offeror, affixes the offeror's signature to the card?

The Board, of course, may exercise its discretion and consider other issues presented by that case.

In addition, the Board may consolidate the reconsideration of *Pack* with other cases presenting similar issues. * * *

The Board in its Order of Mar. 31, 1978, granting reconsideration and scheduling a pre-briefing conference, limited the proceeding to the formulator/amanuensis issue defined by the Secretary.

Therefore, although I would be tempted to overrule *Arata*, with prospective effect, and interpret 3112.2-1(a) as requiring holographic signatures, such holding would be manifestly unfair to all parties before us. However, I urge the Department to consider such an amendment, as well as others, in order to clarify its intentions regarding the simultaneous filing procedures.

NEWTON FRISHBERG,
Chief Administrative Judge.

I CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

IN FLORIDA

November 14, 1978

**CRIMINAL JURISDICTION ON THE
SEMINOLE RESERVATIONS IN
FLORIDA****Indians: Criminal Jurisdiction—
Indian Tribes: Jurisdiction—Indian
Tribes: Sovereign Powers**

An Indian tribe may exercise criminal jurisdiction over its members concurrently with a State where the State has assumed jurisdiction over the tribe's reservation pursuant to Act of Aug. 15, 1953, Pub.L. 280, 67 Stat. 588, 18 U.S.C. § 1162 (1976).

The letter of the Assistant Secretary to the Minneapolis Area Director, dated June 4, 1954; Solicitor's Opinion M-36241, Sept. 22, 1954; and the Solicitor's Memorandum of Feb. 13, 1961, to the Regional Solicitor, Portland, are overruled as far as inconsistent with this opinion.

M-36907

*Nov. 14, 1978***OPINION BY SOLICITOR
KRULITZ, OFFICE OF
THE SOLICITOR****TO: ASSISTANT SECRETARY—
INDIAN AFFAIRS****ATTN: CHIEF, DIVISION OF LAW
ENFORCEMENT SERVICES****FROM: SOLICITOR****SUBJECT: CRIMINAL JURISDIC-
TION ON THE SEMINOLE RESER-
VATIONS IN FLORIDA**

This responds to your request of Mar. 31, 1978, for an opinion on the

jurisdictional status of the three Seminole reservations in Florida: Big Cypress, Brighton and Hollywood. Since the attachments to your memorandum indicate that the tribe and the State are concerned with development of a law enforcement program, I will limit this discussion to criminal jurisdiction.

Florida has assumed criminal jurisdiction over the Seminole reservations pursuant to Act of Aug. 15, 1953, Pub. L. 280, 67 Stat. 588, 18 U.S.C. § 1162 (1976). See Florida Statutes § 285.16. Also, by § 285.061, Florida authorized the transfer of certain State reservation lands to the United States in trust for the Seminole Tribe, reserving criminal jurisdiction over them in accordance with § 285.16. Thus, Florida clearly has authority to exercise criminal jurisdiction over the Seminole reservations.

Florida has, by Florida Statutes § 285.17 and § 285.18, created a special improvement district within the Seminole reservations, designated the governing body of the Seminole Tribe as the governing body of the special improvement district, and vested the tribal governing body with certain law enforcement powers under State law, particularly the power to plan and implement law enforcement programs for the benefit of tribal members and the power to employ personnel to exercise law enforcement powers, including the investigation of violations of any of the criminal laws of the State occurring within

85 I.D. No. 12

the reservations. Sec. 285.18 further provides that all law enforcement personnel employed shall be considered peace officers for all purposes and shall have the authority to bear arms, make arrests, and apply for, serve, and execute search warrants, arrest warrants, *capias*, and other process of court, within the reservations. It also requires, however, that all law enforcement officers employed meet certain State standards, which are enumerated in § 943.13. In exercise of the powers delegated to it by the State, the tribe is, of course, subject to the superior authority of the State.

The question whether the tribe may, apart from its State-delegated powers and in exercise of its sovereign authority, enact its own law and order code, establish a tribal court and authorize tribal police to enforce tribal law depends upon whether the tribe possesses criminal jurisdiction, by virtue of its sovereignty, concurrently with the Pub. L. 280 jurisdiction exercised by the State. As you know, this office has already expressed the view that Pub. L. 280 did not divest Indian tribes of their part of the previously-existing concurrent Federal-tribal jurisdiction but transferred only Federal jurisdiction to the States. *See* Memorandum of the Acting Associate Solicitor for Indian Affairs, July 13, 1976. Similarly, in response to an analogous question, that office concluded, on Apr. 11, 1978, that the Kickapoo Tribe of Kansas retained the power to exercise criminal jurisdiction over Indians on its lands concurrently with

the State and the Federal Government after passage of the Act of June 8, 1940, 54 Stat. 249, 18 U.S.C. § 3243 (1976), which conferred on the State of Kansas criminal jurisdiction over offenses committed by or against Indians on Indian reservations.

Since you have again raised the question, and since the Department has, in the past, taken a position contrary to the current one, we will attempt to address the issue in more detail.

The earlier position of the Department was that Pub. L. 280 vested exclusive criminal jurisdiction in the States, and this position found expression as late as 1970. *See* the Department's letter on the Metlakatla Amendment to Pub. L. 280 by the Act of Nov. 25, 1970, 84 Stat. 1358, in House Report 1545, 91st Cong. 2nd Sess. (1970). The Department did not always act consistently with that position, however, even prior to the 1976 memorandum from this office.

Several tribes in Pub. L. 280 States, including the Miccosukee Tribe in Florida,¹ were certified in 1973 as performing law and order functions for purposes of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197. *See* 38 FR 13758-13759. The Seminole Tribe of Florida was certified in 1975. 40 FR 22152.

The Department's former position was apparently first enunciated

¹ An amendment to the Miccosukee Constitution authorizing the Miccosukee Business Council to enact a law and order code was approved by the Acting Commissioner of Indian Affairs on Mar. 31, 1977.

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in a letter, dated June 4, 1954, from Assistant Secretary Lewis to the Area Director in Minneapolis. That letter stated:

Although there has been no interpretation of the act of Aug. 15, 1953 (Public Law 280-83d Cong.), by the Federal courts, it is our view that the act, by providing that the State shall have jurisdiction over crimes and offenses committed by or against Indians in the Indian country *to the same extent* that the State has jurisdiction over crimes and offenses committed elsewhere within the State, except as limited in Section 2(b), made such jurisdiction of the State exclusive. The extent of the State's jurisdiction is full and complete and permits of no such jurisdiction by any other body save the Federal Government and subordinate agencies of the state itself. The act also explicitly states that the criminal laws shall have the same force and effect within Indian country as they have elsewhere within the State. The effect of this provision clearly is to extend both the substantive and procedural laws of the State to crimes committed by Indians. Thus, State law defines not only the criminal offenses against the State and the penalties therefor, but it also defines the courts in which and the manner in which persons accused of committing such offenses are to be tried. (*Italics in original*)

That view was adhered to, without further analysis, in later documents.² However, the position seems never to have been the subject of any considered legal analysis and now appears to be in conflict with principles enunciated in recent decisions of the Supreme Court.

The apparent rationale of the view set forth in the 1954 letter does

not, in fact, withstand analysis. That view appears to rest entirely on an assumption that the exercise of tribal jurisdiction would in some way lessen the States' jurisdiction. The exercise of tribal jurisdiction, however, would not and could not deprive the States of any jurisdiction. It is well established that exercise by one sovereign of jurisdiction over criminal offenses is not a bar to exercise of jurisdiction over the same offenses by another sovereign, and it is now clear that Indian tribes are sovereigns separate, not only from the States, but from the Federal Government as well. *See, United States v. Wheeler*, 4.5 (U.S. Supreme Court, No. 76-1629, March 22, 1978) and cases cited therein. Thus, the fact that an Indian tribe exercised jurisdiction over certain offenses would not affect the right of the State to exercise jurisdiction over the same offenses. The State would continue to have, within the tribe's reservation, that jurisdiction which P.L. 280 conferred, *i.e.*, jurisdiction "to the same extent that such State has jurisdiction over offenses committed elsewhere within the State."

The ultimate question, of course, is whether the sovereign power of Indian tribes in P.L. 280 States to exercise criminal jurisdiction over Indians within their reservations has been withdrawn. The Supreme Court held, in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), that sovereign tribal powers could be withdrawn expressly by treaty or statute or by implication

² Solicitor's Opinion M-36241, Sept. 22, 1954; Memorandum of the Solicitor, Feb. 13, 1961.

as a necessary result of the dependent status of Indian tribes. *Oliphant* at p. 17; *Wheeler, supra* at p. 10. In *Wheeler*, the Court held that the power to prosecute members for tribal offenses did not fall within the part of sovereignty which could be lost implicitly by virtue of dependent status. *Wheeler* at p. 12. It follows then that only by express act of Congress may this power be terminated.

P.L. 280 explicitly withdrew Federal jurisdiction in Sec. 2(c) of the Act; it did not, however, explicitly withdraw tribal jurisdiction. A withdrawal of tribal jurisdiction by necessary implication might reasonably be inferred if continued tribal jurisdiction were inconsistent with State jurisdiction. Yet, as discussed above, there is no inherent inconsistency in the concurrent exercise of criminal jurisdiction by the tribes and the States.

Rather than conflicting with the Congressional purpose in conferring jurisdiction on the States, in fact, the establishment of viable tribal law enforcement systems would further that purpose. The legislative history of P.L. 280 makes abundantly clear that the overriding intent of Congress was to overcome the "problem of lawlessness on Indian reservations and the absence of adequate tribal institutions for law enforcement." *Bryan v. Itasca County*, 426 U.S. 373, 379 (1976).³ Tribal law en-

forcement programs conducted in addition to, or in conjunction with, State programs would even more effectively carry out the purpose of the statute. Since continued tribal jurisdiction would not be inconsistent with, and in fact would further, the purpose of P.L. 280, it cannot be said that tribal jurisdiction was expressly or by necessary implication withdrawn by that statute.

Moreover, construction of the jurisdiction conferred on the States by P.L. 280 as exclusive of tribal jurisdiction would have an incidental, but not insignificant, anomalous result with respect to the disparate treatment of tribes in the "mandatory" States (those listed in the statute) and tribes in the "optional" States (other States given permission to assume jurisdiction). Congress excepted from the grant of jurisdiction to the mandatory States those reservations which this Department had reported as having reasonably satisfactory law and order systems and which objected to State jurisdiction.⁴ (The effect of these exceptions, of course, was to preserve the existing Federal-tribal jurisdictional scheme.) The optional States were authorized to assume jurisdiction without regard to the adequacy of tribal law enforcement systems. If the assumption of jurisdiction by these optional States is construed as ousting tribal jurisdiction, then Congress must be seen as having conferred upon those States the power to do what it declined to do itself with respect to tribes in the mandatory

³ See also S. Rep. 699, 83rd Cong. 1st Sess. (1953); Hearings on H.R. 459, *et al.*, before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 82nd Cong., 2nd Sess., p. 14 *et seq.* (Statement of Rep. D'Ewart).

⁴ S. Rep. 699, *supra*, note 3, at 6.

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States, *i.e.*, disband satisfactory tribal law and order programs. If, however, State jurisdiction is construed as concurrent with tribal jurisdiction, such an anomolous result is avoided.

In *Bryan v. Itasca County, supra*, the Supreme Court construed the civil jurisdiction provisions of Pub. L. 280, holding that these provisions did not impliedly authorize State taxation of Indian property. The Court found that Pub. L. 280 was not meant to effect total assimilation or to undermine tribal governments. 426 U.S. at 387-388. The right to enact and enforce criminal laws against members has always been recognized as a fundamental aspect of tribal self-government, as the Supreme Court has recently reaffirmed. *United States v. Wheeler, supra* at p. 8. The removal of this power would clearly have the effect of undermining tribal self-government, and such a result should not, consistent with the Supreme Court's interpretation of Pub. L. 280 in *Bryan* and with the principles enunciated in that case, be inferred.

Another recent decision of the Supreme Court gives added weight to our reluctance to read into Pub. L. 280 an implied withdrawal of tribal criminal jurisdiction. In *Santa Clara Pueblo v. Martinez* — U.S. — (No. 76-682, May 15, (1978), the Court declined to find in the Indian Civil Rights Act, Act of Apr. 11, 1968, 82 Stat. 73, 77, 25

U.S.C. §§ 1301-1303 (1976), an implied Federal remedy beyond the habeas corpus remedy provided in the statute. The Court found, *inter alia*, that an implied remedy, which would constitute an intrusion into tribal sovereignty, was not plainly required to give effect to Congress' objective in the statute. (Slip opinion at pp. 11-12, 15). In like manner, an implied withdrawal of tribal criminal jurisdiction, a clear intrusion into tribal sovereignty, is not required to give effect to Congress' objective in Pub. L. 280.

The recent decisions of the Supreme Court, taken together, indicate that such a fundamental sovereign power as law enforcement authority may not be withdrawn by statutory implication when such an implication is not necessary to the objective of the statute. I conclude, therefore, that the Seminole Tribe of Florida retains the sovereign power to enact its own law and order code, establish a tribal court and authorize tribal police to enforce tribal law.

The letter of the Assistant Secretary dated June 4, 1954; Solicitor's Opinion M-36241, Sept. 22, 1954; and the Solicitor's Memorandum of Feb. 13, 1961, are overruled as far as they are inconsistent with this opinion.

LEO M. KRULITZ,

Solicitor.

ESTATE OF ELLEN PHILLIPS

7 IBIA 100

Decided *December 6, 1978*

Appeal from an order denying petition for rehearing.

AFFIRMED.**1. Indian Probate: State Law: Applicability to Indian Probate, Interstate Estates: Generally**

Under sec. 5 of the General Allotment Act, 25 U.S.C. § 348 (1976), the Department is required to apply the law of the State in which the allotment is located in determining the heirs of the deceased allottee.

2. Indian Probate: Homestead Right: Generally

The Department of the Interior has recognized homestead rights in those cases where such rights have been found necessary and purposeful in the distribution of interstate estates under State law.

APPEARANCES: Michael I. Jeffery, Esq., Alaska Legal Services Corp., for appellant Shirley Phillips.

OPINION BY CHIEF ADMINISTRATIVE JUDGE WILSON**INTERIOR BOARD OF INDIAN APPEALS**

Ellen Phillips, hereinafter referred to as decedent, an Alaskan Native, died, intestate on Oct. 2, 1978, possessed of an undivided one-half interest in restricted property described as Lot 11, Block 42, Barrow Townsite, United States Survey 4615.

A hearing was duly held and concluded at Barrow, Alaska, on Sept. 29, 1977. From the evidence adduced therein Administrative Law Judge William E. Hammett on Nov. 23, 1977, issued an order determining heirs wherein he found the decedent's heirs to be Shirley Phillips, husband, and Samuel Ekosik, adopted son, each entitled to one-half of decedent's interest in the above-described property pursuant to the laws of intestate succession of the State of Alaska (§ § 13.11.010 (4) and 13.11.015 (1), Alaska Stat. 1972).

The judge also found that the property involved herein was on July 26, 1965, through a Native restricted townsite deed, conveyed to the decedent and appellant as tenants in common rather than tenants by the entirety.

A petition for rehearing, dated Jan. 22, 1978, was filed by the appellant on Jan. 27, 1978. In support of the petition appellant alleged that the judge in his order of Nov. 23, 1977, misstated Alaska law in the following respects: (1) In finding that the decedent's interest in the property in question was that of a tenant in common, and (2) In failing to find that homestead and other statutory rights were applicable.

The judge on Feb. 28, 1978, denied the petition for the following reasons:

(1) That a tenancy in common was created in the property by the trustee's deed of July 26, 1965, pursuant to Alaska law (AS 34.15.110)

December 6, 1978

in effect at that date which provided as follows:

A conveyance or devise of land or an interest in land made to two or more persons, other than executors and trustees, as such, shall be construed to create a tenancy in common in the estate, unless it is expressly declared in a conveyance or devise that the grantees or devisees take the lands as joint tenants.

He further found petitioner's argument that a tenancy by the entirety was created by a 1970 amendment¹ was without merit in view of the fact that the amendment had no retroactive effect, thus, leaving unchanged the quality of the tenancy created by the deed of July 26, 1965, *i.e.*, a tenancy in common.

(2) That the Departmental decisions in the *Estates of Titus Jug (Jugg)*, 36846-33, and *Alex Horned Eagle*, 36360-35, were controlling in not recognizing homestead rights on trust lands.

Having determined that the appellant and the adopted son inherited equally as tenants in common the judge followed the precedents set forth in *Jug (Jugg)*, and *Horned Eagle*, *supra*. Accordingly, he gave no recognition to the homestead allowance and other special rights.

¹ Section 34.15.110 was amended in 1970 and now reads as follows:

"(a) A conveyance or devise of land or an interest in land made to two or more persons, other than to executors and trustees, as such, shall be construed to create a tenancy in common in the estate, except as provided in (b) of this section.

"(b) A husband and wife who acquire title in real property hold the estate as tenants by the entirety, unless it is expressly declared otherwise in a conveyance or devise. The conveyance shall recite the marital status of the parties acquiring title to the real property."

[1] There appears to be no argument that the Alaska laws of intestate succession are applicable in this case. Under sec. 5 of the General Allotment Act, 25 U.S.C. § 348 (1976), the Department is required to apply the law of the State in which the allotment is located in determining the heirs of the deceased allottee.²

However, while obligated to apply State laws of descent or inheritance, the determination and settlement of all other questions or controversies concerning the heirship to allotted and other restricted Indian lands is vested solely in the Secretary, uncontrolled by the laws of a State or court decisions construing State law. *Estate of Lucy Thompson*, 60 I.D. 125, 127 (1948); *Bertrand v. Doyle*, 36 F.2d 351 (10th Cir. 1929); *First Moon v. White Tail and United States*, 270 U.S. 243 (1926); *Hallowell v. Commons*, 239 U.S. 506 (1916); *Lane v. Mickadiet*, 241 U.S. 201 (1916).

Clearly, the issue of whether homestead and other similar rights are to be recognized on trust or restricted lands falls within the jurisdiction of the Secretary. In order to resolve such issue one must look to Federal statutes and Departmental regulations and decisions. We find no Federal statute which mandates recognition of homestead

² 25 U.S.C. § 348 in pertinent part provides: "The United States does and will hold the land thus allotted, * * * in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in the case of his decease, of his heirs according to the laws of the State or Territory where such land is located, * * *."

rights or allowances in restricted allotments. Neither do the regulations, 43 CFR 4.200 *et seq.*, make such allowances or rights mandatory. Under 43 CFR 4.240(a)(5) an administrative law judge is required to make a determination of any rights of dower, curtesy or homestead which may constitute a burden upon the interest of the heirs.

In the instant case, the judge in the absence of specific statutes and regulations mandating homestead and other special rights, looked to past decisions of the Department on the subject. In so doing he found and concluded the decisions of *Jug* (*Jugg*), and *Horned Eagle*, *supra*, to be controlling and determinative of the issue insofar as this estate is concerned.

Homestead rights and similar rights are generally accepted and recognized in the majority of the States for the specific purpose of protecting the surviving spouse and dependent children from creditors and from levy and forced sales. 40 Am. Jur. 2d, *Homestead* § 53. Homestead rights generally are not intended to operate to the prejudice of cotenants or deprive them of their enjoyment of the property. *Cole v. Coons*, 178 P.2d 997 (Kan. 1947); *Cooley v. Shepherd*, 225 P.2d 75 (Kan. 1950); *Sayers v. Pyland*, 161 SW.2d 769 (Tex. 1942), 140 ALR 1164; 4A *Thompson*, Real Property, Estates in Freehold, sec. 1937.

[2] The Department of the Interior has recognized homestead

rights whenever such rights have been found necessary and purposeful in the distribution of intestate estates under State law.

Considering the present case along the foregoing recognized concepts concerning homestead rights or allowances, we fail to see the necessity of invoking the Alaskan laws of homestead allowances. In a first instance there are no creditors seeking satisfaction of any indebtedness. Assuming *arguendo* that there were creditors they could not in any event levy and force a sale of the trust or restricted lands in satisfaction of claims unless with the approval of the Secretary of the Interior. 25 U.S.C.A. § 412(a) and 48 U.S.C.A. § 355(a). Accordingly, insofar as this estate is concerned, recognizing homestead allowances and other special rights would serve no useful purpose as the surviving husband's tenure in the property involved is already amply protected and assured.

Appellant further contends that sec. 13.11.125 of the Alaska statutes creates a right to a homestead allowance in the amount of \$12,000 in the surviving spouse. Accordingly, the appellant contends that he is entitled to the entire estate to the exclusion of the other heir, Samuel Ekosik, since the amount of the homestead allowance exceeds the value of the estate. We disagree. To do so would disregard completely the Alaska laws of intestate succession. We do not believe the Alaskan legislature intended the homestead allowance provision to serve as a

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means of disinheritance where the amount of the homestead allowance exceeds the value of the estate. The appellant cites no authority to substantiate his contention.

Appellant's final argument is that the rationale underlying the decisions in the *Estate of Jug (Jugg)*, and *Horned Eagle, supra*, is inapposite in the context of this case. Specifically, appellant contends that because the decedent had no cotenants other than the appellant, there is no possibility of cotenants being deprived of their rights if the homestead allowance is recognized. This argument, like the other contention is likewise unacceptable as being without foundation or merit.

As previously indicated, the judge found the decedent and the appellant held the property in question as tenants in common and not as tenants by the entirety. Accordingly, the decedent's interest in the property passed to the surviving spouse and the adopted son as tenants in common in accordance with Alaska law, secs. 13.11.010(4) and 13.11.015(1). Under such circumstances we find the rationale of the *Horned Eagle* case, *supra*, regarding cotenants to be applicable and dispositive of this case.

In view of the reasons set forth above we find no reason to disturb the judge's decision of Feb. 28, 1978, and it should be affirmed.

NOW, THEREFORE, by virtue of the authority of the Secretary of the Interior, 43 CFR 4.1, the Order

Denying Petition for Rehearing of Jan. 22, 1978, is affirmed and the appeal is dismissed.

This decision is final for the Department.

ALEXANDER H. WILSON,
Chief Administrative Judge.

I CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

UNITED STATES

v.

FRANK AND WANITA MELLUZZO

38 IBLA 214

Decided December 7, 1978

Appeal from a decision of Administrative Law Judge George A. Koutras declaring null and void 38 lode mining claims situated in Maricopa County, Arizona. AZ 9911, 9912, 9913.

Affirmed.

1. Mining Claims: Discovery: Generally

A discovery exists only where minerals have been found in quantities such that a person of ordinary prudence would be justified in the further expenditure of his labor and means with the reasonable expectation of developing a valuable mine.

2. Mining Claims: Discovery: Generally

A prudent man would be justified in expending his labor and means in developing an unpatented mining claim only

where it appears that the mineralization on the claim in question is valuable enough to yield a fair market value in excess of the costs of its extraction, removal, and sale.

3. Mining Claims: Discovery: Generally

When the Government through the testimony of an expert mineral examiner has alleged a lack of valuable mineralization, the burden of showing the contrary by a preponderance of the evidence shifts to the contestees.

4. Mining Claims: Discovery: Generally

Isolated showings of high assay values will not suffice to establish a discovery, especially where the claimants have attempted little or no development of the alleged mineral discovery.

5. Mining Claims: Discovery: Generally

The sale of decorative building stone from the surface of a lode mining claim cannot support a claimant's contention that a valuable mineral discovery has been made on such lode claim, decorative stone being locatable only under the provisions of the placer mining laws, 30 U.S.C. § 161 (1976), and only where such stone is shown to be an "uncommon variety" within the meaning of 30 U.S.C. § 611 (1976).

APPEARANCES: Tom Galbraith, Esq., Louis & Roca, Phoenix, Arizona, for contestees; Fritz L. Goreham, Esq., Office of the Field Solicitor, Department of the Interior, Phoenix, Arizona, for contestant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES
INTERIOR BOARD OF LAND APPEALS

Frank and Wanita Melluzzo appeal from a Mar. 7, 1978, decision

of Administrative Law Judge George A. Koutras which held that the Melluzzos had failed to demonstrate a discovery of a valuable mineral deposit on 38 unpatented mining claims, in secs. 3 and 4, T. 4 N., R. 3 E., Gila and Salt River meridian, Maricopa County, Arizona, named in three separate contest complaints, and held the following claims to be null and void:

[Contest] AZ 9911

El rame Lode Mining
Claims 2, 3, 11 through 14
Incl., 22, 23, 24, 36 and 37

[Contest] AZ 9912

El rame Lode Mining
Claims 27, 28 and 44

[Contest] AZ 9913

El rame Lode Mining
Claims 4 through 8 incl.,
15, 16, 17, 25, 26, 29 through
34 incl., 39 through 42 incl.,
45, 46, 47.

The proceeding which gave rise to the above decision was initiated by the Arizona State Office, Bureau of Land Management (BLM), by complaints filed Mar. 23, 1977, charging that the claims in question were invalid under the General Mining Laws of 1872, *as amended*, 30 U.S.C. § 22 *et seq.* (1976). While the original contest complaints charged that the claims were invalid due to (1) the absence of a valuable mineral discovery and (2) the claims being located on land which is nonmineral in character, the decision here appealed from rests solely upon the former charge.

Contestees filed answers to the charges on Apr. 25, 1977, and hearings on the merits of the three complaints were held in Phoenix, Arizona, on Dec. 6, 7, 8, and 9, 1977, the

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three contests being consolidated for hearing by agreement of both parties. Both parties filed posthearing briefs and proposed findings and conclusions, and contestees filed a reply brief. Contestees, through counsel, have, additionally, submitted a Statement of Reasons for Appeal from the decision below.

As contestees point out in the hearing below and in their briefs, a condemnation program instituted by the Maricopa County Flood Control District (District) in connection with the Cave Creek Dam project resulted in two condemnation proceedings against the Melluzzos, their Rena placer groups, and the El rame lode claims. The trial of this condemnation action, at the request of the Flood District, has been postponed by the Arizona State Courts pending a resolution of the present contest, and the District has taken possession of the claims, having posted a bond of \$500,000 to guarantee protection of the Melluzzos' rights, if any, in the disputed acreage. The District concedes, moreover, that it contacted the Phoenix office, BLM, on Jan. 31, 1977, and requested a review of the validity of the El rame claims with the avowed intent of avoiding payment of more than a minimal sum for the claims if they should be declared invalid. As the record below indicates (Tr. 21), the District did not request that BLM institute a contest against the Melluzzo claims, but merely sought a determination of the practical state of the title of the El rame tracts. We note parenthetically that this course of action,

far from being improper, could best be characterized as simply prudent action by a public authority which does not wish to pay twice (with public moneys) for the same piece of property.

William M. Lawson, Jr., the first witness called by the Government at the hearing below, is an independent attorney representing the Flood District in the condemnation of the El rame claims. Lawson described the District's efforts at reaching an agreement with the Melluzzos regarding the claims and made reference to a written mineral evaluation of the property done by Donald F. Reed which recommended that the District pay Melluzzo \$300,000 to quitclaim his interest in the subject lands. While contestees imply that this estimate supports their claim of discovery, we find that Reed's opinion was based on considerations entirely apart from the mineral value of the claims. Exhibit G-6, a transcript of Reed's testimony at the condemnation proceedings in the Maricopa County Superior Court, shows that his acquisition price recommendations were based on avoiding the cost of litigation and the cost inherent in a protracted delay of the project. In Reed's words, "I have made no attempt to appraise the value of minerals found on the El Rame claims since sufficient work to determine the value and extent of such minerals has not been done * * *" (Ex. G-6, p. 10).

Lawson, having indicated that Reed was seriously ill and unable to

testify personally,¹ went on to describe the District's request for a second opinion or valuation in connection with the condemnation of the Melluzzo claims. As Lawson stated, this second opinion was provided by Charles L. Fair who was requested by the District's legal counsel to prepare a mineralogical evaluation of the El rame claims. Lawson testified that Fair had valued the claims at \$8,750 in light of the value of the mineralization on the ground, and, at the conclusion of Lawson's testimony, Fair was called as a Government witness.

Charles Fair, who holds a Ph.D. in economic geology from the University of Arizona, has had some 25 years experience as a private consultant in the field of mining. Fair testified that he examined the El rame claims in Oct. 1976 with the assistance of Barton Cross, a geologist, and Edwin Robb, an employee of Fair. The decision below summarized Fair's examination and testimony in the following terms:

In conducting his examination of the claims, Dr. Fair was provided with a claim map similar to Exhibit G-3, and he was able to relate the map with various ground points, such as the dam, some section corners, and other physical features. The examination revolved around two points: (1) locating any surface mineralization that was visible, and trying to place some value, if any, on it, and (2) determine enough of the

¹ In response to contestee's counsel's objection that Reed's testimony at the condemnation proceeding constituted hearsay, Reed was deposed in Phoenix, Arizona, on Jan. 20, 1978, with counsel for the contestee and the Government in attendance. His testimony at that time was not materially different from his testimony at the condemnation hearing, *supra*.

geological relationships so that some estimate might be made on possible occurrence of valuable minerals in the subsurface. The best way to make an appraisal of the surface mineral content is to find old prospect pits that are visible to the eye and he did so in this case finding a good many * * *.

Although each claim was traversed in an effort to collect rock samples, he and his assistants did not specifically examine each claim as such. In order to make a determination of any possible value of subsurface minerals, a grid over the entire area was laid out and rock chip samples were collected on a wide spacing in an effort to obtain a reflection of the actual mineral content of the entire area in order to estimate what is underground. Any mineral deposits of sufficient size to be mined is [*sic*] usually surrounded by what a geologist calls an "alteration halo." This is a larger area than the deposit itself in which the original rock has been altered by whatever process concentrates the mineral. This halo can be defined by taking soil or rock samples and assaying those and looking for anomalous values of particular minerals looking for anomalous ratios of elements. [*sic*]

In traversing the area, they were not able to completely locate each individual claim, that is, they were not able to find the corners or papers. However, by using section corners and known physical features as shown on topographic maps, they were able to locate themselves well in the field, that is, with[in] a few dozen feet. By establishing the grid, he was reasonably sure that at least one, and probably two samples, were collected from each claim (Tr. 39-40).

Dr. Fair's report (Exh. G-1) contains an illustrated diagram of where the samples were taken. He described the sampling process and indicated that rocks were chipped in a 10-foot radius off the outcrop of the sample site and the sample ranged from 1 to 3 pounds. The samples were individually bagged, labeled, and delivered to the Skyline

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Laboratories in Tucson for assay, and the results are included in his report. Dr. Fair explained the column headings on the assay report as follows: "ppm" [*sic*] means parts-per-million; "Au" is gold; "Ag" is silver; "Cu" is copper; "Pb" is lead; "Zn" is zinc. In some cases they tested for calcium, magnesium, and sodium because these elements are indicative of alteration affects [*sic*] for certain types of ore deposits. One thousand parts per million is one-tenth of 1 percent. Thus, Item No. 4, Sample Number 104 in the assay report in Exhibit G-1, which shows 910 ppm copper, translates into nine-hundredths of 1 percent or .09 (Tr. 40-43). Dr. Fair testified that his original report did not include the results of his examination of claims 29, 30, 33, 34, and 46, because he was told to omit these claims because there had been other disposition made of the claims. Later, he was instructed to examine them and he returned and completed his field examination on Mar. 9, 1977. The examination was similar to the first one, but because most of the surface of these claims was covered with alluvium, *i.e.*, sand and gravel deposits which were washed in over the outcrop, they examined the outcrop which was showing at the edge of the stream. There was some outcrop on claims 30 and 33, but the other claims were entirely alluvial covered. He concluded that there was no evidence of any significant ore deposits buried beneath the wash, and this was based on the fact that no evidence of this was found in the rock observed at the edge of the wash (Tr. 43-44).

Dr. Fair testified that his grid system resulted in at least one sample from every claim, and in those areas where mineralization was found, detailed studies of the mineralization was [*sic*] made. The results of the rock chip sampling in most cases were in agreement with the backgrounds normally expected of the rock types found. As an example, he stated that granite has a certain

background of copper and on an average will contain a copper level in the 10 to 20 ppm range. Other volcanic rocks will have higher levels of copper, such as 20 to 70 ppm. In most cases, his examinations revealed only background levels or below * * *.

Dr. Fair stated that most of his 25 years of experience has been in the area of exploration or evaluation of copper deposits and that it is his business. He is familiar with ongoing operational copper pits and many that were never developed. Most companies would not be interested in copper values below a .75 range, but this depends on tonnage and grade. If the tonnage or deposit is low, the grade must be higher. Massive sulfide deposits in the 10 to 50 million-ton range may contain 2 to 5 percent copper, and depending on the presence of other metals, there may be lead and gold present. As the deposit decreases, *i.e.*, below a million tons, copper in excess of 5 percent is what is being looked at (Tr. 47-49).

Dr. Fair stated that based on his experience, he would not recommend that any mining company invest any money in the claims, and in his view, a reasonable and prudent man would not invest his time and money with the prospect of developing a paying mine on any of the claims (Tr. 50-51).

At the conclusion of Dr. Fair's testimony, Robert A. McColley, a mining engineer employed by the Bureau of Land Management, was called to testify. McColley, who has received both Bachelor's and Master's degrees in geology from the University of Arizona, has had 2 years experience with the exploration division of Kennecott Copper Corp., and some 16 years experience as a mineral examiner with BLM. In Oct. 1976 he examined the El rame claims and testified that he

conducted further examinations in mid-July 1977 and went over the ground with Mr. Melluzzo on Dec. 1 and 2, 1977. McColley stated (Tr. 86) that his observation and sampling led him to concur with Dr. Fair's analysis of the claims, *supra*.

McColley's actual sampling appears to have been limited to claims 13, 15, and 40, and the samples on claims 13 and 40 were taken mostly from points which Melluzzo felt contained the best mineralization. As the decision below states:

Mr. McColley testified that most of the copper minerals on the claims that he sampled and could identify were basically oxide minerals, although a couple contained sulphide mineralization. Basically, however, the values that he observed were oxide, which are less recoverable. No samples were obtained from the other 35 claims. Although Mr. Melluzzo referred to other areas where he felt similar values might be obtained, no other points were visited or samples taken. Mr. McColley has been on the other claims several times and has reviewed Dr. Fair's reports. He has no disagreement with those reports and based on his experience and education in mining, it is his opinion that a reasonable and prudent man would not spend his time and means in developing a paying mine on any of the El Rame claims (Tr. 106-108).

On cross-examination, McColley stated that, "All other things being equal, you're better off having copper present in sulfide minerals which are more readily recoverable than oxide minerals * * * basically the values that I saw [on the El rame] are oxide values" (Tr. 105, 107). Contestee's counsel then asked McColley whether he had

ever testified, in a mineral contest, that a contestee had made a valid discovery. McColley replied in the negative (Tr. 112), but noted (Tr. 116) that he had examined "a few hundred" claims which he recommended for patent on the basis of the mineralization that he observed on the ground.

William D. DiPaolo, who accompanied McColley on his June 22 and July 15, 1977, examinations of the El rame claims, is also employed by BLM as a geologic examiner. DiPaolo testified that he read the Fair report after his first visit to the claims and found himself in agreement with the conclusions reached in that evaluation. DiPaolo's second visit to the claim tended to confirm his initial impression that there was no commercially valuable mineralization uncovered on the ground, and he stated that, based on his experience, personal observations and on his review of the assay reports from the McColley sampling, *supra*, he would conclude that a prudent man would not invest further time and money to try and mine the claims for a profit.

At the conclusion of DiPaolo's testimony, the Government rested its preliminary case and contestees called Frank Magini, a self-employed contractor, to testify. Magini, who is in the road building and earth moving business testified principally concerning the relative cost of the excavation which would be necessary if the El rame group was to be developed into a paying mine. As he stated at the outset, he

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had been asked by Melluzzo to compute an estimate of the quantity of copper and gold ore on the El rame claims, and relate this figure to the cost of recovering the material (Tr. 235, 236). In order to develop figures for the gold and copper values on the claims, Magini set up a small leaching operation using a cyanide leaching solution to process approximately 1 ton of material taken from the top of an ore dump (Tr. 244) located on claims 28 and 32 (Tr. 248) and some 5 tons of material taken from claims 13, 40, and 42. The leaching solution, which was filtered through an activated charcoal element to recover the mineral values, yielded .068 ounce of gold (Tr. 253) and, in the case of the copper leach, a 1.32 percent copper (Tr. 258) assay value for the 1 ton sample. Magini used these assay values to estimate a projected figure of \$15.04 per ton copper recovery value for the claims, and stated that the cost for removal, crushing, stockpiling, and leaching would total \$6.35 per ton. Contestees moved to submit the cost and recovery figures which Magini projected from these sampling results and were met with the Government's objection that the computation procedures of Exhibit M-13 were flawed, being based on ore volume figures which contestees themselves characterized as "only a guestimate [*sic*]" (Tr. 267), and percentage figures which were unsupported by sampling (Tr. 262, 263), these latter being proffered by contestees as "admittedly only gross estimates" (Tr. 272).

Exhibit M-13 was received over the Government's objection.

While Magini, testifying on the basis of his prior experience and the above-mentioned leaching results, saw a bright commercial future for the El rame claims, Government experts seriously questioned the reliability of his conclusions. Dr. Fair, testifying upon recall for the Government, criticized the assays derived from Magini's leaching plant stating that:

[U]nless we know exactly the amount of gold or copper that was precipitated out, we don't have any handle on that [the actual value of the sample]. Because if you only assay the solvent itself or you only assay the char without knowing exactly how much copper was actually extracted, you don't really have anything. What we really need to know is how much copper, how much gold, was physically taken out of the rock and deposited somewhere else, and those assays that I heard yesterday didn't tell me that.

(Tr. 499, 500). Fair then went on to state that the 2.3 percent assay report average which Magini used to make the calculations set out in Exhibits M-13 and M-14 was not based on a scientifically valid cluster of sample values (Tr. 499). Fair characterized the statistics derived from his own report, from contestee's six drill holes, and from the above-described leaching operation as being wholly insufficient to support the tonnage and profitability figures set forth by Magini.

Following Magini's testimony, contestee Frank Melluzzo was called to the stand and described the drilling and sampling which he

had conducted on various of the contested claims. Melluzzo described in detail the manner in which he had located the claims and spoke at length of the assessment and exploration work which he performed on the El rame claims, illustrating his narrative with a series of photos and maps. Exhibit M-57 is an assay report which Melluzzo testified was derived from a sample taken from a pit on the El rame No. 13. The assay, dated Oct. 14, 1959, reports a copper content of 3.6 percent from the sample, but makes no mention of the quantity of material assayed or the method of assay.

We find that the most significant portions of Melluzzo's testimony are his statements regarding the sale of copper mineralized stone which he picks up on the claims and markets through his building stone business in Phoenix. As the decision below indicates, Melluzzo began selling rock from the El rame claims shortly after he located the first of the claims. The rock which is readily marketable due to its unique coloration, initially commanded a price of \$15 per ton and now brings \$75 per ton. Melluzzo's success in marketing the stone from these claims is uncontroverted and the legal significance of this obviously profitable operation is the issue at the very core of this appeal. The decision below records that:

Mr. Melluzzo testified that in a number of instances he has removed and sold rock from the El Rame claims over a period of years, and that his son has been mining rock up to the time of withdrawal. He has been able to sell the rock building

stone because of its copper mineralization characteristics. The overburden of dark surface coloration of the stone enabled him to market it while he was digging his location holes. He sold the minerals, "which I call mineral in character, rock" for \$15 and \$25 a ton, and his son is selling it for \$75 a ton. He described the rock as follows (Tr. 353-354):

Q. This is for rock on the surface with copper coloration?

A. Copper coloration and the dark color of the surface, and the dark, dark aging. In the quartz, the quartz molders are using landscaping boulders. All the huge, massive boulders we use as landscaping. And some of those boulders would bring in \$150, \$200 just for one boulder.

Q. As a result, what is the condition of the ground now as opposed to what it was before you removed rocks from the surface?

A. Well, if everybody who was on the land would notice, you would see all the shafts and all the cuts and all the diggings. There wasn't any piles of rubble rock around them. There wasn't hardly any rock of any size that was saleable. It was gone.

And if you noticed on top of the mountains where I wasn't able to get my trucks, my ore was still there. The rock was still there. Copper rock or stained rock was still there. But all on the lower parts where I was able to mine it, take it out without any problem, it's been sold and gone, picked over all these years.

On cross-examination, Mr. Melluzzo testified that he obtained the building stone from his discovery shafts, and as he removed the material, he loaded it on his trucks, and would leave the find. He defined "ore" as "any mineral that a prudent man could make any money off of" (Tr. 357). He dug a discovery hole on all but claim 44 and he sold the ores he recovered from the holes. Most of the holes were 4 or 5 feet wide, 6 or 7 feet long and 10 feet deep and he sold the saleable stone that looked good (Tr. 358). On certain claims, 60 percent of the stone was saleable, and he made a living at

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selling this stone for some 20 years (Tr. 359). On some claims he recovered entire boulders, which he sold for \$25 a ton, and for some of the "beautiful boulders," he would get \$50 to \$75 a ton. His biggest market is for surface rock, which is just picked up rather than quarried. This rock was the "stain and the color" (Tr. 359-361).

Mr. Melluzzo testified that in an effort to develop copper mining on the claims, he has drilled, kept up his assessment work, and has talked and had different companies visit the property. He had a lease drafted in 1962 or 1967 with an O. L. Johnson from Midland, Texas, but Mr. Johnson had a heart attack and that ended the lease. The lease was for a percentage of the mining. Since then, prospective customers have been scared away because of talk in BLM that the property would be withdrawn because of a flood control claim (Tr. 363-364).

Mr. Melluzzo testified that there "is a body of ore out there. I was making money on these claims" (Tr. 365). When reminded by Government counsel that he was selling building stone, Mr. Melluzzo replied (Tr. 365):

A. You call it building stone? It was my minerals. Now, I'm a business man. You're a lawyer. I'm a business man. I go on the property and I've got a copper stone that I can sell for \$25 or \$30 a ton to an individual.

Now I can take that same stone and sell it to a mining company and get 30 cents. Now, as a business man, what would you do? Who would you sell to?

And, at page 366:

Now, when I'm digging that stone, and I can sell it for \$25 a ton to an individual, why should I be crazy and sell it to the smelters for 30 cents? That don't make sense.

Q. Okay, now—

A. You've seen money lost. I think they're crazy. This is economics.

Mr. Melluzzo testified that he visited a leaching operation in Prescott on Dec. 14,

1976, and identified pictures of the Bluebell Mine leaching operation (Tr. 354, Exhs. M-80 and M-81). The average ore at that operation leached from one-half to 1 percent, but he had no production figures (Tr. 356). Mr. Melluzzo produced copies of sales receipts from his records in support of his contention that he was selling copper ore from the El Rame claims in 1958 (Exh. M-95). He testified that while some of the receipts show the sale of rocks or building stone, others show copper (cooper). The amounts of copper sold in 1958 came from the El Rame claims (Tr. 436). He also identified a picture of a "copper rock" which he had bulldozed on El Rame claim 26 (Exh. M-96, Tr. 437), and a picture of some stone quarried from the "El Rame Mine" which he delivered to a local housing development for use as decorative entryway and which was published in the local newspaper beautifying section (Exh. M-97, Tr. 437).

The following colloquy took place between Mr. Melluzzo and Government Counsel Goreham (Tr. 438-439):

Q. Mr. Melluzzo, I think you gave us a story about goat and the dollar yesterday in response to selling building stone rather than copper.

A. Yes.

Q. Now, keep in mind your goats and your dollars, would you sell at \$40 or \$50 a ton for building stone if you could make \$4.5 million on a claim on copper as Mr. Magini says?

A. It takes special mineralization, a certain amount. All the ore out there doesn't have the same coloration. And if you look at the job, it has a certain leaching. It takes leaching effect to make it.

Now, I can't just go pick up every rock and say, this is copper. They won't buy it. They won't give me \$60 for that one when they can buy for \$18. Now, it has to have a mineral characteristic in that rock to make it special quality. It's gem stone, you have crysacolla there. You may run into a beautiful sample. You can take it

to a store and sell it for \$25. But you may find one that ground. Yes, if you could find a million of them, yes, you have a million \$25. But it takes that mineralization of copper and that leaching to make that color. And that's what they're buying now.

I never saw anything that said I had to sell it to a smelter. I call it copper and that's what it's specified. It's billed that. I sold my other rock at one cent a pound. I got three cents for the copper. It was a special and distinct quality.

A review of the sales receipts produced by Mr. Melluzzo describes the alleged copper sold as "cooper stone," "copper," "cooper ore," "copper stain," "copper crysacolla," and "green copper ore." The material was sold by the ton, or lesser amounts, and the "green copper ore" was described as being three-fourths to 1-inch size, and the price ranged from \$25 to \$60 a ton.

Contestees stipulated (Tr. 368) that the only mining operations which Melluzzo personally conducted on the claims "has been in copper in the form of building stone."

Hale C. Tognoni, a registered mining engineer and attorney, is president of the Mineral Economics Corporation of Phoenix, Arizona. At the conclusion of Melluzzo's testimony, Tognoni was sworn as a witness for the contestees with the Government agreeing to stipulate to his professional expertise as a mining engineer. Tognoni testified that he first visited the El rame claims in 1954 on behalf of a client and returned again in 1956 in connection with an inquiry as to whether the claims could be declared nonmineral in character (Tr. 446-7). He subsequently visited the area of the contested claims on two additional oc-

casions prior to the spring of 1976 when he inspected the El rame group for Melluzzo in connection with the Flood District's condemnation action.

Tognoni stated that, in making his present evaluation of the El rame claims, he reviewed all the exhibits and reports generated in the contest proceeding including those of Dr. Fair, Magini and Reed. Tognoni testified that the values he has seen on the ground together with the applicable reports, leave him with the opinion that a prudent man would be justified in expending his time, effort, and money on the claims with the reasonable expectation of developing a profitable mine. He cited the extensive production of copper from the claims in the form of building stone, the rising price of copper on the world market, and records of past production in the district as factors evidencing the economic viability of a mine on the El rame claims. He felt that the dumps on claims 27, 28, and 32 are "very likely to contain these small amounts of gold that Magini is talking about, or the values that he is talking about, in order to merit a leaching operation and one that would make a profit. Tognoni made various calculations in regard to the leaching recovery of copper, and his conclusions are recounted as follows in the decision below:

Mr. Tognoni estimated the acreage of leachable area that he believes is present within the El Rame claims. He estimated that there are 20 acres of copper zone within approximately 500 acres of the claims containing 1 percent leachable

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copper. His estimates are based on all the past reports, Mr. Magini's computations and the sampling conducted on the claims. Calculating an acre of land as covering 43,560 square feet, 1 foot deep, and assuming 1 cubic foot of rock weighing 100 pounds, he estimates there is a total of 4,356,000 pounds of rock, and since 1 percent copper will yield 43,560 pounds of copper per acre, at 60 cents a pound, he computed the copper value per acre 1 foot thick at \$26,136. He then computed a yield of 20 pounds of copper per ton, and at 60 cents a pound indicates that the copper would sell for \$12 per ton. There would be no problem in removing the overburden since the top layer values have already been removed, and the minerals would probably increase right below the surface in that top 1 foot. His estimates are conservative [in his opinion] because his drill hole samples increase in parts per million in those holes. In his opinion, a prudent man could reasonably anticipate being able to leach the quantity of copper ore on the claims which he described, and that a prudent man would invest his time and money in the development of the claims into a larger producing copper property. It would be prudent to spend time and money with financing with the reasonable expectation of developing a large sulfide copper deposit (Tr. 463-466; Exhs. M-99, M-100).

There are massive sulfide deposits in Arizona, and a number of major producers are massive sulfide deposits. He identified Exhibit M-101 as a mapping on the copper association map of porphyry coppers and it indicates the locations of recognized massive sulfide deposits which are near or on the trend of the El Rame claims with similar geology. (The circles show the deposits, and the El Rames are shown by an "X.") Exhibit M-102 is the production figures for the mines shown (Tr. 466-468).

On voir dire, Mr. Tognoni indicated that the classification of the mines as massive sulfide deposits is not his classi-

fication. It is a "Canadian term recently injected into our geological thinking" (Tr. 468).

On cross-examination, Mr. Tognoni testified that the 1 percent copper he used in his calculations was based on 100 percent recovery. The industry experience on a leachable operation is from 10 to 90 percent, depending on the efficiency of the individual operation. He is familiar with the Bluebird Mine at Globe as an industry recognized leaching operation, but does not know its average recovery, and would be surprised to learn it was 50 percent (Tr. 478-480). No reserves have been calculated on any of the El Rame claims, other than the information presented during the hearing, and his testimony is based on his surface examination and sampling (Tr. 479-481).

When called as the Government's witness on rebuttal, Dr. Fair voiced a number of criticisms of Tognoni's conclusions, *supra*. At the outset, he stated that the Tognoni/Magini cost estimates included no allowance for grinding and crushing costs, procedures which Fair thought would be necessary to achieve a leach recovery in excess of 40 to 50 percent of the extractable copper in a relatively low grade ore sample. With respect to Tognoni's projections for 100 percent leach recovery, Fair stated that the industry average was in the 40 to 50 percent range (Tr. 501). Fair introduced into evidence (Ex. G-18) an Apr. 1973 copy of *Mining Engineering*, the journal of the American Institute of Mining, Metallurgic and Petroleum Engineers, which listed a statistical breakdown of "Principal Copper Mine Statistics" rating capacity, production, and recovery.

efficiencies for major U.S. copper mines. This document listed two leaching operations in Arizona, the Bluebird and the Oxide mines, which claim recovery rates of 41.7 and 50 percent total copper recovered, respectively. Fair noted that the Bluebird, which was cited by contestee's witnesses as an example of a successful leaching operation, processes over 6 million tons of material each year, and thus gleans a volume profit from low grade ore that would be impossible to achieve on a claim (such as the El rame group), which is tiny by comparison. Fair stated, furthermore, that the Oxide and Bluebird mineralization is in excess of a 3.5 percent copper average, a value far above the most optimistic projections for the El rame group.² Fair testified, moreover, that most of the large currently producing copper mines were developed at a time when labor costs were much lower than at present, and that many of them could not now be profitably brought into initial production (Tr. 60-62).

Fair's opinion regarding contestee's assertion that the El rame group is valuable as a "massive sulfide deposit" is that this contention is both unproved and improbable. As he stated on rebuttal:

² See, Tr. 457-461 where Mr. Tognoni, in developing his projections for the El rame, anticipates mining deposits in the 1.3 to 2.3 percent copper range. Tognoni feels that copper ore in the 1 percent range can be profitably leached on the claims (Tr. 461), but Fair asserted (Tr. 502) that, "for any kind of a leaching operation to be successful * * * you're going to have to have an average ore grade of 3.5 to 4 percent, probably more in today's inflated rates."

A. Well, massive sulfide deposits in the literature are normally accepted as being those that contain at least 50 to 60 percent by volume sulfide. To develop any tonnage, this means an awful lot of sulfide in the area.

But one of the things that I pointed out in my first report, in walking over this area, yes, here and there you can, in the shear zones, in the course veins, you can find some sulfide.

But when we speak of massive sulfide, we're talking about large concentrations of sulfide. And by that I mean areas where there are several hundred feet wide in which the pyrite content is certainly high enough to see it. It would develop a gossan or a capping if those outcrops disturbed those. These things are very recognizable and all the geologists recognized them.

There is nothing of that sort up there on the surface.

(Tr. 506-7). Fair concluded his rebuttal testimony with a general criticism of the extrapolations which contestees made from the sampling data in their possession. As he stated at Tr. 495:

A lot of what has been said here is based upon visual examination, with the exception of just a few of the samples. The sampling has really been undocumented. It certainly covers the old, so-called historical sampling.

When a sample is taken, it is necessary to know for one thing if you are taking a sample perpendicular to the geologic structure in which the mineralization occurs.

And this normally means a lode or a vein which has some narrow thickness and large linear and depth extensions so that it's rather tabular.

If you are sure that you are crossing such a structure, in order to get a true indication of the grade of the material in it. [*sic*] If you cross in an oblique angle, it's possible to get erroneous results in the sense you may go 20 or 30 or 40 or 50

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feet with the high assay. And this won't really be true of the amount that is there because it may be only one foot thick.

And the mineralization [*sic*] as it occurs, all of us here have been out on the property, if you examined it carefully, at least I feel that what I saw there was that the mineralization occurred along the partings in this schist.

Now, probably all of us are familiar with slate. Slate is a common rock that breaks in large, flat pieces in the normal break. And this break is along its foliation plane.

And the mineralization that occurs along the El rame claim occurs along these foliation planes. In some cases, the zone has moved later so there has been some rock fracturing so that you can get anything from a few inches to a foot or more wide filled with quartz and copper mineralization [*sic*].

But basically, we are talking about mineralization that does occur in the tiny vertical fractures.

Now, when the rock weathers on the surface, it breaks apart along these fractures. If the huge slabs or little pieces of various sizes falling [*sic*] open, you can see the copper. That's the basis for Mr. Melluzzo's copper rock he's been able to sell.

But if you actually took one of these slabs and ground it up and assayed it in toto, you would find that the amount of copper is relatively small.

I once did a job in Baja, California, on a property that had many fractures covered green like this. And in the morning light, the mountains were green. My client was ecstatic.

But when we actually cut the samples across the structures and assayed the entire rock, we found that the values were low.

Now, my observations on the El rame claim is that this is the way that mineralization occurs. It is true that you can walk over these claims and you can pick a rock here and a rock there, here on an

outcrop, there on the outcrop, and you're going to see copper. It looks very good.

If you physically channel across these foliation planes in most of these areas and took a large amount of rock and assayed it, you are going to find that the assays are lower.

I'm not saying that in some places you would two percent assays [*sic*]. Both sides have had very few of these assay levels.

But much of the testimony here has been talking about large masses of rock. Extrapolation, especially in the testimony yesterday morning, was talking about huge volumes of rock for which I feel there is just no basis for such testimony for the average grade of these huge volumes of rock.

Following the testimony of Hale Tognoni, Robert T. Wilson, a geologist employed by Tognoni's Mineral Economics Corp., was called as a witness for contestees. The decision below details his testimony as follows:

He [Wilson] first became acquainted with the Winifred Mining District in 1976 when he was assigned to a project to research literature on the various mining districts within the Pima Indian Maricopa land. He identified Exhibit M-83 as a mining district map of the Gila and Salt River basin mineral province, Pima-Maricopa land, put together by Mineral Economics personnel and stated that the El Rame claims are basically in the heart of the Winifred Mining District. He identified Exhibits M-84 as a set of three maps compiled by Mineral Economics showing occurrences of copper, gold, and silver within the boundaries of the areas shown in Exhibit M-83. All of these maps (Exhs. M-83 and M-84) were compiled with information obtained from historical research of the area. Four reports compiled in 1917 were obtained from the files of the Department of Mineral Resources (Exhs. M-1 through M-4). One of those

reports, the *Hubbard* report, contains information on claims in California, but the portion of the report dealing with the "Copper Hill Group" pertains to the El Rame claims, since that is the name used in all four reports that applied to the El Rame's. After conducting his research, he visited the property and surrounding area, beginning on Oct. 20, 1976, and compiled a geology map of the El Rame claims showing the various rock units, strikes and dips, and Corps of Engineers' drill holes (Exh. M-85). He identified Exhibit M-86 as a cross-section drawing from the Corps of Engineers' drill holes and from the geology map (cross A-A prime and B-B prime), and the drill holes are labeled with numbers taken directly from the Corps' map and drill logs. The geology map is designed to show the rock outcrop and rock attitudes of the property, and no mineral values are shown on the maps (Tr. 404-411).

Mr. Wilson visited the property on Nov. 9, 1976, in the company of Mr. Hale Tognoni and Mr. Melluzzo. Mr. Melluzzo pointed out the discovery holes and Mr. Tognoni indicated where he wanted channel samples to be taken across these holes. He returned on November 14 and took channel samples at those points, and returned again on Nov. 17 doing more field checking as to sample locations. On Nov. 21 he went to Los Angeles and sampled the Corps of Engineers drill core for the property. With him was a man from Dr. Fair's office, a Mr. Ned Robb, and a Corps geologist. Thereafter, on Nov. 22, 23, and 25 he conducted and established a geo-chem sampling grid over the property. A number of samples were taken for age-dating, on the El Rame claims, and just to the east of the claims, and Exhibit G-87 is a map he prepared showing the location of the samples he took and those taken by Dr. Fair, which are mentioned in his reports (Exhs. G-1 and G-2, Tr. 411-413).

Exhibit M-88 is the results of the channel samples taken on the El Rame claims from the discovery holes, and the geochemical analysis was conducted by

the Arizona Testing Laboratory. The exhibit shows a picture of where the sample was taken, the lines and arrows depict where the channel sample was taken, and the last page indicates the results of the samples. Exhibit M-89 are copies of the Corps of Engineers' drill logs indicating the drill holes, the elevation of the collar, the depth of the drill hole, and the results of the laboratory tests for each sample. These samples were submitted for age-dating analysis to Teledyne Isotopes, Westwood, New Jersey, for the purpose of obtaining a regional picture of the geology of the El Rame claims area, and Exhibit M-90 is the letter dated Dec. 7, 1977, reporting the results of that analysis (Tr. 413-416). Mr. Wilson marked the "copper occurrence" map, Exhibit M-84, with the locations of the samples depicted on Exhibit M-90, and he identified Exhibit M-19 as the geochemical analysis used in preparing the geochem anomaly maps, along with the grids and the geochemical analysis reported in the two Fair reports (Tr. 417-419). Using this information, he and Mr. Tognoni established their own grid analysis and used 170 samples to do this, and this resulted in the preparation of three geochemical analysis value maps for copper, lead, and zinc (Exhs. M-92, M-93, and M-94). The color codes depicted on the maps show the mineral content in parts per million and the degree of anomalous background represented, the numerical values are parts per million, and the markings depicted by "x," a circle, etc., are labeled as to the identity of the samples. All of the 170 samples from both his work and Dr. Fair's report were used to plot the background values for all three maps. However, he used a slightly different method than Dr. Fair in plotting the backgrounds namely, logarithmic probability, rather than a histogram, because Dr. Fair probably did not have available a large enough sample population to have all the anomalous values (Tr. 419-430).

Mr. Wilson was asked whether he was able to express an opinion as to whether

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or not the El Rame properties are such that a man would develop them with a reasonable expectation of developing them into a paying mine. Mr. Wilson stated that while he has had considerable academic schooling, the past 2 years of his experience has been "on the ground dealing with mineral properties, geochemical surveys and the likes," and he did not feel that his level of professional expertise or maturity allows him to give an honest answer to the question. However, he indicated that in the past several months he has done studies on massive sulfide deposits, and has visited many of the deposits in Arizona, and he is "quite excited" about the El Rame area (Tr. 431).

On cross-examination, Mr. Wilson testified that he is "excited" about sulfide deposits because on the western half of the claims he sees many of the key types of outcrop or marker beds mineralization that is sought in such deposits, and these are similar to what he has observed on the ground of other locations that had been mined in Arizona. He could not state whether he would recommend that additional work be done on the claims because of his lack of experience. He considers the El Rame claims as a "prospect" for a volcanic massive sulfide deposit and has seen sulfides. Dr. Fair's age analysis of the rocks as precambrian was exactly the results obtained from the Teledyne Isotopes Company analysis (Tr. 433-434).

[1] It is a well-established principle of law that a discovery under the Federal mining laws exists only where minerals have been found in quantities such 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. *United States v. Maley*, 29 IBLA 201 (1977); *United*

States v. Arcand, 23 IBLA 226 (1976). See also, *Castle v. Womble*, 19 L.D. 455, 457 (1894). This test, often known as the "prudent man" test has been refined to require a showing that the mineral in question can be presently extracted, removed, and marketed at a profit. *United States v. Coleman*, 390 U.S. 599 (1968); *United States v. Vaux*, 24 IBLA 289 (1976).

[2] The Government, in a mineral contest, must meet the initial burden of going forward with a prima facie showing that no valuable mineral discovery has been made. Such a prima facie case is established when a Government mineral examiner samples and evaluates a claim and gives his expert opinion that the mineral values on the claim are not such as would prompt a prudent man to believe that the mineralization could be extracted, removed, and marketed at a profit. *United States v. Hunt*, 29 IBLA 86 (1977); *United States v. Bechthold*, 25 IBLA 77 (1976). In the case before us, the Government's prima facie case was established beyond dispute by the opinions of three expert mineral examiners: Fair, McColley, and DiPaolo, *supra*.

[3] When, as here, the Government has made its prima facie case, the burden of going forward with the evidence shifts to contestees who must show by a preponderance of the evidence, the existence of a valuable mineral deposit sufficient to support discovery. *Foster v. Seaton*, 271 F. 2d 836 (D.C. Cir. 1959); *Maley*, *supra*. Thus, the testimony

below of the Government's mineral examiner placed upon the contestees the ultimate burden of proving discovery, or, stated conversely, the burden of overcoming the Government's case. *United States v. Springer*, 491 F. 2d 239, 242 (9th Cir. 1974).

Contestees herein have sought to demonstrate discovery through the testimony of four different witnesses including that of contestee Frank Melluzzo. Contestee's first witness, Frank Magini, offered testimony relating both to the value of the mineralization on the claims and the cost of its extraction and removal. As noted above, Magini's assessment of the value of mineralization on the ground has been seriously challenged by Government witnesses on rebuttal. More specifically we find considerable merit in Dr. Fair's objections to the validity of the assays derived from Magini's leaching plant and his objections to the incomplete or cursory sampling process on which Magini based his recovery value figures (Tr. 499, 500). We find, therefore, that Magini's testimony is entitled to little weight except in regard to his assessment of the cost of earth moving on the claim, an area where his expertise remains unchallenged.

Although both Melluzzo and Magini appear to have good business acumen, neither appears to have expertise in the specialized business of mineral extraction. At the hearing below, Melluzzo testified (Tr. 304-310) that he sampled

claims using an eyedropper of acid solution, a honing stone and a pocket knife. He explained that he would pick up likely looking rocks, apply the acid, and scratch the rock with his knife. Thus he claims he is able to obtain a quick indication of mineralization if the knife turns a copper color showing a copper stain. He sought to demonstrate the efficacy of this admittedly preliminary sampling technique at the hearing, and the decision below records that: "Mr. Melluzzo conducted an experiment during the hearing by placing the four drill hole samples in four cups, adding acid, and placing a nail in each solution. The nails showed indications of copper, and Mr. Melluzzo concluded that he has leachable copper ore on the claims" (Tr. 317).

On rebuttal, Dr. Fair criticized Melluzzo's conclusion stating that:

Well, in difference [*sic*] to Mr. Melluzzo, I think he mentioned that it was only an indication of copper. And the reason for this is the deposition of copper on those nails was in the matter of a molecule or hemolecule stick.

This is an extremely thin layer. For instance, if we had been able to dissolve that penny, and there are some acids [*sic*] that would, the amount of copper in that penny would have covered hundreds of nails, maybe hundreds of kegs of nails. We could scatter nails all over the room that were copper covered just from the amount of copper that is in that penny.

And again, this brings me back to what worries me about the—what's been claimed for the assays and the grades and the material from the claims. Because copper, as Mr. DiPaulo tried to em-

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phasize in his testimony, the copper is very mobile. That would mean the copper moves around. In the vernacular, a little bit goes a long way.

The green that you see out there on the outcrop, well, it's very colorful but it may not represent great amounts of copper. Similar to the deposit I described in Baja, California, when the hills were virtually a malachite green.

So that this test that we had, in answer to your question, shows copper is there, yes. It shows some of it is leachable, yes. It gives us no idea of how much is leachable or how much is there.

(Tr. 508, 509).

We believe that the above discussion highlights the major problem with Melluzzo's claim of discovery; *i.e.*, that the purported discovery is based largely upon visual indications of copper which are of absolutely no quantitative significance. Melluzzo's testimony, for example, abounds in references to "good visual indications" "black mineralized zone," "green mineralization of copper," etc., and, while numerous photos of the claims were introduced in connection with Melluzzo's testimony, only a single assay was produced. This solitary assay, as noted, *supra*, contained no mention of the quantity of material examined or the method of assay used, and is therefore entitled to little weight.

Melluzzo's visual orientation is perhaps best understood in light of the history of his "mining" on the claims. Melluzzo is in the business of selling building stone and has evidently made a comfortable profit

selling the attractively colored rock from the claims.³ It makes not a whit of difference to Melluzzo or to his customers whether the coloration is the result of a commercially mineable copper presence. It is the visual attractiveness of the rock which makes it salable at a price of \$75 per ton as building stone and, until recently, Melluzzo has had little reason to know or care about the percentage or mineral grade of the copper on the El rame claims. We therefore find that his testimony was material and relevant to the issue of discovery only to the extent that the sale of building stone may be considered as evidencing a commercially mineable deposit of copper ore.

Mr. Hale Tognoni, contestee's major expert witness, testified that, in his opinion, the El rame group is the sort of property upon which a prudent man would spend money and time with the reasonable expectation of developing a paying mine. This opinion, in turn, was based upon what Tognoni saw as three possible methods of working the El rame claims, namely, (1) the sale of "surface copper" for use in decorative walls or as souvenirs, (2) the development of a commer-

³ However, to avoid any inference that this finding is inconsistent with the findings and conclusions expressed in *United States v. Melluzzo (Supp. on Judicial Remand)*, 32 IBLA 46 (1977), we note that this market did not develop until long after July 23, 1955, when the location of mining claims for common stone was prohibited by statute. 30 U.S.C. § 611 (1976).

cial scale copper leaching on the claims, and (3) the exploitation of the claims as a "massive sulfide." Since, in our opinion, Tognoni's evaluation is the vital item of proof with which contestee's case must stand or fall, we will examine each of these contentions separately.

As for the assertion that the El rame claims should go to patent on the strength of decorative stone sales, we find that contention difficult to reconcile with Tognoni's statement that no decorative rock remains on the surface of the El rame claims. At the hearing below, Tognoni spoke of:

[T]he production of the surface copper, which has been going on since my first visit to the ground in 1954 to now, a *literal denudeing* [sic] of the surface of the copper colored rock as specimens and part of decorative walls. [Italics added.]

We are thus left to wonder how the El rame claims can be valuable for decorative stone if it has been "denuded" of the same. We note, furthermore, that Melluzzo himself stated (Tr. 354):

A. Well, if everybody who was on the land would notice, you would see all the shafts and all the cuts and all the diggings. There wasn't any piles of rubble rock around them. There wasn't hardly any rock of any size that was saleable. It was gone.

And if you noticed on top of the mountain where I wasn't able to get my trucks, my ore was still there. The rock was still there. Copper rock or stained rock was still there. But all on the lower parts where I was able to mine it, take it out without any problem, it's been sold and gone, picked over all these years.

Since it is the surface rock that Melluzzo has been successfully marketing (Tr. 353), and since the surface is now "denuded," we conclude that surface building stone sales cannot support an application for patent or a present claim of discovery in this case, even if common variety building stone sales could be considered in support of a lode claim location. (See, *infra*.)

Turning to Tognoni's assertion that the El rame claims could be developed as a copper leaching operation, we find Dr. Fair's criticism of Tognoni's projections to be so well taken as to render those projections meaningless. As stated, *supra*, Fair pointed out grave flaws in the sampling techniques which gave rise to Tognoni's mineral value figures, and demonstrated that Tognoni's expectations of a 100 percent copper recovery rate were wildly at odds with general industry expectations and experience. Most significantly, however, Fair's criticism of the relatively small number of samples involved in the Tognoni projections leads us to agree with his judgment that those profitability figures are constructed on a foundation in which highly optimistic guesswork is substituted for provable fact. We therefore conclude that the testimony and projections which Tognoni and his employee Robert Wilson developed fail to demonstrate that a reasonable man might expect to make a profit by leaching copper on the El rame claims.

In regard to Tognoni's prediction that the El rame group is valuable

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as "a target area for a massive sulfide deposit," we would first note that this assertion is entirely distinct from the contention that the El rame claims can be profitably leached for copper. Although the distinction was never explained at the hearing or discussed in the decision below, it would appear that Tognoni's prediction of a "massive sulfide" simply refers to the possible existence of a zone of copper sulfide material occurring at a greater depth than the surface and shallow level mineralization which Magini and Tognoni felt could be leached for profit. These upper level mineral occurrences are, in the case of the El rame claims, largely copper oxide-type occurrences. As Robert McColley stated while describing his examination of the claims (Tr. 107), "In other words, the copper minerals that I could identify were all oxide minerals. I take that back. There were a couple of sites where we did see sulfide mineralization on the claim. But, basically the values that I saw are oxide values."

The significance of this oxide/sulfide distinction is briefly explained by the following excerpt from *Mineral Facts and Problems*, a 1975 publication of the Department of the Interior, Bureau of Mines, which states, at p. 293, that:

Domestic mine production is approximately four-fifths from open pit mining and one-fifth from underground mining. Most of the ores are sulfides which are subjected to crushing, fine grinding, and concentration by flotation. Oxide ores are leached with acid, and the dissolved cop-

per is recovered by precipitation on scrap iron or by direct electrowinning. Copper concentrates and precipitates are smelted to an impure blister copper, and then upgraded to refined copper by fire refining or electrolytic refining.

Donald F. Reed, in his examination of the claims, noted that:

In several instances chalcopyrite (copper-iron sulphide) is found. This is of significance because such sulphides are normally primary in origin, and indicate that mineralization *may* have been deposited from hypogenic (ascending from below) solutions, and that the mineralization may extend to considerable depth. In other words, the copper and iron minerals found in the outcrops may be only residual values remaining in the upper leached or oxidized zone. If this is so, then concentrations of mineral may be expected to be found below, in a zone of secondary enrichment, at the ancient or premanent [*sic*] water level, perhaps even below this in the primary zone. This could only be determined by a systematic program of diamond (core) drilling which should extend to a depth of 500 to 1000 feet. Such a program would be expensive and highly speculative. [Italics in original.]

With regard to the present state of knowledge of the lower strata of the El rame group, Reed states that:

The Corps of Engineers did drill several holes at the proposed dam site, but these holes were drilled for the purpose of determining the stability of the bedrock as a base for the dam. The deepest was about 100 feet and no assays to determine mineral content were taken. I talked to Mr. Fenimore Turner, Geologist for the Corps in Los Angeles, where the drill cores are presently stored. Over the telephone he told me that he had visually examined the cores and had not seen any copper minerals in any of them, that the only mineralization observed was in the

form of iron oxides (limonite and hematite).

Although these above-mentioned drill cores were examined, in Los Angeles, by Tognoni's associate, Robert T. Wilson, contestees themselves appear to have conducted no exploratory drilling of the type described by Reed, *supra*. Wilson, for his part, expressed no opinion as to the question of whether a prudent man would invest in the El rame claims. Robert E. Wilson, a retired geologist (no relation to Robert T. Wilson, *supra*) who testified for contestees also expressed no opinion regarding the probability of a massive sulfide existing on the El rame group. Only Hale Tognoni ventured to suggest that the El rame group was a likely prospect for development as a massive sulfide, and his testimony on this issue (Tr. 465-474, Ex. M-101, M-102) contains not one scintilla of probative evidence suggesting the occurrence of such a deposit. Tognoni's testimony, rather, is confined to a discussion of surface value occurrences and the suggestion that, since the El rame group is located roughly 100 miles southeast of a cluster of massive sulfides, it too is probably a massive sulfide. We would note that, while geologic inference may not be relied upon as a substitute for the actual finding of a mineral deposit, Tognoni's "massive sulfide" predictions are so badly strained and so completely unsupported that they cannot even rise to the status of legitimate inference. See *United States v. Grigg*, 8 IBLA 331, 79 I.D. 682 (1972).

Weighing carefully all the evidence submitted by contestees on the issue of discovery, we find that they have failed to carry the burden of coming forward and rebutting the presumption of invalidity raised by the testimony of the Government's mineral examiners. At best, contestee's evidence suggests the possibility that a prudent man might embark on a program of diamond core drilling to test the El rame area for the presence of a deep lying zone of secondary enrichment or "massive sulfide." As the Reed report notes, even this possibility "would be expensive and highly speculative." We find, moreover, that evidence which merely suggests that a prudent man might invest in further exploration with the hope of finding a paying deposit will not, without more, support a claim of discovery. *Chrisman v. Miller*, 197 U.S. 313 (1905); *United States v. Walls*, 30 IBLA 333 (1977).

[4] The following colloquy took place at the hearing below as Mr. Tom Galbraith, counsel for contestees, cross-examined Dr. Fair:

Q. [Galbraith] And if a prudent man wants to develop a mine, isn't one of the best ways for him to learn whether it would really work economically is to give it a try on a small scale?

A. [Fair] Would you define small scale? In other words, what are we talking about here?

Q. Well, let's take the little leach operation that Frank Magini set up. I think that was something that a prudent man would do to determine what the economics would be.

A. If he made careful measurements of the amounts in material, if he took proper assays, if he controlled his solu-

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tions in a certain way so he could come out with useful data, yes.

Q. Well, maybe somebody like Frank Melluzzo would be—or Magini would be lost with the idea of useable data. Maybe he would understand it a little better if he took five tons of ore, put some acid on it and was able to sell the copper and came out with a little bit of profit.

A. I'm sure if—oh, I'm sorry.

Q. My question is, wouldn't that be a way a prudent man would develop the apparently leachable material that at least from his view was on his claims?

A. If it's done exactly the way you said it with the profit on the end. I'm sure Mr. Magini recognizes profit. I would agree.

We agree wholeheartedly with the suggestion which counsel puts forward in the above line of questioning. Our approval of his proposal, however, leaves us with another question, *i.e.*: Why hasn't Melluzzo tried to leach the El rame on a small scale? Melluzzo has held the contested claims, in most instances, since 1957, but he has made no attempt whatever at developing the sort of small scale, leaching-for-profit operation which his counsel enthusiastically recommends. Melluzzo states at the hearing that he has been unable to mine the claims on a large scale due to the threat of condemnation which has overshadowed the claims and discouraged capital investment for the past several years. This uncertainty, however, should have no effect on the ability of Melluzzo or Magini to work the claims themselves on the scale suggested by Mr. Galbraith, *supra*. We therefore conclude that the reason for contestees inaction is

quite simple; they have made no discovery which might warrant development. As the Court of Appeals for the Tenth Circuit held in the case of *United States v. Zweifel*, 508 F. 2d 1150; 1156 (10th Cir. 1975):

If mining claimants have held claims for several years and have attempted little or no development or operations, a presumption is raised that the claimants have failed to discover valuable mineral deposits or that the market value of discovered minerals was not sufficient to justify the costs of extraction. *E.g.*, *United States v. Humboldt Placer Mining Co.*, 8 IBLA 407 (1972); *United States v. Ruddock*, 52 L.D. 313 (1927); *Castle v. Womble*, 19 L.D. 455 (1894). [Italics added.]

[5] Melluzzo asserts both below and on appeal, that his sale of decorative stone from the El rame claims constitutes "copper mining." Judge Koutras refused to accept this contention and counsel for contestees refers to the judge's logic as creating "a reverse Midas touch." While we agree that Melluzzo has been successfully selling stone from the El rame group, and this stone contains a certain amount of copper coloration, this does not, without more, support Melluzzo's characterization of the rock as "copper ore." Melluzzo defines "ore" as "any mineral that a prudent man could make a profit off of" (Tr. 357) and points out that his records refer to material from the El rame claims as "copper" or "copper stone." Melluzzo thus appears to reason that, since he is selling stone from the El rame claims at a profit, the stones are "ore," and

since the stones are "ore," he is mining copper. We disagree.

In the first place, no showing has been made of the actual copper content of this building stone. Melluzzo protests that he cannot be forced to sell the stone to a smelter when he profits more by selling it to builders. He neglects to prove, however, that the stone would be in any way useful to a smelter. The fact that Melluzzo calls the rock "copper" does not make it so, and Dr. Fair's observation, *supra*, that a small amount of copper can produce a striking coloration effect leads us to believe that Melluzzo's decorative building stone may have been low in actual copper content. We do not wonder that Melluzzo's records show only the removal of "copper" as opposed to "building stone" from the El rame since, as Melluzzo undoubtedly knows, common varieties of building stone were excluded from the coverage of the mining laws by the Act of July 23, 1955, *as amended*, 30 U.S.C. § 611 (1976), commonly called "The Multiple Use Act." While "uncommon varieties" of building or decorative stone remain locatable under the Act of Aug. 4, 1892, 30 U.S.C. § 161 (1976), such location must be supported by a showing that the deposit in question has a unique property giving it a special value reflected by the fact that the material commands a higher price in the marketplace than "common varieties" of the same material. *United States v. Chartrand*, 11 IBLA 194, 80 I.D. 408 (1973). Locations of such claims, moreover, must be

made as placer locations, and a lode claim location, such as the claims here at issue, cannot support a building stone placer claim under the Act of Aug. 4, 1892, *supra*. *U.S. v. Chartrand, supra; United States v. Edwards*, 9 IBLA 197 (1973). We therefore hold that Melluzzo's removal of building stone from the claims cannot be considered as evidence of a discovery of a valuable mineral deposit on the El rame claims. *See also Cole v. Ralph*, 252 U.S. 286, 295 (1920), holding that a placer discovery will not support a lode location nor a lode discovery a placer location.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

DOUGLAS E. HENRIQUES,
Administrative Judge.

WE CONCUR

EDWARD W. STUEBING,
Administrative Judge.

ANNE POINDEXTER LEWIS,
Administrative Judge.

APPEAL OF COOK INLET REGION,
INC.

3 ANCAE 111

Decided *December, 27 1978*

Appeal from the Decision of the Alaska State Director, Bureau of Land Management #AA-11153-21, dated July 5, 1978, rejecting a land selection ap-

December 27, 1978

plication of Cook Inlet Region, Inc., pursuant to §§ 12 and 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), as amended, 89 Stat. 1145 (1976).

Decision of the Bureau of Land Management, dated July 5, 1978, affirmed December 27, 1978.

1. Alaska Native Claims Settlement Act: Land Selections: Regional Corporations—Applications and Entries: Generally

A land selection application filed pursuant to §§ 12(b) (1), 12(b) (3), and 14(h) (1) of the Alaska Native Claims Settlement Act must conform to the regulations promulgated under the statute as enacted at the time the application is filed unless a later amendment to the statute provides otherwise.

2. Alaska Native Claims Settlement Act: Generally—Regulations: Generally

As an amendment to the Alaska Native Claims Settlement Act, P.L. 94-204, 89 Stat. 1145, 43 U.S.C. § 1611 (Supp. IV, 1974), is subject to both the provisions of ANCSA and the regulations promulgated to implement ANCSA, unless such provisions or regulations conflict with, or are specifically excepted or preempted in the amendment.

3. Alaska Native Claims Settlement Act: Land Selections: Regional Corporations—Applications and Entries: Generally

Neither 89 Stat. 1145, 43 U.S.C. § 1611 (Supp. IV, 1974), nor the Terms & Conditions incorporated in the amendment, contain language which conflicts with excludes, or preempts ANCSA regulations 43 CFR 2650.2(e) (1) and (2) requiring a legal description of lands applied for pursuant to ANCSA, or 43 CFR 2653.5(f)

requiring a description and location of historical sites selected pursuant to § 14 (h) (1) of ANCSA.

4. Alaska Native Claims Settlement Act: Land Selections: Regional Corporations—Applications and Entries: Generally

A land selection application filed pursuant to §§ 12(a) (1), 12(a) (3), and 14(h) (1) of ANCSA containing only a metes and bounds description of the exterior boundaries of a region, does not meet the requirements for a legal description of 43 CFR 2650.2(e) (1) and (2) and 2653.5(f).

5. Alaska Native Claims Settlement Act: Land Selections: Regional Corporations—Applications and Entries: Generally

A land selection determined finally to be invalid pursuant to ANCSA or its implementing regulations is not protected within the meaning of § 22(h) (1) after the date of terminations.

APPEARANCES: James F. Vollintine, Esq., representing Cook Inlet Region, Inc.; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, representing the Alaska State Director, Bureau of Land Management.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

On Dec. 18, 1975, Appellant, Cook Inlet Region, Inc. (hereinafter Cook Inlet), filed a selection application pursuant to §§ 12(a) (1), 12(a) (3) and 14(h) (1) of the Alaska Native Claims Settlement Act (hereinafter ANCSA), 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), as amended, 89 Stat. 1145

(1976). In that application Cook Inlet applied for the following lands:

All vacant and unappropriated federal lands; all lands withdrawn for Native selection; all lands which are now or may hereafter become surplus under section 3(e)(1) of ANCSA; all scattered tracts including, but not limited to, abandoned and unperfected homesteads, trade and manufacturing sites, small tract sites, headquarter sites, etc; and all surplus federal properties which are now or may hereafter be declared surplus under the General Services Administration or by any other Federal Agency.

Submitted with the application was a metes and bounds description of the exterior boundary of the Cook Inlet Region and a map showing the exterior boundary of the Cook Inlet Region.

By a decision dated July 5, 1978, the Bureau of Land Management (hereinafter BLM) rejected the application. BLM's basis for rejecting the application was that Cook Inlet did not follow the application procedures set forth in 43 CFR 2650.2 (e)(1) and (2), which require that surveyed lands applied for will be described by the official plat of survey and unsurveyed lands will be described by protraction diagrams. The same application which also purported to select pursuant to § 14(h)(1) of ANCSA for cemetery and historical sites was rejected for its failure to meet documentation and physical description requirements of 43 CFR 2653.5(f). The BLM decision notes that Cook Inlet has filed individual applications for specific tracts of land under § 14(h)(1) of ANCSA sub-

sequent to the application here appealed and these applications will be considered on a case by case basis.

After Cook Inlet filed the application here in question, Congress enacted P.L. 94-204, 89 Stat. 1145, 43 U.S.C. § 1611 (Supp. IV, 1974), on Jan. 2, 1976 (hereinafter P.L. 94-204). This amendment to ANCSA effected a settlement of Cook Inlet's selection rights negotiated by the appellant, the State of Alaska and the Federal Government. The settlement agreement entitled "Terms & Conditions for Land Consolidation & Management in the Cook Inlet Area" (hereinafter T&C) is incorporated into P.L. 94-204 under § 12(b). Under P.L. 94-204 § 12 and the T&C, a selection pool consisting of certain designated federal lands was to be established by Jan. 15, 1978. (The date for establishing the selection pool has since been extended to June 15, 1979.) Under the T&C, § I.C.(2)(a), Cook Inlet has 90 days from the time it is notified of property being placed in the selection pool or from the time the property is valued, whichever date is later, to make its selection decision on the property. Under certain conditions, lands are also made available to the region from outside its regional boundaries.

Procedurally, appellant filed its Notice of Appeal from the above-mentioned BLM decision with this Board on Aug. 2, 1978, pursuant to 43 CFR 4.903. On Sept. 15, 1978, appellant filed its Statement of Reasons to which, in turn, BLM filed its Reply on Oct. 18, 1978.

December 27, 1978

In its Statement of Reasons, Cook Inlet contends that its application cannot be rejected until the Secretary of the Interior completes the selection pool required by § I.C.(2) (a) of the T&C. In support of this position, a number of arguments are set forth by Cook Inlet.

First, it is argued that P.L. 94-204 and the T&C preempts any ANCSA land selection regulations which conflict with its provisions. The assertion is that Cook Inlet's application did not need to conform with the specifics of the ANCSA regulations because Cook Inlet's land entitlement is based on P.L. 94-204 and the T&C, both of which came into existence long after the land selection application regulations were issued. To support this contention, appellant states:

* * * * *

* * * In view of the language in section 12(b) of P.L. 94-204 that the Secretary is to make conveyances to Cook Inlet "in accordance with the specific terms, conditions, procedures, covenants, reservations and other restrictions" set forth in the T&C, it must be presumed that the T&C preempts any ANCSA land selection regulations which conflict therewith.

* * * * *

Second, even assuming that the ANCSA land selection regulations apply in this situation, 43 CFR 2652.3(f) provides that regional corporations "may file applications in excess of their total entitlement" and the application here in question was merely filed in conformance with that regulation.

Third, for BLM to require compliance with 43 CFR 2650.2(e) (1) and (2) would have placed an impossible burden upon Cook Inlet because (a) at the time of filing the application, the entire Cook Inlet land staff was involved in the negotiations which resulted in the T&C and (b) due to the uncertain land status existing in the Cook Inlet Region at the time, it was not clear which lands were available for selection.

Fourth, ANCSA § 22(h) (1) which provides that "any lands selected by Village or Regional Corporations * * * shall remain withdrawn until conveyed," when read together with ANCSA § 2(b) directing that ANCSA be accomplished "with maximum participation by Natives in decisions affecting their rights and property," indicates that the Secretary should not reject selection applications until he has conveyed the Natives' entitlement.

BLM, in its Reply, made the following arguments in response to the appellant's Statement of Reasons. First, since Cook Inlet's application was filed pursuant to ANCSA, and not P.L. 94-204 or the T&C, ANCSA regulations are applicable and controlling. Second, even if the application had been made pursuant to P.L. 94-204 and the T&C, ANCSA regulations would still apply because nothing in either P.L. 94-204 or the T&C makes a general exception to, or preemption of, other ANCSA provisions. Third, the fact appellant alleges that it did not

have the staff capacity to comply with the stringent requirements in 43 CFR 2650.2(e) (1) and (2) and 2653.5(f), can in no way change these requirements.

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in ANCSA, *as amended*, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), and implementing regulations in 43 CFR Part 2650 and Part 4, Subpart J, hereby makes the following findings, conclusions, and decision affirming that Decision of the State Director, Bureau of Land Management #AA-11153-21.

[1] The Board concludes that it was proper for BLM to apply ANCSA application regulations (43 CFR 2650.2(e) (1) and (2) and 2653.5(f)) to Cook Inlet's application here in question. The appellant's application was filed at a time when P.L. 94-204 was not yet in existence. The application was filed Dec. 18, 1975, and P.L. 94-204 was enacted on Jan. 2, 1976. It is reasonable to conclude that a land selection application must conform to the legal standards in existence at the time of filing, *i.e.*, 43 CFR 2650.2(e) (1) and (2) and 2653.5 (f). Therefore, the Board concludes that when a land selection application is filed with the Bureau of Land Management pursuant to the Alaska Native Claims Settlement Act, it must conform to the regulations promulgated under the statute as enacted at the time the application is filed.

[2] The Board further finds that even if the application had been made pursuant to P.L. 94-204 and

the T&C, ANCSA regulations 43 CFR 2650.2(e) (1) and (2) and 2653.5(f) would have applied. P.L. 94-204, which incorporates the T&C, is an amendment to the Alaska Native Claims Settlement Act and therefore subject to both the provisions of ANCSA and the regulations promulgated to implement ANCSA, unless such provisions or regulations conflict with, or are specifically excepted or preempted in either the amendment or the T&C. P.L. 94-204, § 12(c) states:

The lands and interests conveyed to the Region under the foregoing subsections of the section and the lands provided by the State exchange under subsection (a) (1) of this section, *shall be considered and treated as conveyances under the Settlement Act unless otherwise provided.* * * * (Italics added.)

P.L. 94-204, § 18 states:

Except as specifically provided in this Act, (i) the provisions of the Settlement Act are fully applicable to this Act, and (ii) nothing in this Act shall be construed to alter or amend any of such provisions.

Section IX, T&C states:

Lands conveyed to CIRI and/or its Village and Group Corporations in accordance with this Document, notwithstanding their source (whether Federal or State), *shall be considered and treated as conveyances under and pursuant to ANCSA, except as may be expressly provided otherwise in this Document.* (Italics added.)

Because P.L. 94-204 is an amendment to ANCSA, it is necessary to ascertain whether the amendatory provisions were intended to preempt the ANCSA land selection regulations here in question. This inquiry is necessitated by the rule

December 27, 1978

of statutory construction which provides that an Act, and its amendments, be read as one harmonious whole.

The presumption is that the lawmaker has a definite purpose in every enactment and has adapted and formulated the subsidiary provisions in harmony with that purpose; that these are needful to accomplish it; and that, if that is the intended effect, they will, at least, conduce to effectuate it * * *. From this assumption proceeds the general rule that the cardinal purpose, intent or purport of the whole act shall control, and that all the parts be interpreted as subsidiary and harmonious. (Italics added.) Sands, *Sutherland on Statutory Construction*, Vol. 2A, § 46.05, 57, (4th ed. 1972).

[3] The Board concludes that § 12(c) and § 18 of P.L. 94-204, along with § IX of the T&C and the applicable general rule of statutory construction quoted above require that this amendment to ANCSA be read as an addition of certain new selection rights and terms for Cook Inlet and is not a general preemption of ANCSA application regulations. After careful review, the Board finds that neither P.L. 94-204, nor the T&C contain language which conflicts with, preempts, or excludes ANCSA regulations 43 CFR 2650.2(e)(1) and (2) and 2653.5(f) requiring that surveyed lands applied for will be described by the official plat of survey and unsurveyed lands will be described by protraction diagrams. Therefore, even if the land selection application here appealed had been filed pursuant to the provisions of P.L. 94-204, the legal description

requirements established by regulation under the Settlement Act would still apply.

[4] The Board having found that appellant's selection application needed to be filed in conformance with requirements set forth in 43 CFR 2650.2(e)(1) and (2) and 2653.5(f), the Board further concludes that an application with a metes and bounds description of the exterior boundaries of a region, does not satisfy the requirements of those regulations for purposes of selecting land under §§ 12(a)(1), 12(a)(3) and 14(h)(1) of ANCSA. Appellant did not provide either the legal description of surveyed lands applied for in accordance with the official plats of survey as required by 43 CFR 2650.2(e)(1) or protraction diagrams for unsurveyed lands as mandated by 43 CFR 2650.2(e)(2). Nor did Cook Inlet include a statement describing the historical background and value of their § 14(h)(1) claims or provide a sufficient description of these sites as required by 43 CFR 2653.5(f).

Appellant also argues that the application identifying all of the lands within the exterior boundaries of the region for selection is valid because 43 CFR § 2652.3(f) provides that regional corporations "may file applications in excess of their total entitlement." The Board does not dispute the clear reading of the regulation, but merely points out that all applications under ANCSA, including applications that may be for lands "in excess of

entitlement" must satisfy the regulations requiring a legal description of the land selected. Appellant's conclusion here fails.

Likewise, the Board rejects appellant's conclusion that ANCSA § 22(h)(1) which provides that "any lands selected by Village or Regional Corporations * * * shall remain withdrawn until conveyed," when read together with the "immediately" requirement of § 2(b), indicates that the Secretary should not reject selection applications until he has conveyed the Natives' entitlement.

[5] Section 22(h)(1) of ANCSA terminates all withdrawals made under the Act within four years of the date of enactment, then provides that lands selected shall remain withdrawn until conveyed. However, as found earlier in this Decision, such selections must be made pursuant to the terms of the Act and implementing regulations. The Board concludes that a land selection determined finally to be invalid pursuant to ANCSA or implementing regulations is not protected within the meaning of § 22(h)(1) after the date of termination.

Appellant also asserts that compliance with the regulations for legal description "would have placed an impossible burden upon Cook Inlet * * * because the land staff was involved in negotiations which resulted in the T&C * * * [and] due to the uncertain land status existing in the Cook Inlet Region, it was not clear which lands were available for selection." The Board dismisses this argument as having no bearing on the present

appeal. It should have been more properly made to the Secretary of the Interior as a basis for a hardship waiver of the legal description regulations.

It should be noted in conclusion that what has been decided herein in no way affects the right of the appellant to select lands to complete its entitlement as provided for in P.L. 94-204 and the T&C. As mentioned previously, ANCSA was amended by P.L. 94-204 in such a manner as to place the responsibility and opportunity upon appellant to make selections from land which is placed in the selection pool by the Secretary of the Interior. The Secretary has until June 15, 1979, to place the required amount of property in the selection pool.

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
*Chairman, Alaska Native
Claims Appeal Board.*

ABIGAIL F. DUNNING,
Board Member.

LAWRENCE MATSON,
Board Member.

A&J CONSTRUCTION CO., INC.

IBCA-1142-2-77

Decided *December 28, 1978*

Contract No. H50C14209716, Bureau of Indian Affairs.

Sustained in part.

1. Contracts: Construction and Operation: Drawings and Specifications—

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Contracts: Performance or Default: Impossibility of Performance

When the Government issues a contract which, unknown to the contractor, is defective because insufficient borrow is available from the designated borrow sites, and thereafter the Government issues three de facto change orders, at three different times, to make sufficient borrow available, and where the record discloses that the Government failed to reveal pre-award knowledge that haul or overhaul would be required and that it had decided to substantially alter a borrow depth limit on the drawings, the Government is liable under the changes clause for the additional costs shown to be attributable to the Government's actions.

2. Contracts: Construction and Operation: Drawings and Specifications— Contracts: Construction and Operation: General Rules of Construction

A dispute as to pay quantities under a construction contract is resolved in favor of the contractor where his interpretation of the specification paragraph in issue gives effect to all the language of the particular provision and is consistent with the construction placed upon the specifications and drawings by the Government employees responsible for their preparation. A Government's counterclaim involving a portion of the disputed pay quantities is denied.

3. Contracts: Construction and Operation: Drawings and Specifications— Contracts: Disputes and Remedies: Equitable Adjustments

Where under a standard construction contract the liability of the Government for defective plans and specifications is clearly established but as a consequence of the contractor having failed to segregate the costs applicable to the constructive change it is not possible to determine precisely the extent to which the Government's actions increased the cost of performance, the amount of the equitable adjustment to which the contractor is en-

titled is determined by the Board finding whether particular costs are allowable where that is possible and drawing inferences from the entire record where it is not possible to otherwise determine the proper allowances to be made for various aspects of the claimed amount.

4. Contracts: Construction and Operation: Drawings and Specifications— Contracts: Disputes and Remedies: Equitable Adjustments

Claims for extra costs incurred in the concrete lining of a canal attributed to heat encountered during delayed performance allegedly caused by defective plans and specifications is denied, where the Board finds that the delays experienced were the result of actions or inactions for which the contractor was responsible including (i) the failure to have necessary equipment operational weeks after concrete placement was to commence according to the contractor's plan; (ii) the hiring of incompetent carpenters; and (iii) the manner in which the contractor chose to place outlet structures.

APPEARANCES: Mr. Alva A. Harris, Attorney at Law, Shelley, Idaho, and Mr. William L. Hintze, Attorney at Law, Short, Cressman & Cable, Seattle, Washington, for appellant; Mr. Fritz L. Goreham, Department Counsel, Phoenix, Arizona, for the Government.

*OPINION BY ADMINISTRATIVE JUDGE MCGRAW**

*INTERIOR BOARD OF
CONTRACT APPEALS*

INTRODUCTION

This appeal arises out of a standard form 23-A (Oct. 1969 edition) contract to excavate, build and line

*This appeal was heard by Administrative Judge Steele who is no longer a member of this Board.

with concrete a 2.6 mile canal called "Lateral 90." The appellant claims \$412,746.86 inclusive of profit, together with an extension of time and remission of liquidated damages in the amount of \$1,700. Interest on the amount awarded is also claimed, as authorized by the contract. The Government denies liability. The parties tried liability and amount.

FINDINGS OF FACT

Sometime before Nov. 10, 1975, the Department of the Interior, Bureau of Indian Affairs (BIA), decided to have a 2.6 mile canal built.¹ It obtained the services of the Bureau of Reclamation (BOR) to design and supervise the construction of the canal.² The design of the project was assigned to a BOR engineer, Mr. Wong (Tr. 213, 214). He prepared the draft and final drawings for the canal. The canal was to be 7.9 feet deep, 8 feet wide at the bottom and about 32 feet wide at the top. It was to be constructed by excavating the canal channel itself, called the prism, out of original ground in certain places and in other places by building dikes of dirt called embankments on either side of the channel or prism. The channel would be lined with a concrete lining 2½ inches thick (AF I Drawings #70, #75). The canal would be 2.6 miles long. It would start at a point on an already existing canal called the "Main Drain." The Main Drain ran north to south. The new canal,

called "Lateral 90" would start on the Main Drain and go due east about 2,500 feet. It would then make a 90-degree turn south and run about 2,500 feet south to "the county road" after which it would continue south about 8,000 more feet to end at a place called "Tyson Wash."³ Mr. Wong supervised the preparation of 15 drawings showing the proposed canal. Drawings #67, #68, and #69 showed two views of the proposed canal. One view was a bird's eye view looking down on the proposed canal. The other view was a worm's eye view looking at the side of the proposed canal from about ground level. These drawings showed that the bottom of the proposed canal—called "flowline" or "invert"—would be above the level of the "original ground" for roughly 1,000 feet at the northwest end of the canal (near the Main Drain) and for roughly 1,500 feet at the south end near Tyson Wash (AF I Drawings #67 and #69). The drawings also depicted typical cross sections of the prospective canal. The drawings clearly indicated that the work site was to be 300 feet wide, that is 150 feet on either side of the centerline of the canal (AF I Drawings #75 and #76).

The obvious and contemplated method to build the canal was to dig out (excavate) the channel (or prism) where this could be done, and to build the embankments on either side of the channel by constructing them with dirt. Some of

¹ Appeal File 1 (hereafter "AF"), Invitation dated Nov. 10, 1975.

² Transcript (hereafter "Tr.") pp. 213-215, 256, 267-298, 299-316, 566, 624-625, 645-646, 702-708.

³ Appellant's Exhibit 18 (hereafter "AX"), AF I Drawing #66.

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the dirt—which the parties called “borrow”—would come from excavating the channel. The rest of the dirt would come from outside of the embankments but within the 300-foot right-of-way.⁴ The BIA had considered this problem of where to obtain the dirt and did not want excessively deep borrow pits on either side of the canal because of their concern about fertility and the need to fill the voids left by the material removed (Tr. 634, 635). The BIA and the BOR field engineer, Mr. King (Tr. 624, 625), agreed that the borrow from alongside the canal would be limited to 2 feet below original ground level (Tr. 634). Thus, Mr. Wong placed an arrow on the cross sections of the draft drawings #75 and #76 showing that the borrow areas could only be 2 feet below the original ground surface (Tr. 634, 220).

Mr. Wong next prepared a document entitled “Borrows for Lateral.” The document so prepared was an estimate that indicated to Mr. Wong that it would be cheaper to use borrow from alongside the canal (within the 300-foot right-of-way) rather than take borrow

from the spoil banks along the Main Drain (AX-2; Tr. 216-220). Mr. Wong also prepared an engineering estimate on a form entitled “Computation Sheet” (Tr. 227, 228). He concluded that 16,950 cubic yards (c.y.) would be excavated from the channel (the prism), that the borrow areas on either side of the canal would provide 203,000 c.y. but that since it would require 231,600 c.y. to build the embankments, there would be a shortage of 11,650 c.y. Thus, he concluded that it would be necessary to import that amount to complete the embankment. Utilizing 12,000 c.y. and estimating the distance to haul the borrow would be one-half mile, he computed “overhaul” as involving 6,000 mile cubic yards (P3 AX-3; Tr. 227-233). Based upon this information Mr. Wong then prepared what we will call a pro forma bid. He listed all the pay items which he thought would be in the contract to build the canal, inserted the quantities from his just-mentioned paper and inserted a unit price he thought was reasonable. Among the items included were the following expected earth work items:

Item No.	Work	Quantity	Unit Price	Price
2	Excavation for lat.	17, 000 c.y.	. 75	\$12, 750
3	Compacted embankment	81, 000 c.y.	. 25	20, 250
4	Excavation from borrow	215, 000 c.y.	1. 00	215, 000
5	Overhaul	6, 000 mi. c.y.	. 50	3, 000
6	Trimming for lining	53, 500 c.y.	1. 00	53, 500
8	Excavation for structure	1, 000	2. 00	2, 000
9	Backfill about structure	1, 500	2. 50	3, 750
—	Other work			

(AX-3; Tr. 233-239).

⁴ See AF 1 Drawings #75 & 76 and AF #1, para. 56 of the specification, Tr. 219, 220.

The conclusion that there would be a need for more borrow was communicated to the Government's resident engineer Mr. King (Tr. 634) who talked with BIA about the situation. Mr. King estimated that enough dirt would be obtained if the limitation on borrow depth was increased to 2½ to 3 feet (Tr. 635, 652). BIA agreed there was a need for an increase (Tr. 635). Someone of the Government engineers decided to change the 2-foot limitation on the drawings to read 2 feet plus or minus (Tr. 652). This was intended to mean "approximately 2 feet" (Tr. 635). Drawings #75 and #76 were changed to read "2.0±" feet (Tr. 302, 635).

We digress a moment to discuss a document called a "mass diagram." A mass diagram is a study done of a proposed earthwork project. The purpose of the study is to determine the net amount of dirt needed and available at selected points on the project. When these

amounts are plotted on a "map" of the project, one can determine how much dirt must be moved from one place to another to build the project (AX-10, AX-11; Tr. 426-428).

The BOR prepares mass diagrams on any of its projects that contain an overhaul item and on all its canal jobs (Tr. 767, 768).

Returning to our chronology, the BOR representatives had a meeting to determine the form and content of the solicitation package for this BIA project to build Lateral 90. The Government's chief engineer on the project had had a prior experience when there had been a dispute as to the quantities of materials hauled (Tr. 705-706). Further, the Government wanted to minimize the number of field personnel needed to administer the expected project (Tr. 301). The decision was made to write the solicitation so that it would have only two earth work pay items (Tr. 300). The pay items later issued were included in the IFB as follows:

SCHEDULE

Item No.	Work or Material	Quantity and Unit	Unit Price	Amount
1	Mobilization and preparatory work	Lump sum		\$ _____ (not to exceed \$25,000)
2	Remove 24-inch corrugated metal pipe culvert	Lump sum		_____
3	Constructing lateral embankments	160, 000 cu. yd.	\$ _____	_____
4	Compacting embankments	81, 000 cu. yd.	_____	_____
5	Trimming earth foundations for concrete lining	54, 500 sq. yd.	_____	_____
6	Furnishing and installing Main Drain culverts	Lump sum		_____
7	Constructing and installing turnouts	17 each	_____	_____

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Item No.	Work or Material	Quantity and Unit	Unit Price	Amount
8	Concrete in lateral lining and transitions	3,800 cu. yd.	_____	_____
9	Furnishing and handling cement	22,500 cwt	_____	_____
10	Construct turnout, overflow plug and wasteways at Tyson Wash	Lump sum	_____	_____
11	Furnishing and placing elastic joint filler	300 sq. ft.	_____	_____
12	Furnishing and installing safety ladders	23 each	_____	_____
			Total for schedule	\$ _____

(AX-4, AF #1 (bid)). Since there was no pay item for haul or over-haul, the Government decided that it would not prepare a mass diagram (Tr. 768). This decision was reached even though the Government had the basic data—mass ordinates—from which to prepare such a document (Tr. 786, 787).

On Nov. 10, 1975, the Government issued an invitation for bids covering this project and including the pay items for earthwork listed above. The drawings said the borrow pits could go down $2.0 \pm$ feet (AF Drawings #75 and #76). The c.y. quantities indicated in the IFB were "neat line quantities." That means that they were the "in place," the "finished work" quantities shown on the drawings as being the embankments (and other parts of the project, *e.g.*, 1-foot compaction) as they were to be built (Tr. 230-231, 628).

The IFB was a total small business set aside.⁵ The estimate of the

dollar size of the project published by the Government in the IFB was \$250,000 to \$500,000 (Tr. 282).

The appellant is an Idaho Corp. that has been in the business of constructing canals and sewers since 1965 or 1966. During the period 1972-77 its yearly annual gross was about \$2 million (Tr. 23, 122, *cf.* 139). Appellant's president, Mr. Jackson, who prepared the bid submitted in response to the invitation, had prepared bids all of his life since high school (Tr. 24, 26). He had 2 years of Junior College and one semester at San Francisco State College (Tr. 23-24). Prior to bidding Mr. Jackson read the plans and specifications, walked the work site with a BIA representative (Tr. 26, 27, 89, 118-120) and made an estimate of labor, materials, and computations of areas. It was his estimate that he would have to excavate 193,600 c.y.; that he would be in a position to place this material on the embankments at the rate of 600 c.y. per hour and that this rate of production would necessarily in-

⁵ AF 1 (IFB, also "Notice of Small Business Set-Aside").

volve a relatively short haul (Tr. 523-525; AX-23). The appellant's expert, Mr. Threlkeld, calculated the average haul would be 520 linear feet (AX-9; Tr. 423-424). Mr. Jackson planned to obtain the borrow for the embankments from

the borrow areas by the sides of the canal as shown on the drawings by excavating to 2 feet (Tr. 55, 117). Appellant and other bidders submitted their bids which were partially recorded in an abstract of bids on Dec. 17, 1975 (AF 2), as follows:

Item	Quantity	Description	A&J	B	C	D
3	160,000	Constr. lateral	.42	.80	.86	.70
	c.y.	embank.	67,200	128,000	137,600	121,600
4	81,000	Compacting	.56	.94	.57	.59
	c.y.	embank.	45,360	76,140	46,170	47,790
Total (all items bid upon)			\$479,925	\$659,474	\$684,238	\$558,440

Meanwhile, and unknown to appellant, the Government's head of contract administration spoke to the Government's field engineer in Parker and told him that the Government had decided that the prospective contractor would not be limited by the 2.0± feet but could excavate to invert and that this information could be given to any bidder who asked. (See discussion in Part III under "Additional Factors Considered in Evaluating Earthwork Claims.") This information was not given to appellant until a month or more after contract award (Tr. 50, 303-305). It is not clear if it was given to any of the bidders (Tr. 304-306, 635-636). Apparently the Government engineers had made this decision—to go to invert—prior to the opening of bids (Tr. 303-306). The Government asked appellant to verify its bid. Mr. Jackson confirmed appellant's bid after discussing it with Mr. King in the latter's office. At that time Mr. King did not tell him of the decision to go to invert (AF

6; Tr. 627-629). The contract was executed as of Jan. 5, 1976 (AF 1, Contract). Appellant started laying the water sprinkling system (needed for the moisture required to compact the dirt) about Jan. 21 (Tr. 29). The notice to proceed was issued Jan. 26 (Tr. 28).

Appellant started work by stripping 4 to 8 inches of dirt and roots off the site (Tr. 39, 40). After wetting (Tr. 35-38), he began excavation for the embankments. It commenced excavation and construction of embankments at the northwest end of the project and soon realized that it would be helpful if it could use the dirt from the Main Drain spoil banks. It asked for permission to do so on Jan. 29, 1976 (AF 9, AF 12) and the Government agreed—at no added cost to it—on Feb. 13, 1976 (AF 13). Appellant became concerned about the source of borrow, as the hauls began to get longer and longer.⁶ Mr. Jackson told the Government resi-

⁶ Appellant was working at about the 90-degree elbow on Lateral 90 (Tr. 47, 98, 100).

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dent engineer of the situation and finally Mr. King, about the end of Feb. or the beginning of Mar. 1976 (Tr. 116-117), told him that appellant was not limited by the $2.0 \pm$ feet on the drawing and directed him to excavate to invert (Tr. 48, 99). Following this conversation, the appellant began to excavate to invert. It also went back and took more dirt from the Main Drain spoil banks. About Apr. 1 appellant had to and did obtain more and faster equipment to supplement the equipment it was already using on the job (Tr. 60, 61). As appellant progressed in construction south of the elbow and south of the county road, it became clear that importation of borrow from Tyson Wash would be considerably cheaper than hauling borrow from the borrow areas in the project alongside the canal just south of the county road (Tr. 56-58). The appellant asked and the Government agreed on Apr. 12, 1976, that A&J could obtain borrow from Tyson Wash. This appellant did (AF 18).

During performance of the contract appellant was required to excavate 1.0 ft. minimum (AF Drawings #75 and #76) under the bottom of the yet-to-be-placed concrete liner and to build this portion of the project as "compacted embankment." Appellant did this work (Tr. 42, 43, 144, 155), it submitted pay estimates that included this work and it was paid for this work (Tr. 310, 311, 354). In the summer of 1977 the Government asserted that it was not obligated to pay for this work (Tr. 311, 354).

In its answer dated July 13, 1977, the Government asserted a counterclaim saying that the actual material placed was 169,956.0 c.y. and the amount paid for was 185,621 c.y. and that the appellant had been overpaid \$6,579.30 (185,621 c.y. minus 169,956.0 c.y. = 15,665.0 c.y. Thus, 15,665.0 c.y. times \$.42/c.y. equals \$6,579.30).

On June 25, 1976, the Government stated that the project was substantially completed on June 11 (AF 22). The project was completed on Aug. 7, 1976 (AX-14, Tr. 210, 475). On Oct. 29, 1976, the appellant filed a claim for \$557,269.67,⁷ alleging that the IFB had been misleading (AF 27). In 1977 appellant hired an expert who finally prepared a mass diagram (Tr. 428-430, 433, 435). This mass diagram showed that if the IFB had been issued allowing excavation down to invert there would have been a need to import 43,000 c.y. of borrow for the north end of the project and 35,900 c.y. of borrow for the south end of the project (Tr. 440).⁸

⁷Total contract costs were in the amount of \$1,071,802 (AX-5). According to AF 23, the amount paid or approved for payment by the Government totals \$497,755. Consequently, unreimbursed total costs are in the amount of \$573,547. Appellant's claim is in the amount of \$414,446.86 (AX-16).

After citing the above figures and noting the weaknesses associated with the total cost approach, appellant's counsel states: "The difference in results between the method actually employed and the total cost method is approximately \$159,000 which should be adequate to more than cover any possible contractor bidding or performance problems reflected by the record." Appellant's Opening Brief, p. 35 (hereafter AOB).

⁸AX-10, AX-11; Tr. 427-452.

Part I Entitlement

[1] The appellant says that the specifications were defective.⁹ We agree. The Government says that the appellant should have prepared a mass diagram prior to making its bid.¹⁰ We do not agree. We conclude that the appellant acted in a reasonable manner and was misled by the Government's failure to tell it (and all other bidders) that the Government's designer expected that there would be overhaul; that the Government estimated the 300-foot right-of-way would be adequate as a source of borrow only if it were excavated to a depth of 2½ to 3 feet; and that the excavation limit was invert.

In reaching the above-stated conclusion we have carefully considered the three principal arguments. The contention that all would have been well if appellant had only done a prebid mass diagram is fatally flawed by the failure to show that that responsibility rested with the contractor rather than with the Government. The law is clear that a bidder may rely on information in the bid package unless the deficiencies are patent.¹¹ According to tes-

timony of the BOR's construction engineer, the information available to the Government would have permitted the preparation of a mass diagram within a matter of hours (Tr. 720-24, 786-87). The preparation of a mass diagram by prospective bidders from information available to them, however, would have required the services of an engineer for a period of 3 weeks (Tr. 429).

The evidence shows that the appellant conducted an adequate prebid site investigation and that it confirmed its assessment of the scope of the job at the time it was requested to verify the bid submitted. On neither occasion was the bidder informed of the conclusion the Government had already reached (*e.g.*, the borrow necessary could be obtained by excavating to invert). If the appellant had been so informed, it appears reasonable to assume that it would have altered its plan, particularly as it related to obtaining the penetration necessary to achieve the required moisture at the lower level of the borrow excavation.

In any event, it is clear that irrespective of who prepared it, a prebid mass diagram would have shown (1) that there was not enough borrow on the site to do the job, and (2) a significant amount of overhaul would be required.

Especially noteworthy is the fact that entirely for its own convenience, the Government reduced the number of pay items for earthwork from the number of items contemplated by the engineer who designed the project to the two on which bids were requested in the invitation.

⁹ AOB pp. 1, 24-31.

¹⁰ Government's Reply Brief (hereafter "GRB") dated Feb. 16, 1978, p. 6, line 4, and Government's Posthearing Brief (hereafter GPBH) dated Feb. 2, 1978, pp. 2-4.

¹¹ Nash, *Government Contract Changes*, Chapter 12; *J. W. Hurst & Son Awning, Inc.*, ASBCA No. 4167 (Feb. 20, 1959), 59-1 BCA par. 2095; *J. D. Hedlin Construction Co., Inc. v. United States*, 171 Ct. Cl. 70, 76 (1965); *cf. Morrison-Knudsen Co., Inc. v. United States*, 184 Ct. Cl. 661, 685 (1968); *cf. Foster Wheeler Corp. v. United States*, 206 Ct. Cl. 533 (1975).

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Among the pay items so eliminated was an item for overhaul estimated by the designer at 6,000 mi. c.y. An appraisal that overhaul is required on a project involving earthwork is highly germane to the Government determining when to prepare a mass diagram for the guidance of bidders. The BOR's construction engineer for the Central Arizona project testified that the Government makes mass diagrams normally when there is an overhaul item involved; that presently the Bureau of Reclamation makes mass diagrams on all canal jobs; and that that information is furnished to prospective bidders (Tr. 767-768, 785). He attributed the failure of the BOR to make a mass diagram in this particular instance to the decision to combine some of the earthwork items and the fact no mass diagrams had been made for any Bureau of Indian Affairs projects administered by the Bureau of Reclamation (Tr. 768, 785-786).

The information to which a bidder is entitled on a formally advertised procurement ought not to turn on the fortuitous circumstances of whether BIA or BOR funds are being expended. In any event it is clear that if a mass diagram had been prepared by the Government and included among the documents furnished to prospective bidders, the gravamen for the complaint presented here would not exist (Tr. 47-53, 97, 117, 122).

The second Government argument is a factual one: the appellant did not excavate nearly as deep as

claimed (GPHB, p. 3). The great weight of the evidence is that appellant frequently excavated to invert and some places deeper than invert (Tr. 159, 161-62, 436). Such excavation (without importation of borrow) would not build the project (Tr. 137-138, 141, 158-163, 435, 436; AX-10). The basis of the Government's argument is a field survey made in Apr. 1977 (Tr. 658; GPHB, p. 3, line 14). There was testimony that the ground as it had been left by the appellant at the end of the project in Aug. 1976 (AX-14; Tr. 210, 473) had been altered and the borrow pits at least partially filled in as of Mar. 23, 1977 (Tr. 331-332). The Government—as the proponent of the factual defense—had the burden of proof to establish that the land when it made its survey in Apr. 1977, was the same as when the appellant completed work in Aug. 1976.¹² The Government failed to carry this burden.¹³

The Government's third argument is that the time and cost overruns were not caused by the Government but were solely caused by the ineptitude and inefficiency of

¹² Cf. Wigmore, Evidence § 437, 490-495 (Chadborn rev. 1970) especially p. 245 where it says, "The condition of the person or object at the time of being photographed may be required to be evidenced as being the same (substantially) as at the time in issue in the case * * *." (Italic in the original.) See also p. 237.

¹³ We note, for example, that the appellant's witness Threlkeld testified as to the conditions he observed when he visited the site of the work on Mar. 23, 1977 (Tr. 331-332), while the Government's witness King relied in the main upon what others had reported to him (Tr. 659-660).

the contractor.¹⁴ With respect to the claims for earthwork we are not persuaded that this is true. While we have not been persuaded that all estimates submitted by appellant's expert should be accepted at face value and while other adjustments affecting both cost and profit are necessary as discussed in Part III below, we are satisfied that the bulk of the costs claimed were caused by the defective specifications. The defectiveness of the specifications is highlighted by (1) the order in Mar. 1976 to excavate to invert, (2) the authorization to import borrow from the Main Drain and (3) the authorization to import borrow from Tyson Wash.

We have concluded otherwise with respect to the claims for concrete. In our view the additional costs claimed for principal items in this category cannot properly be attributed to defective plans and specifications or other actions of the Government.

Part II Quantities and Government Counterclaim

A. Discussion.

There are very substantial differences between the parties as to the quantities of earthwork items for which the appellant is entitled to be paid in accordance with the terms of the contract. In appellant's opening brief (pp. 15, 16), these differences are described as follows:

Total final quantities computed and approved for payment by the BOR were:

Item 3, Constructing lateral embankments, ----- 185,621 cy

Item 4, Compacting embankments, ----- 88,079 cy (App. F-31, COD p. 3). Mr. Threlkeld, appellant's expert witness, pointed out that the quantities computed by the government did not include the quantities of material necessary to replace the stripping and consolidation under embankment areas, or the compaction of those areas, or the compaction of the foundation under the canal liner (Tr. 351-410). Those areas are depicted on AX-7. The addition of those quantities results in total actual quantities of:

Item 3, ----- 202,165 cy
Item 4, ----- 106,720 cy
(Tr. 410-417; AX-8).

The Government contests the propriety of having paid the appellant as much as it has for the earthwork items, however, and has filed a counterclaim in these proceedings in the amount of \$6,579.30. In the Answer To Amended Complaint And Counterclaim at p. 2, Government counsel states:

Based on allegations made by the Appellant in its claim and at subsequent meetings, the Bureau of Reclamation re-examined the lateral cross sections and it was determined that there was a discrepancy in the ground at Stations 1083+00 and 1089+00. As a result of the same, the Appellant was overpaid for constructing lateral embankments. The quantity paid for was 185,621.0 cubic yards, while the actual material placed was 169,956.0 cubic yards. Therefore, the reduction of 15,665.0 cubic yards resulting in an overpayment of \$6,579.30 (15,665.0 x .42). Attached hereto and incorporated is Government Exhibit No. 1 [¹⁵] which is the computation sheet reflecting said figures.

¹⁵ The authors of the memoranda and work papers included as Ex. 1 did not authenticate them at the hearing. The Government witnesses were very unfamiliar with the computer processes used to compute payments. They failed to testify as to the alleged "discrepancy" in the ground at the two stations.

¹⁴ GPHB, p. 4, lines 4-9; p. 7, lines 21-28; GRB, p. 7, lines 1-6; p. 7, lines 23-26.

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The interpretation question presented for our decision is considered to be the same for all disputed quantities including the quantities involved in the Government's counterclaim. Appellant's counsel states: "[T]he controversy appears to revolve primarily around the proper interpretation of Paragraph 57(e) of the specifications * * *." Also relied upon by the appellant are "[t]he indications and representations contained on drawings BIA 70, 75, and 76" (AOB, pp. 31, 32). Government counsel agrees that "the correctness of the figures presented by the Government and Mr. Threlkeld as to actual quantities is for the Board to decide based on the contract provisions and the drawings" (GRB, p. 4). The Government also cites par. 57(e) of the specifications (GRB, p. 5). In the Government's view, however, some of the quantities for which claim has been made involve work which was simply not done.¹⁶

B. Decision

[2] The legal question presented for decision is the interpretation to be placed on par. 57(e) of the specifications and BIA Drawings, #70, #75, and #76. In especially pertinent part, par. 57(e) reads as follows:

(e) Measurement and payment.—Measurement, for payment, for constructing lateral embankments will be made of the embankments in place to the lines and dimensions as shown on the drawings ex-

tended to the original ground surface or as prescribed by the contracting officer * * *.

(AF 1, Specifications).

According to the testimony Drawing No. 70 shows the paylines as extending to the ground after removal of unsuitable material and placement of embankment by the contractor. The testimony includes the admission by Government witness Wong (the BOR engineer responsible for the preparation of the drawings) that the typical section shown on Drawing No. 70 indicates it will be necessary to excavate and place compacted embankment 1 foot under the lining of the canal section (Tr. 221-222) and that the paylines cover everything within the excavated prism (Tr. 222-223). Wong's position appears to be that the drawings and the specifications are inconsistent in this matter and that the drawings are wrong (Tr. 250-255). Government witness Blecha (the BOR engineer responsible for drafting the specifications) considered the drawings and specifications could be reconciled by treating the "original ground" language in the par. 57(e) as qualified by the reference in the same sentence to the "or as prescribed by the contracting officer" (Tr. 291). While Government witnesses Borge (Tr. 310, 311) and Dolyniuk (Tr. 712) clearly considered the reference to "the original ground surface" in par. 57(e) to be dispositive of the question presented, neither witness undertook to say what effect, if any, should be given to the "or as prescribed by the contracting officer" language con-

¹⁶ The interpretation question is considered in detail in appellant's opening brief at pp. 31-34.

tained in the same sentence of that paragraph.

In our view the testimony ad-duced at the hearing (some of which is cited above) clearly warrants re-solving the interpretation question in the appellant's favor. See *Hol-Gar Manufacturing Corp. v. United States*, 169 Ct. Cl. 384 (1965), in which the Court stated at p. 395:

[A]n interpretation which gives a rea-sonable meaning to all parts of an in-strument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, mean-ingless or superfluous; nor should any pro- vision be construed as being in conflict with another unless no other reasonable interpretation is possible * * *.

Accordingly, the appellant's fig-ures for earthwork quantities of 202,166 cubic yards for Item 3 and 106,720 cubic yards for Item 4 are accepted. For these items the con-tractor is found entitled to be paid the additional sum of \$17,387.86.¹⁷ As a corollary to these findings, the Government's counterclaim in the amount of \$6,579.30 is hereby denied (note 15, *supra*, and accompanying text).

¹⁷ In AX-16 these costs are summarized as follows:

"1. Underpayments:

(a) Underpayments, Bid Item No. 3
Constructing Lateral Embankments
Actual..... 202,166 c.y.
Paid..... 185,621 c.y.

Requested: 16,545 c.y. @ \$0.42/c.y. = \$6,948.90

(b) Underpayment, Bid Item No. 4
Compacting Embankments
Actual..... 106,720 c.y.
Paid..... 88,079 c.y.

Requested: 18,641 c.y. @ \$0.56/c.y. = \$10,438.96
Total underpayments \$17,387.86

Part III The Earthwork Claims

A. Discussion

Before undertaking to discuss spe-cific items of cost with a view to de-termining the proper amount of the equitable adjustment, a few general observations would appear to be in order. This is another case of a con-tractor who recognized compara-tively early in contract performance that he was being required to do work over and above what was in-dicated in the contract but who nevertheless failed to segregate costs¹⁸ between those required to meet the contract terms¹⁹ and those incurred by reason of the defective plans and specifications.

In this case the problems created by the contractor's failure to segre-gate costs have been compounded by the fact that neither party took cross sections of the work as soon as it was completed or within a short time thereafter. Although the con-tractor's claim in the amount of \$557,269.67 was submitted to the

¹⁸ See *H. R. Henderson & Co.*, ASBCA No. 5146 (Sept. 28, 1961), 61-2 BCA par. 3166 at 16,446 ("Whether there existed a formal change order or not, appellant, acting as a prudent contractor and aware of its poten-tial claim, should have kept records reflecting the extra costs attributable to the de facto change.")

¹⁹ See *Sunset Construction, Inc.*, IBCA-454-9-64 (Oct. 29, 1965), 72 I.D. 440, 447, 65-2 BCA par. 5188 at 24,397. ("The contractor's bid was an unqualified representa-tion that the contractor had the supervision, personnel, equipment, skill and ability to do the work upon which the contracting officer was entitled to rely (citations omitted), *Jim Challinor*, AGBCA No. 75-133 (June 12, 1978), 78-2 BCA par. 13, 278 at 64,925 ("[I]t would ap-pear that the need to remove the rocks by blade work and hand labor resulted from the failure by Appellant to have the required ripper. Aside from the require-ment in the contract, it is well established that a con-tractor has the responsibility to provide the machinery or equipment necessary to accomplish the contract work" (citations omitted).)

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contracting officer by letter dated Oct. 29, 1976, there is no evidence that the contractor made any effort to take or arrange for the taking of as-built cross sections of the borrow areas until Mr. Jackson accompanied by appellant's expert, Mr. Threlkeld, visited the site on Mar. 23, 1977.²⁰

Perhaps stimulated by the activity of the appellant, the Government finally took cross sections of the borrow areas on about Apr. 1, 1977. The cross sections so taken were received in evidence as GX-1 over the vigorous objection of appellant's counsel. The Government's resident engineer, King, testified that he had instructed his crews not to take as-built cross sections at particular stations unless they could get them in original ground or as the contractor had left them. He acknowledged, however, that he had not gone to the work site when the cross sections were being taken; that he had not otherwise participated in developing the data reflected in them; and that when he visited the site a couple or three weeks before, he had seen some BIA activity in progress (Tr. 655-660).

Based upon the evidence adduced in these proceedings, we find that the Government's cross sections

(GX-1) are not as-built cross sections of the borrow areas along side of Lateral 90 as of the date of contract completion on Aug. 7, 1976. Because of the substantial activity shown to be present in the borrow areas in question during the more than 7 months that elapsed between the time the contract work was completed and the cross sections (GX-1) were taken, we further find that the information shown therein has little probative value in resolving the issues presented by this appeal.

In the absence of as-built cross sections, witnesses for both the appellant and the Government have had to rely heavily upon after-the-fact reconstructions, estimates, assumptions and averages. In these circumstances, it is not surprising that the witnesses for the appellant and the Government have highly divergent views as to the consequences attributable to particular actions.

While an audit of the contractor's claims has been made (AX-17), the Government audit report makes clear that even with respect to costs not questioned, the auditors were only concerned about verifying that the costs claimed were incurred in performing the contract work (AX-17, p. 2). The report takes no position with respect to the amount of profit²¹ claimed. At the hearing,

²⁰ Explaining the reasons for not engaging an engineering firm to take as-built cross sections of the borrow areas on each side of the lateral, Mr. Threlkeld stated: "After we got there and looked at it, there were bulldozers and scrapers working on each side and they had partially backfilled the borrow areas so that it was no longer possible to get as-built cross-section(s)."

²¹ "The contractor estimated profit at \$173,837, or 20 percent of the total direct costs and overhead. At the time of our review the contractor's secretary-treasurer informed us that an incorrect percentage had been used and that a 10 to 15 percent profit margin was more realistic."

the appellant contested the action of the Government auditors in placing portions of the amount claimed for owned equipment costs²² and for repairs²³ in the category of questioned costs.

The president of the appellant company, Mr. J. R. Jackson, testified as to the general plan²⁴ he in-

tended to follow at the time of bidding. He and others testified as to the difficulties involved in (i) having to haul large quantities of borrow material longer distances than had been anticipated, (ii) coping with dry materials in the borrow available for the embankments, and (iii) contending with the heat as a result of doing concrete work in Arizona in midsummer rather than in early spring as had been contemplated. None of the witnesses who had been actively involved in contract performance, however, undertook to relate the time and effort involved in such endeavors to the costs incurred.²⁵

In AX-16 the extra costs for the earthwork are summarized as follows:

scrapers of 600 c.y. per hour; (iv) a listing of the equipment contemplated for the job; and (v) a concrete crew involving 20 men for 10 days (Tr. 515-525).

The production rates involved for the two scrapers would indicate a relatively short haul according to Mr. Jackson (Tr. 525).

²²One of the claimed costs treated in AX-5 is in the amount of \$67,707. In the remarks section opposite that figure, the exhibit has the comment "Owned Equipment Rental, from AGC Schedule, attached." In fact, the AGC schedule is not attached to AX-5; nor is there any indication that the schedule in question was otherwise received in evidence. In AX-6, however, the appellant shows the amount claimed of \$67,707 to be the result of applying to the owned equipment on the job the applicable AGC schedule rates, as modified by the limitations contained in General Condition 25 and utilizing certain other commonly accepted cost references. Mr. Threlkeld testified extensively in support of the claimed amount and how it was determined (Tr. 341-350). On cross-examination, he was requested to elaborate upon his remarks but no serious attempt was made to impugn his testimony (Tr. 496-498). None of the Government witnesses testified with respect to this item; nor do the exhibits the Government offered in evidence relate to the owned equipment rental claim.

²²At the hearing, appellant's witness Threlkeld testified that based upon the equipment cost as obtained from the appellant's secretary-treasurer and equipment usage reflected in the Government inspector's reports, utilizing AGC rates as modified by Par. 25 of the General Conditions and other commonly accepted cost references, the claim for owned equipment, properly computed, was in the amount of \$67,707 (Tr. 341-351). This is the amount shown on AX-5 as to which an asterisked remark notes that the amount so shown is "not directly in agreement with audit."

²³The costs involved were for modifying a trimmer so that it could perform the work as required by the contract. The item in question is discussed at pp. 4 and 5 of the audit report from which the following is quoted:

"The contractor's secretary-treasurer felt that the \$21,500 was a proper equipment modification necessitated by the canal specifications and should therefore be allowable. We found that the contractor had capitalized such costs as equipment additions and had taken and claimed depreciation on the addition. According to the *U.S. Code of Federal Regulations* (CFR), Capitalized costs are not allowable as repair costs (41 CFR 1-15.205-20(b)). Therefore, these costs are questioned as discussed above" (AX-17, p. 5).

²⁴Throughout the hearings and in its post-hearing briefs the Government's position has been that the contractor had no projected work schedule for either the earthwork or the concrete (GPHB, p. 4 citing Tr. 179, 210-211). The cited transcript references do show that the contractor's general superintendent in charge of the earthwork and his concrete foreman were not provided with a written schedule for their respective operations. They also show, however, that Mr. Jackson testified as to a general plan for proceeding. This is confirmed by the testimony of his earthwork superintendent (Tr. 150) and is corroborated by a summary of the worksheets prepared by Mr. Jackson prior to bidding (AX-23) which shows (i) approximately the price bid (\$479,000); (ii) 193,600 c.y. of material to be handled; (iii) an estimated production with two

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2. Extra Costs, Bid Item Nos. 3 & 4

a) Due to Longer Hauls	\$154,592
b) Due to Rework of Dry Materials	120,805

Total Extra Bid
Items 3 & 4— \$275,397

Testimony of Appellant's Expert

To establish a nexus between the difficulties encountered by reason of the defective plans and specifications and the cost incurred, the appellant has relied principally upon the testimony offered by his expert witness, Mr. Duane Threlkeld (Tr. 326-514). Mr. Threlkeld was not retained by the appellant until late Feb. or early Mar. of 1977 (Tr. 331). This was some months after completion of the contract work. Following his retention, Mr. Threlkeld was given copies of the plans and specifications, copies of the daily inspection reports, and copies of the correspondence file both during the contract and prior to advertising and award of the contract. He was also furnished with copies of handwritten notes pertaining to the Government's calculation of pay quantities, as well as a complete copy of the computer printout (Tr. 332-334).

Although AX-9 is entitled "A&J Construction—Mass Diagram As Planned," Mr. Threlkeld testified that the use of the terms "As Planned" and "Mass Diagram" for the exhibit was misleading. He noted that he had had a lot of discussions with Mr. Jackson as to what he had in mind when he bid the job, what his plans were for ob-

taining the borrow excavation and where he was going to get the borrow excavation from on each end of the project. As to the last item he also noted that the center line profile indicated that no borrow excavation was available in the adjacent borrow areas. Appropos AX-9, Mr. Threlkeld states: "[T]his is my reconstruction of my comments with him, my analysis of his bid work papers and what I think would have been feasible out there at the time." He also characterizes it as "a very rough approximation of what the original haul requirements might have been" (Tr. 418). Giving effect to the fact that the total embankment requirement listed in the bid documents was 160,000²⁶ cubic yard and the total length of the canal was 13,200 linear feet, this would result in an average of about 12.12 cubic yards of embankment per linear foot of canal. This would have to be swelled by a factor of 25 percent for the comparable figure in terms of excavation yardage.

Mr. Threlkeld calculated that the borrow required for the first 1,000 feet on the northern end of the project would be obtained from the main drain, involving 2,678 c.y.m. of haul; that the borrow required for the 1,500 feet at the southern end would have to be obtained from somewhere upstream,²⁷ entailing

²⁶ AX-9 shows this figure to be equivalent to 213,333 c.y. of excavation.

²⁷ In the discussions between Mr. Threlkeld and Mr. Jackson, the latter indicated that he did not have any intention of going off the project on the south end to obtain any embankment (Tr. 421).

6,886 c.y.m. of haul; and that the balance of the material required could be obtained from the adjacent borrow areas within 150 feet on each side of the center line, resulting in 11,463 c.y.m. of haul. Multiplying the total haul so obtained of 21,027 c.y.m. by 5,280 and dividing by 213,333 (note 26, *supra*) results in an average haul of 520 linear feet (Tr. 417-423).

According to Mr. Threlkeld's testimony, AX-10 is a true mass diagram. Elaborating upon his characterization he stated: (i) that a mass diagram is an algebraic accumulation of cut and fill as you progress along an earthwork project; (ii) that it is an algebraic accumulation because it does not represent total cut or total fill or indicate any lateral movement of material; (iii) that where at a particular station—as on Lateral 90—you have both excavation and embankment, a mass diagram will only indicate the deficiency or surplus at that station; (iv) that in the absence of an electronic computer which was not available to the appellant, the calculations required to develop a mass diagram are very time-consuming and tedious; (v) that without information as to cross-section areas being available by stations, it had taken three weeks to prepare the mass diagram; and (vi) that the only pertinent information available from the plans (Drawings 67, 68 and 69) was "the center line profile of the existing ground and the invert elevation of the lateral by the design, what they want finished ele-

vation of the concrete to be" (Tr. 427-430).²⁸

AX-10 provides information with respect to quantities,²⁹ showing any shortage or excess of borrow and indicating at a glance that at both the start and the end of the project there would not be sufficient material to construct the embankment areas (Tr. 440). The mass diagram does not show the actual haul involved in performing the work (Tr. 427-428, 436, 448-449).

AX-11 is captioned "Mass Diagram Haul Theoretical As Built" and was prepared for the dual purpose of showing a tabular summary of the quantities shown in AX-10 and the average haul involved in utilizing the borrow sources availed of in performing the contract.³⁰ The exhibit shows that to complete the contract 269,555 cubic yards of excavation were required.³¹ Of this amount, 154,400 cubic yards represent the quantity of excavation required to be moved longitudinally in excess of 100 feet. (The exhibit

²⁸ Mr. Threlkeld outlined in detail the basis for the mass diagram portrayed in AX-10 and the scale to which it had been drawn, making clear that one of the basic assumptions used in developing the mass diagram was excavation to invert in all areas (Tr. 429-441).

²⁹ The exhibit shows a deficiency of borrow of about 43,000 cubic yards at the north end and approximately 35,900 cubic yards at the south end, assuming that all of the borrow had been taken out of the side borrow area to invert (Tr. 440-441).

³⁰ As in the case of the mass diagram (note 28, *supra*), AX-11 is based on the assumption that on an average the borrow areas were excavated to invert (Tr. 444).

³¹ The 269,555 c.y. figure for excavation is the equivalent of the 202,166 c.y. of embankment (AX-8) swelled by a factor of 25 percent in order to convert cubic yards of embankment to cubic yards of excavation (Tr. 445).

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shows the total haul for this quantity to be 58,168 c.y.m.) While the differences between the two figures of 115,555 cubic yards involves lateral movement only, this quantity would have to be moved approximately 350 feet due to the necessity of using ramps at the latter stages of embankment. This would entail a haul of 7,633 cubic yard miles. Thus, the total haul for the job is shown to be 65,801 cubic yard miles (58,169 c.y.m. + 7,633 c.y.m.),³² resulting in an average haul of 1,289 feet,³³ if the theoretical best possible haul could have been achieved,³⁴ (Tr. 442-452).

AX-12 consists of two charts and three printed pages giving performance characteristics for the various types of equipment. The use of the term "Should Cost Estimate" for the two handwritten charts is misleading in that the exhibit does not involve a should cost comparison as such but rather shows pay load quantities for the scrapers listed and the production for such

³² The figures shown on the exhibit in cubic yard miles were obtained by multiplying the average haul distance by the cubic yards involved and dividing by the 5,280 feet in a mile (Tr. 444).

³³ Derived as follows:

$$\frac{65,801 \times 5,280}{269,555} = 1,289 \text{ feet.}$$

The exhibit shows the average length of haul on the north end was 1,393 feet, as compared to an average length of haul on the south end of 2,200 feet (AX-11, pp. 1, 2; Tr. 449-452).

³⁴ Concerning the 65,801 c.y.m. figure, Mr. Threlkeld states: "That represents approximately the total haul on the job, if he had actually hauled it in—this is the ideal theoretical best haul—I shouldn't say as built. It's the ideal theoretical best possible haul, if all of the borrow excavation is excavated to invert elevation (Tr. 447).

scrapers in terms of embankment cubic yards per hour conservatively estimated (Tr. 456, 458).

The first chart shows the time required to place the 202,166 cubic yards of embankment involved under what is characterized in the exhibit as "Haul As Bid" conditions, as contrasted with the placement of the same amount of embankment under what the second chart of the exhibit characterizes as "Actual Haul" conditions. The "Haul As Bid" portion of the exhibit shows that using one Terrex scraper and two John Deere scrapers and assuming an average haul of 520 feet, the contractor should have placed the 202,166 cubic yards of required embankment in 26 days. The "Actual Haul" portion of the exhibit shows that using not only the Terrex and John Deere scrapers but also a Cat 631B scraper and assuming an average haul of 2,000 feet, the contractor should have placed the same quantity of embankment (202,166 c.y.) in 58 days, assuming the scrapers had achieved their capacity conservatively estimated.

In fact, however, as the portion of AX-12 concerning "Actual Haul" conditions shows, the placement of the required 202,166 cubic yards of embankment was not performed in 58 days as shown in one set of calculations in the exhibit above but rather required 83 days to complete. The exhibit also shows that at the embankment production rate employed of 3,467 cubic yards

a day, the contractor should have moved 287,796 c.y. of embankment material during that time period (Tr. 465-467).

In computing what is described in the heading of AX-13 as "Extra Costs on Bid Items 3 and 4, Earthwork," the appellant shows the total cost of these items to be \$401,003. The average daily cost figure shown of \$4,831 per day is arrived at by dividing the total cost of \$401,003 by 83 days. For handling the same quantity of material but on the basis of what is described as the planned haul, the exhibit shows that the earthwork should have been completed within 26 days at a cost of \$125,606 (26 days at 4,831/day). Predicated upon the borrow material not being available as indicated on the plans and a consequent increase in the average haul distance to 2,000 feet, the exhibit shows that the time required to place the actual embankment quantities involved would have required 58 days for a total cost of \$280,198 (58 days at \$4,831/day). The 83 days figure used in the total cost computation for Bid Items 3 and 4, as well as the 26 days and the 58 days used in the other cost computations in AX-13, correspond to the figures used in AX-12.

AX-13 shows the total extra costs on the earthwork portion to be in the amount of \$275,397.³⁵ This

³⁵ This figure plus the \$125,606 shown on the exhibit as the "should cost" figure for the actual quantity of embankment materials involved, if placed according to plan, total \$401,003, the total cost shown for Items 3 and 4.

figure is comprised of \$154,592 for the extra costs of the longer hauls and \$120,805 for the extra costs of reworking dry materials and resulting inefficiencies (Tr. 461-470).

Government counsel objected vigorously to the reception into evidence of AX-14 (As-Bid vs. As-Built Schedule) on the ground that the president of the appellant company had testified that he did not have a plan (Tr. 472, 475). It is undisputed that the "As-Bid" portion of the exhibit is an after-the-fact reconstruction (Tr. 471). In overruling the Government's objection, the hearing member noted that the exhibit would not be persuasive to the Board in the area pertaining to the Government's objection unless the appellant's position was found to be supported by evidence in the record. AX-23 and Mr. Jackson's testimony on recall are found to support the appellant's position (Tr. 515-519, 523-525).

Additional Factors Considered in Evaluating Earthwork Claims

For its defense the Government relies to a considerable extent upon the testimony offered by Mr. Doly-niuk, Construction Engineer for the Central Arizona Project and upon GX-2 prepared by him. In Mr. Doly-niuk's view the contractor should have developed a mass diagram prior to bidding in order to know what he had to do, particularly with reference to hauling. Utilizing only the specification drawings and a calculator and with

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very limited assistance from others, Mr. Dolyniuk had prepared a mass diagram for the project (GX-2) within several hours. Based upon the figures and charts in the exhibit,³⁶ he determined that a total haul of 42,693 c.y. miles would be required, as compared to a total haul of 21,027 c.y. miles for an average haul of 520 linear feet (AX-9). He noted that the figure of 42,693 c.y. miles³⁷ should be increased to cover shrinkage and additives such as overbuild (Tr. 719-732).

Responding to an inquiry from Department Counsel, Mr. Dolyniuk stated: "Based on the specs; there's no way that you could come up with less than what's showing on this computation, in my opinion" (Tr. 733-734). We are unable to reconcile this view of the matter with the fact that the BOR engineer responsible for the preparation of the drawings had estimated that 6,000 c.y. miles of haul would be involved (AX-3) and the BOR engineer responsible for drafting the specifications testified that he did not anticipate any substantial haul of material would be required and that generally speaking the material from

alongside the lateral was going to be sufficient to build the embankments (Tr. 279-280, 296, 298). While neither of these estimates were based on mass diagrams, they were made by experienced BOR engineers familiar with the contract drawings and specifications.

Mr. Dolyniuk's estimate that a mass diagram could be prepared in several hours does not include the time required to develop the data obtained from other sources including computers (Tr. 723-724, 755). His estimate of the time required for the task is in marked contrast not only to the 3 weeks actually consumed in producing a mass diagram for the project as testified to by Mr. Threlkeld but also with respect to the 2-week estimate of BOR engineer Wong (Tr. 262, 429). It is clear from the testimony, however, that both of the latter estimates were based on hand calculations being used throughout, as opposed to the use of electronic computers for the development of the underlying data.

As to the offsite borrow used in performing the contract, Mr. Jackson gave the off-hand estimate that the amount of material he had taken from the main drain spoils bank was in the range between 30,000 and 50,000 c.y. (Tr. 51, 52). The midpoint of this estimate of 40,000 c.y. is only 3,000 c.y. less than the 43,000 c.y. shown on AX-10 and AX-11 (Tr. 440). With respect to the Tyson Wash location, Mr. Jackson recollected that from 20,000 to 30,000 c.y. of borrow had been re-

³⁶ Upon cross-examination, Mr. Dolyniuk acknowledged that there were errors in the computations reflected in GX-2 (Tr. 745-753). He did not regard the figures themselves as significant, however, on the ground that it is the ratio of numbers which is important. In his view, the errors in the individual computations did not materially affect the ratio of the numbers, the matter of prime importance.

³⁷ This would involve an average haul of approximately 1,057 linear feet (42,693 x 5,280).

213,333

See note 26, *supra* and accompanying text.

moved from that area (Tr. 56). The mid-point of that estimate is 25,000 c.y. or some 10,900 c.y. less than the 35,900 c.y. of borrow excavation shown as coming from that area on AX-10 and AX-11 (Tr. 440).

The figure developed by Mr. Threlkeld of 35,900 c.y. hauled from the Tyson Wash area is approximately 40 percent higher than the mid-point of Mr. Jackson's estimate. While we cannot say with certainty the reason for the very substantial difference between the two estimates, one explanation may be that on the average, the contractor's onsite excavation exceeded considerably in depth the borrow obtainable by excavating to invert, an assumption upon which Mr. Threlkeld's calculations were based. If this view of the matter is correct, then the 10,900 c.y. of borrow would have been hauled an average of only 350 feet as compared to the average haul of some 2,200 feet assuming this quantity of material were obtained from the Tyson Wash area (AX-11). (This presupposes only lateral movement of the material is involved.)

The most serious indications of inefficiency and ineptitude with respect to the earthwork related to the manner in which the contractor undertook to cope with the dry materials. The contractor's earthwork superintendent, Curtis, testified that excavating to invert sometimes involved going down 3 or 4 feet; that excavating to this depth got them into situations where they exceeded the penetration of the moisture; and

that he did not think they would have had the problems encountered if they could have obtained the borrow material needed at 2 feet because in most cases they had 2 feet of penetration (Tr. 161-163). The same witness testified, however, (i) that the ratio of water trucks to rollers and scrapers and other equipment was not in proper balance for normal operation and (ii) that a couple of times he had to take out and rework dirt that Jackson had put in at night (Tr. 185-186). Government Inspector Dunn testified that on one occasion Curtis had expressed dissatisfaction to him about the contractor not having the personnel to run the support equipment (Tr. 594-595).

There can be no doubt but what handling dry materials presented a very serious problem. The appellant's expert Threlkeld testified that the inspector's reports show that day after day the contractor was fighting dry material and that he was directed to remove and replace fairly extensive areas on some occasions, such as up to 12,000 or 1,500 feet long and a foot or two deep. This sometimes resulted in excavating material out, rewatering, recompacting, reprocessing and hauling material down to place in another area. Threlkeld attributed the approximately 85,000 cubic yard difference between the estimated 287,796 cubic yards of embankment the contractor should have placed and the 202,166 cubic yards he actually did place at the production rates and haul distances involved,

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as shown in AX-12, to the extra double-handling of dry materials and the efficiencies associated with it (Tr. 466-470).

Placing dry materials in the embankment areas and then having to take the materials out, reprocess and replace were unquestionably costly operations. The appellant's earthwork superintendent testified that dry materials getting into the embankment caused considerable problems from an operational standpoint since "it is work you are doing over" (Tr. 163-164). He acknowledged, however, that the specifications required the wetting to be done at the source of the borrow (Tr. 174). In view of the great amount of additional work entailed once dry borrow materials were placed in embankments, a question arises as to what measures, if any, the contractor took to insure that the borrow materials utilized satisfied the specification requirements for moisture before being placed in the embankment areas. The testimony at the hearing provides no answer to this question.

Remaining for consideration in reference to the earthwork are the amounts claimed by the appellant for (i) owned equipment costs, (ii) costs incurred in modifying a trimmer and (iii) profit. Also for consideration is the time extension to which the appellant may be entitled by reason of the Government's actions affecting the earthwork.

The appellant's Secretary-Treasurer, Larry J. Rourke, took excep-

tion to the manner in which the owned equipment costs and the modification of trimmer costs had been treated in the Government's audit report (AX-17). Respecting the former, he stated that the Government had allowed depreciation as shown on the contractor's financial records. As to the latter, he expressed doubt that an allowance had even been made for depreciation. Mr. Rourke acknowledged, however, that he would have to check (Tr. 320-326).³⁸

We have previously discussed the inclusion in the claim of an item for owned equipment (notes 22 and 25, *supra*). In the course of his testimony Mr. Threlkeld made clear that the AGC rates employed in preparing AX-6 were those for "rental values on equipment" which he explained were "the cost to a contractor for owning and operating a piece of equipment" (Tr. 342-343, 350). In AX-13 the claim for owned equipment (AGC rates) is shown to be in the amount of \$15,069³⁹ on which equipment operating expenses are claimed at the

³⁸ Presumably this information was readily available from the contractor's own records. Neither Mr. Rourke nor any other witness for the appellant undertook to say definitively whether or not the Government auditors included a factor for depreciation of the trimmer in the total costs (see note 23, *supra*; Tr. 321).

³⁹ Mr. Threlkeld testified that the total rental value for owned equipment on the project was in the amount of \$67,707 (notes 22 and 25, *supra*; Tr. 350). This item of claim is discussed in the Government audit report which allowed \$6,795 for depreciation but disallowed the claimed equipment cost of \$50,813 (AX-17, pp. 3, 4). In AX-6, the

(Continued)

rate of 34.783 percent.⁴⁰ Aside from denying any liability to the contractor by reason of defective plans and specifications, the Government offered no evidence at the hearing relative to the claim for owned equipment.

With respect to the costs involving the trimmer, Mr. Rourke started that the trimmer had been modified so that it would trim the 8-foot bottom of the canal (Tr. 322). Mr. Jackson testified that the equipment for which the costs claimed were incurred was a 420 Parsons Trimmer owned by the contractor which had to be modified to lengthen it out and make it trim an 8-foot bottom (Tr. 62, 63). The appellant does not dispute that the trimmer had to be modified before it could be utilized to perform the contract in accordance with its terms. The appellant has cited no authority to show that the Government should assume responsibility for the \$21,500 involved in this expenditure. This Board and other Boards have repeatedly held that the contractor has the responsibility to provide the machinery or equipment necessary to accomplish the contract work. *Jim Challinor and Sunset Construction, Inc.*, note 19, *supra*.

(F.N. 39—Continued)

appellant presented the claim on a different basis and Mr. Threlkeld testified that the exhibit had been prepared by two of his associates under his direction after issuing instructions that they were to comply with the provisions of par. 25 of the General Provisions which prescribed for use the AGC rates in effect on the date of the contract (Tr. 341-44).

⁴⁰The combined total of both items is \$20,310.50 (\$15,069 + \$5,241.50).

As to the profit question, we note that the extra costs claimed for the earthwork of \$275,397 includes 15 percent profit.⁴¹ Mr. Threlkeld testified that he considered this to be a reasonable profit allowance considering the amount of risks and the amount of the contractor's investment to carry the cost of the extra work (Tr. 340). At an earlier time, however, the Secretary-Treasurer of the appellant corporation had told the Government auditors that he considered a profit from 10 to 15 percent would be realistic (note 21 and accompanying text). We note that in a case involving retroactive pricing, a 10 percent profit allowance was found to be reasonable. *Itek Corp.*, ASBCA Nos. 13528, 13848 (May 26, 1971), 71-1 BCA par. 8906.

Lastly, we consider the contractor's time extension request. In the Findings of Fact from which the instant appeal was taken, the contracting officer found that according to its terms the contract was to be completed by May 25, 1976. It was found to be substantially complete on June 11, 1976, or 17 days after the scheduled completion date. Because of the increase in quantities, the contracting officer extended the contract performance time by 5 calendar days (AF 31, pp. 1, 15). No time extension was granted for the additional time required (i) to haul borrow materials substantially greater distances, and (ii) to handle greater quantities of dry materials

⁴¹ AX-13. Exclusive of profit, the claimed costs are in the amount of \$239,476 (\$275,397-1.15).

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than had been anticipated at the time of bidding.

B. *Decision*

[3] The appellant has made a serious attempt to prove its quantum case principally by an expert who testified extensively as to the significance of exhibits prepared by him or under his direction. The exhibits were designed to portray the extent to which the contractor's cost was increased by the Government's defective plans and specifications. Insofar as the earthwork claims are concerned, this involved undertaking to show the longer distances the contractor had been required to haul the borrow materials and the measures adopted in coping with dry borrow materials greatly in excess of the quantities the contractor had anticipated at the time of bidding.

The expert was not associated with the job in any way during contract performance and had never even seen the work site until some 7 months after the contract work was completed. By that time conditions at the site had so materially changed that it was no longer possible to take cross sections with a view to (i) determining the quantities of borrow that had been used to build the concrete-lined canal called for by the contract, and (ii) ascertaining where such borrow had been obtained.

Faced with this situation, the appellant's expert has had to predicate his calculations upon what are admitted to be assumptions, estimates, averages and after-the-fact reconstructions. While the contrac-

tor is not entirely without responsibility for the conditions which has made resort to such an approach to the claims necessary, the primary responsibility is considered to rest with the Government. Knowing that claims involving borrow were pending, the Government failed to take any effective action to insure that the ground conditions remained undisturbed until cross sections could be taken. In fact, it was Government employees who so altered conditions at the site by their activities that when cross sections were taken they no longer accurately portrayed ground conditions at the site as of the time the contract work was completed.

With respect to the earthwork claims, the testimony of the appellant, particularly that of its expert, has persuaded us that the damages sustained by the appellant because of the defective plans and specifications were very substantial.⁴² In reference to the disputed items of cost discussed above, we find the testimony of appellant's witnesses to be persuasive as to the owned equipment and unpersuasive as to the modification of the trimmer. We also find that a 10 percent profit factor on accepted costs to be reasonable.

In two areas we do not consider the appellant's evidence establishes a sufficient basis for the amount of

⁴² Most of the Government's efforts were expended on attempting to show that the plans and specifications were not defective. As a consequence, particularly in reference to the earthwork claims, the amount of evidence offered by the Government on the quantum issue was extremely limited.

the damages claimed. First, we are not in a position to find that the average length of the haul was 2,000 feet, as shown on AX-13, when that estimate is based in part on the assumption that 35,900 c.y. of borrow were hauled from the Tyson Wash area (AX-10 and AX-11). As noted in the discussion above, this figure is some 40 percent higher than the mid-point of Mr. Jackson's estimate of from 20,000 to 30,000 c.y. of borrow having been hauled from that area.

As to Mr. Jackson, we note that he had both the opportunity and the incentive to keep some semblance of records of the amount of material hauled from the Tyson Wash. It appears that Mr. Jackson was on the job virtually every day while the earthwork was being done. It seems reasonable to assume that his estimate was based upon some sort of records, no matter how informal, of the amount of material being hauled from the Tyson Wash area, assuming the average length of haul from this area was 2,200 feet as is shown on AX-11. In any event, it appears that if, as indicated by his testimony, Mr. Jackson knew that he intended to present a claim against the Government, there was an obligation on his part to maintain at least some records, even if informal, of the time and effort being expended on crucial items, such as the amount of borrow materials being hauled from the Tyson Wash area.

In the matter of the amount of dry material handled, we do not consider the evidence shows that

the reason the contractor placed approximately 85,000 c.y. of borrow material less than the capacity of his equipment during the 83-day period involved (AX-12) was entirely due to the fact the Government's plans and specifications were defective. It is undisputed that the specifications required the material to be wetted at the source of the borrow and that a great amount of additional work was required once dry materials were placed in the embankments. While it is clear that the amount of dry material encountered was greatly increased by reason of the depths to which the contractor had to go, it is not clear what actions, if any, the contractor took to mitigate damages by adopting measures designed to insure that the borrow materials were sufficiently wet before being placed in the embankments. See *Power City Construction & Equipment, Inc.*, IBCA-490-4-65 (July 17, 1968), 75 I.D. 185, 68-2 BCA par. 7126.

Taking into account the several factors discussed above and based upon our review of the entire record and the inferences drawn therefrom, the Board finds that the Government's defective plans and specifications increased the appellant's cost of performing the earthwork and that the appellant is entitled to an equitable adjustment in the amount of \$200,000. *Turnbull, Inc. v. United States*, 180 Ct. Cl. 1010, 1024-25 (1967); *G.T.S. Co., Inc.*, IBCA-1077-9-75 (Sept. 15, 1978), 85 I.D. 373, 78-2 BCA par. 13,424.

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The Board further finds that by reason of the defective plans and specifications, the appellant had to haul the borrow materials substantially greater distances and contend with larger quantities of dry borrow materials than had been anticipated at the time of bidding for which it is entitled to have the time for performance of the contract extended by 12 calendar days. This is in addition to the 5-day time extension previously granted by the contracting officer.

Part IV The Concrete Claims

A. Discussion

AX-15 is entitled "Extra costs Due to Extended Completion." The exhibit states that the contractor experienced extra costs due to the hotter weather in four areas. These areas and the claimed amounts are as follows: (1) Extra costs of concrete finishing and general labor inefficiency—\$115,005; (2) Wasted concrete—\$2,515; (3) Ice in concrete—\$2,442; and (4) Liquidated damages—\$1,700.⁴³

The exhibit notes that the project as bid was supposed to be completed by May 25, 1976, but changes in the earthwork requirements extended the project completion time approximately 2 months, into early August. The extra costs involved in

⁴³ Giving effect to a 5-day time extension allowed by the contracting officer, the amount of liquidated damages in issue is \$1,200. In Part III, *supra*, the contractor has been found to be entitled to a 12-day time extension by reason of the delays associated with the earthwork for which the Government has been found to be responsible.

Claim Item 1, *supra*, are shown to include (i) an increase in the size of the crew to perform the same amount of work; (ii) slower overall production due to effect of higher air temperature, and (iii) extended contract completion time. The cost involved in performing this work is in the stated amount of \$287,512. Based upon the contractor's experience, the reference literature and labor analysis, the assertion is made in the exhibit that the same amount of work should have been performed at 40 percent less cost had it been done 2½ months earlier. Applying this factor to the figure of \$287,512⁴⁴ results in a claim for Item 1 in the amount of \$115,005.

Appendix I to the exhibit includes weather information as to temperature and precipitation readings for various stations including a reading for Parker, Arizona (approximately 30 miles north).⁴⁵ These readings show that the 2½ extra months were much hotter than the average temperatures recorded during the earlier months. The face page of the exhibit contains a summary of such weather data showing the average maximum, the average

⁴⁴ This includes a profit factor of 15 percent.

⁴⁵ AX-15, Appendix I, U.S. Weather Bureau Information, Monthly Summarized Station and Divisional Data, Arizona (Jan. through Aug. 1976).

There is some question as to the distance of the work site from Parker. AX-15 says the distance is approximately 30 miles. Mr. Jackson testified the site was 36 miles south of Parker (Tr. 30).

Except for a passing reference to Appendices II, III, and IV (Tr. 480), Mr. Threlkeld's entire testimony related to the balance of the exhibit, the summary of Appendix I and that appendix.

minimum and the maximum temperatures, as well as the number of days involving temperatures of 90 degrees or above during the two periods. The summary shows that during the planned lining period (Apr. 10 through May 10, 1976), the average maximum, the average minimum and the maximum temperatures were 85.9, 56.1 and 99 degrees, respectively, and that during such period 14 out of 31 days (45.2 percent) had temperature readings of 90 degrees or higher. Comparable figures for the actual lining period (May 26 through July 27, 1976), are 105.1 degrees (average maximum), 74.9 degrees (average minimum) and 117 degrees (maximum). On 62 out of 63 days during this period (98.4 percent), the recorded temperatures were 90 degrees or over.

AX-15 was prepared by Mr. Threlkeld or under his direction. Much of his testimony in this area simply confirms what is shown in the exhibit itself and which has been discussed above. The claims included in the exhibit were discussed with Mr. Jackson. In these discussions Mr. Jackson stated that his intention when he bid the job was to do the concrete work in about the first 2 weeks in April; that the hot weather encountered when the concrete work was performed had had a significant effect on his crew; that the size of the crew had to be increased to perform the same amount of work because of the faster cure time of the concrete; that because of the high temperatures the overall production rate of even the increased crew was slowed down; and

that this extended the time required to complete the work (Tr. 476-478).

The principal sources used in preparing the exhibit were the daily inspector reports, a tabular summation of the concrete poured each day furnished to the contractor by the Government and the U.S. Weather Bureau records for the months and the geographical area involved (Tr. 478-479).

As shown by the daily inspector reports and the Government records showing concrete pours, the concrete work was started on about May 22 or 23, 1976, and finished on or about Aug. 7, 1976, including some handwork (Tr. 476).⁴⁶ As shown on AX-15, the comparison is between the weather conditions prevailing during the period of the planned lining (Apr. 10 through May 10, 1976), and those present during the period of the actual lining (May 26 through July 27, 1976).⁴⁷

In an effort to quantify the effect of the heat upon the crew during the extra months, Mr. Threlkeld took a number of actions. This included (i) checking the library for reference to any labor studies made with a view to measuring the effect of heat on people working in an extreme temperature; (ii) making phone calls to ready-mix companies that do a lot of concrete paving as to their experience with respect to

⁴⁶ Responding to an inquiry from Department counsel as to the contract having been accepted as substantially complete on about June 12, 1976, Mr. Threlkeld stated that on that date the concrete lining itself was probably only half done. (Tr. 485).

⁴⁷ The comparison involves not only slip form lining but also hand lining (Tr. 478).

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the effect upon workers of differences in temperature, and (iii) calling the Department of Labor in both the San Francisco and Washington, D.C., areas, as to studies made involving construction labor. These efforts failed to disclose that any studies of this nature involving construction labor had been made (Tr. 479, 481).

Even if studies relating to construction labor had been found, a serious question would exist as to their probative value, where, as here, most of the problems associated with the heat were avoided by having the concrete work commence at night and finish well before noon. Mr. Jackson testified that after an artificial lighting system was installed, they would start approximately at midnight and then work until whenever they could in the morning. He noted that when a cloud condition or a low pressure front moved in to hold the mean temperatures down, they could sometimes work from midnight until 9, 10, or 10:30 a.m. (Tr. 72, 73). The testimony of other witnesses shows that much of the concrete work was done at night or in the cooler hours of the morning (Tr. 202, 207-208, 605-606). Mr. Jackson also testified that they lost a "slight efficiency factor, just working under artificial light" (Tr. 74). We need not pursue this question any further, however, for there are other factors to which we now turn that we consider to be dispositive on the questions presented by the concrete claims.

There is no dispute about the incompetence of the initial set of carpenters retained by the contractor and involved in constructing some of the outlet structures. Mr. Jackson testified that the first set of carpenters were on the job for about 2 weeks and worked on four structures. All of such structures had to be redone by a second set of carpenters who also completed the remaining structures (Tr. 63-65, 78, 107). While admitting that the problem with the carpenters delayed the completion of the four structures involved, Mr. Jackson denied that there was any overall delay to the entire job from this cause (Tr. 112-113). Mr. Threlkeld testified, however, that the trouble with the carpenters on the outlet structures was a factor in delaying the hand lining (Tr. 503).

Prosecution of the concrete work was delayed to some extent by a dispute over the pay classifications for some of the workers. A number of them objected to being classified as concrete tenders and insisted upon being paid as finishers. The work was delayed a couple of days before the dispute was apparently settled by treating all of the workers involved in the dispute as finishers and paying them at the higher scale. Resolution of the dispute in this manner may have created other problems. In any event commenting generally upon the concrete workers, Government Inspector Dunn stated: "Their performance of work was pretty bad, and the quality of their finish was better after they got

towards the end of the job" (Tr. 589-591).

A major objection made by the Government to the concrete claims is the failure of the contractor to proceed with the trimming⁴⁸ and the concrete lining as soon as the earthwork was finished on the northern portion of the job. Responding to a question by Government counsel, Mr. Jackson states that while they could have done it that way, they had chosen not to do so.⁴⁹ The record clearly indicates, however, that no matter what his personal preference might have been, Mr. Jackson had no real choice in the matter for the trimmer⁵⁰ simply was not ready to operate when the earthwork on the northern portion of the job was done. Undisputed is Government Inspector

Dunn's testimony to this effect, as is his testimony that when the earthwork north of the road was done only about a third of the portion south of the road had been finished (Tr. 576-577).

While the appellant has disputed that the trimmer was not quite ready to operate when the southern portion of the earthwork was done,⁵¹ there is no dispute about the fact that the trimmer was not sent into the lateral until May 5 or 6, 1976 (Tr. 577, 600).⁵² The date is of considerable significance since AX-15 shows the dates of the planned concrete lining to encompass the period from Apr. 10 to May 10, 1976. Unexplained is how the failure to achieve that plan can be attributed to actions of the Government when because of the unavailability of the trimmer the contractor could not proceed with an operation necessarily antecedent to concrete lining, namely trimming (note 48, *supra*), until some 25 or 26 days after the planned operation was to commence.

⁴⁸ According to Mr. Jackson "the trimming operation is simply cutting the canal line to grade and dimension or cross-section as depicted in the plans and specifications. This is just prior to placing the concrete" (Tr. 62).

⁴⁹ The following colloquy occurred:

"Q. When the north was done, any particular reason why you didn't start the trimming and lining of the north, instead of waiting until it was all completed?

"A. Well, we weren't ready for the trimming and lining, because the trimming basically is a faster operation. The dirt work is the slower operation. The trimming and lining is for the most part fast, and I didn't want to cause Fred and myself to—I wanted to get on a nucleus basis and complete for the most part the entire dirt work process, or at least a large part thereof before we got into the trimming.

"Q. But you could have done it that way, especially with the hot weather coming on?

"A. We could have done it that way. That's why we wanted to get the dirt work done first" (Tr. 519-520).

⁵⁰ Mr. Jackson acknowledged that the trimmer he owned had to be modified to cut an 8-foot bottom (Tr. 106). The face page of the contract awarded under date of Jan. 5, 1976, contains the statement: "Lateral 90 has a bottom width of 8' * * *" (AF 1).

⁵¹ The dispute centers around the question of when the embankment could be considered complete for the purpose of commencing the trimming. While the appellant's position appears to be that the lateral excavation of embankment was not completed until May 8, 1976 (Tr. 600-603), the Government's position is that the instruction prohibiting trimming until the compacted embankment zones were in only applied to areas where the compacted embankments had not been brought up to or maintained at the required height (Tr. 640-641; 602-603; 620-621).

⁵² It was approximately another 3 weeks before the concrete lining commenced on May 26, 1976 (AX-15). According to Mr. Threlkeld's testimony the concrete work actually began on May 22 or 23 (Tr. 476). Mr. Jackson testified that generally speaking the trimming operation went okay (Tr. 106-107).

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Accepting Mr. Threlkeld's testimony that the concrete lining actually began on May 22, 1976 (note 52, *supra*), and assuming as shown in AX-15 that placement of the concrete according to plan would take 30 days, then the concrete lining should have been completed by June 21, 1976, or some 10 days after the job was accepted as substantially complete on June 11, 1976. Up until the time the contract work was accepted as substantially complete, the contractor had not had any trouble with excessive heat temperatures (AF 22; Tr. 579-580).

Another factor of prime significance in undertaking to determine whether the extra costs claimed for concrete can properly be attributed to the Government's defective plans and specifications is the question of the extent to which the costs involved were increased by the contractor choosing to install the turnout structures in such a way that machine concrete lining could not be used with respect to them for the great bulk of the work involved. It is clear from the testimony that originally the contractor had intended to install the turnout structures so that they would actually have intruded into the interior surface of the concrete lining and been flush with it; that it was only after difficulty was experienced with the initial set of carpenters in completing the forms for these structures that this plan was abandoned; and that this decision resulted in much more hand placing that would

otherwise have been the case (Tr. 577-579; 603-604).

The Government's resident engineer King estimated that the contractor had completed 93 percent of the concrete lining by machine within 3 weeks at the time the job was accepted as substantially complete on June 11, 1976, and that it took him approximately 6 weeks to complete the remaining 7 percent. It was his view that if the contractor had had the turnout structures in, the 300 yards of hand lining involved would have probably taken only 2 or 3 days to complete depending on the approach taken and how many shifts were worked. Mr. King made clear that his estimate was also predicated upon the batch plant for the concrete being on the site (Tr. 641-643). The Government inspector testified that if the turnout structures had been put in so that they could have been lined over, the contractor would have been able to eliminate 17 areas of hand placing (Tr. 579).

While the appellant's witness Threlkeld estimated that the concrete lining was only about 50 percent completed on June 12, 1976 (Tr. 485, 504), he was not recalled to rebut the detailed appraisal of the state of concrete completion on that date given by Government witness King. Although Mr. Jackson and his concrete foreman, Mr. Hobbs, were either on the job or visited it frequently during the time in question (Tr. 77), neither testified as to the extent to which

the concrete lining had been completed on June 11 or 12, 1976. Lending credence to the accuracy of King's assessment of the extent of completion of the concrete work on June 11 or 12, 1976, is the fact that it is apparently undisputed that the batching plant of the Desert Materials Co. was moved off the site at about the time the Government accepted the contract work as substantially complete and that it was only after that date that ice had to be used in the concrete hauled from the Parker area, some 30 to 36 miles away (Tr. 30, 642-643; Tr. 579-580).

Comparatively little evidence was offered with respect to Claim Item 2 in the amount of \$2,515. AX-15 describes the claim as follows:

2. Wasted Concrete

Reference Gov't memo of June 13, 1977, from Resident Engr. to Construction Engr.—66½ C.Y. of concrete were wasted because of too high temperature of mix.

This should not have occurred earlier. Therefore:

66.5 C.Y. @ \$37.82/C.Y. = \$2515
(Cost—F.O.B. Jobsite)

Mr. Threlkeld testified that the Government inspector had directed the contractor to waste the 66½ yards of concrete involved in Claim Item 2 because the temperature of the concrete was higher than that permitted by the specifications (Tr. 482).

The evidence is a little more extensive with respect to Claim Item 3 in the amount of \$2,442. AX-15 describes the claim in the following terms:

3. Ice in Concrete

Same Memo above [53] stated that 30,982 # of ice was used after middle of June 1976 to keep concrete temperature down in 389.5 C.Y. concrete.

Ice cost \$6.27/C.Y.
389.5 × \$6.27 = \$2442.

Mr. Threlkeld testified that after it got hotter, the contractor started adding ice to the batch trucks in an attempt to keep the temperature of the mix down; that the claim represented some of the concrete involved in the hand lining in the later stages of the job; that because it had to be hauled quite a ways, it was necessary to add ice; and there were 389½ cubic yards of concrete to which ice was added at an average cost of about \$6.27 a yard (Tr. 483).

According to the testimony of Government Inspector Dunn, the costs involved in Claim Item 3 is for adding ice to concrete after the batch plant of Desert Materials was no longer on the site and the concrete had to be hauled from the Parker area (Tr. 579-580). The Government Resident Engineer King testified that no ice had been required for the concrete prior to the time the batch plant was moved off the site and the job was accepted as substantially complete on June 11, 1976 (Tr. 641-643).

B. Decision

[4] The contractor has failed to show that the additional costs claimed for concrete were attributable to the Government's defective

⁵³ The memo in question is that referred to in the text in connection with Claim Item 2 for wasted concrete.

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plans and specifications. The evidence shows that at the time the contract was awarded on Jan. 5, 1976, the contractor knew or was chargeable with the knowledge that to meet the requirements of the contract the trimmer employed would have to be capable of trimming the 8-foot bottom of the lateral (note 50, *supra*). If by reason of delay in accomplishing the necessary modifications to the trimmer or if because of delay in effecting the necessary repairs, or a combination of the two factors, the trimmer required for the work did not become operational until May 5, 1976, the delays in any event were caused by matters for which the contractor was responsible (*Sunset Construction, Inc.* and *Jim Challinor*, note 19, *supra*). The appellant has acknowledged that trimming had to precede the placement of the concrete lining (note 48, *supra*), and the president of the appellant corporation testified that in general the trimming operation went well (note 52, *supra*). In these circumstances, the fact that the placement of the concrete lining did not commence until May 22, 1976, appears to be simply a corollary of the delay in starting the trimming operation. Commencing the concrete lining on that date, the contractor could not expect to complete that operation according to its own plan (AX-15) until June 21, 1976. This was some 10 days after the job was accepted as substantially complete by the Government on June 11, 1976.

While the appellant's witness Threlkeld has stated that on that date the concrete lining was only approximately 50 percent complete, we find the testimony of the Government witnesses King and Dunn as detailed above, to be more persuasive. Accordingly, we find that the job was properly accepted as substantially complete on June 11, 1976.

There is no question but that the contractor continued to be involved in the placement of concrete for approximately another 6 weeks. According to the Government witnesses this resulted from the contractor having to do a much greater amount of handlining than would have been required if he had followed the plan authorized by the specifications of placing the turnout structures in a manner so as to take maximum advantage of the use of machine concrete lining.

The evidence indicated that the contractor's decision to proceed in the manner he did may have been dictated by the difficulties experienced with the carpenters retained to build the forms for the outlet structures. We make no finding on this question, however, for assuming without deciding that the delays in completing at least some of the forms for the outlet structures did not delay the overall performance of the contract, it is unquestionably true that the manner of installing the outlet structures was a choice the contractor made and the contractor rather than the Government must bear the consequences of that choice.

We, therefore, find that any costs claimed for concrete attributed to the heat conditions encountered on the job and related labor inefficien-

cies are not costs for which the Government is liable. Accordingly, Claim Items Nos. 1, 2, and 3 for concrete, *supra*, are hereby denied.

Part V Summary

Description of Claim	Amount of Claim	Amount Allowed
Disputed Quantities Involving Bid Items 3 and 4 (Part II, <i>supra</i>)-----	\$17, 387. 86	\$17, 387. 86
Extra Costs on Bid Items 3 and 4 (Part III, <i>supra</i>)-----	275, 397. 00	200, 000. 00
Extra Concrete Costs (Part IV, <i>supra</i>)-----		
Extra Concrete Finishing Costs General Labor Inefficiency Due to Heat-----	115, 005. 00	0. 00
Wasted Concrete Due to Heat-----	2, 515. 00	0. 00
Ice in Concrete Due to Heat-----	2, 442. 00	0. 00
Total-----	\$412, 746. 86	\$217, 387. 86

The Government counterclaim in the amount of \$6,579.30 (Part II, *supra*) is denied.

The appellant is entitled to have the contract performance time extended by 12 calendar days in addition to the 5-calendar day time extension granted by the contracting officer in the findings from which the instant appeal was taken (Part III, *supra*).

In addition to the equitable adjustment of \$217,387.86 found to be due the appellant herein, the appellant shall also be paid interest there-

on as determined by the contracting officer in accordance with Clause No. 6A of the General Provisions entitled "Payment of Interest on Contractors' Claims."

WILLIAM F. MCGRAW,
Chief Administrative Judge.

WE CONCUR:

G. HERBERT PACKWOOD,
Administrative Judge.

RUSSELL C. LYNCH,
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- 4. ANCSA and the implementing regulations draw a basic distinction between valid existing rights leading to the acquisition of title and those of a temporary nature, requiring exclusion of the former from the interim conveyance but inclusion of the latter with provisions protecting the third parties rights for the duration of his interest. The statute and the implementing regulations do not distinguish, in protecting rights leading to the acquisition of title between those arising under Federal law and those arising under State law..... 2

PRIMARY PLACE OF RESIDENCE

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- 1. In order to establish a primary place of residence there must be evidence that the applicant resided on the tract applied for as his primary place of residence on a regular or seasonal basis for a substantial period of time..... 27

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WITHDRAWALS AND RESERVATIONS

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1. Segregation of lands covered by a withdrawal application filed by a military agency, accomplished by a notation of the land records, does not prevent statutory withdrawal of such lands for selection by a Native Corporation pursuant to sec. 11 of ANCSA..... 229

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Survey Offsets

1. A township, which is by legal description and in the prescribed plan of rectangular survey, located within a sec. 11 (a) (1) (C) of ANCSA withdrawal, becomes excluded from such withdrawal when it fails to physically share a common corner with a township withdrawn under sec. 11(a)(1)(B) of ANCSA because BLM made an offset at that corner in order to cure a survey error..... 97

Federal Installations

1. The exception in sec. 3(e) of ANCSA for the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation, can apply to lands which are not formally withdrawn for the agency using such lands and seeking to protect its use by invoking the exception..... 229

APPEALS

(See also Contracts, Federal Coal Mine Health and Safety Act of 1969, Indian Probate, Indian Tribes, Rules of Practice)

1. When an appeal is filed with the Board of Surface Mining and Reclamation Appeals from a decision made by the Office of Surface Mining Reclamation and Enforcement, that office loses jurisdiction and has no authority to take any action concerning it until that jurisdiction is restored by action of the Board that is dispositive of the appeal..... 395
- 2 A final Departmental appellate decision construing a regulation will be given immediate effect, and will not be applied with prospective effect only, unless the decision alters materially the interpretation given the regulation by earlier Departmental decisions or official published opinions, and unless the equitable benefit of the decision is not outweighed by ill effects of allowing a benefit in derogation of the regulation..... 408

APPLICATIONS AND ENTRIES

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1. "Subject to appropriation by him." The provision in 43 CFR 2511.4-2(a) permitting credit for residence and cultivation by a homestead entryman before the date of entry if during that period the land was "subject to appropriation by him" does not refer to land for which there were prior-filed homestead applications which are subsequently withdrawn or rejected. Therefore, until action is taken on prior-filed applications, final proof filed by a junior homestead applicant should not be rejected merely because the land is subject to the prior applications..... 81
2. Sec. 9(b) of the Administrative Procedure Act, *as amended*, 5 U.S.C. § 558(c) (1976), does not apply to coal prospecting permit extension applications because the prospecting is not an "activity of a continuing nature" within the meaning of the statute. As the Federal Coal Leasing Amendments Act of 1975, 90 Stat. 1083, 30 U.S.C. § 201 (West Supp. 1977), removed the Secretary of the Interior's discretion to grant extensions, applications for preference-right leases filed after expiration of the initial 2-year permit term, and during pendency of extension applications, cannot be issued..... 396
3. An application for an oil and gas lease filed in the name of a person deceased at the time of filing is properly rejected as there then was no offeror qualified to hold a lease..... 404
4. A land selection application filed pursuant to §§ 12(b)(1), 12(b)(3), and 14(h)(1) of the Alaska Native Claims Settlement Act must conform to the regulations promulgated under the statute as enacted at the time the application is filed unless a later amendment to the statute provides otherwise..... 463
5. Neither 89 Stat. 1145, nor the Terms & Conditions incorporated in the amendment, contain language which conflicts with, excludes, or preempts ANCSA regulations 43 CFR 2650.2(e)(1) and (2) requiring a legal description of lands applied for pursuant to ANCSA, or 43 CFR 2653.5(f) requiring a description and location of historical sites selected pursuant to § 14(h)(1) of ANCSA..... 463
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1. The rejection of a homestead application in Alaska merely because there are prior-filed homestead applications for the same land is improper and premature where no action has been taken on the conflicting applications. If a prior-filed application is allowed, the land comes within an allowed entry of record and a junior application must be rejected thereafter. However, if the prior application is rejected or withdrawn, it no longer bars allowance of a junior application..... 81

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- 1. Sec. 4 of the Federal Coal Leasing Amendments Act of 1975 removes the authority of the Secretary to grant extensions of coal prospecting permits, subject to valid existing rights, and applies to applications for permit extensions pending at the time the law was enacted by Congress. Such pending applications are not valid existing rights under sec. 4 of the 1975 Amendments Act because the authority to grant coal prospecting permit extensions was discretionary with the Secretary..... 161
- 2. A delay in taking action on an application for extension of a coal prospecting permit while the Secretary formulates a new leasing policy does not violate the Administrative Procedure Act, 5 U.S.C. § 555(b) (1976), nor does it constitute an abuse of discretion which would create any rights not authorized by law. No hearing is required when the facts of a case are not in dispute and the only issues are questions of law..... 396

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- 1. When the Bureau of Land Management has appraised the damages for a mineral trespass under 43 CFR Part 9230, a hearing will not be ordered and an appraisal will not be disturbed in the absence of an offer of specific substantial evidence that the determination is incorrect..... 130
- 2. "Fair market value." As used in 43 CFR 2802.1-7, "fair market value" of a communication site right-of-way is the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the right to use the site would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user who desired but is not obligated to so use..... 207
- 3. The comparable lease method of appraisal of microwave communication sites, which involves the comparison of comparable rental data from other leased sites with data from the subject site, is the preferred method of determining the fair market rental value of the right-of-way where there is sufficient comparable data available..... 207
- 4. Appraisals of rights-of-way for communication sites will be upheld if no error is shown in the appraisal methods used by the Bureau of Land Management and the appellant fails to show by convincing evidence that the charges are excessive. Where an appellant has raised sufficient doubt that the Bureau properly considered the highest and best use of a right-of-way in determining comparability of other sites as a basis for the use charges, the case may be remanded for the Bureau to reconsider whether a further appraisal or adjustments in the appraised values should be made..... 207
- 5. Where a grantee seeks renewal of a right-of-way for a communication site, the Bureau of Land Management should require an advance annual payment at the rate formerly charged until a new fair market value rate may be established by appraisal. In the absence of contrary directives, the guideline in 43 CFR 2802.1-7(e) should be applied to renewals of existing rights-of-way. Increased charges may not be imposed retroactively, but are only imposed by the authorized officer, after reasonable notice and opportunity for hearing, beginning with the next charge year after the officer's decision..... 208

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| 1. Reliance upon erroneous information provided by employees of the Bureau of Land Management cannot create any rights not authorized by law. The fact that a coal prospecting permittee alleges he was assured by BLM employees that he would receive permit extensions does not prevent the applicability of subsequent legislation which prohibits such extensions from causing his extension applications to be rejected.. | 161 |
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5. Sec. 9(e) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(e) (1970), does not give the Secretary any independent authority for entering water service contracts for areas except as separately authorized by Congress..... 297
6. Where there is no clear Congressional authority to operate a Bureau of Reclamation project one way as opposed to another and there are proposed inconsistent methods of operation contained in the draft set of Operating Principles and feasibility report, it is the responsibility of the agency to seek additional and clarifying authority from Congress as to how the project is to be operated, particularly when important and controversial economic and environmental interests are involved... 326
7. The Secretary of the Interior has discretion to modify the physical features or plans of a Bureau of Reclamation project after Congressional authorization when the authorizing legislation only states what the general features of the project are to be and does not specifically incorporate any detailed feasibility report into the legislation. The Secretary cannot, however, deviate from the general plans or facilities specifically defined by Congress to be part of the project without obtaining the approval of Congress..... 337
8. When Congress places a cost ceiling in legislation authorizing construction of a project, the agency must obtain additional authority from Congress to continue construction of the project if it is projected that the cost ceiling will be exceeded..... 337
9. The Bureau of Reclamation is required to seek additional Congressional authority to continue a project at the earliest point in time that it determines the authorized cost ceiling will be exceeded so that Congress can determine whether the project should be completed at the increased cost..... 337

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1. Where there is no clear Congressional authority to operate a Bureau of Reclamation project one way as opposed to another and there are proposed inconsistent methods of operation contained in the draft set of Operating Principles and feasibility report, it is the responsibility of the agency to seek additional and clarifying authority from Congress as to how the project is to be operated, particularly when important and controversial economic and environmental interests are involved... 326
2. The Secretary of the Interior has discretion to modify the physical features or plans of a Bureau of Reclamation project after Congressional authorization when the authorizing legislation only states what the general features of the project are to be and does not specifically incorporate any detailed feasibility report into the legislation. The Secretary cannot, however, deviate from the general plans or facilities specifically defined by Congress to be part of the project without obtaining the approval of Congress..... 337

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- 4. The Bureau of Reclamation is required to seek additional Congressional authority to continue a project at the earliest point in time that it determines the authorized cost ceiling will be exceeded so that Congress can determine whether the project should be completed at the increased cost..... 337

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- 1. Congress intended to replace the excess land provisions of the general reclamation laws when it passed the SRPA by providing in sec. 5(c) thereof that excess landowners could receive Federally subsidized water on their excess holdings if they would repay with interest "a pro rata share of the loan which is attributable to furnishing irrigation benefits *** to land held *** in excess of 160 acres"..... 254
- 2. Where lands are receiving benefits from both an SRPA loan project and an ordinary reclamation project, general reclamation law, including residency and acreage limitations, apply to those lands..... 254

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- 1. The Secretary of the Interior has discretion to modify the physical features or plans of a Bureau of Reclamation project after Congressional authorization when the authorizing legislation only states what the general features of the project are to be and does not specifically incorporate any detailed feasibility report into the legislation. The Secretary cannot, however, deviate from the general plans or facilities specifically defined by Congress to be part of the project without obtaining the approval of Congress..... 337

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- 1. Where there is no clear Congressional authority to operate a Bureau of Reclamation project one way as opposed to another and there are proposed inconsistent methods of operation contained in the draft set of Operating Principles and feasibility report, it is the responsibility of the agency to seek additional and clarifying authority from Congress as to how the project is to be operated, particularly when important and controversial economic and environmental interests are involved..... 326

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- 1. A short-term or temporary contract will not rescind a long-term contract under the doctrine of superseding contracts unless the parties clearly intended that to be the effect of the new agreement and the terms of the new agreement are flatly inconsistent with the former agreement..... 297
- 2. Sec. 9(e) of the Reclamation Project Act of 1939, 43 U.S.C. §485h(e) (1970), does not give the Secretary any independent authority for entering water service contracts for areas except as separately authorized by Congress..... 297
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2. Where lands are receiving benefits from both an SRPA loan project and an ordinary reclamation project, general reclamation law, including residency and acreage limitations, apply to those lands..... 254

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3. Congress intended to replace the excess land provisions of the general reclamation laws when it passed the SRPA by providing in sec. 5(c) thereof that excess landowners could receive Federally subsidized water on their excess holdings if they would repay with interest "a pro rata share of the loan which is attributable to furnishing irrigation benefits * * * to land held * * * in excess of 160 acres"..... 254
4. When those provisions of reclamation law which are specifically incorporated by SRPA are added to the provisions of SRPA itself, they form a complete scheme which is capable of standing by itself without need to incorporate the general body of reclamation law..... 254
5. Even though Congress stated that the SRPA was to be a supplement to the reclamation law, SRPA's legislative history indicates that the Act was not intended to include the remainder of reclamation law, including the residency requirement..... 254
6. Where lands are receiving benefits from both an SRPA loan project and an ordinary reclamation project, general reclamation law, including residency and acreage limitations, apply to those lands..... 254

COAL LEASES AND PERMITS**GENERALLY**

1. Reliance upon erroneous information provided by employees of the Bureau of Land Management cannot create any rights not authorized by law. The fact that a coal prospecting permittee alleges he was assured by BLM employees that he would receive permit extensions does not prevent the applicability of subsequent legislation which prohibits such extensions from causing his extension applications to be rejected..... 161

APPLICATIONS

1. Sec. 4 of the Federal Coal Leasing Amendments Act of 1975 removes the authority of the Secretary to grant extensions of coal prospecting permits, subject to valid existing rights, and applies to applications for permit extensions pending at the time the law was enacted by Congress. Such pending applications are not valid existing rights under sec. 4 of the 1975 Amendments Act because the authority to grant coal prospecting permit extensions was discretionary with the Secretary..... 161

COAL LEASES AND PERMITS—Continued

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- 2. The Federal coal program was substantially revised in 1975 by the Secretary in proper exercise of his discretion. The Bureau of Land Management did not act in an arbitrary and capricious manner when, under the new coal policy, it suspended applications for coal prospecting permit extensions and the applications were eventually rejected because the Federal Coal Leasing Amendments Act of 1975 removed the authority to grant coal prospecting permit extensions. A program pursued for a period of time under a statutory grant of discretionary authority may be reviewed and revised at any time provided it is not done in an arbitrary manner and is done within the authority granted by Congress..... 161
- 3. A delay in taking action on an application for extension of a coal prospecting permit while the Secretary formulates a new leasing policy does not violate the Administrative Procedure Act, 5 U.S.C. § 555(b) (1976), nor does it constitute an abuse of discretion which would create any rights not authorized by law. No hearing is required when the facts of a case are not in dispute and the only issues are questions of law..... 396
- 4. Sec. 9(b) of the Administrative Procedure Act, as amended, 5 U.S.C. § 558(c) (1976), does not apply to coal prospecting permit extension applications because the prospecting is not an "activity of a continuing nature" within the meaning of the statute. As the Federal Coal Leasing Amendments Act of 1975, 90 Stat. 1083, 30 U.S.C. § 201 (West Supp. 1977), removed the Secretary of the Interior's discretion to grant extensions, applications for preference-right leases filed after expiration of the initial 2-year permit term, and during pendency of extension applications, cannot be issued..... 396

PERMITS

Generally

- 1. Sec. 4 of the Federal Coal Leasing Amendments Act of 1975 removes the authority of the Secretary to grant extensions of coal prospecting permits, subject to valid existing rights, and applies to applications for permit extensions pending at the time the law was enacted by Congress. Such pending applications are not valid existing rights under sec. 4 of the 1975 Amendments Act because the authority to grant coal prospecting permit extensions was discretionary with the Secretary..... 161
- 2. The Federal coal program was substantially revised in 1975 by the Secretary in proper exercise of his discretion. The Bureau of Land Management did not act in an arbitrary and capricious manner when, under the new coal policy, it suspended applications for coal prospecting permit extensions and the applications were eventually rejected because the Federal Coal Leasing Amendments Act of 1975 removed the authority to grant coal prospecting permit extensions. A program pursued for a period of time under a statutory grant of discretionary authority may be reviewed and revised at any time provided it is not done in an arbitrary manner and is done within the authority granted by Congress..... 161
- 3. A delay in taking action on an application for extension of a coal prospecting permit while the Secretary formulates a new leasing policy does not violate the Administrative Procedure Act, 5 U.S.C. § 555

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COMMUNICATION SITES

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| 1. "Fair market value." As used in 43 CFR 2802.1-7, "fair market value" of a communication site right-of-way is the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the right to use the site would be granted by a knowledgeable owner willing but not obligated to grant a knowledgeable user who desired but is not obligated to so use..... | 207 |
| 2. The comparable lease method of appraisal of microwave communication sites, which involves the comparison of comparable rental data from other leased sites with data from the subject site, is the preferred method of determining the fair market rental value of the right-of-way where there is sufficient comparable data available..... | 207 |
| 3. Appraisals of rights-of-way for communication sites will be upheld if no error is shown in the appraisal methods used by the Bureau of Land Management and the appellant fails to show by convincing evidence that the charges are excessive. Where an appellant has raised sufficient doubt that the Bureau properly considered the highest and best use of a right-of-way in determining comparability of other sites as a basis for the use charges, the case may be remanded for the Bureau to reconsider whether a further appraisal or adjustments in the appraised values should be made..... | 207 |
| 4. Where a grantee seeks renewal of a right-of-way for a communication site, the Bureau of Land Management should require an advance annual payment at the rate formerly charged until a new fair market value rate may be established by appraisal. In the absence of contrary directives, the guideline in 43 CFR 2802.1-7(e) should be applied to renewals of existing rights-of-way. Increased charges may not be imposed retroactively, but are only imposed by the authorized officer, after reasonable notice and opportunity for hearing, beginning with the next charge year after the officer's decision..... | 208 |
| 5. Under sec. 504(g) of the Federal Land Policy and Management Act of 1976, payments for use of right-of-way sites should be on an annual basis at the fair market value unless the annual payment would be less than \$100. Therefore, although lands may be appraised for a longer future period of time, lump-sum payments for future years may not be demanded for amounts exceeding the statutory amount; instead charges for such amounts should be made on an annual basis..... | 208 |

CONTRACTS*(See also Rules of Practice)***CONSTRUCTION AND OPERATION****Generally**

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1. A short-term or temporary contract will not rescind a long-term contract under the doctrine of superseding contracts unless the parties clearly intended that to be the effect of the new agreement and the terms of the new agreement are flatly inconsistent with the former agreement. . . . 297
2. Laws in existence at the time a contract is entered into become a part of the contract whether or not expressly referred to in the contract or incorporated in its terms. . . . 297

Allowable Costs

1. Where the Government contracts with a small corporation to obtain the services of a recognized expert in fish biology and where the sum of an approximate yearly salary of \$44,000 plus approximately \$4,000 of fringe benefits and approximately \$8,000 of life insurance premiums are compensation to the expert for a total approximate yearly compensation or corporate cost of \$56,000 and where the specific contract is for approximately \$1 million said compensation and costs are reasonable allowable costs under the contract. . . . 41
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2. The contractor's claim that the Government's use of the word "subgrade" in the earthwork specifications created an ambiguity which should be construed against the drafter was denied. The "contra proferentem" rule is not applicable in this instance because the definition propounded by the contractor was not reasonable, use of the word in the specified context did not create an ambiguity, the contractor did not register an objection when informed of the Government's interpretation, and no evidence was presented to show that the contractor relied on its alleged interpretation at the time of bidding. . . . 353

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- 3. Where the Government's engineer recorded in his daily diary a verbal protest made by the contractor about embankment compaction difficulties and the inaccuracy of the proctor information furnished by the Government, this satisfied the 20-day notice requirement of the changes clause with respect to some of the claims. It was unnecessary to finally decide the scope of such notice, however, where the Board found the claims to be without merit in any event.----- 354

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- 1. The contractor's claim that the Government's use of the word "subgrade" in the earthwork specifications created an ambiguity which should be construed against the drafter was denied. The "contra proferentem" rule is not applicable in this instance because the definition propounded by the contractor was not reasonable, use of the word in the specified context did not create an ambiguity, the contractor did not register an objection when informed of the Government's interpretation, and no evidence was presented to show that the contractor relied on its alleged interpretation at the time of bidding.----- 353

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- 4. The contractor's claim that the Government's use of the word "subgrade" in the earthwork specifications created an ambiguity which should be construed against the drafter was denied. The "contra proferentem" rule is not applicable in this instance because the definition propounded by the contractor was not reasonable, use of the word in the specified context did not create an ambiguity, the contractor did not register an objection when informed of the Government's interpretation, and no evidence was presented to show that the contractor relied on its alleged interpretation at the time of bidding.----- 353
- 5. Where the contracting officer by contract was given discretion in setting the moisture requirement for high volume change soils, the contractor's claim of extra compaction work due to rigid moisture requirements was denied because the contractor failed to show that the contracting officer abused his discretion or that the discretion exercised caused the contractor extra contract costs.----- 354

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| 2. Where the contracting officer by contract was given discretion in setting the moisture requirement for high volume change soils, the contractor's claim of extra compaction work due to rigid moisture requirements was denied because the contractor failed to show that the contracting officer abused his discretion or that the discretion exercised caused the contractor extra contract costs----- | 354 |

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(See also Stock-Raising Homesteads)

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5. The sale of decorative building stone from the surface of a lode mining claim cannot support a claimant's contention that a valuable mineral discovery has been made on such lode claim, decorative stone being locatable only under the provisions of the placer mining laws, 30 U.S.C. § 161 (1976), and only where such stone is shown to be an "uncommon variety" within the meaning of 30 U.S.C. § 611 (1976) -----

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1. "Leasing Act minerals." The Multiple Mineral Development Act, 30 U.S.C. § 524 (1970), reserved all Leasing Act minerals to the United States, and no rights to deposits of Leasing Act minerals are open to location under the mining laws under 30 U.S.C. § 525 (1970). "Leasing Act minerals" is defined as "all minerals which, upon Aug. 13, 1954, are provided in the mineral leasing laws to be disposed of thereunder." 30 U.S.C. § 530 (1970). Because leases for sodium, potassium, and "other related products" are authorized pursuant to 30 U.S.C. §§ 262, 282 (1970), "other related products" along with sodium and potassium fall within the category of Leasing Act minerals which include lithium which is dissolved in a sodium or potassium brine -----

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1. "Leasing Act minerals." The Multiple Mineral Development Act, 30 U.S.C. § 524 (1970), reserved all Leasing Act minerals to the United States, and no rights to deposits of Leasing Act minerals are open to location under the mining laws under 30 U.S.C. § 525 (1970). "Leasing Act minerals" is defined as "all minerals which, upon Aug. 13, 1954, are provided in the mineral leasing laws to be disposed of thereunder." 30 U.S.C. § 530 (1970). Because leases for sodium, potassium, and "other related products" are authorized pursuant to 30 U.S.C. §§ 262, 282 (1970), "other related products" along with sodium and potassium fall within the category of Leasing Act minerals which include lithium which is dissolved in a sodium or potassium brine -----

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SPECIFIC MINERAL(S) INVOLVED

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1. "Leasing Act minerals." The Multiple Mineral Development Act, 30 U.S.C. § 524 (1970), reserved all Leasing Act minerals to the United States, and no rights to deposits of Leasing Act minerals are open to location under the mining laws under 30 U.S.C. § 525 (1970). "Leasing Act minerals" is defined as "all minerals which, upon Aug. 13, 1954, are provided in the mineral leasing laws to be disposed of thereunder." 30 U.S.C. § 530 (1970). Because leases for sodium, potassium, and "other related products" are authorized pursuant to 30 U.S.C. §§ 262, 282 (1970), "other related products" along with sodium and potassium fall within the category of Leasing Act minerals which include lithium which is dissolved in a sodium or potassium brine -----

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MULTIPLE MINERAL DEVELOPMENT ACT

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1. "Leasing Act minerals." The Multiple Mineral Development Act, 30 U.S.C. §524 (1970), reserved all Leasing Act minerals to the United States, and no rights to deposits of Leasing Act minerals are open to location under the mining laws under 30 U.S.C. §525 (1970). "Leasing Act minerals" is defined as "all minerals which, upon Aug. 13, 1954, are provided in the mineral leasing laws to be disposed of thereunder." 30 U.S.C. §530 (1970). Because leases for sodium, potassium, and "other related products" are authorized pursuant to 30 U.S.C. §§262, 282 (1970), "other related products" along with sodium and potassium fall within the category of Leasing Act minerals which include lithium which is dissolved in a sodium or potassium brine..... 171

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1. The boundary of an oil and gas lease covering lands riparian to a navigable river is the meander line indicated on the official plat of survey and not the waterline. Thus, lands accreted to the leased lands may be separately leased..... 154
2. An oil and gas lease is "issued" on the day it is signed by the authorized officer of the Department of the Interior, although it is not effective, per 43 CFR 3110.1-2, until the first day of the month following its date of issuance..... 225
3. The Department of the Interior has the authority to issue orders to oil and gas lessees to protect all of the natural resources of the Continental Shelf. An order which requires lessees to shut in wells during welding or burning operations will be sustained on appeal as not being arbitrary or unjustified where the record shows that a number of companies had followed the practice even when it was not required, where the order is not so prohibitive as to effect a *pro tanto* cancellation of the lease, and where departures from the order may be granted in certain situations... 347
4. An application for an oil and gas lease filed in the name of a person deceased at the time of filing is properly rejected as there then was no offeror qualified to hold a lease..... 404

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1. Where BLM issues a decision requiring that an oil and gas offeror submit additional advance rental within 30 days, and the offeror files a timely appeal to this Board, the running of the 30 days is suspended. Following affirmation by this Board of BLM's decision, the offeror is properly given the entire 30 days within which to submit the additional rental..... 225
2. An oil and gas offer which is accompanied by advance rental of \$0.50 per acre may not be rejected as not including sufficient advance rental, per 43 CFR 3103.3-2, 3111.1-1(d) and (e)(1), if the regulation raising the rental to \$1 is not in effect when the offer was filed..... 225
3. The simultaneous drawing system presupposes that each properly filed offer be afforded the same opportunity for priority consideration. This requires that when drawing entry cards are improperly omitted from a drawing, the first drawing be considered as void, and priorities established at a second drawing, in which all entry cards are included, shall control consideration for the oil and gas lease..... 380

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- 4. While the Department of the Interior does not require oil and gas lease drawing entry cards to be signed and dated at the same time, the signer does attest to the truth of the statements on the card as of the date of the card and is bound by and to its terms..... 404
- 5. A final Departmental appellate decision construing a regulation will be given immediate effect, and will not be applied with prospective effect only, unless the decision alters materially the interpretation given the regulation by earlier Departmental decisions or official published opinions, and unless the equitable benefit of the decision is not outweighed by ill effects of allowing a benefit in derogation of the regulation..... 408

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- 1. Where a contract between an oil and gas lease offeror and a leasing service created an agency relationship, in the absence of circumstances giving the agent an authority coupled with an interest, the agent's authority ordinarily terminated upon the death of the principal. If the leasing service had an interest, a lease could not issue to the estate of the deceased if no statement was filed delineating the nature and extent of that interest as required by 43 CFR 3102.7..... 404
- 2. Where a drawing entry card form of offer to lease a parcel of land for oil and gas is prepared by a person or corporation having discretionary authority to act on behalf of the named offeror, and the offer is signed by such agent or attorney-in-fact on behalf of the offeror, the requirements of 43 CFR 3102.6-1 apply, so that separate statements of interest by both the offeror and the agent must be filed, regardless of whether he signed his principal's name or his own name as his principal's agent or attorney-in-fact, and regardless of whether the signature was applied manually or mechanically..... 408

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- 1. Established and long-standing Departmental policy relating to the administration of the simultaneous oil and gas leasing system is binding on all employees of the Bureau of Land Management, until such time as it is properly changed..... 380
- 2. The simultaneous drawing system presupposes that each properly filed offer be afforded the same opportunity for priority consideration. This requires that when drawing entry cards are improperly omitted from a drawing, the first drawing be considered as void, and priorities established at a second drawing, in which all entry cards are included, shall control consideration for the oil and gas lease..... 380
- 3. Where a drawing entry card form of offer to lease a parcel of land for oil and gas is prepared by a person or corporation having discretionary authority to act on behalf of the named offeror, and the offer is signed by such agent or attorney-in-fact on behalf of the offeror, the requirements of 43 CFR 3102.6-1 apply, so that separate statements of interest by both the offeror and the agent must be filed, regardless of whether he signed his principal's name or his own name as his principal's agent or attorney-in-fact, and regardless of whether the signature was applied manually or mechanically..... 408

OIL AND GAS LEASES—Continued**APPLICATIONS—Continued****Sole Party in Interest**

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1. Where a contract between an oil and gas lease offeror and a leasing service created an agency relationship, in the absence of circumstances giving the agent an authority coupled with an interest, the agent's authority ordinarily terminated upon the death of the principal. If the leasing service had an interest, a lease could not issue to the estate of the deceased if no statement was filed delineating the nature and extent of that interest as required by 43 CFR 3102.7----- 404

FIRST QUALIFIED APPLICANT

1. An application for an oil and gas lease filed in the name of a person deceased at the time of filing is properly rejected as there then was no offeror qualified to hold a lease----- 404

LANDS SUBJECT TO

1. Unsurveyed fast lands, formed by accretion to public land or to lands patented with an oil and gas reservation, riparian to a navigable river and lying within the meander lines of that navigable river, as recorded on the official plat, may be leased provided that a proper offer is received and the other relevant conditions precedent to leasing are met----- 154
2. Federal law determines the legal characterization of accretions, avulsions, and relictions to land riparian to navigable bodies of water, where title to the land or reserved interests in the land remains in the United States----- 154
3. The boundary of an oil and gas lease covering lands riparian to a navigable river is the meander line indicated on the official plat of survey and not the waterline. Thus, lands accreted to the leased lands may be separately leased----- 154

PRODUCTION

1. The Department of the Interior has the authority to issue orders to oil and gas lessees to protect all of the natural resources of the Continental Shelf. An order which requires lessees to shut in wells during welding or burning operations will be sustained on appeal as not being arbitrary or unjustified where the record shows that a number of companies had followed the practice even when it was not required, where the order is not so prohibitive as to effect a *pro tanto* cancellation of the lease, and where departures from the order may be granted in certain situations.----- 347

RENTALS

1. A check tendered prior to the due date of an oil and gas lease annual rental payment, which is properly dishonored by the drawee bank, does not constitute timely payment. But where return of the check results from a confirmed bank error, subsequent collection and payment of the check relates back to the time of the original tender, and payment is timely----- 70

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- 2. Annual rental payments on oil and gas leases are sent to depositories designated by the Secretary of the Treasury if their location permits the deposit to be hand carried; otherwise, the deposits are mailed to the Denver Branch of the Kansas City Federal Reserve Bank. Washington, D.C., offices of the Bureau of Land Management may send deposits to the Cash Division of the Treasury Department. All checks drawn on foreign banks or foreign branches of United States banks must be sent for deposit to the Cash Division of the Treasury Department ----- 70
- 3. An oil and gas lease rental payment check returned to the Bureau of Land Management because a Federal Reserve Bank will not accept for collection checks drawn on foreign banks, but which could be collected through the Cash Division of the Treasury Department and would be honored by the drawee bank, is not "uncollectible" ----- 70
- 4. An oil and gas offer which is accompanied by advance rental of \$0.50 per acre may not be rejected as not including sufficient advance rental, per 43 CFR 3103.3-2, 3111.1-1(d) and (e)(1), if the regulation raising the rental to \$1 is not in effect when the offer was filed ----- 225

SUSPENSIONS

- 1. A nonproducing oil and gas lease expires and may not be retroactively suspended when there is no suspension application pending at the time of expiration. The filing of an application for permit to drill and Geological Survey's delay in acting on the application do not create a *de facto* suspension of the lease ----- 89

TERMINATION

- 1. A check tendered prior to the due date of an oil and gas lease annual rental payment, which is properly dishonored by the drawee bank, does not constitute timely payment. But where return of the check results from a confirmed bank error, subsequent collection and payment of the check relates back to the time of the original tender, and payment is timely ----- 70
- 2. A nonproducing oil and gas lease expires and may not be retroactively suspended when there is no suspension application pending at the time of expiration. The filing of an application for permit to drill and Geological Survey's delay in acting on the application do not create a *de facto* suspension of the lease ----- 89

OUTER CONTINENTAL SHELF LANDS ACT

(See also Oil and Gas Leases)

OIL AND GAS LEASES

- 1. The Department of the Interior has the authority to issue orders to oil and gas lessees to protect all of the natural resources of the Continental Shelf. An order which requires lessees to shut in wells during welding or burning operations will be sustained on appeal as not being arbitrary or unjustified where the record shows that a number of companies had followed the practice even when it was not required, where the order is not so prohibitive as to effect a *pro tanto* cancellation of the lease, and where departures from the order may be granted in certain situations ----- 347

OUTER CONTINENTAL SHELF LANDS ACT—Continued

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1. The Department of the Interior has the authority to issue orders to oil and gas lessees to protect all of the natural resources of the Continental Shelf. An order which requires lessees to shut in wells during welding or burning operations will be sustained on appeal as not being arbitrary or unjustified where the record shows that a number of companies had followed the practice even when it was not required, where the order is not so prohibitive as to effect a *pro tanto* cancellation of the lease, and where departures from the order may be granted in certain situations.....

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PATENTS OF PUBLIC LANDS

GENERALLY

1. "An Act granting public lands to the town of Silverton, Colorado, for public park purposes" (43 Stat. 980, Feb. 25, 1925).....
2. The above Act and the patent issued in accordance therewith require that the lands granted be used for public park purposes only, and the town's attempt to lease a portion of the lands for the construction of camper sites does not violate the Act and patent since the use of a limited part of the patented land for camper sites is consistent with recreational and public park purposes.....

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RESERVATIONS

1. As to gravel, interpretations of the mineral reservation in patents issued by the United States under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), must be consistent with the established rule that land grants are to be construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.....
2. In determining whether gravel is included in a mineral reservation in a patent issued under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), the interpretation of the reservation must take into account the intended use for which the land was conveyed and those uses which the Government intended to reserve.....
3. A patent of land under the Stock-Raising Homestead Act, 43 U.S.C. § 291 *et seq.* (1970), was not generally intended to give the grantee the right to use the land for mineral development and mineral development was to proceed only under the mineral laws.....
4. "*Ejusdem generis.*" The *ejusdem generis* rule of construction may not be invoked to exclude gravel from the scope of a reservation of "all the coal and other minerals" in patents issued under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), because this rule of construction can only be effectively applied where there is a series of specific terms which define a class so that one may construe a general term by reference to that class.....
5. Sec. 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), contemplates the Department of the Interior retaining continuing jurisdiction and administration of mineral deposits reserved by that Act.....

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- 6. "Public lands." Under 43 CFR 9239.0-7 which defines a trespass, the term "public lands" includes mineral deposits reserved under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970)----- 130
- 7. The declaration in the Surface Resources Act, 30 U.S.C. § 611 (1970), that no deposit of common varieties of gravel shall be deemed a valuable mineral deposit within the meaning of the mining laws, was not intended to operate as a conveyance, to holders of patents, of any minerals reserved under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970)----- 130
- 8. Gravel in a valuable deposit is a mineral reserved to the United States in patents issued under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970)----- 130
- 9. Unsurveyed fast lands, formed by accretion to public land or to lands patented with an oil and gas reservation, riparian to a navigable river and lying within the meander lines of that navigable river, as recorded on the official plat, may be leased provided that a proper offer is received and the other relevant conditions precedent to leasing are met.----- 154
- 10. Federal law determines the legal characterization of accretions, avulsions, and relictions to land riparian to navigable bodies of water, where title to the land or reserved interests in the land remains in the United States----- 154

PAYMENTS

(See also Accounts)

GENERALLY

- 1. A check tendered prior to the due date of an oil and gas lease annual rental payment, which is properly dishonored by the drawee bank, does not constitute timely payment. But where return of the check results from a confirmed bank error, subsequent collection and payment of the check relates back to the time of the original tender, and payment is timely----- 70
- 2. Annual rental payments on oil and gas leases are sent to depositories designated by the Secretary of the Treasury if their location permits the deposit to be hand carried; otherwise, the deposits are mailed to the Denver Branch of the Kansas City Federal Reserve Bank. Wash-ton, D.C., offices of the Bureau of Land Management may send deposits to the Cash Division of the Treasury Department. All checks drawn on foreign banks or foreign branches of United States banks must be sent for deposit to the Cash Division of the Treasury Department----- 70
- 3. An oil and gas lease rental payment check returned to the Bureau of Land Management because a Federal Reserve Bank will not accept for collection checks drawn on foreign banks, but which could be collected through the Cash Division of the Treasury Department and would be honored by the drawee bank, is not "uncollectible"----- 70

POTASSIUM LEASES AND PERMITS

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1. "Other related products." "Other associated deposits." When sodium or potassium brines are covered by leases conveying the exclusive right to mine and dispose of sodium compounds and other related products or potassium compounds and other associated deposits, the leases convey the exclusive rights to all minerals dissolved in the brine, including lithium----- 171
2. "Leasing Act minerals." The Multiple Mineral Development Act, 30 U.S.C. § 524 (1970), reserved all Leasing Act minerals to the United States, and no rights to deposits of Leasing Act minerals are open to location under the mining laws under 30 U.S.C. § 525 (1970). "Leasing Act minerals" is defined as "all minerals which, upon Aug. 13, 1954, are provided in the mineral leasing laws to be disposed of thereunder." 30 U.S.C. § 530 (1970). Because leases for sodium, potassium, and "other related products" are authorized pursuant to 30 U.S.C. §§ 262, 282 (1970), "other related products" along with sodium and potassium fall within the category of Leasing Act minerals which include lithium which is dissolved in a sodium or potassium brine----- 171

ROYALTIES

1. "Gross value at the point of shipment to market." The royalty rate for products mined and disposed of under sodium and potassium leases must be imposed on the "gross value of the sodium (or potassium) compounds and other related products at the point of shipment to market," which means the gross value of a refined product for sale in an established market, and in general, no deductions may be allowed for costs incurred in developing a product to a marketable condition except for the price of reagents which are chemically combined with the product sold from the lease----- 171

PUBLIC LANDS

(See also Accretion, Avulsion)

ADMINISTRATION

1. Sec. 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), contemplates the Department of the Interior retaining continuing jurisdiction and administration of mineral deposits reserved by that Act----- 129
2. "Public lands." Under 43 CFR 9239.0-7 which defines a trespass, the term "public lands" includes mineral deposits reserved under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970)----- 130

DISPOSAL OF

Generally

1. "An Act granting public lands to the town of Silverton, Colorado, for public park purposes" (43 Stat. 980, Feb. 25, 1925)----- 140
2. The above Act and the patent issued in accordance therewith require that the lands granted be used for public park purposes only, and the town's attempt to lease a portion of the lands for the construction of camper sites does not violate the Act and patent since the use of a limited part of the patented land for camper sites is consistent with recreational and public park purposes----- 140

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- 1. Federal law determines the legal characterization of accretions, avulsions, and relictions to land riparian to navigable bodies of water, where title to the land or reserved interests in the land remains in the United States----- 154

LEASES AND PERMITS

- 1. Unsurveyed fast lands, formed by accretion to public land or to lands patented with an oil and gas reservation, riparian to a navigable river and lying within the meander lines of that navigable river, as recorded on the official plat, may be leased provided that a proper offer is received and the other relevant conditions precedent to leasing are met----- 154
- 2. The boundary of an oil and gas lease covering lands riparian to a navigable river is the meander line indicated on the official plat of survey and not the waterline. Thus, lands accreted to the leased lands may be separately leased----- 154

RIPARIAN RIGHTS

- 1. Unsurveyed fast lands, formed by accretion to public land or to lands patented with an oil and gas reservation, riparian to a navigable river and lying within the meander lines of that navigable river, as recorded on the official plat, may be leased provided that a proper offer is received and the other relevant conditions precedent to leasing are met----- 154
- 2. Federal law determines the legal characterization of accretions, avulsions, and relictions to land riparian to navigable bodies of water, where title to the land or reserved interests in the land remains in the United States----- 154
- 3. Federal law follows the common law in distinguishing between accretion and avulsion. Accretion is the gradual and imperceptible addition of land to adjacent riparian land. Title to accreted lands inures to the uplands owner. Avulsion is the sudden perceptible shifting of the course of a river or stream. In the case of avulsion, title to the avulsed land is not lost by its former owner nor does it accrue to the owner of what was formerly the opposite bank----- 154

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- 1. Where lands are receiving benefits from both an SRPA loan project and an ordinary reclamation project, general reclamation law, including residency and acreage limitations, apply to those lands----- 254

INCLUSION AND EXCLUSION OF WITHIN IRRIGATION DISTRICT

- 1. Sec. 9(e) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(e) (1970), does not give the Secretary any independent authority for entering water service contracts for areas except as separately authorized by Congress----- 297

IRRIGABLE LANDS

- 1. Certification that lands are irrigable is a separate and distinct process from authorizing a Bureau of Reclamation project and cannot be construed as authorization to serve lands in excess of those specifically authorized in the project act----- 297

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| 1. As an amendment to the Alaska Native Claims Settlement Act, P.L. 94-204, 89 Stat. 1145, 43 U.S.C. § 1611 (Supp. IV, 1974), is subject to both the provisions of ANCSA and the regulations promulgated to implement ANCSA, unless such provisions or regulations conflict with, or are specifically excepted or preempted in the amendment..... | 463 |

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| 1. Applications for rights-of-way on public lands pending on Oct. 22, 1976, are to be considered as applications under Title V of the Federal Land Policy and Management Act of 1976, but existing regulations will govern the administration of public lands to the extent practical until new regulations are promulgated..... | 207 |
| 2. A final Departmental appellate decision construing a regulation will be given immediate effect, and will not be applied with prospective effect only, unless the decision alters materially the interpretation given the regulation by earlier Departmental decisions or official published opinions, and unless the equitable benefit of the decision is not outweighed by ill effects of allowing a benefit in derogation of the regulation..... | 408 |

RIGHTS-OF-WAY*(See also Outer Continental Shelf Lands Act, Reclamation Lands)***GENERALLY**

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| 1. A request for rent-exempt status for a right-of-way granted for telephone poles and lines pursuant to the Act of Mar. 4, 1911, 43 U.S.C. § 961 (1970), is properly denied where the terms of the grant clearly state that the grant is made in consideration of periodic rental payments and contains no authorization for rent-exempt status..... | 186 |
| 2. "Rural Electrification Administration projects." A right-of-way holder is not excused from payment of rental under 43 CFR 2802.1-7(c), by virtue of holding an REA loan, where such holder is neither a cooperative or nonprofit organization..... | 186 |
| 3. Applications for rights-of-way on public lands pending on Oct. 22, 1976, are to be considered as applications under Title V of the Federal Land Policy and Management Act of 1976, but existing regulations will govern the administration of public lands to the extent practical until new regulations are promulgated..... | 207 |
| 4. "Fair market value." As used in 43 CFR 2802.1-7, "fair market value" of a communication site right-of-way is the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the right to use the site would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user who desired but is not obligated to so use..... | 207 |
| 5. The comparable lease method of appraisal of microwave communication sites, which involves the comparison of comparable rental data from other leased sites with data from the subject site, is the preferred method of determining the fair market rental value of the right-of-way where there is sufficient comparable data available..... | 207 |

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- 6. Appraisals of rights-of-way for communication sites will be upheld if no error is shown in the appraisal methods used by the Bureau of Land Management and the appellant fails to show by convincing evidence that the charges are excessive. Where an appellant has raised sufficient doubt that the Bureau properly considered the highest and best use of a right-of-way in determining comparability of other sites as a basis for the use charges, the case may be remanded for the Bureau to reconsider whether a further appraisal or adjustments in the appraised values should be made..... 207
- 7. Where a grantee seeks renewal of a right-of-way for a communication site, the Bureau of Land Management should require an advance annual payment at the rate formerly charged until a new fair market value rate may be established by appraisal. In the absence of contrary directives, the guideline in 43 CFR 2802.1-7(e) should be applied to renewals of existing rights-of-way. Increased charges may not be imposed retroactively, but are only imposed by the authorized officer, after reasonable notice and opportunity for hearing, beginning with the next charge year after the officer's decision..... 208
- 8. Interest may be imposed on use charges for right-of-way sites depending on considerations of fairness and equity. In the absence of contrary directives, interest may be imposed for occupancy of a site where use charges should have been imposed at the same rate as past permitted use. Also, interest may be imposed on increased charges due on an annual basis for the years prior to payment of such amount..... 208

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- 1. A request for an oral argument before the Board of Land Appeals may be denied when legal issues are well briefed and no useful purpose would be served..... 404

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- 1. The Government, after waiver of the original delivery schedule, has the burden of proof that the unilaterally established new schedule is reasonable under all the circumstances existing at the time of the re-establishment, which, however, it failed to show..... 12

Dismissal

- 1. The Government's opposition to appellant's request for a hearing and its motion for partial summary judgment in a default termination case are both denied where the contractor contends and the Government denies that the delays experienced by the contractor in attempting to perform the contract were excusable and the Board finds that determining whether delays are excusable in such circumstances involves resolving a fact question which should only be done after the parties have had an opportunity to present their evidence at a hearing where one has been requested..... 77

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1. Where BLM issues a decision requiring that an oil and gas offeror submit additional advance rental within 30 days, and the offeror files a timely appeal to this Board, the running of the 30 days is suspended. Following affirmation by this Board of BLM's decision, the offeror is properly given the entire 30 days within which to submit the additional rental...	225
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1. The Government's opposition to appellant's request for a hearing and its motion for partial summary judgment in a default termination case are both denied where the contractor contends and the Government denies that the delays experienced by the contractor in attempting to perform the contract were excusable and the Board finds that determining whether delays are excusable in such circumstances involves resolving a fact question which should only be done after the parties have had an opportunity to present their evidence at a hearing where one has been requested.....	77
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2. A motion for reconsideration is denied where based on the same arguments made and fully considered in the principal decision.....	67
3. A Government motion for reconsideration is denied where the Board finds that a cost estimate (cost and pricing data) was not a firm offer to perform the work within the hours and at the prices or rates specified, but was rather simply the initial basis for negotiating a cost-plus-fixed-fee contract.....	167
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1. An insurance company is refused permission to participate directly in prosecution of an appeal proceeding with a view to recovering the amount paid to the contractor under a builder's risk insurance policy as part of the contractor's differing site conditions claim, where the	

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Standing to Appeal—Continued

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grounds assigned for the participation are that the interests of the contractor and the insurance company may well prove to be adverse and that the insurance company has the right to participate directly by reason of its status as a partial subrogee, the Board finding (i) that the privity of contract rule rather than the real party in interest rule is controlling in appeal proceedings and (ii) that it has no authority under the Disputes clause to adjudicate the rights of the contractor and the insurance company should they prove to be adverse, irrespective of whether such rights are asserted by the insurance company under a release and assignment of interest executed by the contractor or as a partial subrogee and without regard to the fact that the appellant had authorized the insurance company to file a separate complaint and to prosecute its claim through its own attorneys in the appellant's name.....

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1. A request for a hearing will be denied in the absence of an assertion of fact which, if proved true, would entitle appellant to the relief sought.....

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WITNESSES

1. The Government, after waiver of the original delivery schedule, has the burden of proof that the unilaterally established new schedule is reasonable under all the circumstances existing at the time of the reestablishment, which, however, it failed to show.....

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SECRETARY OF THE INTERIOR

1. The Federal coal program was substantially revised in 1975 by the Secretary in proper exercise of his discretion. The Bureau of Land Management did not act in an arbitrary and capricious manner when, under the new coal policy, it suspended applications for coal prospecting permit extensions and the applications were eventually rejected because the Federal Coal Leasing Amendments Act of 1975 removed the authority to grant coal prospecting permit extensions. A program pursued for a period of time under a statutory grant of discretionary authority may be reviewed and revised at any time provided it is not done in an arbitrary manner and is done within the authority granted by Congress.....

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SEGREGATION

GENERALLY

1. There is a legal distinction between the administrative segregation of land under application for withdrawal, pending action on the application, and the completed withdrawal itself.....
2. "Segregation" is an administrative procedure preliminary to favorable or unfavorable action on a withdrawal application by the Secretary of the Interior in the exercise of his delegated authority under the Pickett Act, 43 U.S.C. § 141 *et seq.* (1970), and is not legally equivalent, in its effect on the status of the land, to a completed withdrawal or reservation.....

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2. Segregation of lands covered by a withdrawal application filed by a military agency, accomplished by a notation of the land records, does not prevent statutory withdrawal of such lands for selection by a Native Corporation pursuant to sec. 11 of ANCSA..... 229

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1. "Other related products." "Other associated deposits." When sodium or potassium brines are covered by leases conveying the exclusive right to mine and dispose of sodium compounds and other related products or potassium compounds and other associated deposits, the leases convey the exclusive rights to all minerals dissolved in the brine, including lithium..... 171
2. "Leasing Act minerals." The Multiple Mineral Development Act, 30 U.S.C. § 524 (1970), reserved all Leasing Act minerals to the United States, and no rights to deposits of Leasing Act minerals are open to location under the mining laws under 30 U.S.C. § 525 (1970). "Leasing Act minerals" is defined as "all minerals which, upon Aug. 13, 1954, are provided in the mineral leasing laws to be disposed of thereunder." 30 U.S.C. § 530 (1970). Because leases for sodium, potassium, and "other related products" are authorized pursuant to 30 U.S.C. §§ 262, 282 (1970), "other related products" along with sodium and potassium fall within the category of Leasing Act minerals which include lithium which is dissolved in a sodium or potassium brine..... 171

ROYALTIES

1. "Gross value at the point of shipment to market." The royalty rate for products mined and disposed of under sodium and potassium leases must be imposed on the "gross value of the sodium (or potassium) compounds and other related products at the point of shipment to market," which means the gross value of a refined product for sale in an established market, and in general, no deductions may be allowed for costs incurred in developing a product to a marketable condition except for the price of reagents which are chemically combined with the product sold from the lease..... 171

STATUTORY CONSTRUCTION**GENERALLY**

1. As to gravel, interpretations of the mineral reservation in patents issued by the United States under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), must be consistent with the established rule that land grants are to be construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it... 129

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2. In determining whether gravel is included in a mineral reservation in a patent issued under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), the interpretation of the reservation must take into account the intended use for which the land was conveyed and those uses which the Government intended to reserve 129
3. "*Ejusdem generis*." The *ejusdem generis* rule of construction may not be invoked to exclude gravel from the scope of a reservation of "all the coal and other minerals" in patents issued under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), because this rule of construction can only be effectively applied where there is a series of specific terms which define a class so that one may construe a general term by reference to that class..... 129
4. When those provisions of reclamation law which are specifically incorporated by SRPA are added to the provisions of SRPA itself, they form a complete scheme which is capable of standing by itself without need to incorporate the general body of reclamation law..... 254
5. When a statute is enacted as being "supplemental" to a general law, it will incorporate the provisions of that other law to the extent the provisions of the general law are not inconsistent with the supplemental statute, unless the intent is otherwise clear that Congress did not intend incorporation..... 254

STOCK-RAISING HOMESTEADS

1. As to gravel, interpretations of the mineral reservation in patents issued by the United States under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), must be consistent with the established rule that land grants are to be construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it..... 129
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5. Sec. 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), contemplates the Department of the Interior retaining continuing jurisdiction and administration of mineral deposits reserved by that Act..... 129

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| 6. "Public lands." Under 43 CFR 9239.0-7 which defines a trespass, the term "public lands" includes mineral deposits reserved under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970)----- | 130 |
| 7. The declaration in the Surface Resources Act, 30 U.S.C. § 611 (1970), that no deposit of common varieties of gravel shall be deemed a valuable mineral deposit within the meaning of the mining laws, was not intended to operate as a conveyance, to holders of patents, of any minerals reserved under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970)----- | 130 |
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| 1. The declaration in the Surface Resources Act, 30 U.S.C. § 611 (1970), that no deposit of common varieties of gravel shall be deemed a valuable mineral deposit within the meaning of the mining laws, was not intended to operate as a conveyance, to holders of patents, of any minerals reserved under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970)----- | 130 |
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HEARINGS

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| 1. When the Bureau of Land Management has appraised the damages for a mineral trespass under 43 CFR Part 9230, a hearing will not be ordered and an appraisal will not be disturbed in the absence of an offer of specific substantial evidence that the determination is incorrect. | 130 |
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TRESPASS**GENERALLY**

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| 1. Sec. 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), contemplates the Department of the Interior retaining continuing jurisdiction and administration of mineral deposits reserved by that Act. | 129 |
| 2. "Public lands." Under 43 CFR 9239.0-7 which defines a trespass, the term "public lands" includes mineral deposits reserved under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970)----- | 130 |

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| 1. When the Bureau of Land Management has appraised the damages for a mineral trespass under 43 CFR Part 9230, a hearing will not be ordered and an appraisal will not be disturbed in the absence of an offer of specific substantial evidence that the determination is incorrect. | 130 |
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WORDS AND PHRASES

1. " <i>Ejusdem generis.</i> " The <i>ejusdem generis</i> rule of construction may not be invoked to exclude gravel from the scope of a reservation of "all the coal and other minerals" in patents issued under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), because this rule of construction can only be effectively applied where there is a series of specific terms which define a class so that one may construe a general term by reference to that class-----	129
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5. "Other related products." "Other associated deposits." When sodium or potassium brines are covered by leases conveying the exclusive right to mine and dispose of sodium compounds and other related products or potassium compounds and other associated deposits, the leases convey the exclusive rights to all minerals dissolved in the brine, including lithium. ----- 171
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